

24 April 2018

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**Partner**

Jim Griffiths

**Our reference**

JMG:398119

**Your reference**

JLH:HEM:WOOO010/4007

Dear Ms Macfarlane,

**Lake Macquarie City Council ("Council"): Section 94 Contributions – Development  
Application No. 1178/2017 ("Current Application")  
Property: 309 George Booth Drive, Cameron Park ("Site")**

We are instructed in this matter by the Council. Our client has provided us with a copy of your letter dated 18 January 2018 and has asked us to respond on Council's behalf.

We understand that your client currently holds development consent number 2207/2007 (issued on 3 June 2010) for the construction of a retail centre comprising commercial premises and shops with associated car parking, landscaping and staging of the development into two stages ("Approved Development"). The Approved Development received Council consent under the previous Contribution Plan relevant to the Site, being Lake Macquarie Section 94 Contribution Plan No. 2 – Northlakes (2004) ("Previous Plan").

We are further instructed that physical commencement as anticipated by Section 85(4) of the *Environmental Planning and Assessment Act 1979* ("EPAA") has occurred in respect of the Approved Development.

As you have noted, Council believes that clause 2.9 of the Lake Macquarie City Council Development Contributions Plan No 2 2004 – North Lakes Urban Release Area (effective from 4 August 2013) ("Current Plan") does not apply to avail your client of an allowance equivalent to the contribution attributable to the Approved Development.

Relevantly, clause 2.9 of the Current Plan provides as follows:

"An amount equivalent to the contribution attributable to any existing lawful development on the site of a proposed new development, at the time of this Plan's commencement, will be allowed for in the calculation of contributions.

Accordingly, if an applicant wishes to obtain an allowance against contributions payable based on pre-existing development, information must be provided with the development application which demonstrates the lawful existence of the development on the subject site as at the commencement of this Plan."

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We understand that your client has requested an allowance for an amount equivalent to the contribution attributable to its existing development consent for the following reasons:

1. In your client's opinion, the underlying intention of clause 2.9 in the Current Contribution Plan is to require Council to allow a credit or allowance for existing development when determining the net demand generated by new development for public services and amenities.
2. Your client believes that there is no basis upon which the words "existing lawful development" in clause 2.9 should be construed to require that the existing development be operational.
3. Under the EPAA there is no requirement for a development to be constructed and operational before its use can be changed.
4. In your client's opinion, to require the Approved Development to be physically constructed could lead to an absurd situation when no allowance could be given to the Approved Development but could be given to the Approved Development if it was constructed and subsequently demolished and the site left vacant.
5. If it is established that clause 2.9 applies it is not discretionary or something in a way of a gift from the Council that the allowance should be given.

We further note that you have referred to the Department of Infrastructure, Planning and Natural Resources document entitled "Development Contributions Practice Notes – July 2005" ("Practice Note") in support of your client's contention.

We are instructed to respond to the matters raised in your letter as set out in paragraphs 1-5 above, as follows:

1. The Approved Development was approved under the Previous Plan. As such it would, in the absence of any other considerations, qualify as a development to which clause 2.9 might apply. Clause 2.9 in the Current Plan is a provision which in some cases will permit the Council to allow an amount equivalent to the actual contribution attributable to a qualifying prior development in calculation of contributions payable in respect of a later development.

To qualify for an allowance under clause 2.9 there must be:

- (a) an existing lawful development on the site;
- (b) as at 4 August 2013 (the date of introduction of the Current Plan); and
- (c) a contribution attributable to the existing lawful development on the site.

The terminology used in clause 2.9 clearly anticipates that the pre-existing use of the relevant site must be an actual use, not merely an approved use. The underlying intention of clause 2.9 is to make allowance for contributions already made for actual uses to the extent of the demand for the specific community facilities and services arising from the earlier development of the relevant site.

We believe that this is made clear by the use of terminology in clause 2.9 such as:

- (I) "development on the site" (line 2);
- (II) "demonstrates the lawful existence of the development on the subject site" (lines 6-7); and
- (III) "replaces" (line 11).

These terms all support the underlying intention of the clause as being to introduce consideration of earlier amounts paid by way of development contributions only where a



physical development has been constructed on the site. The focus is to provide a financial allowance for the actual demand for facilities from the pre-existing development against the financial contributions required to be paid in respect of the later development.

2. The basis for the words "existing lawful development" being construed to require that the existing development be operational comes from the specific wording found in clause 2.9.
3. It is true that under the EPAA there is no requirement that a development be constructed and operational before its use can be changed but here we are considering not the ability to change a use from a previously approved use but rather the operation of a particular provision in a specific contributions plan.
4. We do not agree that requiring that the pre-existing development be actually constructed before clause 2.9 comes into operation gives rise to an absurd situation.

As the terms of clause 2.9 indicate, the allowance for contributions attributable to the earlier development is intended to provide "an allowance for the existing development to the extent of the demand for specific community facilities and services **arising from** that development" (emphasis added).

Unless actually constructed it cannot be said that the Approved Development could generate demand for community facilities and services. At present any demand for community facilities and services arising from your client's site would only be that arising from the vacant development site not that which would have arisen from a site developed as anticipated by the development consent granted in response to development application number 2207/2007.

5. If your client was successful in satisfying the criteria of clause 2.9 it would have been entitled to an allowance equivalent to the contribution attributable to the lawful development on the site as at the date of introduction of the Current Contribution Plan.

As you have noted in your letter, the Practice Note advises it as "acceptable practice" that a credit for existing development on a site is taken into consideration and provides a number of examples (at page 3). The examples provided in the Practice Note are given as suggestions for treatment of an existing attached dwelling, a vacant residential allotment and a residential flat building. Commercial and retail development are not specifically mentioned in the examples.

Also of note is that the next paragraph in the Practice Note after the examples (commencing on page 3 and continuing onto page 4) says:

"For commercial and industrial development, the credits are more complicated, as the same development may have differing implications such as higher (or lower) levels of traffic generation. Councils will need to assess these on a case by case basis."

The terms of the Practice Note are advisory and neither the Practice Note nor the EPAA place a legal obligation on councils to allow credits for existing development. This leaves it up to the individual council to decide whether to allow credits for existing development at all, and, if so, on what terms. This position is re-enforced by the draft template Section 94 contribution plan included in the Practice Note. Clause 2.15 of the template plan (at page 10) says "Council may wish to state its policy on credits. The following is an example."

As the Practice Note is on its terms advisory, our client Council in formulating the Current Plan has decided to limit allowances under clause 2.9 to only contributions paid in respect of prior developments in existence on relevant sites.

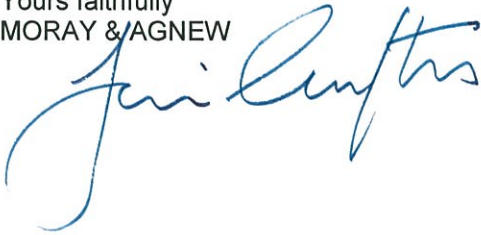
Although we do not agree with your client's assertions in relation to the correct interpretation and operation of clause 2.9, we are instructed that under the specific terms of the Previous Plan, no development contributions were attributable to the Approved Development. That being the case, even if Council agreed with your client's position on the proposed operation of clause 2.9, the amount equivalent to the contribution attributable to the Approved Development would be nil.

We trust that the above has adequately addressed your client's concerns as expressed in your letter dated 18 January 2018.

As a side note, we are instructed that Council officers have commenced a review of the Current Plan and it is anticipated that a draft contributions plan will be reported to Council in July 2018 seeking approval to exhibit the draft plan.

Would you please ensure that any future correspondence on this issue is directed to this office.

Yours faithfully  
MORAY & AGNEW

A handwritten signature in blue ink, appearing to read "J. L. Lupton", is written over the typed name "MORAY & AGNEW".