NEXTDC LIMITED

6-8 GIFFNOCK AVENUE, MACQUARIE PARK

JOINT MEMORANDUM OF ADVICE

Addisons Lawyers
DX 262 Sydney

Attention: Harshane Kahagalle

NEXTDC LIMITED

6-8 GIFFNOCK AVENUE, MACQUARIE PARK

JOINT MEMORANDUM OF ADVICE

INSTRUCTIONS

1. NEXTDC Limited is the applicant for development consent to construct a building to be used for the purposes of a data centre. The application is made in respect of land known as 6-8 Giffnock Avenue, Macquarie Park (**the site**). The site is within the City of Ryde local government area. The development application is to be determined by the North Sydney Joint Regional Planning Panel (**JRPP**) on Monday next, 7 August 2017.

2. On 31 July 2017, the solicitors' firm of Ashurst Australia sent a letter on behalf of an unnamed client to Ryde City Council, enclosing a submission from Design Collaborative Pty Limited, planning and development consultants. In their submission, the planners allege that the JRPP has no power to approve the development application on the four grounds set out in that submission. The four grounds are:

    (1) That the development is properly characterised as a hazardous storage establishment as defined by the Ryde Local Environmental Plan 2014 (**LEP 2014**) and is, therefore, a prohibited use within the B3 zone.

    (2) The application exceeds the floor space ratio control permitted by cl 6.9 of LEP 2014 because large areas allocated to "plant

rooms" have been impermissibly excluded from the calculation of gross floor area (**GFA**).

(3) That the application fails to demonstrate, in accordance with the requirements of cl 6.9(3) of LEP 2014, that there will be adequate provision for recreation areas and an access network.

(4) The development is integrated development under s 91 of the Environmental Planning and Assessment Act (**EPA Act**) by reason of the fact that the power generators have a capacity to generate more than 200 hours per year of standby electricity.

3. Our advice in relation to each of these grounds is set out below.

ADVICE

Characterisation

4. The planners contend that the proper characterisation of the development is as a "hazardous storage establishment" under LEP 2014 rather than for a "high technology industry". At the outset, we should point out that we do not agree with the approach taken to characterisation for the purposes of the Land Use Table in LEP 2014.

5. The first question to be asked in the context of the Land Use Table, framed as it is for the B3 Commercial Core Zone under LEP 2014, is whether the development falls within any of the identified prohibited purposes within the Table. This is because within item 3 of the Table, identifying land use purposes that are permissible with consent, is the catch-all phrase "*any other development not specified in item 2 or 4*". Consequently, if the development does not fall within any of the

identified uses in items 2 or 4 of the Table, the use will be permissible with consent. Relevantly, item 4 of the Table specifies particular forms of land use that are prohibited in the B3 zone. There is no residual or innominate form of land use that falls within item 4.

6. The only potential two candidates in item 4 for the proposal are "heavy industrial storage establishments" and "industries". The planners identify the proposal as being a "hazardous storage establishment", a type of "heavy industrial storage establishment". "Hazardous storage establishment" is defined as follows:

> "a building or place that is used for the storage of goods, materials or products that would, when in operation and when all measures proposed to reduce or minimise its impact on the locality have been employed (including, for example, measures to isolate the building or place from the existing likely future development on other land in the locality), pose a significant risk in the locality:
>
> (a) to human health, life or property, or
> (b) to the biophysical environment."

7. "Heavy industrial storage establishment" is defined to mean:

> "a building or place used for the storage of goods, materials, plant or machinery for commercial purposes and that requires separation from other development because of the nature of the processes involved, or the goods, materials, plant or machinery stored, and includes any of the following:
>
> (a) a hazardous storage establishment,
> (b) a liquid fuel depot,
> (c) an offensive storage establishment."

8. Using the terms of the definition of "hazardous storage establishment", we doubt that it would be accurate to describe the proposal as a use for the storage of "goods" or "materials": both terms connote a tangible physical thing. Data storage may fall within a broader term "product" i.e. a product of computer processing.

9. However, it is unnecessary to resolve that element of the definition as even if the data stored does constitute "goods", the essential component of the definition is that the product (or "goods") requires separation from other development due to the nature of the processes involved. In our opinion, there is nothing inherent about the activity of data storage that poses a significant risk in the locality to human health, life or property or to the biophysical environment. The identified risk in the planner's letter, being a risk in the event of fire, is not a risk inherent in the operation of the storage establishment. The question of whether a development is of a kind that is likely to pose a significant risk in the locality is not answered by reference to an unusual circumstance or catastrophic event, such as a fire. Rather, focus is required upon its ordinary operation, considering the inherent nature of the product (in this case data) being stored.

10. This is also made clear by the definition of "heavy industrial storage establishment", which is the genus for the use of "hazardous storage establishment". It requires a focus upon a need for separation due to the "nature of the processes involved" rather than by reason of any prospect of catastrophic failure of those processes to operate in the ordinary course. It is axiomatic that even the most benign activity, such as a conventional office building or a light industrial building of any kind, might pose a significant risk to the locality in the event of a fire.

11. For this reason, in our opinion the proposed use does not fall within the definition of heavy industrial storage establishment or any of the species of uses that fall within that definition.

12. An alternative argument advanced by Design Collaborative is that the proposal is a form of general industry which is also prohibited in the zone by reason of the term "industries", as it is listed in item 4 of the Land Use Table. For the purposes of considering whether the proposal

falls within the definition of "industries", it is not sufficient to make the enquiry as to whether or not the development falls within that defined term. This is so because within the permissible forms of development listed in item 3 of the Table is "light industries". That term is defined to include "high technology industry" or "home industry". Thus, the enquiry must focus upon whether the proposed use can properly be described as "light industry" or a species of that use, such as "high technology industry".

13. High technology industry is defined as follows:

> "a building or place predominately used to carry out an industrial activity that involves any of the following:
>
> (a) electronic or micro electronic systems, goods or components,
> (b) information technology (such as computer software or hardware),
> (c) instrumentation or instruments of a scientific, industrial, technological, medical or similar nature,
> (d) biological, pharmaceutical, medical or paramedical systems, goods or components,
> (e) film, television or multimedia technologies including any post production systems, goods or components,
> (f) telecommunication systems, goods or components,
> (g) sustainable energy technologies,
> any other goods, systems or components intended for use in a science or technology related field,
>
> but does not include a building or place used to carry out an industrial activity that presents a hazard or potential hazard to the neighbourhood or that because of the scale and nature of the processes involved, interferes with the amenity of the neighbourhood."

14. For the same reasons as identified in relation to the definition of "hazardous storage establishment", in our opinion the proposed building does not present a hazard or potential hazard to the neighbourhood. Further, contrary to the Design Collaborative submission, we think that the proposal does relate to an "industrial activity" as defined. Data storage is not limited to "storage" of goods, materials plant or machinery, but involves the processing, storage and transportation of that data.

Data storage necessarily involves the transmission of data through the fibre optic network to the proposed mainframe computers in the data halls in the building. The transmission of data is a "processing" of a kind that could readily fall within the definition of "industrial activity". While it is difficult to conceive of data as being a "good" or a "substance" it is nevertheless an intangible "product" or "article" processed for commercial purposes and clearly falls within paragraph (a) and (b) of the definition of "high technology industry".

15. Accordingly, if the development falls within the definition of "high technology industry", as we consider it does, then it satisfies the definition of "light industry" and is specifically identified as a permissible use in item 3 of the Land Use Table.

16. Accordingly, we are of the opinion that the proposed development is not a prohibited "heavy industrial storage establishment" but is a "light industry" in the form of a "high technology industry" and is, therefore, a permissible use of the land.

Clause 6.9 – Recreation Areas

17. The second contention raised in the Design Collaborative submission is that the proposal does not satisfy cl 6.9(3) of LEP 2014.

18. Clause 6.9(3) is in the following terms:

> "The consent authority may approve development with a height and floor space ratio that does not exceed the increased height and floor space ratio identified on the Macquarie Park Corridor Precinct Incentive Height of Buildings Map and the Macquarie Park Corridor Precinct Incentive Floor Space Ratio Map, but only if the consent authority is satisfied that:
>
> (a) there will be adequate provision for recreation areas and an access network, and

> (b) the configuration and location of the recreation areas will be appropriate for the recreational purposes of the precinct, and
> (c) the configuration and location of the access network will allow a suitable level of connectivity within the precinct."

19. We note at this juncture that Ryde Development Control Plan 2014 (**DCP 2014**) makes provision for the location of specific recreation areas within the Macquarie Park precinct as well as the configuration and location of new roads to provide for an access network across the precinct. Road 15, identified as such in DCP 2014, is located within the site. The applicant proposes to construct and to dedicate as a public road that part of the site in the location identified for Road 15.

20. Accordingly, it is beyond doubt that the proposal makes provision for the access network as required by cl 6.9(3) and the DCP.

21. The submission contends that adequate provision is not made for recreation areas. In our opinion this argument has no force. Clause 6.9(3)(a) cannot be read in isolation, but rather must be read in the context of the clause as a whole. This must include reference to the objective of the provision expressed in cl 6.9(1):

> "The objective of this clause is to encourage additional commercial development in the Macquarie Park Corridor coordinated with an adequate access network and recreation areas."

22. Subclause (2) refers to a specific map, being Macquarie Park Corridor Precinct Map while subclause (3) refers to maps identifying floor space ratio and height of buildings limits across the precinct. It follows that cl 6.9, read as a whole, relates to the adequate provision of recreation areas and an access network across the precinct if "bonus" floor space and building heights are to be sanctioned by granting development consent. Clause 6.9(3)(a) must be interpreted to mean that the consent authority must be satisfied, before acceding to development that relies upon the "bonus" provisions, that there will be adequate provision for

recreation areas and an access network across the precinct, not necessarily on the particular site that is the subject of an application for development consent.

23. This approach to the purpose of the clause is also confirmed by cl 6.9(3)(b), requiring that the configuration and location of recreation areas will be appropriate for the precinct. It would make no sense to require every site within the precinct to provide for a recreation area because this would conflict with the requirement of subclause (b) to provide for a "configuration and location of recreation areas that are appropriate for the precinct", as a whole, not for any particular site. No doubt this is why DCP 2014 was prepared, identifying the location of recreation areas for the precinct, so as to "facilitate the development" made permissible under cl 6.9 of the LEP (cf s 74BA(1)(b) of the EPA Act). That observation would extend to the provisions of cl 6.9(3)(c), requiring satisfaction as to the configuration and location of the access network allowing suitable "connectivity *within the precinct*" (added emphasis).

24. Accordingly, provided that the consent authority is satisfied that the proposal makes a contribution towards the open space network and access network as required by the DCP and as envisaged by cl 6.9 as a whole, then consent may be granted. In any particular case, the consent authority would be entitled to require the provision of a road only in the circumstance where a site included one of the proposed access network roads. In the case of a site not affected by a proposed new road or recreation area, the Council may require a contribution towards the acquisition of land for such purposes.

25. In this case, the construction and dedication of a road makes more than the necessary contribution to achieving the requirements of cl 6.9.

Floor space ratio

26. The submission from Design Collaborative contends that the Applicant has miscalculated the floor space ratio by wrongly excluding plant rooms from the calculation of GFA because it is said that the areas dedicated to "electrical plant room" and "generator plant room" do not accord with the context of the term "plant room" as used in the definition of "gross floor area".

27. The definition of GFA specifically excludes:

> "(f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting."

28. The term "plant room" is not defined and the definition extends the exclusion by the more general concept of "other areas used exclusively for mechanical services or ducting".

29. There are significant areas of each floor of the proposed building devoted to electrical plant room and generator plant room. These areas, as we understand it, serve two different functions. First, electrical plant rooms are necessary to provide electrical distribution across the data halls. Conventionally understood, this plant comprises electrical ducting and apparatus that distributes electricity from the grid into each mainframe computer in the data hall, just as the traditional "power box" does for any building.

30. Second, the generator plant rooms are necessary to house the backup power generation that operates only in the event of emergency, that is, in the event of power loss from the main grid. As described, these areas are exclusively used for mechanical services and ducting. Power generation is itself a form of mechanical service and the attendant ducting and cabling between the electrical plant rooms and the data hall

and the generator plant rooms and the electrical plant room could be understood as being "exclusively for mechanical services or ducting".

31. It must readily be accepted that this is an unusual case where the area of floor space dedicated to plant rooms, mechanical services and ducting is relatively large. However, there is nothing in the text of the definition of "gross floor area" indicating that simply because, in any particular case, the area of space dedicated to such services is proportionately large, that area should be counted as GFA.

32. A similar situation was faced by the Queensland Court of Appeal in *des Forges v Brisbane City Council and Another* [2002] QCA 90, 121 LGERA 349. In that particular case, the proposed building had substantial balconies and terraces which, in area, exceeded the internal space. The area of balconies and terraces was, by reference to the definition of GFA under the relevant planning instrument, to be excluded in calculating the floor space ratio of the proposed building. At first instance in the Planning and Environment Court, the trial judge included the areas of the balconies. The Court of Appeal held that regardless of the peculiarly large size of the balconies, in the absence of a limitation as to the extent of the area excluded from GFA under the definition, there was no basis to include the area of any part of the balconies when calculating GFA. Applying the same reasoning here, there is no reason to exclude any part of the plant rooms on account of the fact that they are of a significant size in comparison with what might be expected for a conventional office building or an industrial building.

33. A useful example in context might include a building constructed for the purposes of a stock exchange or trading floor. The power and technological plant required to service such a facility might be far greater than for a conventional office and might include back-up power generation. There would not be a basis to exclude such plant rooms on

account of such needs. Likewise, a hospital providing a large number of operating theatres and critical care units would be expected to have substantial areas devoted to emergency plant for power generation should power be lost from the grid. Those areas would nonetheless qualify as plant rooms, although they may be proportionately larger than if required as plant rooms for a traditional office building of a similar size.

34. We accept that, in the context of an industrial use, where the entire floor area is devoted to plant used to manufacture products, such floor area should not be excluded from the calculation. A distinction might appropriately be drawn between plant that is inherently part of the operation and plant rooms that are ancillary to the principal purpose.

35. In this context, the purpose of the use as a data centre is fulfilled in the data hall areas where the computer equipment is kept. The electrical plant room and the generator plant rooms can be seen as ancillary to the principal function of the data halls because they facilitate the primary purpose by the distribution and generation of power. The electrical plant room and generator plant rooms do not constitute an end in themselves, but rather facilitate the operation of the principal purpose.

36. Design Collaborative cites a decision of *North Sydney Council v Harris Farm Markets Pty Ltd* [2017] NSWLEC 67 in support of its submission on this point. That decision is unhelpful in this context because it turned upon cl 5.2 of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, specifying that the alteration of an existing building must not involve the conversion of any area that was excluded from GFA of the unaltered building, such as a plant room in the original grant of development consent. Whether cool rooms were to be included or excluded on the facts of that case turned more upon whether or not the area utilised had been converted from a plant room or something else, not upon whether or not cool rooms should be counted

as GFA, per se. In any event, in the same way as we have identified above, it is understandable that a cool room be regarded as integral to the operation of a supermarket or neighbourhood shop selling fresh produce rather than an ancillary area housing plant for emergency electricity generation.

37. For these reasons, we are of the opinion that, while the area of floor space required to be devoted to plant room for this particular type of use might be regarded as unusual, this fact alone is an insufficient reason to require that those areas or some unspecified proportion of them be included in the calculation of GFA. The fact that those areas may be seen as unusually large does not, on that account, require that they be considered as falling outside the exclusion expressed in the statutory definition of GFA. It is the definition that governs the calculation, not a perception that applying the definition may yield an usual result.

Integrated development

38. The Design Collaborative submission appears to contend that the proposed development is integrated development under s 91 of the EPA Act because the capacity for generation of electrical power exceeds 3 megajoules of fuel per second and is therefore a "metropolitan electricity work" under Pt 17 of Sch 1 to the *Protection of the Environment Operations Act 1997* (**POEO Act**).

39. First, even if the development is integrated development, this does not preclude the grant of consent in the absence of an application having been made for integrated development. There is no compulsion on an applicant to make an application for integrated development and there is nothing unlawful in the grant of a consent for development that would otherwise qualify as integrated development: see *Maule v Liporoni* (2002) 122 LGERA 140 at [86]-[87]. The provisions of ss 91 and 91A of

the EPA Act, which are concerned with integrated development, are beneficial and facultative in that they serve a purpose of avoiding delay or duplication in the determination of development applications involving development that requires another statutory approval. The granting of a development consent for integrated development does not avoid the need to obtain the additional approval. Accordingly, if an approval is required for a "metropolitan electricity work" by reason of the capacity for generation of electricity in emergency circumstances then the approval will still be required once development consent is granted. The absence of general terms of approval from the EPA at the development consent stage simply means there is a risk that the terms of the approval under the POEO Act might require modification to the development consent in some way if the approval is granted on terms different to that contemplated in that development consent.

40. Secondly, on our instructions the proposed development does not entail the construction of a "metropolitan electricity works" because the aggregate generation is likely to be less than 200 hours per annum which is less than the requisite minimum capacity under Pt 17 of Sch 1 to the POEO Act.

CONCLUSION

41. In our opinion, the JRPP does have power to grant consent to the development application for the construction of the 8 storey data storage centre at the site. In particular:

    (a) The development is appropriately characterised as "high technology industry" and is not a "hazardous storage establishment" or a "heavy industrial storage establishment".

(b) The JRPP could be satisfied that there is adequate provision for recreation areas and access network across the precinct by reason of the provision of a road on the site in accordance with DCP 2014, without the provision of recreation space on the subject land.

(c) The proposal complies with the floor space ratio requirements of cl 6.9 of the LEP as the generator plant rooms and electricity plant rooms are appropriately excluded from the definition of GFA.

(d) The development is not integrated development but even if it were, consent may still be granted.

Chambers

04 August 2017

MALCOLM CRAIQ QC

ANDREW PICKLES SC