MinterEllison

21 November 2017

BY EMAIL AND EXPRESS POST: mail@fairfieldcity.nsw.gov.au

The Chair
Sydney South West Planning Panel
c/o The General Manager
Fairfield City Council
Administration Centre
86 Avoca Road
WAKELEY NSW 2176

Dear Sir

Development Application DA 266.1/2017
29 Chifley Street, Smithfield (Premises)
Council's ref: 266.1/2017/rw

1. Introduction

1.1 We act for TIC (Mattress Recycling) Pty Ltd (**TIC**) in relation to Development Application No. DA 226.1/2017 which seeks approval for a change in use of the warehouse located on the Premises to a resource recovery facility (mattress deconstruction facility).

1.2 We understand that the Sydney South West Planning Panel is now to determine the Development Application in the coming weeks.

1.3 Fairfield City Council have raised a number of legal issues associated with the Development Application during the assessment of the Development Application. The purpose of this letter is to consolidate the three separate advices we have given to Fairfield City Council on behalf of TIC during the assessment process; including

(a) permissibility issues associated with the Development Application; and

(b) a proposal by the Council to impose a condition of consent requiring the surrender of a previous development consent applying to land including land outside the Development Application footprint (**Proposed Surrender Condition**); and

(c) advice in relation to carparking and the Council's enforcement powers following a meeting with Council staff on 31 October 2017.

2. Summary

2.1 Firstly, in relation to permissibility issues, dealt with at parts 3 – 6 of this advice:

(a) more than one development consent may apply to one parcel of land. As the Development Application is for a separate and independent development on the Premises, the merits of the application should be considered on that basis.

(b) the proposal is properly characterised as a *'resource recovery facility'*, a use that is permissible with consent. The Development Application is therefore permissible.

(c) In relation to the weight that should be given to the continued use of the offices on an adjacent part of the Premises (as part of the assessment of the Development Application):

(i) we assume that the office was approved as an ancillary use to the existing warehouse/industrial building and that its continued use may be unlawful; and

(ii) notwithstanding the above and as detailed at part 6 of this advice, in our view, the Council would fall into error if it was to place any significant weight on the creation or continuation of an unlawful use outside the Development Application boundary.

2.2 Secondly, in relation to the Proposed Surrender Condition proposed by the Council dealt with at sections 7 and 8 of this advice:

(a) the Development Application is not in respect of land on which the office building is located.

(b) section 80A(1)(b) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) provides that a condition of development consent may be imposed if:

> *"it requires the.. surrender of a consent granted under this Act..* ***in relation to the land to which the development application relates****"*
>
> (emphasis added).

(c) In our view, the Proposed Surrender Condition would be unlawful because:

(i) the consent authority's power under 80A(1)(b) is limited to the land "*to which the development application relates*"; and

(ii) the relevant consent to be surrendered applies to land including adjacent land. The Proposed Surrender Condition would therefore not be "*in relation to land to which the Development Application relates*" and would be in breach of section 80A(1)(b).

2.3 Thirdly, we have also annexed a short memo to the Council (in relation to car parking and enforcement powers) at Annexure B.

3. Background – relevant planning and ownership history

3.1 It is necessary to briefly describe the relevant planning and ownership history of the Premises.

3.2 We are advised that:

(a) in 1990, the Premises was purchased by Diversey Australasia Pty Ltd (**Diversey**), a food hygiene and cleaning product company. We are advised that a development consent for the erection of buildings on the Premises was granted in approximately 1990. We have not reviewed a copy of any such consent;

(b) in November 1991, building application B 504/91 was approved in respect of certain factory alterations on the Premises;

(c) in November 1996, building application B 1478/96 was approved in respect of certain office refurbishment works in the L-shaped office building on the Premises;

(d) the current built form of the Premises includes front office, rear warehouse and two level office/laboratory/showroom building, storage, workshop and parking areas;

(e) at some point prior to 2017, the use of warehouse in the rear of the Premises was discontinued by Diversey and the warehouse was vacated, but the use of the front offices continued;

(f) in December 2016,

(i) the Premises was sold by Diversey to Mr Natale Finocchiaro;

(ii) TIC entered into a 3.5 year lease with respect to the warehouse and storage area at the rear of the Premises;

(g) in May 2017, TIC submitted the Development Application with respect to the warehouse area at the rear of the Premises; and

(h) at present, the front offices are still used and occupied by Diversey.

3.3 The Development Application footprint is provided for in the plan at Annexure A. Notably, the area subject to the Development Application includes the warehouse and storage area at the rear of the Premises. It does not apply to the front offices.

3.4 Notwithstanding this, on the 18th of July 2017, the Council wrote to TIC referring to the Development Application further to an on-site meeting on 6 July 2017. The letter provides that following a preliminary assessment of the application, the following matters have been identified as 'requiring attention':

'*1. The proposal involves the reconfiguration of a single tenancy/occupancy premises into two tenancies. In this regard concern is raised regarding the configuration of such, whereby the existing industrial/warehouse-type building is only serviced by minimal car parking spaces* ***and that the existing office-type building is not provided in conjunction with any (or any substantial) industrial/warehouse-type space.***

2. Given that the proposal involves the reconfiguration of a single tenancy/occupancy premises into two tenancies, it is considered appropriate for the existing industrial/warehouse-type building to be provided with a clearly identifiable entry point and for satisfactory manoeuvring to be provided (ie in accordance with the requirements of sections 9.2.3 and 9.2.4 of the Fairfield Citywide Development Control Plan 2013.

(emphasis added)

3.5 This advice addresses below the permissibility issues that are raised in Part 1 of the Council's letter.

4. Relevant principles: nature of a development consent and overlapping consents

4.1 Before dealing with the issue of permissibility it is necessary to deal with some preliminary issues which have been implicitly raised by the Council.

Nature of a development consent

4.2 The Council has referred to the *'reconfiguration of a single tenancy into two tenancies'*. In our view, reference to 'tenancies' rather than 'uses' is of some concern.

4.3 The tenancy and lease arrangements (and associated property rights) are not relevant to an assessment of the Development Application unless these matters fall within the ambit of section 79C of the Act.

4.4 It is a fundamental principle of planning law that a development consent runs with the land and is available to be utilised by any person lawfully entitled to the use and enjoyment of the land to which the consent relates. Thus, Else-Mitchell J held in *Ryde Municipal Council* v *The Royal Ryde Homes* (1970) 19 LGRA 321 (*Royal Ryde Homes*) at p 324:

> *"It must not be overlooked that a consent to the development of land under a prescribed planning scheme is not personal to the applicant but enures for the benefit of subsequent owners and occupiers, and in some respects a consent is equivalent to a document of title."*

4.5 Similarly, Hope J held in *Auburn Municipal Council* v *Szabo* (1971) 67 LGRA 427 at p 433–434:

"… a development approval does not enure only for the benefit of the applicant. It enures for the benefit of all future owners or occupiers …"

4.6 Accordingly, references to tenancy and lease arrangements and associated property rights are unhelpful in the present circumstances and are of little utility. Rather than address 'tenancies', this advice deals with the 'uses,' both approved and proposed. We consider it appropriate that the Council adopt the same approach.

Principles relating to overlapping development consents

4.7 The Council has raised a concern with the new proposal and its relationship with previously approved development.

4.8 It is a fundamental principle of planning law that more than one planning approval may apply to the same land. In the leading case of *Pilkington v Secretary of State for the Environment* [1974] 1 All ER 283 at 286-287, of Lord Chief Justice Widgery stated:

> '*There is, perhaps surprisingly, not very much authority on this point which one would think could often arise in practice, so I venture to start at the beginning with the more elementary principles which arise. In the first place, I have no doubt that a landowner is entitled to make any number of applications for planning permission which his fancy dictates, even though the development referred to is quite different when one compares one application to another. It is open to a landowner to test the market by putting in a number of applications and seeing what the attitude of the planning authority is to his proposal.*
>
> *Equally it seems to me that a planning authority receiving a number of planning applications in respect of the same land is required to deal with them, and to deal with them even though they are mutually inconsistent one with the other. Of course, special cases will arise where one application deliberately and expressly refers to or incorporates another, but we are not concerned with that type of application in the present case.*
>
> *In the absence of any such complication, I would regard it as the duty of the planning authority to regard each application as a proposal in itself, and to apply its mind to each application, asking itself whether the proposal there contained is consistent with good planning in the factual background against which the application is made.*
>
> ***I do not regard it as part of the duty of the local authority itself to relate one planning application or one planning permission to another to see if they are contradictory. Indeed, I think it would be unnecessary officiousness if a planning authority did such a thing. They should regard each application as a proposal for a separate and independent development, and they should consider the merits of the application on that basis***. '
>
> (emphasis added)

4.9 Accordingly, more than one consent may apply to one parcel of land. As the application is for a separate and independent development, the merits of the application should be considered on that basis.

4.10 In NSW, it has been expressly held that a development consent can be amended or modified by another. In the decision of *Waverley Council v Hairis Architects* (2002) 123 LGERA 100, Talbot J stated:

> '*There is no statutory constraint upon the category of development, as defined, that can be the subject of a development application. In the Court's view, the distinction between an application to alter a building and an application to alter a right arising from an earlier development consent is not sustainable in the present context.*
>
> ...
>
> *There is no statutory or other legal constraint upon the number of development applications that a person can make in respect of the same land.* ***A shopping centre complex is a demonstrative example of the way in which there can be a mosaic of***

development consents extending around the different parts or sections of a single Premises. *Section 80A(1)((b) of the EP&A Act provides a facility for the consent authority to insist on the surrender of an existing development consent.* ***It follows that the Act contemplates there can be more than one valid and operating consent in existence at the one time.*** *The legislature has left the option or election whether to require surrender of an existing consent to the consent authority. There is no warrant to read the power to modify in s.80A(1)(b) as being akin to or in the context of a surrender as Mr Ayling suggests. Just because the result may be little or no different in some cases does not necessarily lead to the conclusion that the power to modify is always to be construed in such a constrained way.*'

4.11 Accordingly, it follows that a subsequent consent can amend or modify a previous consent to the extent of any inconsistency. Similar to a shopping centre site, the Development Application can be lawfully approved and operate separate to (or in conjunction with) previously approved development.

5. Is the Development Application permissible?

5.1 In the letter of 18 July, the Council suggests that the existing office type building is *'not provided in conjunction with any (or any substantial) industrial/warehouse type space.'* Whilst the point is not made expressly in the letter, there is a suggestion that the office building, used independently of the warehouse building, is potentially unlawful. We are advised that this suggestion has also been made by Council's officers over the telephone.

5.2 We note that the Development Application is not in respect of the Premises as a whole, it is in respect of a discrete part of the Premises identified at Annexure A.

5.3 In our view, regardless of the extent of previously approved development on the Premises, the proposed use is permissible in accordance with the following reasoning:

(a) the Premises is zoned 'IN1 General Industrial' under the provisions of the *Fairfield Local Environmental Plan 2013* (**LEP**).

(b) there are a range of land uses that are permissible with consent in the zone including *'resource recovery facility'*.

(c) 'Resource recovery facility' is defined as

> '*a building or place used for the recovery of resources from waste, including works or activities such as separating and sorting, processing or treating the waste, composting, temporary storage, transfer or sale of recovered resources, energy generation from gases and water treatment, but not including remanufacture or disposal of the material by landfill or incineration*'.

(d) The Environmental Impact Statement submitted with the Development Application provides that the proposed use includes the separating, sorting and transfer of waste materials associated with mattresses.

(e) the proposed use therefore is properly characterised as a *'resource recovery facility.'*

5.4 Accordingly, the Development Application is permissible and can be approved subject to a merit assessment in accordance with section 79C of the EP&A Act.

6. What weight should be given to the use of the Office in the assessment of the DA?

6.1 As indicated above, there is a possibility that the separate use of the office (not in conjunction with the warehouse industrial building) may be unlawful, particularly if the office use was approved as an ancillary and incidental use to the warehouse/industrial building.

6.2 In the absence of the historical consent documentation, the following section assumes that the office use was approved as an ancillary and incidental use to the warehouse/industrial building, and therefore the separate use of the office is unlawful.

6.3 The next issue is to determine what weight (if any) should be given to the existing use of the office in the assessment of the Development Application.

6.4 The Council would be aware that section 79C(1) of the EP&A Act provides for the relevant matters that are to be taken into consideration in assessing a development application. These matters include:

> *"(a) the provisions of:*
>
> *(i) any environmental planning instrument, and*
>
> *(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
>
> *(iii) any development control plan, and*
>
> *(iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and*
>
> *(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and*
>
> *(v) any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),*
>
> *that apply to the land to which the development application relates,*
>
> *(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
>
> *(c) the suitability of the Premises for the development,*
>
> *(d) any submissions made in accordance with this Act or the regulations,*
>
> *(e) the public interest."*

6.5 Section 79C does not on its terms invite a consideration of this matter, being an unlawful use outside the development application footprint. There is a tenuous argument that this issue could be considered under the *'public interest'* provision at section 79C(1)(e) .

6.6 In our view however, the Council would fall into error if it was to place any significant weight on the creation or continuation of an unlawful use outside the development application boundary as it is not relevant to this Development Application. This is for the following reasons:

(a) any unlawful use of the office would have commenced with the vacation of the warehouse/industrial building by Diversey. By reference to the Council's concerns, at the vacation of the building, the use of the offices was *'not provided in conjunction with any (or any substantial) industrial/warehouse type space.'*

(b) if the use of the office space is unlawful, the Council presently has enforcement powers available to it to restrain the continued use of the office space; and

(c) even if the Development Application is approved, the legal status of the use of the front offices would not change, nor would the Council's enforcement powers with respect to the use of the office space. Any such enforcement action would then be a matter for the current tenant and the landlord.

6.7 Accordingly, the use of the offices is not in our view relevant to an assessment of the Development Application. Further, the consent authority would fall into error if it was to place any significant weight on the creation or continuation of an unlawful use outside the Development Application boundary.

7. Proposed Surrender Condition and section 80A of the Act

7.1 Part 1 of the Council's letter dated 20 October 2017 provides:

"1. The application involves the proposed use of a portion of the allotment, ***leaving the existing ancillary building separate to the industrial/warehouse type building****. In Council's previous letter (dated 18 July 2017), concern was raised in this regard. In the response provided to Council in relation to this matter (on your behalf), it was requested that the application be assessed independent* (sic) *to the existing office building.*

Consequently, given the above and that ***both uses are unlikely to operate in a manner that complies with the relevant requirements****, it is advised that any recommendation is likely to include a* ***condition requiring other/existing uses of the site (including of the office building) to be surrendered (i.e pursuant to section 80A(1)(b)*** *of the Environmental Planning and Assessment Act 1979"*
(emphasis added)

7.2 Before we deal with the relevant legislative provisions in relation to the surrender of consents, it is necessary to deal with a number of issues raised by the Council's comment above. Our comments are as follows:

(a) firstly, the comment that the Development Application somehow leaves *'the existing ancillary building separate to the industrial/warehouse type building*' perhaps reflects a misunderstanding of the nature of the DA. The 'separation' of the warehouse and office uses occurred at some point prior to 2017 when the existing warehouse was vacated by Diversey. Further:

(i) if the Council has reached the view that the use of the office space is unlawful, it has enforcement powers available to it to restrain the continued use of the office space unrelated to the Development Application; and

(ii) even if the Development Application is approved, the legal status of the use of the front offices would not change, nor would the Council's enforcement powers with respect to the use of the office space. Any such enforcement action would then be a matter for third parties, being the current tenant and the landlord.

(b) secondly, the Council's comment that *'both uses are unlikely to operate in a manner that complies with the relevant requirements'* is with respect, ambiguous and unhelpful in the circumstances. The *'relevant requirements'* are not specified, and we are instructed that the Development Application as it stands is almost entirely compliant with the relevant planning scheme and planning controls.

7.3 We turn to the Council's comment proposing the imposition of a condition of consent requiring the surrender of a previous consent which applies to the Premises as a whole.

Legislative provisions

7.4 It appears that the Council has previously granted consent for an industrial/warehouse building on the Premises with an ancillary office building. We refer to this as the 'Existing Consent.'

7.5 Section 80A(1)(b) provides that a condition of development consent may be imposed if

"it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 10 ***in relation to the land to which the development application relates"***

7.6 Section 80(1)(b) contains an important limitation on the exercise of the power: a surrender condition must relate to "*the land to which the development application relates*".

7.7 In the absence of such a limitation, a consent authority could theoretically impose a condition requiring the surrender of consents at large regardless of the relevant development application boundary. For example:

(a) a landowner could be required to surrender a consent for adjacent land unrelated to development application or land ownership; or

(b) a tenant of a shopping centre could be required to surrender a consent for the centre as a whole.

7.8 Such a result would be contrary to the effective operation of the planning system in NSW and could not have been the intention of the draftsperson.

7.9 In our view, the requirement that a condition relate to "*the land to which the development application relates*" circumscribes the power in section 80A(1)(b).

7.10 It follows that for the Proposed Surrender Condition to be lawful, one of the following tests must be satisfied:

(a) the land subject to the Existing Consent must be congruent with the Development Application boundary; or

(b) the land subject to the Existing Consent must fit wholly within the Development Application boundary.

7.11 In this case, it is clear that the Proposed Surrender Condition does not satisfy either of these two tests.

7.12 It is not in dispute that the Existing Consent applies to a broader area than the land "*to which the Development Application relates*" as it includes the existing office building. However, the effect of the Proposed Surrender Condition would be that such a condition would apply to land outside the DA footprint, in breach of section 80(1)(b).

7.13 As an aside, we would note we are not aware of a condition ever having been imposed in NSW requiring the surrender of a consent applying to land outside the relevant development application boundary.

7.14 Finally, if the Proposed Surrender Condition was imposed, we would anticipate instructions to commence proceedings challenging the imposition of the condition in the appropriate jurisdiction.

8. Other procedural issues

8.1 Clause 97(1)(e) of the Environmental Planning and Assessment Regulation 2000 provides that a notice of surrender of a development consent, as referred to in section 80A (5) of the Act, must include the following information

> *"(e) if the applicant is not the owner of the land, a statement signed by the owner of the land to the effect that the owner consents to the modification or surrender of the consent or right."*

8.2 As the Council is aware, the applicant is not the owner of the land. It is merely a tenant in respect of part of the Premises. The applicant was also not aware of the previous consent history of the site before it signed the relevant lease.

8.3 In our view, in addition to being unlawful, it would also be unduly onerous and unreasonable for the Council to impose the Proposed Surrender Condition. The adjacent land is not owned or controlled by the applicant, and the applicant would have no ability to obtain or compel a statement signed by the owner of the land to the effect that the owner consents to surrender of the consent as required by clause 97(1)(e) of the *Environmental Planning and Assessment Regulation 2000*. One result would potentially be that any consent would be unable to be implemented.

Please contact us if you have any questions with respect to this letter.

Yours faithfully
MinterEllison

John Whitehouse
Partner

Jeremy Farrell
Senior Associate

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OUR REF: JFW:JXF: Matter ref: 1138294

cc: Robert Walker
Senior Development Planner | Development Planning Branch
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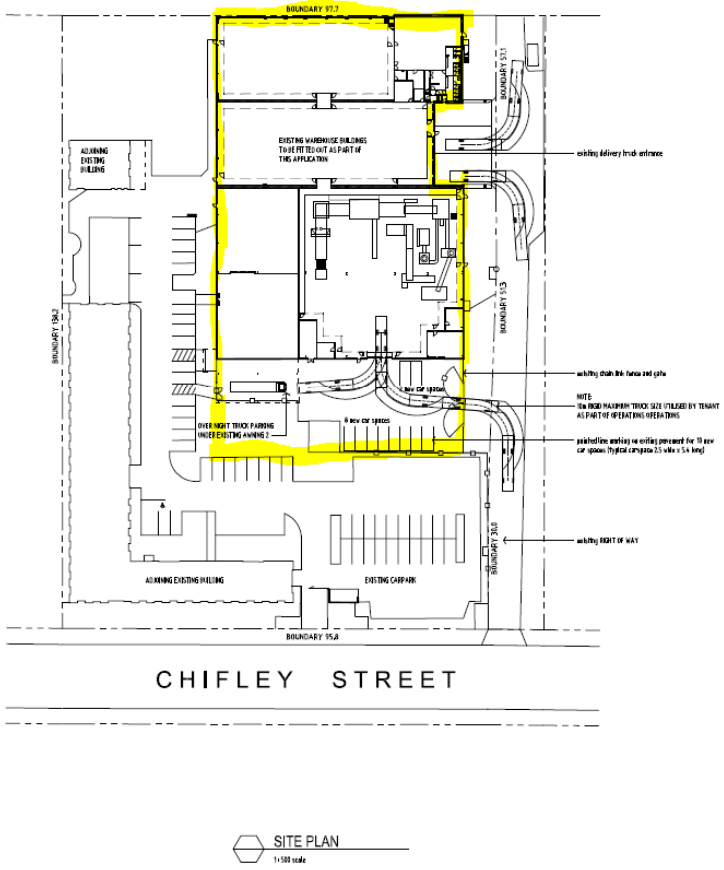
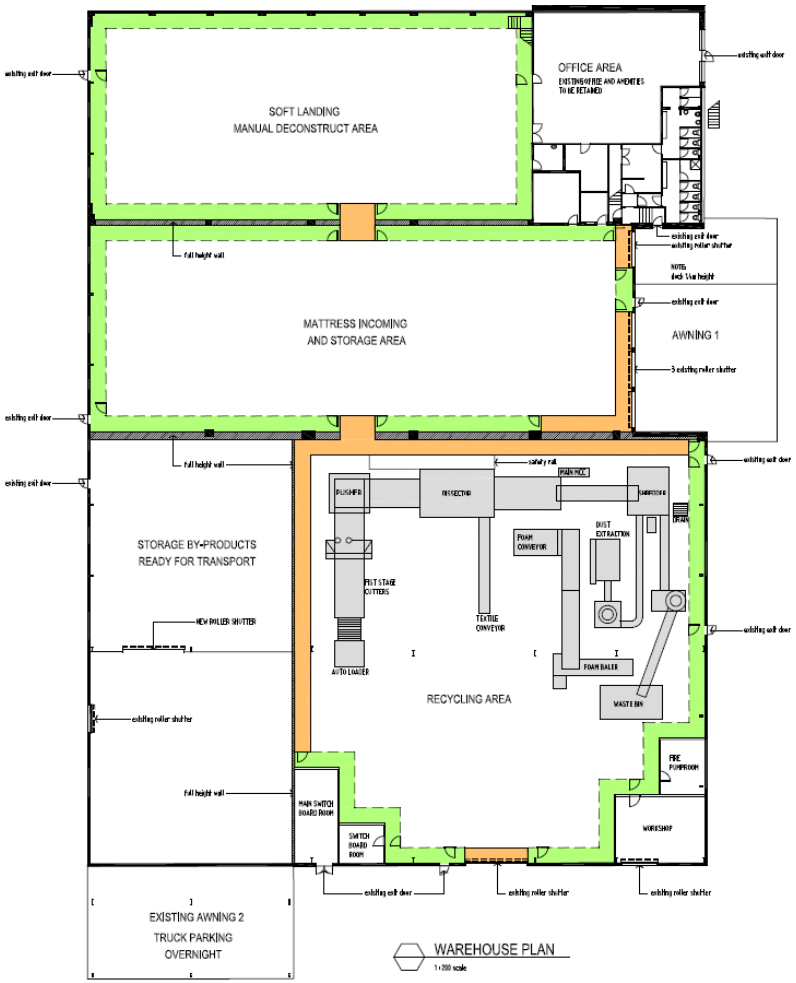
ANNEXURE A – Development Application footprint



SITE PLAN
1:500 scale



WAREHOUSE PLAN
1:200 scale

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ANNEXURE B – Memo to Fairfield Council 2 November 2017

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2 November 2017

PRIVATE AND CONFIDENTIAL

BY EMAIL AND EXPRESS POST: mail@fairfieldcity.nsw.gov.au

The General Manager
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Administration Centre
86 Avoca Road
WAKELEY NSW 2176

Dear Sir

Development Application DA 266.1/2017 29 Chifley Street, Smithfield (Premises)
Your ref: 266.1/2017/rw

1. Introduction

1.1 We refer to the above Development Application No. DA 226.1/2017 and our meeting with Liam Hawke and Robert Walker of Council on 31 October 2017. For the purposes of finalising the assessment of the Development Application, we provide the following memorandum in relation to matters discussed at the meeting.

2. Car parking numbers

2.1 In its letter of 20 October 2017, the Council raised concerns with the number of car parking spaces proposed, indicating that there is a limitation on the *'ability for the premises.. to be alternatively and suitably used in the future'*.

2.2 We understand from our meeting however that the Council's primary concern relates to the ability of a third party to obtain a complying development certificate in the future for a change in use of the premises, with insufficient car parking. In particular, the Council would like to ensure that any future change of use of the premises is subject to a development application and considered by the Council.

2.3 As we referred to at the meeting:

(a) Part 5 of the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (**Codes SEPP**) contains the Commercial and Industrial Alterations Code; and

(b) in relation to a complying development provisions for a changes in use, clause 5.4(1)(g) of the Codes SEPP provides: "*the new use must not cause the contravention of any existing condition of the most recent development consent (other than a complying development certificate) that applies to the premises relating to hours of operation, noise, car parking, loading, vehicular movement, traffic generation, waste management or landscaping*."

2.4 The practical effect of this clause is that the Council could effectively prohibit a complying development certificate being granted for a change in use of the Premises by imposing a condition of consent:

(a) expressly limiting the approved car spaces to a certain number; and/or

(b) expressly approving the number of car spaces as being specific to the approved use, and requiring a development application to be approved by the Council before any further change in use.

2.5 In our view, this would also ensure that a development application was approved by the Council before any further change in use.

3. Enforcement powers available to the Council

3.1 The Council have raised concerns relating to the use of a portion of the allotment outside the Development Application footprint and have proposed a condition to require the surrender of previous consents applying to land including land adjacent to the proposed development on which an office building is located (**Proposed Surrender Condition**).

3.2 We have addressed the Proposed Surrender Condition in our letter dated 24 October 2017 whereby we expressed our view that, based on the express provisions of section 80A(1)(b), such a condition would be unlawful.

3.3 As we referred to at the meeting, the Council has a number of enforcement powers available to it to restrain the use of the office premises being carried out without either an ancillary warehouse.

3.4 These powers include:

(a) an order under section 121B of the EP&A Act as follows:

	To do what?	In what circumstances?		To whom?
1	To cease using premises for a purpose specified in the order	(a)	Premises are being used for a purpose that is prohibited	Owner of premises, or person by whom premises are being used for the purpose specified in the order
		(b)	Premises are being used for a purpose for which development consent is required but has not been obtained	

(c) a penalty enforcement notice in respect of these above offences (schedule 5 of the EP&A Regulations). The fine for a corporation is $6,000.00; and

(d) the commencement of proceedings seeking the restraint of the use of the office premises in accordance with section 124 of the EP&A Act.

We trust this resolves the Council's concerns.

Please contact us if you have any questions with respect to this letter.

Yours faithfully
MinterEllison

Jeremy Farrell
Senior Associate

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