

15 July 2019

**STRATHFIELD COUNCIL  
RECEIVED**

**DA2015/100/05  
25 July 2019**

**Mills Oakley**  
ABN: 51 493 069 734

Our ref: JZOS/AJWS/3394108

All correspondence to:  
PO Box H316

**Attention: Glenda Lam**

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Dear Glenda

**Proposed Section 4.55 application for modification at 86 Centenary Drive, Strathfield**

You have asked us to review the email issued by Rachel Gardner (Senior Planner) of Strathfield Council ('**Council**') to Esan Rahmani (Associate) of Urban Link dated 11 July 2019 in relation to your proposed Section.4.55 application for modification at 86 Centenary Drive, Strathfield ('**Site**'), which provides:

*"Thank you for your email. I have now had a closer look at the development consents previously issued for the site. Condition 2 of development consent DA2017/168 states the following:*

- 2. This development consent amends Development Consent DA 2015/100 and the approved plans and conditions of consent supersede and override Development Consent DA 2015/100 to the extent of any inconsistencies.*

*Therefore, as development consent DA2017/168 supersedes the development consent DA2015/100 for the extent of any inconsistencies (i.e. the residential flat buildings component), you are not able to submit a modification application which relates to the residential flat building component of DA2015/100. Furthermore, it is noted that DA2017/168 is the most recent development consent issued by the Regional Planning Panel for the site. If you are seeking to modify the design of the residential flat buildings, this will need to be made in relation to DA 2017/168.*

*The development consent for DA2017/168 relates to the property addresses (including lot and DPs) as they are now."*

**Advice**

Council's interpretation of Condition 2 of Development Consent DA2017/168 is **legally incorrect**.

Whilst Council may impose a condition of development consent which requires the modification (or surrender) of an earlier development consent pursuant to Section 4.17(1)(b) of the *Environmental Planning and Assessment Act 1979 (NSW)* ('**EPA Act**'), Condition 2 of Development Consent DA2017/168 does **not** and **cannot** automatically "*supersede and override*" Development Consent No. DA 2015/100 for the following reasons:

1. You have **not** activated Development Consent No. DA2017/168 (i.e. you have not '*physically commenced*' works on the Site in accordance with that Development Consent); and
2. The condition **of itself** cannot cause a development consent to be modified. It requires a further step to be taken by the applicant, pursuant to clause 97(1) of the *Environmental Planning and Assessment Regulation 2000* ('**EPA Regulation**'). In that regard, you have **not** prepared or delivered to Council a duly signed 'notice of modification or surrender of a development

consent' in accordance with Section 4.17(5) of EPA Act and Clauses 97(1) and (2) of the EPA Regulation, which is a necessary requirement to give effect to that type of condition.

Against that background, and based on the material that we have been provided with, we consider your proposed '*Modification of DA 2015/100 through design changes including the tidying up of previous development consents and modifications including the surrendering of Development Consent DA 2017/168. The modifications include a new half level of basement car parking in a third half basement level, which are a result of the requirement for additional fire engineering services and storage tanks to support the sprinkler system and other service requirements.*' in respect of the residential flat building component of Development Consent No. DA2015/100 (as previously modified) readily capable of being lodged pursuant to Section 4.55 of the EPA Act.

We have set out those parts of the EPA Act and EPA Regulation that are relevant to our forming of this opinion below.

### **Environmental Planning and Assessment Act 1979 (NSW)**

Pursuant to Section 4.53(1) and (4) of the EPA Act, Development Consent DA2017/168 will lapse 5 years after the date from which it operates (i.e. 23 October 2023) unless works are '*physically commenced*' on the Site in accordance with that Development Consent. The relevant provisions are set out below:

#### **4.53 Lapsing of consent**

(1) A development consent lapses 5 years after the date from which it operates.

...

(4) Development consent for:

- (a) the erection of a building, or
- (b) the subdivision of land, or
- (c) the carrying out of a work,

does not lapse if building, engineering or construction work relating to the building, subdivision or work is physically commenced on the land to which the consent applies before the date on which the consent would otherwise lapse under this section.

We understand **no** works have been '*physically commenced*' on the Site in accordance with Development Consent DA2017/168, nor are any works proposed for that purpose. In support of that assertion, we note you have obtained 4 staged Construction Certificates to date in respect of your development of the Site, which do **not** relate to Development Consent DA2017/168.

Therefore, Development Consent No. DA2017/168 has **not** been activated and your proposed Section 4.55 modification application is **not** bound by any of the conditions of consent contained therein (e.g. Condition 2).

In any event, pursuant to Section 4.17(1) and (5) of EPA Act, if a consent authority imposes a condition of consent which requires the modification (or surrender) of an earlier development consent (e.g. Condition 2 Development Consent No. DA2017/168), the original consent can **only** be modified or surrendered subject to and in accordance with the EPA Regulations. The relevant provisions are set out below:

#### **Section 4.17 Imposition of conditions**

##### **(1) Conditions—generally**

A condition of development consent may be imposed if:

...

(b) it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 4.11 in relation to the land to which the development application relates, or

#### **(5) Modification or surrender of consents or existing use rights**

If a consent authority imposes (as referred to in subsection (1) (b)) a condition requiring the modification or surrender of a consent granted under this Act or a right conferred by Division 4.11, the consent or right may be modified or surrendered subject to and in accordance with the regulations.

#### ***Environmental Planning and Assessment Regulation 2000 (NSW)***

Pursuant to Clause 97(1) and (2) of the EPA Regulation a 'notice of modification or surrender of a development consent' must be duly prepared (including a range of specific particulars), signed (including an owners consent) and received by Council to give effect to a condition of consent which requires the modification (or surrender) of an earlier development consent as referred to in section 4.17(5) of the EPA Act. The relevant provisions are set out below:

#### **97 Modification or surrender of development consent or existing use right**

(1) A notice of modification or surrender of a development consent or existing use right, as referred to in section 4.17 (5) of the Act, must include the following information:

- (a) the name and address of the person by whom the notice is given,
- (b) the address, and formal particulars of title, of the land to which the consent or right relates,
- (c) a description of the development consent or existing use right to be modified or surrendered,
- (d) particulars as to whether the consent or right is to be modified (including details of the modification) or surrendered,
- (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.

(2) A duly signed and delivered notice of modification or surrender of a development consent or existing use right referred to in subclause (1):

- (a) takes effect when it is received by the consent authority, and
- (b) operates, according to its terms, to modify or surrender the development consent or existing use right to which it relates.

We understand **no** 'notice of modification or surrender of a development consent' has been prepared or delivered to Council in accordance with the EPA Regulation and therefore, even if Development Consent No. DA2017/168 had been activated (which it clearly has **not**), Consent Condition 2 would not have the effect claimed by Council's interpretation unless and until that had been attended to. This is because the modification **expressly** does not 'take effect' or 'operate' unless and until the required notice is received by the Council.

Conversely, if you choose not to activate DA2017/168, then it will simply lapse after 5 years, as per Section 4.53 of the EPA Act (above). It will then cease to exist. There is nothing requiring you to comply with Condition 2 in the meanwhile, if you do not wish to activate that consent. Alternatively, if you want to voluntarily surrender Development Consent No. DA2017/168 prior to that time (which is foreshadowed by your proposed modification application), you may do so in accordance with Section 4.63 of the EPA Act and Clauses 97(3) and (4) of the EPA Regulation, although this is not essential.

If you have any questions or require further information in relation to this advice, please do not hesitate to contact Anthony Whealy on +61 2 8035 7848 or James Oldknow of +614 8035 7875 or [joldknow@millssoakley.com.au](mailto:joldknow@millssoakley.com.au).

Yours sincerely



**Anthony Whealy**  
**Partner**

Accredited Specialist — Local Government and Planning