

MEMORANDUM

To: Sydney North Planning Panel
Subject: Supplementary information
From: Director Development and Regulation
Date: 21 April 2022
File Reference: MOD0223/21

Additional information dated 12 April 2022

The purpose of this memorandum is to acknowledge and respond to the matters referred to in the letter prepared by James Lovell and Associates Pty Ltd, dated 12 April 2022, as attached, lodged in response to the assessing officer's enquiry in respect of Modification Application No 0223/21 for a modification to Land and Environment Court Approval 159352 of 2016 (DA0145/15) to change the approved neighbourhood shop to a rental management office.

The submission

On 12 April 2022, a letter was prepared by James Lovell and Associates, on behalf of the applicant, and in response to Council's enquiry regarding the number of rental apartments within the complex currently managed by the *Harvie Group* (the intended occupant of the tenancy). The response is summarised below:

"The Applicant has previously advised that the tenancy will be used as follows:

- the primary rental and sales office for the development;*
- a real estate agency that is responsible for the rental and sale of properties in the building will occupy the office space for that purpose (and any other office use by the real estate agent is only minor);*
- the building manager will be based in this office when they are on site;*
- the strata manager(s) will work generally from this office if they are on site; and*
- strata annual general meetings and extraordinary general meetings will be run from these offices as required.*

Further, the Applicant has already indicated that it would embrace a Condition of Consent limiting the rental management office to serving the subject site only, and proffered a possible Condition as follows:

"The rental management office is only to service the rent and sales of the residential apartments within the building(s) on the site, accommodate the building manager and strata manager for the building(s) and host any meetings of the Body Corporate."

The Harvie Group have advised that they are responsible for the substantial majority of the apartment sales within the complex, and currently manage approximately 20 – 35% of the rental properties.

In addition, as the apartments now become 1 – 2 years old, it is a standard progression to see more of the apartments become investments (and available for lease) as people move around or purchase differently.

The management services associated with the rental properties include attending open inspections, detailing inclusions and services, receiving and assessing rental applications, and preparing ingoing and outgoing maintenance reports.

Further, the Harvie Group also offers related services (for both rental and owner occupied apartments) including coordinating the logistics of ingoing and outgoing removals, arranging for the lifts to be padded up, notifying the strata manager of ingoing and outgoing movements, maintaining resident details, and being on-site to manage access for trades people, cleaners and maintenance/repair staff.

The Harvie Group refers owner/tenant defect lists, provides recommendations for correction, liaises with the builder to schedule and follow up maintenance and repairs, manages trades people to attend to building defects, and attends to defect inspections for purchasers and landlords.

The Harvie Group manages daily personal matters for residents and landlords including holding and managing mail and items for delivery and collections, parcels, pet grooming and walking, and incidental personal matters as the need arises.

Further, the Harvie Group hold and securely manage resident's keys, assist with services or delivery of items, property, pet and plant checks if residents are away for an extended period, and provide parking assistance and car space and storage cage management as the need arises.

I would take this opportunity to remind Council of findings of Preston JC in Jonah Pty Limited v Pittwater Council [2006] NSWLEC 99 as follows:

Hence, in undertaking the merit determination of whether to grant or modify a development consent, it is irrelevant to enquire as to who is the current owner/operator, or who might be the future owner/operator, or whether the present owner/operator has in the past acted or used the land unlawfully, or whether the future owner/operator is likely in the future to act or carry out any approved use unlawfully.

In the circumstances, the Application must be determined on the assumption that the Applicant will comply with the requirements of any consent, and the Council cannot assume the Applicant will act unlawfully.

In this instance, the Applicant has explained and detailed the nature of the proposed use and also proffered a possible Condition to ensure the use remains lawful. The Application must be determined on the assumption that such a Condition will be complied with at all times."

Council's response

The prospective use of the tenancy differs between the letter prepared by James Lovell and Associates, dated 12 April 2022, and the earlier letter prepared by James Lovell and Associates, dated 21 March 2022, wherein clarification was sought from Council in respect of the specific uses of the tenancy.

The letter, dated 12 April 2022, now acknowledges the use as a "real estate agency" but what it fails to acknowledge is that the prospective use –

"..... may occasionally lead to further enquiries in relation to the availability of properties [outside of the subject site] if they cannot be accommodated within the existing building."

This use was specifically referenced in the letter prepared by James Lovell and Associates, dated 21 March 2022. The applicant has not sought to amend the uses within the subject tenancy. Council has therefore formed the view that the subject tenancy will also be used for the purpose of rental and sale enquiries in relation to the availability of properties beyond the subject site, as this was confirmed by the applicant in the letter prepared by James Lovell and Associates, dated 21 March 2022

Council does not embrace the applicant's suggested condition of consent to overcome the issue of permissibility. The reasons why Council does not embrace this condition is outlined in the Council Assessment report, dated 11 April 2022. However, in summary, Council contends that the condition is unreasonable, does not have a planning purpose and it could not be enforced and would therefore fail the Newbury Test.

Whilst the proposed services that will be undertaken by the Harvie Group are acknowledged, the issue that Council has is that only 20 to 35 (approximately) of the rental apartments within the complex are currently managed by the Harvie Group (the intended occupant of the tenancy). This is considered a relatively low number of apartments within the complex to justify a rental management office ("real estate agency") that will operate within the approved hours of 7.00am to 7.00pm, Monday to Friday, 8.00am to 7.00pm, Saturdays, and 9.00am to 5.00pm, Sunday and Public Holidays.

The applicant has failed to specify the likely number of rental and sale enquiries in relation to the availability of properties beyond the subject site, which is acknowledged as a use within the prospective rental management office. In the absence of this information, Council is of the view that the proposed rental management office will be independent of and not ancillary to the use as a residential flat building. It will be used for purposes that go beyond what is reasonably required in the circumstances for the development to implement the dominant purpose. It would be used as an office premises that would not solely serve the dominant purposes as a residential flat building and would therefore be prohibited in the R4 High Density Residential zone.

Conclusion

The information submitted by James Lovell and Associates, dated 12 April 2022, is noted and does not alter the recommendation contained in Council's assessment officer's report dated 11 April 2022.



Michael Miocic
Director Development & Regulation