

Jay Wang

From: Aaron Gadiel <agadiel@millsoakley.com.au>
Sent: Thursday, 17 March 2022 5:50 PM
To: Jay Wang
Cc: Steven Chen; Benjamin Lin; Stella Zhao
Subject: Further email advice re 2 - 8 Pymble Avenue.

Dear Jay

Further to our email below, you have asked for advice regarding whether the proposed modification's achieves the zone objectives.

We understand and assume the relevant facts to be as follows:

- The facts as are set out in our letter of advice to you dated 23 September 2021 and our letter below remain correct.
- The facts set out in the letter from Princess Ventura, Urbis, dated 10 March 2022 (**the economic study**) are correct.

Please let us know if any of the above facts are bit correct, as it may change our advice.

The site is zoned 'R4 High Density Residential' (**the R4 zone**).

The objectives of the R4 zone are set out in the land use table at the end of Part 2 of the *Ku-ring-gai Council Local Environmental Plan 2015* (**the LEP**). These are:

- To provide for the housing needs of the community within a high density residential environment.
- To provide a variety of housing types within a high density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide for high density residential housing close to public transport, services and employment opportunities.

There is no requirement that the proposed development be consistent with zone objectives, the relevant test is that a consent authority must merely **have regard** to the zone objectives when determining a development application (section 2.3(2) of the LEP).

In any event, we consider that this proposal achieves the zone objectives for the reasons set out below:

- The development approved under the development consent DA0145/15 (**the development consent**) contains residential apartments with a mix of unit sizes and layouts that provides for the housing needs of the community within a high density residential environment. The proposed modification to change the use of the non-residential tenancy from the 'neighbourhood shop' to the 'rental management office', in particular, will support the achievement of the first two zone objective as the 'rental management office' will provide support and proper management of the rental and sale of the these units.
- The proposed change of use allows for facilities and services to meet the day to day needs of the residents to be provided on site. Namely, the rental management office will service the residents by providing for the proper management of the rental and sale of the residential units. The rental management office will also accommodate the building manager and strata manager for the building and provide a space for the meetings of the Body Corporate to be held. These are services that the residents of the buildings will need on a day to day basis, and as such the third zone objective is achieved.
- The change of use to a rental management office will support housing in an area that is close to public transport and other services. This achieves the fourth zone objective.

- The services that a 'neighbourhood shop' would provide to meet the day to day needs of the residents are already provided for elsewhere. The economic study also sets out the that:
 - there is sufficient retail provision in superior locations around the site to cater for the day to day needs of the residents;
 - there is a sufficient pipeline of future non-residential floorspace to offset any loss of retail floorspace from this change of use; and
 - there are several key retail success factors that the sit lack which may affect the viability of a retail tenant in this location.
- In light of this, the use of the non-residential tenancy as a rental management office better achieves the zone objectives than the approved 'neighbourhood shop'.

If you have any questions regarding the above advice, please contact Stella Zhao on (02) 8035 7905.

Kind regards

Aaron Gadiel

Aaron Gadiel | Partner | Planning & Environment

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From: Aaron Gadiel <agadiel@millsoakley.com.au>

Sent: Thursday, 10 March 2022 5:48 PM

To: jwang@linfield.com.au

Cc: Stella Zhao <szhao@millsoakley.com.au>; schen@linfield.com.au; blin@linfield.com.au

Subject: Email advice re 2 - 8 Pymble Avenue.

Dear Jay

You have asked for advice in relation to the letter you have received from the Council dated 28 February 2022. This letter is in response to modification application MOD0223/21 (**the modification application**) for 2 – 8 Pymble Avenue and 2 – 4 Everton Street, Pymble (**the subject site**).

We understand and assume the relevant facts to be as follows:

- The facts as are set out in our letter of advice to you dated 23 September 2021 remain correct.
- The modification application seeks to modify development consent DA0145/15 (**the development consent**).
- Lot 94 (the non-residential tenancy) is currently used as a rental management office.
- Under the modification application, it is intended that the rental management office will service the rent and sales of the residential apartments on the subject site only.

- The facts set out in the statement of environmental effects prepared by James Lovell and Associates and dated 26 October 2021 are correct.

Please let us know if any of the above facts are bit correct, as it may change our advice.

Approval for the prospective use of the premises as a rental management office

The modification application seeks approval for the **prospective use** of the non-residential tenancy as a rental management office.

Subject to a merit assessment, there is no legal barrier to the grant of the development consent. 'Land' is defined in the EP&A Act as including 'a building erected on the land'. Therefore, a development consent may be granted for an application for the **use** of land, which includes the use of the building that is erected on the land. (*Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177 at [37], [39] – [40]; *Willoughby City Council v Dasco Design and Construction Pty Ltd* [2000] NSWLEC 257 at [102] – [105])

We note that if the modification application is approved, it will not act retrospectively, but rather will authorise the prospective use of the non-residential tenancy as a rental management office.

Potential condition to address Council's concerns

To address the Council's concern regarding the rental management office, you may wish to consider proposing to the Council that a condition be imposed limiting the rental management office to servicing the subject site only. An example condition is below:

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 established presumption is that when a development consent is granted subject to conditions whatever individual or entity has the benefit of that consent, from time to time, will observe the conditions that are attached to it. When this does not occur, enforcement can be undertaken through other legislative processes, not those relating to assessment of modification applications (*TL & TL Tradings Pty Ltd v Parramatta City Council* [2016] NSWLEC 150 at [112]).

Past unlawful use is not in itself grounds for refusal

The fact that the non-residential tenancy is currently operating as a rental management office without approval and/or in breach of the proposed condition, is not in itself grounds for the refusal of the modification application that seeks approval for the prospective use of the land. (*Jonah Pty Limited v Pittwater Council* [2006] NSWLEC 99 at [35]).

If you have any questions regarding the above advice, please contact Stella Zhao on (02) 8035 7905.

Kind regards

Aaron

Aaron Gadiel | Partner | Planning & Environment

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