

COUNCIL ASSESSMENT REPORT

Panel Reference	PPSSNH-281
DA Number	MOD0223/21
LGA	Ku-ring-gai
Proposed Development	Modification to Land and Environment Court approval 159352 of 2016 (DA0145/15) to change the approved neighbourhood shop to a rental management office
Street Address	2-8 Pymble Avenue, Pymble
Applicant/Owner	Bfd Pymble Pty Ltd (Applicant) The Owners of SP 97280 (Owner)
Date of DA lodgement	19 November 2021
Total number of Submissions	One
Number of Unique Objections	
Recommendation	Refusal
Regional Development Criteria (Schedule 7 of the SEPP (State and Regional Development) 2011)	The application is a Section 4.56 modification application to a development consent for works with a capital investment value of more than \$30 million.
List of all relevant s4.15(1)(a) matters	<ul style="list-style-type: none"> • Ku-ring-gai Local Environmental Plan 2015 • Ku-ring-gai Development Control Plan
List all documents submitted with this report for the Panel's consideration	<ul style="list-style-type: none"> • Attachment 1. Statement of Environmental Effects prepared by James Lovell and Associates Pty Ltd dated 26 October 2021 • Attachment 2. Legal advice prepared by Mills Oakley dated 23 September 2021 • Attachment 3. Response to Council's correspondence prepared by James Lovell and Associates Pty Ltd dated 21 March 2022 • Attachment 4. Email containing further legal advice prepared by Aaron Gadiel sent on 10 and 17 March 2022 • Attachment 5. Economic Study prepared by Urbis dated 10 March 2022 • Attachment 6. Letter from James Lovell and Associates Pty Ltd dated 12 April 2022
Clause 4.6 requests	N/A
Summary of key submissions	<ul style="list-style-type: none"> • Permissibility • Not substantially the same • Retrospective approval
Report prepared by	Luke Donovan
Report date	11 April 2022

Summary of s4.15 matters

Have all recommendations in relation to relevant s4.15 matters been summarised in the Executive Summary of the assessment report? **Yes**

Legislative clauses requiring consent authority satisfaction

Have relevant clauses in all applicable environmental planning instruments where the consent authority must be satisfied about a particular matter been listed, and relevant recommendations summarized, in the Executive Summary of the assessment report? **Yes**
e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP

Clause 4.6 Exceptions to development standards

If a written request for a contravention to a development standard (clause 4.6 of the LEP) has been received, has it been attached to the assessment report? **Not applicable**

Special Infrastructure Contributions

Does the DA require Special Infrastructure Contributions conditions (S7.24)? **Not applicable**
Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions

Conditions

Have draft conditions been provided to the applicant for comment? **No**
Note: in order to reduce delays in determinations, the Panel prefer that draft conditions, notwithstanding Council's recommendation, be provided to the applicant to enable any comments to be considered as part of the assessment report

PURPOSE OF REPORT

To determine Modification Application No MOD0223/21 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.

This application is reported to the Sydney North Planning Panel (SNPP) for determination as it is a Section 4.56 modification application to a development consent for works with a capital investment value of more than \$30 million. Pursuant to Schedule 6 of State Environmental Planning Policy (Planning Systems) 2021, the SNPP is the consent authority.

INTEGRATED PLANNING AND REPORTING

Places, Spaces & Infrastructure

Community Strategic Plan Long Term Objective	Delivery Program Term Achievement	Operational Plan Task
P2.1 A robust planning framework is in place to deliver quality design outcomes and maintain the identity and character of Ku-ring-gai	Applications are assessed in accordance with state and local plans	Assessments are of a high quality, accurate and consider all relevant legislative requirements

EXECUTIVE SUMMARY

Issues:	Permissibility Not substantially the same Retrospective approval
Submissions:	1
Land and Environment Court:	DA0145/15 was approved by the Land and Environment Court on 25 July 2016
Recommendation:	Refusal

HISTORY

Site history:

The site has a history of residential use.

Development application DA0145/15

On 25 July 2016, the NSW Land and Environment Court upheld an appeal (by way of a Section 34 agreement) in relation to a DA0145/15 for the “*demolition of existing structures and the erection of three residential flat buildings containing 98 units, a neighbourhood shop, basement car parking and associated landscaping on land at 2-8 Pymble Avenue and 2-4 Everton Street, Pymble*” (the site is now known as No’s 2 – 8 Pymble Avenue, Pymble). An Occupation Certificate was issued by Mike Gooley on 2 October 2020.

Modification application MOD0198/18

On 12 December 2019, DA0145/15 was amended pursuant to Section 4.56 of the *Environmental Planning and Assessment Act 1979*. The approved amendments included “*internal reconfiguration, the addition of waste storage facilities and two water tanks*”.

On 29 September 2020, the site was strata subdivided and strata plan SP97280 was registered. The lot, the subject of this Modification Application, is Lot 94.

Development application DA0205/21

On 17 May 2021, Development Application DA0205/21 proposing the change of use to a temporary display suite, internal fit out and signage to an existing ground and lower ground floor tenancy (Lot 94 in SP 97280) located within Building A was lodged with Council. On 21 June 2021, DA0205/21 was withdrawn by the applicant.

Current modification application

A pre-development application consultation meeting was not undertaken with Council for the proposed modification.

Date	Action
19/11/2021	Application lodged.
6/12/2021 to 20/12/2021	The application was notified and one submission was received.
28/02/2022	<p>Council sent a letter to the applicant requesting the following information:</p> <ul style="list-style-type: none"> i. clarify the specific purpose of the proposed rental management office, in particular: <ul style="list-style-type: none"> a) how many rental and sales enquiries per week does the office receive in respect of the apartments within the buildings on the subject site to demand an on-site rental management office? b) how many staff are required to be employed to attend to these enquiries? c) does the office deal with rental and sales enquiries for other buildings within the locality? d) a site visit revealed that the business that is occupying the tenancy is the “Harvie Group”, and that this tenancy is the headquarters for this business. The Harvie Group website would indicate that these headquarters manage the sales and rental enquiries for buildings in St Ives, Roseville, Pymble, Wahroonga. e) Council is of the view that, because this tenancy is used by the headquarters of the business, it is in fact a “real estate agency” and not a “rental management office” that is confined to the sales and rental enquiries of apartments within buildings located on the subject site. A “real estate agency” would be considered an independent use which would be prohibited given the zoning of the site. ii. demonstrate consistency with R4 High Density Residential zone iii. provide details relating to the Building Information Certificate
21/02/2022	The applicant provided additional information in response to the issues raised in Council’s letter dated 28/02/2022. The additional information is discussed in detail later in this report.
30/03/2022	Council officers briefed the Panel.

THE SITE

Aerial photograph



Figure 1 – Aerial photograph of development on subject site and surrounding properties (subject building is marked in red)

Site description:

The subject site is known as 2-8 Pymble Avenue, Pymble and is identified as Lot 27 in SP 97280. The site contains three multi storey residential flat buildings (Buildings A, B and C) of varying heights with basement car parking and landscaping between buildings and around the perimeter of the site. Vehicular access to the site is via a driveway off Pymble Avenue. The property has a site area of approximately 7,951 square metres.

Within Building A there is a non-residential tenancy, approved as a “*neighbourhood shop*” (Lot 94), with a floor area of 100 square metres that occupies a portion of the ground floor level at the corner of Pymble Avenue and Everton Street (**refer to Figure 2 below**). There is an approved “public plaza” on the corner of Everton Street and Pymble Avenue. The non-residential tenancy is the subject of this modification application.

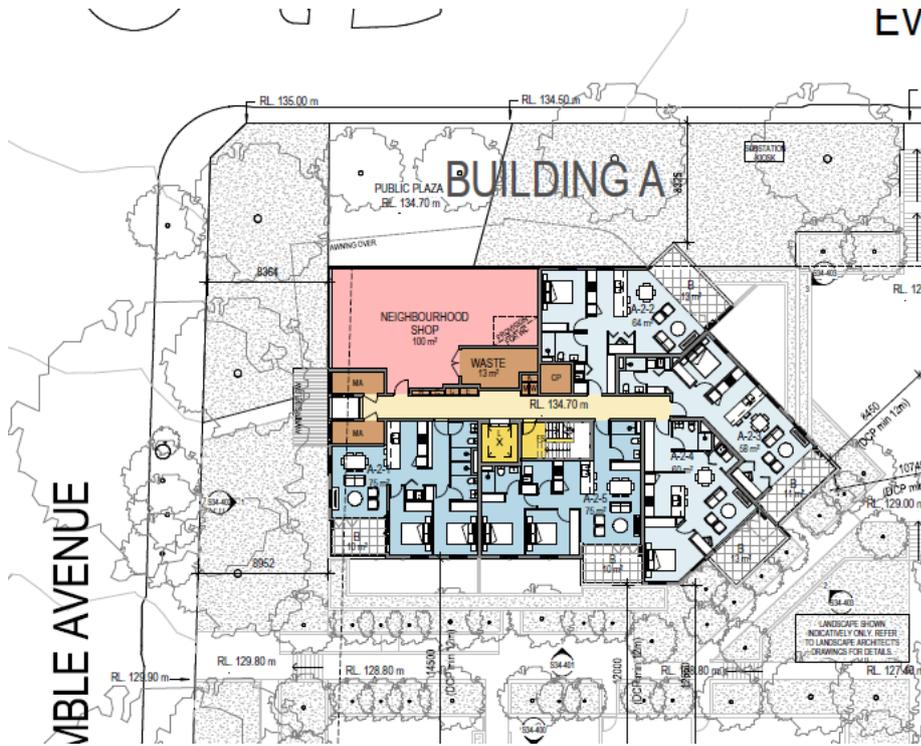


Figure 2 – Extract from approved ground floor plan (Building A) indicating the location of the approved neighbourhood shop

The subject tenancy (Lot 94) is currently used by the Harvie Group (refer to Figure 3 below).



Figure 3 – The subject tenancy as viewed from Everton Street

Constraint:	Application:
Visual character study category	1920-1945
Easements/rights of way	Yes, easement for drainage
Heritage Item - Local	No
Heritage Item - State	No
Heritage conservation area	No.
Within 100m of a heritage item	Yes, 1 Livingstone Avenue, Pymble

	(Uniting Church), 1116 Pacific Highway (Former police station), 7 and 14 Pymble Avenue, Pymble (dwelling houses)
Bush fire prone land	No
Natural Resources Biodiversity	Yes
Natural Resources Greenweb	Yes
Natural Resources Riparian	Yes
Within 25m of Urban Bushland	No
Contaminated land	No

Surrounding development:

Surrounding development to the north-west and north-east of the site is predominantly high density residential, comprising 4 and 5 storey residential flat buildings. To the south-west of the site, along the lower parts of Pymble Avenue, are 1 and 2 storey dwelling houses. Opposite the site on the northern side of Pacific Highway is Pymble Railway Station and the Pymble Town Centre. Further to the north-west of the site, along Avon Road, is Pymble Ladies College.

THE PROPOSAL

The modification application seeks to modify DA0145/15 specifically in respect of the change of use of Lot 94 in SP 97280 from the approved neighbourhood shop to a rental management office.

The Statement of Environmental Effects (“SEE”) provides the following details in respect of the proposed change in use to a rental management office –

- i. *“The general purpose of the rental management office is to facilitate the rent and sales of the residential apartments within the complex, accommodate the building manager and Strata Manager for the complex, and host the general meetings and extraordinary meetings of the Body Corporate.”*
- ii. *The physical works associated with the change of use are all internal, and generally limited to the fit-out, with the floor space accommodating two (2) enclosed offices/meeting rooms, a reception and open plan work space, and amenities comprising a kitchenette and accessible bathroom.*
- iii. *The internal works associated with the fit-out are the subject of a separate and concurrent application for a Building Information Certificate (BIC)*
- iv. *Condition 95 of the Development Consent dictate the hours of operation of the approved “neighbourhood shop” as 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 proposed rental management office will operate during the same times, and no change is necessary or proposed to the approved hours of operation.”*

The applicant has not sought a time limited consent.

Additional information dated 21 March 2022

The additional information provides further clarification on the prospective use of the subject tenancy:

1. *“It is anticipated the rental management office will receive approximately 50 – 100 rental and/or sales enquiries per week.*
2. *It is anticipated that approximately 5 – 6 staff will be required to respond to the enquiries.*
3. *It is anticipated that the initial enquiries may occasionally lead to further enquiries in relation to the availability of properties if they cannot be accommodated within the existing building.*

4. *The Application relates to the prospective, and not retrospective, use of the subject tenancy. That is, if the Application is approved, it will not act retrospectively, but rather will authorise the prospective use of the tenancy as a rental management office.*
5. *As per Item 4 above."*

CONSULTATION

Community

In accordance with Appendix 1 of the Ku-ring-gai Community Participation Plan, owners of surrounding properties were given notice of the application. In response, one submission from the following was received:

1. *Andrea Cepeda & Carlos Ledezma, Unit CG05, 8C Pymble Avenue, Pymble*

The submission raised the following issue:

- ***The use should be a café or restaurant rather than a rental office as this would add very little value to the residents of the community***

The suggestion of an alternate use is irrelevant as it is not the prospective use sought under the application. Council contends that the proposed use, as a prospective rental management office, is prohibited for the reasons provided throughout this report.

Additional information dated 21 March 2022

The additional information was not notified to surrounding residents as it would not result in any greater environmental impact to surrounding properties.

STATUTORY PROVISIONS

Section 4.56 of the Environmental Planning and Assessment Act 1979 - Modification of consents granted by the Court

Subsection (1) (a): Substantially the same development

The development as approved, was for "*demolition of existing structures and the erection of three residential flat buildings containing 98 units, a neighbourhood shop, basement car parking and associated landscaping*". A neighbourhood shop is a permissible use in the R4 High Density Residential zone.

The development, as modified, seeks to change the use of the neighbourhood shop to a rental management office.

In the additional information submitted on 21 March 2022 the applicant confirmed the following in respect of the nature and use of the rental management office - "*it is anticipated that the initial enquiries [sales and rental enquires associated with the subject buildings] may occasionally lead to further enquiries in relation to the availability of properties if they cannot be accommodated within the existing building*".

Given that the rental management office is anticipated to field enquiries in relation to the availability of other building/s outside of the subject site, the proposed use would be more appropriately defined as a "commercial premise" specifically an "office premise" (real estate agency) that would be independent of the approved use of the building as a residential flat building.

The development, as proposed to be modified, would therefore not be substantially the same

development, as that approved in the development consent to DA0145/15. The proposed modification alters the essence and character of the development from a residential flat building with a neighbourhood shop that sells general merchandise and provides for the day to day needs of people in the area to a residential flat building with an office premises that manages sales and rental enquiries both within and outside of the subject site.

Subsection (1)(b): Notification

The application was notified in accordance with the Appendix 1 of the Ku-ring-gai Community Participation Plan.

As required by clause 117(3) of the Environmental Planning Assessment Regulation 2000 the Land and Environment Court were notified of the application on the 25 November 2021

Subsection (1)(c) Notification of previous submitters

Each person who made a submission in respect of the original development application has been notified, or a reasonable attempt has been made to notify, each person by sending written notice to the last known address.

Subsection (1)(d): Submissions

One submission was received in response to the notification of the proposal. The issue identified in the submission has been considered in the 'Community Consultation' section of this report.

Subsection (1A): Section 4.15(1) considerations and consideration of reasons for granting of the consent

This assessment report includes consideration of the matters specified in section 4.15 of the Act.

An agreement under s 34(3) of the Land and Environment Court Act 1979 was reached between the parties in respect of DA0145/15 and this is reflected in paragraphs 2 to 4 of the judgment prepared by Commissioner Brown in *BFD Pymble Pty Ltd v Ku-ring-gai Council [2016] NSWLEC 1315*.

The Court did not specify any reasons for the granting of consent

Section 4.15 (1) considerations

State Environmental Planning Policy (Resilience and Hazards) 2021 - Chapter 4 Remediation of land

The provisions of Chapter 4 require Council to consider the potential for a site to be contaminated. The subject site has a history of residential use and as such, it is unlikely to contain any contamination and further investigation is not warranted in this case

State Environmental Planning Policy No.65 - Design Quality of Residential Flat Development

Clause 4(1) of SEPP 65 states the following:

- (1) *This Policy applies to development for the purpose of a residential flat building, shop top housing or mixed use development with a residential accommodation component if—*
 - (a) *the development consists of any of the following—*
 - (i) *the erection of a new building,*

- (ii) the substantial redevelopment or the substantial refurbishment of an existing building,
- (iii) the conversion of an existing building, and
- (b) the building concerned is at least 3 or more storeys (not including levels below ground level (existing) or levels that are less than 1.2 metres above ground level (existing) that provide for car parking), and
- (c) the building concerned contains at least 4 or more dwellings.

The proposal is for a change of use of the non-residential tenancy from an approved neighbourhood shop to a rental management office. The proposal is of a minor nature and does not activate the triggers referred to in subclauses (i), (ii) or (iii) of Clause 4(1)(a), therefore SEPP 65 does not apply.

Ku-ring-gai Local Environmental Plan 2015

Zone objectives and land use table

The subject site is zoned R4 High Density Residential under the KLEP 2015.

The submitted Statement of Environmental Effects provides the following comments in respect of permissibility –

“The Applicant has obtained legal advice (Mills Oakley, 23 September 2021) which confirms that the use of the non-residential tenancy for the purposes of a rental management office is ancillary to the use of the land as a “residential flat building”, and is therefore, permissible in the zone with the consent of Council.”

To determine permissibility, it is important to firstly characterise the nature of the proposed use of the tenancy. A “rental management office” is not separately defined under the Standard Instrument.

The applicant has provided the following information to Council in respect of the purpose and nature of the proposed use:

- i. *“the general purpose of the rental management office is to facilitate the rent and sales of the residential apartments within the complex, accommodate the building manager and Strata Manager for the complex, and host the general meetings and extraordinary meetings of the Body Corporate.*
- ii. *it is anticipated the rental management office will receive approximately 50 – 100 rental and/or sales enquiries per week.*
- iii. *it is anticipated that approximately 5 – 6 staff will be required to respond to the enquiries.*
- iv. *it is anticipated that the initial enquiries may occasionally lead to further enquiries in relation to the availability of properties if they cannot be accommodated within the existing building.*
- v. *the Application relates to the prospective, and not retrospective, use of the subject tenancy. That is, if the Application is approved, it will not act retrospectively, but rather will authorise the prospective use of the tenancy as a rental management office*

In summary, the purpose of the rental management office would be as follows:

- i. rental and sales enquiries of residential apartments within the complex on the subject site
- ii. accommodate the building and strata managers
- iii. host meetings of the Body Corporate
- iv. rental and sales enquiries of residential apartments on properties outside of the subject site

As the use of the subject tenancy involves rental and sales enquiries of residential apartments on properties outside of the subject site, it would 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.

To address this permissibility issue, the applicant has suggested the following condition:

“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 suggested condition is unreasonable, does not have a planning purpose and it could not be enforced and would therefore fail the Newbury Test.

The objectives of the R4 High Density Residential zone are as follows:

- *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.”*

Clause 2.3(2) of the KLEP 2015 requires the consent authority to have regard to these objectives in determining applications.

Council's current records indicate that only nine of the apartments remain in the ownership of the developer of the site. It is reasonable to therefore assume that a majority of the enquiries that are fielded by this prospective rental management office will be in respect of only these apartments outside of the subject site.

The proposed use as a rental management office, with the primary function involving sales and rental enquiries of the apartments within the complex on the subject site would therefore not provide facilities or services to meet the day to day needs of residents. The proposed use as a rental management office would only services the needs of some residents and only on an occasional basis. A neighbourhood shop, as approved, would provide facilities and services to meet the day to day needs of residents.

Part 4 Principal development standards:

The proposal does not alter compliance with the approved height of building or floor space ratio development standards

Part 5 Miscellaneous provisions

Clause 5.10 – Heritage conservation

The subject site does not contain a heritage item and is not within a heritage conservation area. The subject site is however located within 100m of a number of heritage items including 1 Livingstone Avenue, Pymble (Uniting Church), 1116 Pacific Highway (Former police station), 7 and 14 Pymble Avenue, Pymble (dwelling houses). The proposed works will not impact the heritage significance of these items given the application relates primarily to a change of use

of a tenancy within the building. The proposal is satisfactory having regard to Clause 5.10 in KLEP 2015.

Part 6 Additional local provisions

Clause 6.3 - Biodiversity protection

The site is mapped as land comprising biodiversity significance.

The proposed development will not impact on any native vegetation, fauna and habitat on the subject site as the application is for a change of use to a tenancy within the approved building.

Clause 6.4 – Riparian land and waterways

The site is mapped as Category 3 Riparian Land under Council's mapping system.

The proposed development will not impact on the riparian land within the eastern portion of the site as the application is for a change of use to a tenancy within the approved building.

Ku-ring-gai Development Control Plan

The KDCCP does not contain any controls that are of relevance to the subject modification application.

Fit-out works and Building Information Certificate

A site visit revealed that the fit out works of the subject tenancy have been undertaken without consent and include two enclosed offices/meeting rooms, a reception and open plan workspace, and amenities comprising a kitchenette and accessible bathroom. To date, a Building Information Certificate has not been lodged with Council in respect of these fit out works.

Ku-ring-gai Contributions Plan 2010

The development does not attract a development contribution as there is no change to the approved gross floor area of the subject tenancy.

LIKELY IMPACTS

The likely impacts of the development have been considered within this report and are deemed to be unacceptable.

SUITABILITY OF THE SITE

The site is not suitable for the proposed development.

PUBLIC INTEREST

The public interest is best served by the consistent application of the requirements of the relevant Environmental Planning Instruments and by the Panel ensuring that any adverse effects on the surrounding area and the environment are minimised. The proposal has been assessed against the relevant environmental planning instruments and is deemed to be unacceptable. On this basis, the proposal is contrary to the public interest.

CONCLUSION

Having regard to the provisions of Section 4.15 of the Environmental Planning and Assessment Act 1979, the proposed development is considered to be unsatisfactory.

RECOMMENDATION

PURSUANT TO SECTION 4.56 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979

THAT the Sydney North Planning Panel, as the consent authority, refuse MOD0223/21 for the modification to Land and Environment Court approval 159352 of 2016 (DA0145/15) to change the approved neighbourhood shop to a rental management office on land at 2 - 8 Pymble Avenue, Pymble, for the following reasons:

1. A prospective use that is independent of the dominant use and prohibited in the land use zone

The prospective use as a rental management office is independent of and not ancillary to the use of the site as a residential flat building and is thereby prohibited in the R4 High Density Residential zone.

Particulars

- a) In respect of the nature of the use, the applicant has advised the following:
 - a. *"It is anticipated that the initial enquiries 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.*
 - b) As the use of the subject tenancy may involve rental and sales enquiries of residential apartments on properties outside of the subject site it would be independent of and not ancillary to the use as a residential flat building. It would be used as 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.

2. The prospective use would result in a development that is not substantially the same as that approved in the development consent to DA0145/15

The prospective use of the tenancy as a rental management office would not be essentially or materially the same as the approved use of the tenancy as a neighbourhood shop

Particulars

- a) The prospective use of the tenancy alters the essence and character of the development from a residential flat building with a neighbourhood shop that sells general merchandise and provides for the day to day needs of people in the area to a residential flat building with an office premises that manages sales and rental enquiries both within and outside of the subject site.
- b) The prospective use of the tenancy would not be substantially the same development as the development for which the development consent was granted and therefore would not satisfy section 4.56(1)(a) of the Environmental Planning and Assessment Act 1979 (as amended)

3. Retrospective approval cannot be obtained by way of development consent

Development consent cannot be granted in respect of fit-out works which require consent and which have already been carried out without development consent.

Particulars

- a) Section 4.2 of the Environmental Planning and Assessment Act 1979 states that development may only be carried out except with development consent which has been obtained and is in force.
- b) The fit-out works to the tenancy are completed and are unauthorised.
- c) Retrospective development consent cannot be granted in respect of these unauthorised works.
- d) The prospective use relies upon these fit-out works that are unauthorised and unlawful.
- e) A Building Information Certificate application, seeking to regularise the fit-out works, has not been lodged.

4. Insufficient information

The application is not supported by sufficient information confirming the use of the remainder of Lot 94 in SP 97280 (subject lot) which is located on the lower ground floor of Building A within the complex.

Luke Donovan
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Jonathan Goodwill
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