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Application to Vary Development Control Industrial Subdivision and General Industrial Development, 2 & 10 Bowman Road, Moss Vale

SAAS Aus Pty Ltd

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We declare that:

The report contains all available information that is relevant to the assessment of the Site and proposed development, activity or infrastructure to which the report relates, and the information contained in the report is neither false nor misleading.

Report version	Authors	Date	Reviewer	Approved for issue	Date
Draft	C Rich	12/04/2024	Dr. M. Jackson	Dr. M. Jackson	20/04/2024
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1. Introduction

This submission has been prepared by Jackson Environment and Planning Pty Ltd (JEP) to seek an exception to a development control, under Section 4.15(3A) of the *Environmental Planning and Assessment Act 1979* (EP&A Act), in Section 3.10 of the *Moss Vale Enterprise Corridor Development Control Plan 2008* (MVEC DCP) relating to the width of landscaping on industrial land adjoining a rural zone. This submission relates to development application DA 24/0302 for an industrial subdivision and general industrial development at 2 and 10 Bowman Road, Moss Vale.

This submission seeks an exception to Rule 4, Section 3.10 of the MVEC DCP on the basis that the proposed development meets the objectives of the MVEC DCP, and specifically the objectives of Section 3.10 Landscaping, and that the MVEC DCP is inconsistent in its requirements for landscaping. Rule 4, Section 3.10 states:

A minimum 15 metre wide landscaped area is to be established along lot frontages to internal access roads and along boundaries with rural zoned land outside the Enterprise Corridor.

Legal advice on the non-compliance has been provided by Fishburn Watson O'Brien (Appendix A). The advice notes that Section 4.15(3A) of the EP&A Act requires the consent authority to be flexible in applying development standards where "...reasonable alternative solutions that achieve the objectives of those standards..." are presented.

This submission demonstrates that the proposed 5m wide landscaped areas along lot frontages and boundaries achieve the objectives of the development controls in the MVEC DCP as they relate to landscaping. Therefore, JEP requests that Wingecarribee Shire Council (WSC) approve the proposed design with a 5m wide landscaped area along lot frontages and boundaries with rural zoned land.

2. Description of Proposed Development

SAAS Aus Pty Ltd (SAAS) proposes to create an industrial subdivision on the properties at 2 Bowman Road (Lot 1, DP103123 and Lot 2, DP1070888) and 10 Bowman Road, Moss Vale (Lot 51, DP130176). The proposal also includes the construction of industrial buildings and associated office space and hardstand areas on three of the lots within the proposed subdivision.

Lot 1, DP103123 is zoned C3 Environmental Management. This lot is located on the southern side of Whites Creek. No development is proposed on this lot, and the lot will not be affected by the proposed subdivision. Lot 2, DP1070888 is a split-zoned lot consisting of E4 General Industrial zoned land in the north (formerly IN1 General Industrial and IN2 Light Industrial) and RU2 Rural Landscape land in the south. Lot 51, DP130176 is predominantly zoned RU2 Rural Landscape. A 12,500m² portion of the property in the north, adjacent to the boundary with Lot 2, is zoned E4 General Industrial. The proposed subdivision will better support the use of land within each land use zone in a manner consistent with the zone objectives under the Wingecarribee Local Environmental Plan 2010 and achieves the minimum Lot Size requirements. The subdivision will result in the following lots:

- Created Lot 1 – approximately 2.88ha of land zoned E4 General Industrial;
- Created Lot 2 – approximately 2.64ha of land zoned E4 General Industrial;
- Created Lot 3 – approximately 2.62ha of land zoned E4 General Industrial; and
- Created Lot 4 – approximately 54.6ha of RU2 Rural Landscape zoned land.

Buildings with ancillary office space are proposed to be constructed on the three lots to be created within the E4 zone. The use of the buildings is categorised as General Industry under the Wingecarribee Local Environmental Plan 2010 as they will be used for the storage, assembly, maintenance, transport, and hire of scaffolding equipment for SAAS's three scaffolding business currently based in Sydney, NSW. The proposed building development will include the following:

- Extension of the existing Bowman Road, and creation of part of Hutchinson Road to provide access to the proposed industrial buildings, including;
 - Construction of an industrial cul-de-sac at the termination of Hutchinson Road to accommodate turning of up to 26m B-Double vehicles;
 - Creation of an easement within the RU2 portion of land on the southern side of Hutchinson Road to facilitate construction of the cul-de-sac;
 - Stormwater management system with an outfall on the southern side of Hutchinson Road within the RU2 portion of land; and
 - Street lighting and landscaping in accordance with Wingecarribee Shire Council and Australian Standard requirements;
- Construction of three buildings for the purposes of scaffolding material storage, assembly, maintenance, transport, and hire. Each building will include:
 - Internal office space, staff amenities and training rooms;
 - On-site parking;
 - Haul road and hardstand surrounding each building;
 - Stormwater management system including stormwater treatment devices, on-site detention basin, and rainwater storage;
 - Internal fire sprinkler system and 200kL static water supply; and
 - Outdoor lighting and perimeter landscaping in accordance with Wingecarribee Shire Council and Australian Standard requirements.

3. Justification for Exception to the Development Control

3.1. Inconsistency within the MVEC DCP

The MVEC DCP contains some inconsistencies relating to the requirements for landscaping that affect the interpretation and application of the MVEC DCP to industrial projects. Rule 4, Section 3.10 Landscaping states the following:

A minimum 15 metre wide landscaped area is to be established along lot frontages to internal access roads and along boundaries with rural zoned land outside the Enterprise Corridor.

However, this rule is inconsistent with the Figure contained on page 17 of the MVEC DCP (reproduced in Figure 3.1) that provides a visual representation of building setbacks and landscaping requirements. Scenario C of this figure clearly illustrates that a 5m landscaped zone is required on lot frontages to new roads and on side and rear boundaries adjoining rural zones.

The proposed development (DA 24/0302) complies with all landscaping and building setbacks noted within this figure.

The proposed landscaping extent is consistent with the neighbouring industrial properties within the MVEC, including those on Bowman Road and Old Dairy Close. The landscape concept design proposes to use plant species from the local endangered ecological community *Southern Highlands Shale Woodlands in the Sydney Basin Bioregion*. The design includes a range of plant species including groundcovers, shrubs, and trees with mature heights ranging from 8m to more than 20m with spreading canopies, creating filtered views to the development from surrounding areas and enhancing the native vegetation.

A Visual Impact Assessment (refer to the Response to Submissions Report to which this application is an appendix) has concluded that the use of recessive colours for building materials combined with the landscape screening effect will effectively mitigate impacts on the visual amenity of the surrounding area. As such, increasing the depth of landscaping to 15m is not expected to have any additional benefit to visual amenity.

Figure 3.1. The image contained in the Moss Vale Enterprise Corridor Development Control Plan 2008 providing a visual representation of setback and landscaping requirements.



3.2. Consistency with the objectives

Table 3.1 outlines how the proposed landscape design for DA 24/0302 assists in achieving the aims of the MVEC DCP and the objectives of Section 3.10.

Table 3.1. Summary of the relevant aims and objectives of the *Moss Vale Enterprise Corridor Development Control Plan 2008* and how the proposed development achieves them.

Aim / Objective	How the proposal achieves the objective
1.4 Aims of this plan	
To facilitate the development of the Moss Vale Enterprise Corridor for employment uses.	The proposed development is expected to create up to 60 construction jobs over a two-year period and 120 full-time jobs once operational.
To conserve and manage areas of environmental significance.	The proposed development is located on cleared farm land that does not contain any areas of significant biodiversity or habitat. The proposed development includes stormwater management and treatment measures to improve the quality of run-off reaching Whites Creek and will also include a Vegetation Management Plan to enhance native riparian vegetation between the stormwater outfall and Whites Creek.
To protect important Aboriginal heritage values.	No Aboriginal heritage values have been identified within or near the Site.
To provide adequate essential physical infrastructure to service development.	The application package provides details of all physical infrastructure needs required for the proposed development and included as part of the application.
To ensure development adopts sound urban design and sound environmental management practices.	The application has considered the environmental impacts of the proposed development and recommends management and mitigation strategies to protect and enhance the environment.
To protect the scenic amenity of the Moss Vale area.	A Visual Impact Assessment of the proposed development has concluded that the use of recessive colours for all building materials, and the inclusion of extensive landscaping, will mitigate impacts on the scenic amenity of the surrounding area.
To protect the amenity of surrounding rural and residential areas.	
Section 3.10 Objectives	
Landscape treatments integrate existing native vegetation within the development site where possible.	A Biodiversity Development Assessment Report has demonstrated that existing native vegetation within the development site is extremely limited in extent and in very poor condition. The proposed landscaping and the Vegetation Management Plan (VMP) for a portion of the RU2 land in the south of the Site will enhance existing vegetation by using local native species for all landscaping, and implementing measures, including additional plantings, within the VMP area to enhance the existing vegetation and mitigate impacts of the proposed development.
Landscape treatments complement the area and create consistent and attractive streetscapes.	The proposed landscaping will use plant species typically present in a local Threatened Ecological Community. A variety of plants including groundcovers, shrubs, and trees with mature heights from 8m to more than 30m are proposed to provide dense screening around the perimeter of the proposed development and to complement the natural landscape. Native trees will be planted along the new roads.
Landscape treatments reduce the visual impact of development and enhance the amenity of users.	A Visual Impact Assessment of the proposed development has concluded that the use of recessive colours for all building materials, and the inclusion of extensive and varied landscaping, will mitigate impacts on the scenic amenity of the surrounding area.
Water use for maintenance of landscaped areas is minimised.	The proposed development includes large-scale rainwater collection tanks for landscape irrigation and other on-site water use. Use of native species with low irrigation requirements is also proposed to assist in complying with this objective

Mr. Ross Fox of Fishburn Watson O'Brien Lawyers (FWO) has provided advice regarding the numerical inconsistency within the MVEC DCP with regards to landscaping and concludes that WSC can grant consent to the proposed development notwithstanding the numerical non-compliance (Appendix A).

Section 4.15(3A) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) requires the consent authority to allow flexibility where there is a reasonable alternative solution that meets the objectives of a development control. Table 3.1 summarises the proposed development's compliance with the aims and objectives of the MVEC DCP. Consequently, the proposed landscaping design is considered to be a reasonable alternative solution and can be approved despite the numerical non-compliance.

4. Conclusion

Due to the inconsistencies within the MVEC DCP relating to the requirements for landscaping, the proposed development does not meet WSC's interpretation of Section 3.10, Rule 4 requiring a 15m wide landscaped zone, where the width is interpreted as the depth into the property. However, the proposed landscape design complies with the landscape requirements set out by the Figure on page 17 of the MVEC DCP and achieves the aims and objectives of the MVEC DCP generally, and Section 3.10 specifically.

Given the inconsistency in language used in Section 3.10, it could be interpreted that the proposed landscape design is compliant with Rule 4 as the landscaped areas are more than 15m wide when measured along the property boundaries.

A Visual Impact Assessment (VIA) (refer to Appendix D of the Response to Submissions Report for the full assessment report) prepared for the development has carefully considered the visual impact of the proposed development on the surrounding area, including the adjacent rural lands and heritage listed properties. The VIA considers the combination of recessive colours for building materials and the proposed 5m landscaped areas will provide effective screening of the proposed development. The plant species selection will complement the area by drawing species from a local endangered plant community. The arrangement of individual trees and the use of species with a wide range of mature heights will create visual complexity in the landscaping, further enhancing the visual amenity.

As the proposed landscaping complies with the MVEC DCP, achieves the objectives of Section 3.10, and will effectively mitigate the visual amenity impacts of the proposed development, it is considered unreasonable to require an increase in the depth of landscaping from 5m to 15m. Section 4.15(3A) of the EP&A Act allows WSC to be flexible in their application of the development control as this application demonstrates that the proposal provides a reasonable alternative solution. Therefore, the proposed development warrants approval on its merits notwithstanding the numerical non-compliance.

Appendix A – Advice from Fishburn Watson O’Brien Lawyers



16 April 2024

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Dr Mark Jackson
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Dear Mark,

Advice in relation to inconsistency of Moss Vale Enterprise Corridor Development Control Order Plan 2008

**Proposed General Industry and Subdivision Development
Development Application number: 24/0302**

1. Overview

We are instructed that SAAS Pty Ltd (**SAAS**) have lodged a development application (**DA**) for a General Industry and Subdivision located on land known as 2 & 10 Bowman Road Moss Vale NSW 2577 (Lot 1 DP 103123) (the **Land**).

We have been asked to advise on whether the consent can be granted to the proposed development notwithstanding that there is an apparent numerical non-compliance with the landscaping buffer required by clause 3.10 of the Moss Vale Enterprise Corridor Development Control Plan (**DCP**). In particular, the requirement for a landscaping buffer to the neighbouring rural land of 15 metres.

In response, consent can be granted to the proposed development notwithstanding the numerical non-compliance. Section 4.15(3A) of the EP&A Act requires the consent authority to allow flexibility where there is a reasonable alternative solution that meets the objectives of the clause. For the reasons set out below, that is the case with respect to the landscaping buffer in clause 3.10 of the DCP.

2. Relevant facts and assumptions

We have based our advice on the following facts and assumptions:

2.1 The DA was lodged on 29 September 2023.

- 2.2 The Landscape plans lodged with the DA shows 5-metre buffer compliant with the diagram on page 17 “Scenario C” of the DCP.
- 2.3 Clause 3.10(4.) of the DCP is contradictory and states a 15-metre buffer is required.
- 2.4 You have requested advice on whether consent can be granted on the basis of the proposed 5-metre buffer.
- 2.5 In response to the issue:
 - 2.5.1 Terras Landscape Architects has prepared a Visual Impact Assessment (**VIA**) for SAAS Aus Pty Ltd dated 4 April 2024; and
 - 2.5.2 Moir Landscape Architecture has written a letter of support dated 18 March 2024.

3. Law

Section 4.15 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) sets out matters taken into consideration in determining a development application and includes the requirement to consider DCPs.

Clause 4.15(3A) of the EP&A Act was inserted into the Act on 22 November 2012 to require Councils to be flexible in the application of numerical controls in DCPs if certain criteria were met.

The section states:

- (3A) **Development control plans** If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority—
 - (a) ...
 - (b) if those provisions set standards with respect to an aspect of the development and the development application does **not** comply with those standards—is to be **flexible** in applying those provisions and **allow reasonable alternative solutions** that achieve the objects of those standards for dealing with that aspect of the development, and
 - (c) ...

[emphasis added]

As per s 3A(b) of the EP&A Act, If the development application does not comply with the standards set in the DCP, the consent authority must be flexible in its application of those provisions to allow for reasonable alternative solutions that achieve the objectives of the standards for that aspect of the development.

It is then necessary to consider the objectives of clause 3.10 of the DCP which are as follows:

- 3.1 Landscape treatments integrate existing native vegetation within the development site where possible.
- 3.2 Landscape treatments complement the area and create consistent and attractive streetscapes.
- 3.3 Landscape treatments reduce the visual impact of development and enhance the amenity of users.
- 3.4 Water use for maintenance of landscaped areas is minimised.

4. Advice

The central question is whether the 5-metre landscape buffer is a “reasonable alternative solution” to the requirement for a 15-metre buffer in clause 3.10 in the circumstances of the case.

The “alternative solution” in this case is outlined in the VIA as follows:

- 4.1 The proposed landscape buffer of 5 metres will be sufficient to provide immediate partial screening. The variety of species of plants will grow to achieve dense screening to hide the development from view. This is in line with the objectives of 3.10 of the DCP by integrating existing native vegetation and promoting biodiversity.
- 4.2 The mixed plants that have been selected grow quickly and densely. They are well-suited to the local climate to ensure health and longevity in coverage. Back up plants are implemented to ensure the screening coverage remains effective. Upon maturity, the selected trees are expected to grow to a height of 15 metres. This meets the objectives of 3.10 of the DCP by reducing visual impact.
- 4.3 The exterior of the building will use colours that are found naturally in the environment. This suggests earthy tones or colours that mimic the landscape, rather than bright or artificial hues. The visual impact of this natural colour scheme means that the development will better fit into its surroundings and will be less obtrusive or visually disruptive to the area. Again, this is consistent with the objectives of clause 3.10 of the DCP.
- 4.4 Paragraph 8 (Page 39) of the VIA demonstrates There is no unreasonable impact on heritage. The VIA also confirms that the heritage listed properties have better existing views than in the direction of the proposed development (so any impact on the lesser views will not be material).
- 4.5 The proposal meets all other significant criteria set by the DCP.

We consider this alternative solution to comply with the objectives and to be a reasonable response to the site constraints.

5. Conclusion

It is clear that on the expert evidence above, that the non-compliance is merely numerical. Section 4.15(3A) of the EP&A Act allows departures from strict compliance where a “reasonable alternative solution” achieves the objectives of the DCP clause and a better planning outcome. On the facts of this case, we consider that the proposal warrants approval on its merits notwithstanding the numerical non-compliance.

Yours faithfully,

FISHBURN WATSON O'BRIEN



ROSS FOX
Principal

Accredited Specialist Planning and Environment