

50 Morisset Street Queanbeyan NSW  
DA.2023.0602: Modification of details of 1995 Consent

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**MEMORANDUM OF ADVICE**

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**Prepared for:**

**Kieran Fordham and Matthew Bourke  
On behalf of Riverside Morrisset Developments Pty Ltd (ACN 665 887 132) as trustee  
for the Riverside Morrisset JV Development Fund  
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**Part A: Introduction**

1. Reference is made to DA.2023.0602 (**DA**) lodged with Queanbeyan Palerang Regional Council (**Council**) on 4 December 2023 proposing the construction of a nine storey shop top housing development, with ground floor shops, 160 dwellings and associated infrastructure (**Proposed Development**) on land identified as Lot 100 DP 1308422, located at 50 Morisset Street Queanbeyan (**Development Site**).
2. The Development Site is subject to existing development consents granted by the Council, including DA 950093 granted on 23 May 1995 for development described as “shopping centre extensions” (as modified on 28 August 1996) (**1995 Consent**). Notably, the Development Site operates as a carpark under conditions of the 1995 Consent associated with a shopping centre development.
3. In its correspondence with the Applicant including a letter dated 6 June 2024, the Council raises concerns regarding the relationship between the 1995 Consent and the DA. In particular, the Council suggests that ‘it would not be able to approve the DA’ as ‘such an outcome would conflict with the existing consent.’
4. I have been asked to advise whether, as a matter of law, the Council can lawfully approve the DA and whether it is necessary to modify the 1995 Consent so that the Proposed Development can co-exist with the 1995 Consent.
5. I assume for the purposes of this advice that:
  - a) the 1995 Consent was lawfully physically commenced; and
  - b) the land to which the 1995 Consent applied included the Development Site.
6. If these assumptions are wrong, it may materially affect this advice.
7. This advice is limited to matters of law. I am not able to express an opinion with respect to a matter of merit. In particular, matters relating to the provision of car-

parking spaces as part of the Proposed Development are beyond the scope of this advice.

## **PART B: Summary**

8. In my opinion, the Council can lawfully approve the DA regardless of the conditions of the 1995 Consent or the current use of the Development Site. It is a well known principle of planning law that more than one development consent may apply to a parcel of land. Any inconsistency between the 1995 Consent and the DA can be addressed by condition of consent pursuant to section 4.17(1)(b) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.
9. It is therefore not necessary to modify the 1995 Consent under section 4.55 of the EP&A Act to avoid any conflict with the 1995 Consent.

## **Part C: Advice**

### Statutory provisions and relevant legal principles

10. It is a principle of planning law that more than one development consent can apply to the same land and co-exist and operate according to their terms simultaneously (*Pilkington v Secretary of State for the Environment* [1974] 1 All ER 283; *Seyffer v Shoalhaven City Council* [2006] NSWLEC 564; *Waverley Council v Hairis Architects* [2002] NSWLEC 180).
11. None of these decisions suggest that a surrender or formal modification application is required in respect of a conflict with an earlier development consent: rather, if a later development consent is relied upon, it prevails to the extent of any inconsistency.
12. The statutory provisions also address the issue of inconsistency between consents.
13. The DA will be determined pursuant to Division 4.3 of the EP&A Act. Within division 4.3, section 4.17 empowers the consent authority to impose conditions of consent.
14. Section 4.17(1)(b) provides relevantly that 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”*

(emphasis added)

15. Under this provision, a condition of consent can be granted which has the effect of modifying an earlier development consent provided that the earlier consent is *“in relation to the land to which the development application relates”*.
16. Accordingly, in general terms and as a matter of law, it is not necessary to modify a consent under section 4.55 of the EP&A Act when a later consent is to be granted: if there is any conflict that requires resolution, it can be addressed by way of condition under section 4.17(1)(b) of the EP&A Act.

Application to the 1995 Consent

17. Applying the provisions above to the 1995 Consent it is necessary to make two points.
18. First, the 1995 Consent was expressed as applying to land described as:

*“Lot 2, DP 773522, 139 Monaro Street and Lot A, DP 162373, Lot 2, DP 349095, Lot 1 DP 817801, Lot 7, Sec 9, and Part Lot 9, Sec 9, 50 Morisset Street, Queanbeyan.”*

**(1995 Consent Land)**

19. As stated above at paragraph 5, I assume that the land to which the 1995 Consent applied included the Development Site. Whilst some of the folio identifiers have changed and I do not hold precise instructions as to which parcels in the 1995 Consent Land constitute the now Lot 100 DP 1308422, it is clear that the 1995 Consent Land included land on the corner of Colette and Morisset streets including the area that now forms the Development Site (presently constituted as a carpark).
20. Accordingly, in my opinion, the 1995 Consent applied to land *“to which the DA relates”* for the purposes of section 4.17(1)(b), being the Development Site.
21. Second, based on the DA file that I have been provided with in respect of the Development Site which included the 1995 Consent, the 1995 Consent contained conditions of consent relating to carparking as follows:
  - a) **Condition 1:** requiring the provision of 588 car parking spaces for the existing retail development and its extension;
  - b) **Condition 2:** provision on the southwestern corner of Colette and Morisset streets of no less than 196 car parking spaces; and

- c) **Condition 4:** the final layout of the car park area to be submitted and approved by the Council prior to the building application being released.
22. In my opinion, the requirement to provide parking spaces on the Development Site and related procedural requirements are details that could be the subject of a subsequent condition of consent under section 4.17(1)(b).
23. In particular, it would be lawful for the consent authority to approve the DA subject to conditions of consent either (a) waiving the requirements of conditions 1, 2 and 4 of the 1995 Consent or (b) making alternative arrangements as part of the Proposed Development.
24. As stated above, the merits of any such alternative proposals are beyond the scope of this advice.
25. I so advise.



27 November 2024

Chambers

**Jeremy Farrell**

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