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10 November 2022

Ms Nicole Bennett
General Counsel
ResourceCo Pty Ltd
Level 1, 162 Fullarton Road
Rose Park, SA 5067

Dear Ms Bennett,

Proposed Modification to Handling Capacity at Tyre Recycling Facility –
1-21 Grady Crescent Erskine Park

Contact
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Partner
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Our ref
224465

By email
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1 Introduction

1.1 We refer to your request for advice regarding a proposal by Tyrecycle Pty Ltd (**Tyrecycle**) to lodge a modification application to development consent DA20/0589 (**MA**) to increase the handling capacity at its tyre recycling facility located at 1-21 Grady Street, Erskine Park (**Site**).

1.2 You have instructed us that:

(a) The MA will seek consent for an increase in the handling capacity of tyres at the Site from 30,000 tonnes per annum (**tpa**) to 60,000 tpa (**Proposed Modification**).

(b) Tyrecycle has met with Penrith City Council (**Council**) and Council has expressed concern regarding satisfaction of the necessary jurisdictional pre-requisites that enliven the power to modify a development consent.

(c) Council has also expressed concern that the Proposed Modification may be characterised as Designated Development (Waste Management Facilities) pursuant to Section 45 of Schedule 3 of the *Environmental Planning and Assessment Regulation 2021* (**EPA Regulation**).

1.3 You have sought our advice in respect of these matters. Specifically, we provide our legal opinion in respect of the following two questions:

Question 1. Does the Council or Sydney Western City Planning Panel (**Consent Authority**) have the power to modify the original development consent?

Question 2. Is the Proposed Modification properly characterised as Designated Development or not?

1.4 We set out our answers to these questions as follows.

2 Summary

2.1 Answer to Question 1 - In our opinion, the Consent Authority does have the power to modify the original development consent in accordance with the MA because, in having regard to the relevant legal principles and recent case law, the Proposed Modification is 'substantially the same' as the development for which the original development consent was granted.

2.2 In our view, Tyrecycle is able to lodge a modification application pursuant to section 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**) because the Proposed Modification involves minimal environmental impact.

2.3 Answer to Question 2 – In our opinion, the Proposed Modification is not Designated Development because it is an alteration to an existing approved development and the Consent Authority can be satisfied that the Proposed Modification will not significantly increase environmental impacts.

2.4 A more detailed explanation of this opinion is provided below.

3 The Original Development Consent

3.1 Development consent DA20/0589 was determined by the Sydney Western City Planning Panel (**Planning Panel**) on 18 December 2020 by way of approval, granting consent for:

> '*alterations and additions to an existing warehouse and use of premises as a Waste Management Facility (Tyre Recycling Facility) Operating 24 Hours and 7 days per week*.'
>
> (**Original Development Consent**).

3.2 The following documents, which are relevant to the Original Development Consent, are attached to this opinion:

(a) a copy of the Original Development Consent at **Tab A**;

(b) a copy of the *Determination and Statement of Reasons* issued by the Planning Panel for the decision to grant consent at **Tab B**; and,

(c) the Council Assessment Report at **Tab C**.

3.3 Relevantly, condition 8 of the Original Development Consent states (our emphasis added):

> '*To ensure that the development does not exceed the threshold for designated development the proposed operation of a tyre processing facility (waste management facility) with ancillary storage and transfer of oil filters, oil drums and car batteries, is limited to a* ***maximum handling capacity of no more than 30,000 tonnes per year of waste metal and rubber.*** *Handling capacity includes the sorting, consolidating or temporary storage or material recycling of waste materials.*'

3.4 Accordingly, the conditions of the Original Development Consent impose a handling capacity limit of 30,000 tpa.

4 Question 1 - Does the Consent Authority have the power to modify the Original Development Consent?

4.1 Yes, in our opinion the Consent Authority does have the power to modify the Original Development Consent in accordance with the MA.

4.2 The legal principles governing the power to modify a development consent were set out by Pepper J in *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd(No 3) [2015] NSWLEC 75* at [173] as follows:

(a) first, the power contained in the provision is to "modify the consent". Originally the power was restricted to modifying the details of the consent but the power was enlarged in 1985 (*North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 at 475 and *Scrap Realty Pty Ltd v Botany Bay City Council* [2008] NSWLEC 333; (2008) 166 LGERA 342 at [13]). Parliament has therefore "chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity" (Michael Standley at 440);

(b) the condition precedent to the exercise of the power to modify consents is directed to "the development", making the comparison between the development as modified and the development as originally consented to (*Scrap Realty* at [16]);

(c) the applicant for the modification bears the onus of showing that the modified development is substantially

the same as the original development (*Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8 (**Vacik**));

(d) the term "substantially" means "essentially or materially having the same essence" (*Vacik* endorsed in *Michael Standley* at 440 and *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280; (1999) 106 LGERA 298 at [30] (**Moto**));

(e) the formation of the requisite mental state by the consent authority will involve questions of fact and degree which will reasonably admit of different conclusions (*Scrap Realty* at [19]);

(f) the term "modify" means "to alter without radical transformation" (*Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414 at 42, *Michael Standl*ey at 474, *Scrap Realty* at [13] and *Moto* at [27]);

(g) in approaching the comparison exercise "one should not fall into the trap" of stating that because the development was for a certain use and that as amended it will be for precisely the same use, it is substantially the same development. But the use of land will be relevant to the assessment made under s 96(2)(a) (*Vacik*);

(h) the comparative task involves more than a comparison of the physical features or components of the development as currently approved and modified. The comparison should involve a qualitative and quantitative appreciation of the developments in their "proper contexts (including the circumstances in which the development consent was granted)" (*Moto* at [56]); and

(i) a numeric or quantitative evaluation of the modification when compared to the original consent absent any qualitative assessment will be "legally flawed" (*Moto* at [52]).

4.3 Accordingly, the key issue in determining whether a development consent can be modified is whether the proposed modification meets the test of being *'substantially the same'* which is a condition precedent to the exercise of the power to modify.

4.4 The elements of the 'substantially the same' test and their application to the Proposed Modification in further detail as follows.

Statutory Requirement of the Substantially the Same Test

4.5 Section 4.55(1A) of the EPA Act provides a consent authority with the power to grant a modification application. That section states (our emphasis added):

'*A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:*

(a) it is satisfied that the proposed modification is of minimal environmental impact, and

(b) ***it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified*** *(if at all), and*

(c) it has notified the application in accordance with

(i) the regulations, if the regulations so require, or

(ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and

(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

Judicial Consideration of the Substantially the Same Test

4.6 The leading authorities on the substantially the same test are *Vacik* and *Moto*.

4.7 In Vacik, Stein J held that the term 'substantially' means 'essentially have the same essence'. If a development as modified involves an additional and distinct use it is not substantially the same development. Specifically, Stein J stated [per Bignold J in Moto at 30]:

'Turning to the issue of s102(1)(a). Is the proposed modified development substantially the same development as that in the development consent (as already amended)? In my opinion substantially when used in the section means essentially or materially or having the same essence.'

4.8 In Moto, Bignold J set out the following principles for consideration in satisfying the precondition of substantially the same:

(a) the finding of fact requires the **comparison between the development as originally approved and the development as proposed to be modified** (at 55).

(b) the objective of the comparison is to determine whether the modification is **essentially or materially the same** as that which was originally approved (at 55).

(c) the comparative task **involves a quantitative as well as qualitative appreciation of the differences** - a numeric or quantitative evaluation of the modification when compared to the original consent absent any qualitative assessment will be "legally flawed" (at 52).

(d) the comparative task needs to be undertaken in the context, including the circumstances in which the original development consent was granted (at 56) (our emphasis added):

> '*The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified*
>
> *where that comparative exercise is undertaken in some type of sterile vacuum.* ***Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted)***.'

(e) the comparative task needs to assess the **physical features as well as the environmental impacts** of the changes (at 57-62).

(f) consideration should be given to **any feature of the development which is important, material or essential**. A change to such a feature is likely to mean that it is not substantially the same development (at 64).

4.9 More recently, in *Arrage v Inner West Council* [2019] NSWLEC 85 (**Arrage**) (at [27] to [28]), Preston CJ observed that in most cases the best way to identify whether a modified development is substantially the same as the originally approved development is to identify the material and essential features of the originally approved and modified developments in order to undertake the comparative exercise required.

4.10 Another important consideration when considering the power to modify a consent follows the recent decision of the NSW Court of Appeal in *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177 (**Buyozo**) in which the Court stated:

'*[55] The constraints on three of the powers, s 4.55(1A), s 4.55(2) and s 4.56(1), indicate that the modification of the development consent sought needs to effect some change to the development the subject of the development consent...*'

4.11 Accordingly, a modification application cannot be made that seeks to – for example – change a condition of development consent that does not effect a change to the development.

Application of the law to the facts

4.12 Applying the above legal principles, and recent decisions of the Land and Environment Court of New South Wales, there is a strong argument that the Proposed Modification is substantially the same as the development the subject of the Original Development Consent for the following reasons.

1.The material and essential features remain the same

4.13 Adopting the approach of Preston CJ in Arrage, the material and essential features of the originally approved development can be summarised as follows:

(a) alterations and additions to an existing warehouse facility to be used for the purposes of tyre recycling;

(b) the receival and temporary storage of tyres;

(c) the processing and shredding of tyres;

(d) the dispatch of processed Tyre Derived Fuel (**TDF**) and other Tyre Derived Products (**TDP**);

(e) the operation of the tyre recycling facility 7 days a week and 24 hours per day; and,

(f) that the tyre recycling facility is not designated development.

4.14 The material and essential features of the Proposed Modification are:

(a) that the existing warehouse facility and plant as originally altered remain unchanged and continue to be used for the purpose of tyre recycling;

(b) that the tyre recycling facility continue to receive and temporarily store tyres;

(c) that the processing and shredding of tyres uses the same plant and processes;

(d) the dispatch of the same processed Tyre Derived Fuel (**TDF**) and other Tyre Derived Products (**TDP**);

(e) the operation of the tyre recycling facility 7 days a week and 24 hours per day; and,

(f) that the tyre recycling facility is not designated development.

4.15 Accordingly, the material and essential features of the development the subject of the Original Development Consent and the Proposed Modification will remain unchanged as a result of the MA.

2. The 30,000-tonne limit is not an essential element of the original development

4.16 In our opinion, the numerical limit of 30,000 tpa is not an essential element of the development the subject of the Original Development Consent.

4.17 The quantitative limit must be assessed in the context and circumstances in which the Original Development Consent was granted (as outlined at paragraph 4.8(d) above).

4.18 There can be no doubt that the purpose of imposing the 30,000 tpa limit was to avoid the threshold of Designated Development for waste management facilities (being 30,000 tpa pursuant to clause 45(2)(b)(iii) of Schedule 3 of the EPA Regulation) as opposed to defining an essential element of the development itself. This is clear for two key reasons. EE

4.19 *Firstly*, condition 8 of the Original Development Consent expressly concedes that the purpose of the limit is:

> '*to ensure the development does not exceed the threshold for designated development…*'.

4.20 This condition was imposed by the Planning Panel as stated in the *Determination and Statement of Reasons*.

4.21 *Secondly*, there are two different limits referenced in the Original Development Consent. There is a limit of 30,000 tpa referenced at condition 8, and there is also a limit of 29,000 tpa referenced in the SEE (which is expressly incorporated into the consent by dint of condition 1 of the Original Development Consent*: Allandale Blue Metal Pty Ltd v Roads and Maritime Services (2013) 195 LGERA 182; [2013] NSWCA 103*). As there is no one clear numerical limit on the handling capacity, the 30,000 tpa limit – or for that matter any other specific numerical limit - cannot be said to be an essential element.

4.22 Importantly, consideration needs to be given to the principal in Moto set out in paragraph 4.8(c) above, that a numeric or quantitative evaluation of

the modification when compared to the original consent absent any qualitative assessment will be “legally flawed.”

4.23 Despite the above, it is clear that what is an essential element of the original development - and the purpose of the 30,000 tpa limit – is ensuring that the development is not classified as Designated Development. For the reasons explained at paragraph 5 of this opinion, this 'essential feature' will not be changed by the Proposed Modification.

4.24 In the recent decision of *Hunter Development Brokerage Pty Limited trading as HDB Town Planning and Design v Singleton Council* [2022] Duggan J addressed the approach to be taken when assessing whether the alteration of a single feature of a development can be said to be so significant that the development is no longer substantially the same. Her honour stated at [64] and [97]:

> *'it is relevant for the Court to not only compare the purpose of the development, or the physical differences between the original and modified proposals, but also the context in which the original consent was granted and the different environmental impacts of each proposal'*
>
> …
>
> *'The significance of a particular feature or set of features may alone or in combination be so significant that the alteration is such that an essential or material component of the development is so altered that it can no longer be said to be substantially the same development – this determination will be a matter of fact and degree depending upon the facts and circumstances in each particular case. Such an exercise is not focussing on a single element, rather it is identifying from the whole an element which alone has such importance it is capable of altering the development to such a degree that it falls outside the jurisdictional limit.'*

4.25 In our opinion, a change in the handling capacity limit from 30,000 tpa to 60,000 tpa cannot be said to be so radical or so significant that the development is no longer substantially the same. When considering the facts and circumstances of the handling limit in the context of the whole of the development the following conclusions can be drawn:

(a) the change in the handling capacity will not alter the essential features of the development being the purpose of the development, the processes it adopts, the plant and equipment utilised, the buildings utilised, the materials input or produced or the classification of the development as not being Designated Development; and,

(b) the change in the handling capacity will have minimal environmental impacts as discussed below.

3. The Proposed Modification will have minimal environmental impacts

4.26 In our opinion, the environmental impacts associated with the Proposed Modification will be 'minimal.'

4.27 The courts have given consideration to what is meant by the term '*minimal environmental impact*'. In the decision of *Bechara v Plan Urban Services Pty Ltd* (2006) 149 LGERA 41; [2006] NSWLEC 594 at [57] Jagot J (as she then was) stated:

> '*In King, Markwick, Taylor & Ors v Bathurst Regional Council [2006] NSWLEC 505 at [84], I said that "minimal", in the context of s 96 construed as a whole, must take its ordinary meaning of "very small" or "negligible". The "minimal" requirement qualifies the "environmental impact" of the proposed modification, rather than the proposed modification itself - which is subject to the "substantially the same" requirement in s 96(1A)(b). Hence, the focus must be on the impact or effect of the modification on the environment. Given the very broad and inclusive definition of "environment" in s 4(1) of the EPA Act, it is necessarily a matter for the consent authority to identify for itself the relevant categories of potential impacts*.'

4.28 Accordingly, a minimal impact is one which is very small or negligible.

4.29 The potential environmental impacts of the Proposed Modification relate to air, noise and traffic. You have provided us with reports prepared by experts in these fields which disclose that the respective environmental impacts associated with the Proposed Modification will be negligible.

4.30 Specifically, we have been provided with a report prepared by SCT Consulting dated 3 November 2022 (**Traffic Assessment**) which concludes that (at page 2):

> *'Based on forecast changes due to the Proposed Modification, there is likely to be minimal traffic impact on the surrounding road network. There is also likely to be minimal impact to walking and public transport modes due to the modification'*.

4.31 The Traffic Assessment is attached at **Tab D** of this opinion.

4.32 We have also been provided with a noise assessment prepared by Todoroski Air Sciences dated 10 November 2022 (**Noise Assessment**) which states, at page 5 (our emphasis added):

'*We also note that as a conservative measure, the scenario in the NIA* [the assessment completed for the Original Development Consent] *assumed daytime levels of plant activity, along with an F-class temperature inversion and light winds towards receivers. In reality, the modelled weather condition corresponds with night-time periods when there would likely be minimal site activity external to the warehouse building. Thus, the predicted noise levels in the NIA are conservative and would adequately account for the increased production associated with the Project.* ***There is not expected to be any additional noise associated with the operations above that already predicted for the Project***.'

4.33 Furthermore, we have been provided with an Air quality assessment dated 10 November, also prepared by Todoroski Air Sciences (**Air Quality Assessment**) which states (at page 4):

> '*Based on the comparison of modelling predictions, it is concluded the Project will not result in any discernible additional impact above that presented in the Todoroski Air Sciences (2020) assessment* [the assessment completed for the Original Development Consent] *at any receptor locations*.'

4.34 A copy of the Noise Assessment is attached at **Tab E** of this opinion.

4.35 A copy of the Air Quality Assessment is attached at **Tab F** of this opinion.

4.36 In addition, we are instructed that the Proposed Modification will remain compliant with the environmental conditions imposed on the Original Development Consent. Specifically, we have been instructed that the Proposed Modification will continue to comply with conditions 16 to 26 regarding environmental matters including noise levels, storage tanks, storage of waste oils, stormwater drainage and pollution requirements.

4.37 Having regard to the nature of the impacts and the fact that the environmental conditions of the Original Development Consent will not be contravened, it is our view that the Proposed Modification can be classified as having 'minimal environmental impact.'

4.38 Modification applications can be made through one of two pathways: either an application under section 4.55(1A) of the EPA Act which is for modification applications that involve minimal environmental impact, or under section 4.55(2) for all 'other' modification applications (essentially those applications that do have significant impacts).

4.39 For the reasons outlined above, it is our view that the MA can be made under section 4.55(1A) of the EPA Act as a modification involving a minimal environmental impact.

4. The Proposed Modification will effect a change to the development

4.40 The Proposed Modification will comply with the principle enunciated in Buyozo. namely, it will effect a change to the development in the form of the volume of tyres handled and the associated changes with that increase in capacity. However, the proposed change will not alter the essence of the development, nor will it be accompanied by any more than a minimal environmental impact.

4.41 For the reasons outlined above, it is our firm view that the Consent Authority has the power to modify the Original Development Consent according to the MA pursuant to section 4.55(1A) of the EPA Act.

Other considerations – s 4.55(3)

4.42 Section 4.55(3) of the EPA Act requires the consent authority to take into consideration the reasons given by the (original) consent authority for the grant of the consent that is sought to be modified. In that respect, the *Determination and Statement of Reasons* issued by the Planning Panel stated:

> '*the impacts of the development are expected to be acceptable provided that the conditions of the consent are complied with'*

4.43 As the key environmental conditions of the Original Development Consent will remain complied with, the impacts of the Proposed Modification will remain acceptable.

4.44 In the Council Assessment Report, Council assessed the likely impacts of the development to include traffic and noise impacts (page 16). In respect of traffic impacts the Council stated:

> '*The existing road network is assessed to have capacity to accommodate the increased volume of vehicles.'*

4.45 In respect of noise emissions, the Council stated:

> '*all activities are contained within the site's warehouse and relevant conditions are included*.'

4.46 These reasons remain valid in the context of the Proposed Modification and should be given weight by the Consent Authority in making a determination to grant consent to the MA.

5 Question 2 - Is the Proposed Modification properly characterised as Designated Development or not?

5.1 In our opinion, the Proposed Modification is properly characterised as ***not*** being Designated Development.

5.2 Section 48(1) of Schedule 3 of the EPA Regulation provides for exceptions to Designated Development and states:

> *'(1) Development involving alterations or additions to development, whether existing or approved, is not designated development if, in the consent authority's opinion, the alterations or additions do not significantly increase the environmental impacts of the existing or approved development.'*

5.3 Accordingly, if the Proposed Modification satisfies the following two limbs, it is not Designated Development:

(a) it involves an alteration or addition to approved development: and,

(b) it will not significantly increase environmental impacts,

it is not Designated Development.

5.4 We explore these two limbs further as follows.

Is the Proposed Modification an alteration or addition to approved development?

5.5 There can be no argument that the Proposed Modification is an alteration to an approved development, being an alteration to the handling capacity limit of the Original Development Consent.

Will the alterations or additions significantly increase the environmental impacts of the existing or approved development?

5.6 For the reasons outlined above at paragraph 4.26, the Proposed Modification will have only minimal environmental impacts and consequently there will not be a significant increase in the impacts of the development the subject of the Original Development Consent.

5.7 Despite this, the Consent Authority must consider several 'relevant matters' when forming a view as to whether there will be a significant increase in impacts. Those matters are set out at section 48(2) of Schedule 3 of the EPA Regulation as follows:

> *'(a) the impact of the existing development, including the following—*
> *(i) previous environmental management performance, including compliance with the conditions of any consents, licences, leases or authorisations by a public authority and compliance with any relevant codes of practice,*
>
> *(ii) rehabilitation or restoration of any disturbed land,*

(iii) the number and nature of all past changes and their cumulative effects,

(b) the likely impact of the proposed alterations or additions, including the following—

(i) the scale, character or nature of the proposal in relation to the development,

(ii) the existing vegetation, air, noise and water quality, scenic character and special features of the land on which the development is, or will be, carried out and the surrounding locality,

(iii) the degree to which the potential environmental impacts can be predicted with adequate certainty,

(iv) the capacity of the receiving environment to accommodate changes in environmental impacts,

(c) proposals to mitigate the environmental impacts and manage residual risk,

(d) proposals to facilitate compliance with relevant standards, codes of practice or guidelines published by the Department or other public authorities.'

(**Relevant Matters**)

5.8 For the avoidance of any doubt, giving consideration to the Relevant Matters does not mean that the Consent Authority must be satisfied as to those matters in order to determine that any increase in impacts is not significant. Giving consideration to a relevant matter involves giving proper and genuine consideration and more than mere lip service: *Anderson v Director General of the Department of Environmental and Climate Change & Anor* [2008] NSWCA 337 at [58]. It is entirely permissible for a Consent Authority to consider a matter and find that it should be given no weight.

5.9 Importantly, the Relevant Matters at section 48(2) are 'jurisdictional fact' considerations that are necessary to make a determination under section 48(1), which is to say that the Relevant Matters are relevant only insofar as they give weight to whether there is a significant increase in impacts.

5.10 By way of example, the Relevant Matter relating to previous environmental performance and compliance with conditions of the Original Development Consent is a matter which must be considered but could only be given weight if the failure to comply with conditions resulted in an environmental impact. Put another way, if there was a failure to comply with a condition, but that failure did not result in a

change to environmental impacts, that Relevant Matter would be considered but given no weight.

5.11 In our opinion, none of the Relevant Matters would alter the view of the Consent Authority that there will not be a significant increase in environmental impacts resulting from the Proposed Modification.

Mischaracterisation of development enlivens right of appeal

5.12 The courts have held that the question of whether a development application is designated development is a jurisdictional fact which is appealable in judicial review proceedings. Accordingly, were the Applicant or the Council to mischaracterise the development as designated, an appeal right would be enlivened, and proceedings could be commenced in Class 4 of the Land and Environment Court of New South Wales: *Hollis v Shoalhaven City Council* [2002] NSWLEC 83.

6 Next Steps

6.1 If it would be of assistance, we are happy to meet with the relevant planning officers at Council to discuss the matters raised in this advice in greater detail and to provide them the necessary comfort they require to make an assessment of the MA.

6.2 If you have any questions or require further information in relation to the above matters, please contact me on the details provided on the first page.

Yours sincerely

Matthew Cole

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