

Our Ref: JAC:970340

14 February 2020

IBSA
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DENHAM COURT NSW 2565

Attention: Rachel Hamnett

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Dear Rachel

Permissibility advice
Development Application DA-505/2019
Premises: 12-14 Zouch Road, Denham Court

We refer to your request for advice regarding the permissibility of the proposed development under DA-505/2019 (**Application**) on land legally identified as Lot 2 in DP 1111318 and known as 12-14 Zouch Road, Denham Court (**Land**).

Please find our advice below.

1. Executive Summary

- 1.1 In our view, by examining the current uses of the Land and having regard to established legal principles, the Land is currently being used for the purpose of a place of public worship within the meaning of the *Liverpool Local Environmental Plan 2008*.
- 1.2 The proposed uses of the Land are permissible as ancillary uses to that dominant or primary use because:
- (a) the nature, character and extent of the proposed film studio fit out and associated offices and the replica historical Biblical site will only be used by religious ministers of the organisation for the sole purpose of producing digital media to counsel, instruct and train other individual Jehovah's Witnesses during their daily worship of Jehovah God, along with being an integral part of their religious worship practices and as content for the organisation's website (jw.org) for Jehovah's Witnesses and the broader community; and

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- (b) the proposed new office building will only be used by ministers of the organisation for the sole purpose of facilitating the religious worship of Jehovah and assist in the administrative side of the transition from print to digital media.
- 1.3 The Application satisfies the jurisdictional permissibility bar to the grant of development consent and the Application must therefore proceed to merit assessment and determination by the Sydney Western City Planning Panel (**Planning Panel**).
- 2. Background**
- 2.1 International Bible Students Association (**IBSA**), as one of the corporations used by the religion of Jehovah's Witnesses, is the registered owner of the Land.
- 2.2 The Land is presently used for numerous ancillary uses to the historical dominant purpose, which has been broadly characterised over its time as "religious establishment" or a "place of public worship". The Land enjoys the benefits of numerous Council approvals for buildings and uses facilitating various aspects of the day-to-day religious activities of the Jehovah's Witness ministers and organisation.
- 2.3 The Application seeks development consent under *Part 4 of the Environmental Planning and Assessment Act 1979 (EPA Act)* for development described as additions and alterations to an existing religious establishment. The development includes alterations to the approved printery building, the addition of a new building, referred to as an office building, and the construction of a replica of an historical Biblical site, along with associated car parking.
- 2.4 The Application is integrated development pursuant to s 4.46 of the EPA Act, as a water use approval is required under the provisions of the *Water Management Act 2000*.
- 2.5 The Land benefits from a number of existing development consents which are referenced at Table 3 of the *Statement of Environmental Effects* dated 31 July 2019 prepared by Nicholas Simitzis (**SEE**), which was submitted with the Application. Some of those development consents are extrapolated below.
- 2.6 We understand that the long-term use of the Land by the Jehovah's Witnesses religious organisation is unchallenged and recognised by Council. The Planning Panel, however, seeks clarification regarding the reliance on one of the two possible basis for permissibility; being a "place of public worship" or reliance on existing use rights. Consequently, you have asked for our advice which we understand will be provided to the Planning Panel when it considers the Application on 9 March 2020.
- 2.7 The SEE describes the proposal as requiring the following works:
1. *Sound-proofing some of the existing printery space to convert it to a film studio and the addition of some light-weight stud partition walls to form associated production support areas and upgrade of existing amenities.*

2. *Replacement of a few existing windows to the printery space with insulated panels for sound-proofing of the proposed film studio, and new glazed shopfront doors as an entry to the production support areas. These will maintain the existing articulation and materials palette of the printery building.*
 3. *Addition of a new office building, to accommodate offices, including an office breakout area and amenities, grouped with the existing farm shed and cattle yards.*
 4. *Addition of a replica of an historical Biblical site with permanent structures for filming, including landscaping, to be used by the AVS Department for the purpose of religious instruction and training.*
- 2.8 The printery was previously approved pursuant to consent No. LCC 1174/79 dated 31 November 1979 for development described as the erection of literature storage and printery building, office chapel building and link buildings. The printery has been responsible for the publication of well-known instructive religious literature based on the Jehovah's Witness faith by the occupants of the Land for religious worship through the dissemination of their faith for the purpose of religious instruction and teaching.
- 2.9 The SEE describes that the film studio will be operated by the Audio/Video Services (AVS) Department, which intends to take over from the print medium as part of a transition of the religious organisation to the modern digital landscape. The large printery will be converted into an indoor film studio where the AVS Department will produce audio and video publications for religious worship. The purpose being the dissemination of such instructive and faith-based material for religious teaching and training.
- 2.10 As set out in the SEE, the characterisation of the purpose is to remain the same as present but the use will evolve to meet the modern advancements in technology and to adapt to the changing nature of how the group worships Jehovah God through the producing and dissemination of information in the twenty-first century.
- 2.11 The reading of the Bible has informed the basis of how Christian worship is practised, which was traditionally through written manuscripts of the Bible since the earliest days of the invention of the Gutenberg printing press. The Jehovah's Witness organisation is seeking to adapt how it disseminates information as part of its religious worship. The replica historical Biblical site and associated facilities will act as a set to assist in that purpose.

3. Advice

- 3.1 For existing use rights to be established, the uses currently on this site and proposed use have to be prohibited. In our view, this is not the case. A history of the applicable zonings for the Land demonstrates that the Land has previously enjoyed Special Purpose - Religious Establishment and Non-Urban 1(f) zonings under the *Interim Development Control Order No. 59 - Liverpool City Council*.
- 3.2 The Land was rezoned to RU2 Rural Landscape under the *Liverpool Local Environmental Plan 2008 (LEP)*. "Places of public worship" were made permissible

with consent in the RU2 zone. Item 4 of the Land Use Table prohibits any development not specifically nominated. Consequently, there are no permissible innominate uses in the RU2.

- 3.3 We are instructed that our client approached the Council, after it became aware of the LEP changes, in order to understand the intended planning regime. At the time, our client was advised by the Council that the land use change would not affect the permissibility of the organisation's current purpose for which the Land was being used.
- 3.4 It would seem logical that the draftsman of the LEP, in changing from a specialised zone which recognised the lawful existence of the uses at the time, applied its mind to the planning ramifications of the change and was content that there was no unfair or adverse implications from it. The conduct of the use has never caused reason for any complaint over decades and the rezoning would certainly not have been to seek the long-term removal or change of the use.
- 3.5 Due to the zoning of the Land, the development proposed under the Application will either have to be characterised as falling within the meaning of a "place of public worship" or be ancillary to that use. The alternative conclusion would force an examination of permissibility relying on existing use rights, which in our view is unnecessary in this matter.
- 3.6 "Place of public worship" is defined in the Dictionary to the LEP as follows:

place of public worship means a building or place used for the purpose of religious worship by a congregation or religious group, whether or not the building or place is also used for counselling, social events, instruction or religious training.

- 3.7 It is clear from the definition of a "place of public worship" that the proposed development must be for a building or place which is used for the purpose of religious worship. The proposed development can also include uses for the purpose of "counselling, social events, instruction or religious training" but they cannot be the primary purpose. Having regard to the use of the word "also", the last aspect of the definition clearly points to a broad range of ancillary uses.

General principles of characterisation

- 3.8 The general principles of characterising development have been frequently stated by the Land and Environment Court and the Court of Appeal. In *Dooralong Residents Action Group Pty Limited v Wyong Shire Council* [2011] NSWLEC 251 Pain J at [34-35] and [99] helpfully provided the following summation of those principles:

- 34 *The principles relevant to characterisation were identified in Chamwell Pty Limited v Strathfield Council* [2007] NSWLEC 114; (2007) 151 LGERA 400 at 406 and *Shire of Perth v O'Keefe* (1964) 110 CLR 529 at 535 per Kitto J (Owen J agreeing), approved by the High Court in *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1. The need to identify the purpose at an appropriate level of generality was identified in *Royal Agricultural Society of New South Wales v Sydney City Council* (1987) 61 LGRA 305 at 310 per McHugh J (Hope and Samuels JJA agreeing). *Foodbarn Pty Ltd v Solicitor-*

General (1975) 32 LGRA 157 at 160 per Glass JA (Samuels and Hutley JJA agreeing) held that where there are two uses the dominant purpose can be regarded as the whole.

- 35 *Regardless of how a proponent may describe the proposed development, the true question is how one characterises what is proposed. The Council's submission that it is sufficient to look at the consent to construe what was approved is incorrect. In response to the Council's submissions at par 55 below, if the proposed use cannot properly be described in the way the consent describes it then the consent is invalid. Courts go behind the description in the consent in order to assess what is the true characterisation of the purpose: see *Bentham v Kiama Municipal Council* (1986) 59 LGRA 94; *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422; (2004) 61 NSWLR 707 and *Sansom v Port Stephens Council* [2006] NSWLEC 475; (2006) 147 LGRA 203 at [15]. If the proposed use meets more than one description and one of those is a prohibited purpose within the zone, then the consent is invalid and it matters not what the use may also be characterised as: *Abret v Wingecarribee Shire Council* [2011] NSWCA 107; (2011) 180 LGRA 343. However, if severable, the other part of the use may be permissible with consent as an innominate use.*

.....

- 99 Characterisation must be done in a commonsense and practical way: *Chamwell* at [45]. The principles were correctly summarised in the Salvation Army's submissions. Firstly, a use must be for a purpose, being the end to which the use of the land can be seen to be put : *O'Keefe* at 535. The use of land involves no more than the "physical acts by which the land is made to serve some purpose": *Council of the City of Newcastle v Royal Newcastle Hospital* [1957] HCA 15; (1957) 96 CLR 493 at 508. Secondly, the nature of the use needs to be distinguished from the purpose of the use: *O'Keefe* at 534 - 535 and *Warringah Shire Council v Raffles* [1979] 2 NSWLR 299. Thirdly, in determining whether land was used for a particular purpose, an inquiry into how that purpose could be achieved is necessary : *Council of the City of Newcastle* at 499 - 500 . Fourthly, the characterisation of the purpose should be done "at a level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on", not "in terms of the detailed activities or processes" but not so general as to "embrace activities, transactions or processes which differ in kind from the use which the activities etc, as a class have made of the land" : *Royal Agricultural Society of New South Wales* at 310.

(Our emphasis).

- 3.9 What these principles require is for the consent authority to undertake the process of characterisation to determine what the purpose of the development is. The purpose of the development is the end to which the land is seen to serve. It describes the character which is imparted to the land from its use or proposed use (*Shire of Perth v O'Keefe* (1964) 110 CLR 529, 534).

- 3.10 In determining whether land is used for a particular purpose, an enquiry must be undertaken into how the physical acts proposed to be undertaken (or are being undertaken) to achieve that purpose (*Council of the City of Newcastle v Royal Newcastle Hospital* (1957) 96 CLR 493, 499-500). This is to be done at a level of generality which is necessary and sufficient to cover the individual activities, transactions or process carried on rather than by focusing on specific detail (*Royal Agricultural Society of NSW v Sydney City Council* (1987) 61 LGRA 305, 310). However, it is doubtfully the case that different uses can serve the same purpose (*Warringah Shire Council v Raffles* (1978) 38 LGRA 306, 308).

Characterisation

- 3.11 The current Application and its proposed uses in our view are simply part of, and cannot be divorced from, the current use to which the Land is being used. By identifying the uses on the Land, one can be assisted in discerning the purpose to which those uses are being put.
- 3.12 There are various development consents, which the Land has the benefit of, that discern the nature of the uses and purpose for which the Land is being used and there is no suggestion that the consents are in any way invalid:
- (a) development consent LCC:382/79 was granted on 11 April 1979 for the erection of an "ecclesiastical centre", comprising a service building, swimming pool complex, meter/switch building with associated sewerage plant;
 - (b) development consent 1174/79 was granted on 31 October 1979 for the erection of literature storage and printery building, office chapel and link buildings;
 - (c) development consent LCC:437/80 was granted on 5 May 1980 for the erection of a four storey residential building for the ecclesiastical centre development, with associated amenities and car park area;
 - (d) development consent DA315/82 was granted on 22 June 1982 for the alterations to existing building incorporating mezzanine floor for use as games room;
 - (e) development consent DA 244/86 was granted on 11 June 1986 for the erection of a three storey office building to be used for administrative purposes (1986 Consent);
 - (f) development consent DA226/87 was granted on 21 September 1987 for additions to existing development for the purposes of a Bible and Bible literature storage and printing, residential accommodation and car parking facilities;
 - (g) development consent DA810/89 was granted on 22 December 1989 for the extension to the existing kitchen and storage facilities;
 - (h) development consent DA537/90 was granted on 8 November 1990 for erection of a place of public worship; and

- (i) development consent DA806/92 was granted on 6 April 1994 for the additions to an existing religious establishment, comprising the erection of a garage workshop building, a power generator, a 3 storey office building, a 5 storey residence building and a 3 storey car parking building.
- 3.13 As recently as 7 November 2019, the Council granted consent to DA461/2019 for the alterations and addition to two existing dormitory buildings involving individual ensuites to each bedroom with the construction of new patio areas and privacy screens and the renovation of communal laundry and storage areas, upgrade of the hot water system and fire panel, replacement of roof and gutter and additional landscaping.
- 3.14 The Delegated Assessment Report recommending approval to DA461/2019 assessed that the Land was being used for the purpose of a place of public worship and "*the dormitory buildings are existing on the site*" and in the author's view were "*ancillary uses to the place of public worship*". This is a conclusion with which we agree. A similar or logical process of characterisation of the proposed use under the legal principles identified above, is in our view, present for this Application for reasons that follow.
- 3.15 The primary consideration is whether all of the uses identified above can be characterised as being for the purpose of "religious worship by a congregation or religious group". The definition of a place of public worship recognises that such a use can also include ancillary uses, such as for "counselling, social events, instruction or religious training".
- 3.16 It undoubtedly follows from the definition of a place of public worship, that if the Land as a whole serves the purpose of "religious worship by a congregation or religious group", then it can include ancillary uses, such as for "instruction or religious training". The process of characterisation by having regard to the existing use of the Land is ultimately a task where reasonable minds may differ and one where a definitive answer may be difficult (*North Sydney Municipal Council v Boyts Radio & Electrical Pty Ltd* (1989)16 NSWLR 50).
- 3.17 In our view, however, a review of the development consents (as extrapolated above) clearly demonstrates that the Land is being used for the practise of the Jehovah's Witness faith which has been time and time again recognised in granting development consents for ancillary uses, which support that purpose.
- 3.18 There is nothing within the use of the words "religious worship" that require, or demand, a restrictive interpretation. Religious worship is a protean concept and differs between how a person of faith practises his or her faith in concert with other individuals.
- 3.19 The Online Macquarie Dictionary defines "worship" to mean "*to render religious reverence and homage, as to a deity*" or "*to attend services of divine worship*". The point of inquiry is whether or not the uses of the Land amounts to "religious worship" and therefore, involves an inquiry into the individual transactions or processes and how those uses are for the "religious worship" within the Jehovah's Witness faith.
- 3.20 A consent authority should exercise caution to not overtly restrict the meaning of "religious worship". It is a term that should be applied by having some regard to the

subjective nature of the "religious worship" that is undertaken by individuals of the religious organisation, which is seeking the benefit of the development consent.

- 3.21 This is not to say that the purpose and nature of the planning system can be subverted by the subjective nature of the type of religious worship a particular religious organisation undertakes. Any development application would still need to be assessed under Part 4 of the EPA Act and as part of that assessment, required to meet the Objectives of the RU2 zone as stipulated by cl 2.3(2) of the LEP. However, that is not a jurisdictional bar to the grant of consent and only relevant to the merits assessment of the Application.
- 3.22 In our view, the consent authority can have regard to the activities, transactions or processes which a particular faith undertakes in reverence or homage to a deity, in this case, to Jehovah God, to determine whether the proposed use is for the purpose of "religious worship".
- 3.23 We are instructed that the aim of an individual Jehovah's Witness is to live their entire lives in accordance with the Bible, which affects every part of their life and necessarily dictates certain activities or processes of how they worship as a religious group.
- 3.24 By way of example, the Land is referred to by Jehovah's Witnesses as 'Bethel'. Individual Jehovah's Witnesses who are members of a vowed religious order and accommodated in existing approved facilities on the Land, are known as 'Bethelites'. As Bethelites, they are required to observe 'Morning Worship' each weekday, with assigned Bible readings and comments (synonymous with a formal church service). This is televised live to other members of the religious order who live in the Oceania region, to join in the religious worship program. Another example of their religious practices which permeates the purpose of the use of the Land is seen in the long-term use of part of the Land for the purposes of cattle grazing, which are raised and consumed by the Bethelites at communal meals, which have been prepared by individual Jehovah's Witnesses on-site.
- 3.25 A core tenant of the Jehovah's Witness religion is growing in faith and knowledge of Jehovah God, which includes corporeal worship. What their form of worship is must be understood by reference to their practices. For Bethelites, those practices include living in community with one another and conducting their day-to-day lives in corporeal worship of Jehovah which extends to every facet of their daily lives. In the view of Jehovah's Witness, this is regarded as part of their religious worship. Each Bethelite is an ordained minister and worships Jehovah through the daily practices and activities of their lives. The learning and reflection on their shared Biblical history in paying homage to Jehovah, should be recognised as an integral part of their worship.
- 3.26 All Bethelites are regarded in the Jehovah's Witness faith as ministers. Jehovah's Witnesses do not baptise infants. Once an individual has reached a level of physical and spiritual maturity, the latter by growing in faith through knowledge and practise of their religious beliefs, they may be baptised as one of Jehovah's Witnesses. Only a small minority of baptised, spiritually mature Jehovah's Witnesses may be invited to become a Bethelite and live at the Land.

- 3.27 The Land in our view, having regard to the broad processes and transactions which are undertaken on the Land, amounts to "religious worship by a congregation or religious group" and, so the purpose for which the Land serves is a "place of public worship".
- 3.28 Therefore, the development is permissible on the Land if the uses proposed in the Application either fall within that dominant purpose of "religious worship" or are uses for "counselling, social events, instruction or religious training" or ancillary to the place of public worship.
- 3.29 Whether development is ancillary is a matter of fact and degree and regard may be had to a number of factors none of which are determinative in itself (eg. size, area of land, degree of integration, respective sales and income generation) (*Lizzio v Ryde Municipal Council* (1983) 155 CLR 211).
- 3.30 In *Toner Design Pty Ltd v Newcastle City Council* [2013] NSWCA 410 Basten JA at [10] said that "*for a development to be 'ancillary to' another development it must not merely coexist with, but must serve the purposes of, the other development*". Therefore, it is only if a purpose of development has no connection at all with another purpose being carried out on the land that such a purpose cannot be incidental or ancillary to that use (*Steedman and Anor v Baulkham Hills Shire Council [No 2]* (1993) NSWLRC 562).
- 3.31 Having regard to the above principles, the proposed new office building, as with the existing approved offices, is to incorporate Bethelites that will assist in the day-to-day running of the AVS Department to produce audio and video publications for religious worship, which is part of and supports its wider purpose as a place of public worship. The new office building will support the administrative side of the move from print to digital media. That use is ancillary to the use of the Land as a place of public worship and could be seen as part of the "counselling, social events, instruction or religious training" uses.
- 3.32 The new office building will be used to serve the dominant purpose of the Land. The office building is not proposed to be integrated amongst the current buildings on the Land but built to facilitate the transition from print to digital media. It is natural, in the orderly and economic use of land, for the existing dominant purpose to adapt over time and therefore its integration is with respect to its likeness to the current uses undertaken on the Land. This is entirely consistent with the previously approved office buildings, which have all been considered and approved as ancillary development to the dominant purpose of the Land.
- 3.33 Without the place of public worship being the dominant purpose of the Land there would be no need for the office building or the replica historical Biblical site. It is entirely common for places of public worship to provide accommodation and office space for members of a religious order who assist in the day-to-day running of a particular religious organisation. Such uses are typically ancillary uses.
- 3.34 Of course, the scale and intensity of those ancillary uses differ depending on the size of the religious organisation. A small congregation, for instance, may only need to provide a single office or a dwelling for one person or family. But the same use should not be interpreted as being for a different purpose if a bigger religious organisation requires more offices and more dwellings to support the purpose of the

organisation. This would manifestly defeat the intent of making places of public worship permissible in rural and low-density, residential urban zones where commercial or industrial uses are typically prohibited and where large, faith-based organisations tend to seek land for this type of development.

- 3.35 Based on the above, our advice is therefore that this use is ancillary and therefore permissible.
- 3.36 Turning to the proposed use of the printery to a film studio for religious content and the replica historical Biblical site. The purpose of those uses, which is gleaned from an objective assessment of the Application, are for the purpose of creating audio/video material for subsequent dissemination of Biblical accounts to assist in the "instruction or religious training"; which for the organisation is to provide counselling and instruction to Bethelites, other Jehovah's Witnesses and the broader community. Those uses are therefore inextricably linked, despite their physical degree of separation, as one use cannot exist without the other (*Macquarie International Health Clinic Pty Ltd v University of Sydney* (1998) 98 LGERA 218).
- 3.37 This is exemplified by the fact that the "staff" and "actors" for the digital production will all be ministers creating content to provide counselling and instruction to the organisation and broader community. There will be no actors or production crew who are not Jehovah's Witnesses that will assist in the media production component of the development. All of this will be supported by Bethelites, ministers living on the Land in the existing approved facilities.
- 3.38 Such a use is entirely consistent with the previous use as a printery, which at the time of consent, had to be regarded as being ancillary to the "ecclesiastical centre" as it was a form of development prohibited in Non-Urban 1(f) zone under the Interim *Development Control Order No 59 - Liverpool City Council*. A transition to disseminating religious material for the purpose of religious instruction and training via the digital landscape merely represents a symptom of the changing times where content, whether religious or not, is consumed differently in the twenty-first century. Faithbased organisations are not immune from this change. Even the understanding of how "social events" occur in the twenty-first century does not necessarily require temporal proximity and often takes place via digital media. The 'Morning Worship' breakfast broadcast at Bethel for members of the religious order throughout Oceania, which provides a link between ministers, is demonstrative of this.
- 3.39 Having regard to the character of those uses, extents and other features, they wholly fall within the meaning of a building which is ancillary to "religious worship" or is "used for...instruction or religious training" because the content created will be consumed by the religious organisation on the Land on a day-to-day basis as part of religious worship. This is undoubtedly the case of the replica historical Biblical site as its only purpose is to create religious content to assist in the instruction and training of Bethelites, other Jehovah's Witnesses and the broader community, being a use which is novel to members of the wider Christian faith and difficult to imagine any other use for which it could be put. The production of that material will be used by ministers of the organisation in congregational worship and assisting individuals in growing in their faith of Jehovah God through the instructive and training-based digital media.

- 3.40 There is no activity which can be regarded as falling outside of that purpose or for a different and independent purpose. It is therefore irrelevant to the process of characterisation whether the proposed film studio and replica historical Biblical site can also fall within the definition of another use that is prohibited in the RU2 zone such as "light industry". Once a use is established as being ancillary, its characterisation is ignored and treated as being subsumed within that dominant purpose (*Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157).

4. Conclusion

- 4.1 In our view the proposal is permissible under the LEP being characterised as a "place of public worship". Its innovation, activation and operations cannot be seen as independent and prohibited use but rather an integral part of, and ancillary to, the use of the Land by the Jehovah Witness as a "place of public worship".

Yours faithfully



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