

Advice for Mirvac Projects Pty Limited

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*Privileged and confidential***Chatswood Development - Restriction on the use of commercial and residential car parks**

Question	<p>Condition E33 of Project Application Approval MP09_0154 (Project Application Approval) requires the on-site car parking spaces allocated to the commercial component of the development to be made available for the use of visitors outside of standard office hours (Parking Restriction).</p> <p>You have asked how the Building Management Committee, Owners Corporation and/or Owners and Occupiers of commercial lots at 1 Pacific Place, Chatswood can enforce the Parking Restriction to ensure that visitors to the building will vacate the on-site car parking spaces allocated to the commercial component of the development when required (i.e. during standard office hours).</p>
Answer	<p>There is no legal enforcement mechanism that will ensure that visitors to the building will vacate the on-site car parking spaces allocated to the commercial component of the development when required.</p>
What this advice covers	<p>This advice focuses on the following issues:</p> <p>Background to the development and car parking1</p> <p>How to enforce the Parking Restriction?2</p>
Background to the development and car parking	<ol style="list-style-type: none"> 1 The development at 7 Railway Street, Chatswood is a mixed use "part building strata scheme" regulated by the <i>Strata Schemes (Freehold Development) Act 1973</i> and <i>Strata Schemes Management Act 1996</i>. 2 The development site will be subdivided by stratum plan to create a residential stratum lot and a commercial/retail stratum lot. It is intended that each stratum lot be subdivided by strata plan to create a residential strata scheme and a commercial/retail strata scheme. 3 A strata management statement will be registered with the first strata plan over either the residential lot or commercial lot and this strata management

statement will ultimately regulate the relationship between the residential and commercial/retail components of the building.

- 4 Each of the residential strata scheme and commercial/retail strata scheme will be governed by strata by-law instruments that will be registered with the strata plan for each strata scheme.
- 5 Parking for the residential strata lots and commercial and retail strata lots are located in the basement of the building which includes 9 visitor car parking spaces.
- 6 Access to the basement car park is via a security system for entry into the car park. Once entry to the car park is obtained, there is no security or other mechanism for the monitoring of use of car spaces and visitor car spaces.
- 7 Condition E33 of the Project Application Approval requires the Parking Restriction be documented via a restriction on use of land in favour of Council over the commercial car spaces providing that the on-site car parking spaces allocated to the commercial component of the development to be made available for the use of visitors outside of standard office hours.
- 8 The Project Application Approval does not provide any guidance as to what constitutes "standard office hours".
- 9 The car spaces will not be monitored by a building manager or the like and parking of vehicles in visitor spaces will be subject only to the provisions of any Parking Restriction and the rules contained in the by-law instrument for the strata schemes and, if applicable, the building management statement.
- 10 The sale of the commercial suites have been to numerous individual owners who will require on-site parking spaces be available for the commercial lots.

How to enforce the Parking Restriction?

Enforcement of Parking Restriction

Section 88B Instrument

- 11 Under the provisions of the Project Application Approval, the Parking Restriction will need to be created on the stratum plan by creation of a restriction on use of land burdening each commercial car space in favour of Council.
- 12 The terms of the Parking Restriction will need to comply with E33. This will only obligate the commercial owners to make the spaces available for use outside standard office hours and will not place any obligations on the residential strata scheme or any owners or occupiers in the building.
- 13 The placing of obligations on the residential strata scheme can be achieved by including a positive covenant (which is tied to the restriction on use) burdening all lots in the residential strata scheme (and if applicable the commercial strata scheme) requiring that owners and occupiers of the residential strata scheme (and if applicable commercial strata scheme)

ensure that any visitors vacate the commercial car parking spaces during “standard office hours”.

- 14 The Parking Restriction terms should also include a definition of “standard office hours” (i.e. based on hours approved under development consents for the businesses being conducted in the commercial strata scheme, or some other planning standard etc).
- 15 The Strata Management Statement and by-law instrument(s) can include a by-law obligating owners to ensure that they comply with the Parking Restriction (and if applicable, any positive covenant) by ensuring, in the case of commercial lots, that the lots are available for use outside standard office hours and, in the case of the residential lots, ensuring the visitors vacate the spaces by commencement of ‘standard office hours’.
- 16 Notwithstanding the terms of the Parking Restriction in the section 88B instrument and any obligations under a positive covenant, by-law instrument and strata management statement, the means of enforcement of these obligations are limited and of no practical effect for the owners of the commercial lots for the following reasons.
 - (a) breach of the Parking Restriction and, if applicable, positive covenant, can only be enforced by Council;
 - (b) breach of a by-law in a by-law instrument and/or the strata management statement results in the issue of a notice by the owners’ corporation/building management committee, however, a notice cannot be issued until a special resolution of the owners’ corporation or executive committee is first obtained¹. Potential dispute mechanism provisions under the strata titles legislation and strata management statement will be difficult to invoke and will take considerable time to enforce;
 - (c) the terms of the Parking Restriction only bind Owners and Occupiers of the building and can only require these Owners and Occupiers to use reasonable endeavours/best endeavours to ensure visitors do not use the commercial car parking spaces during “standard office hours”;
 - (d) in order to enforce the Parking Restriction, the party seeking to enforce the Parking Restriction would need to identify the particular Owner or Occupier who has “breached” the terms of the Parking Restriction by failing to ensure its visitor has vacated the commercial car space by the requisite time;
 - (e) as noted above, there is no mechanism to monitor who is using the commercial car parking spaces and who has invited that person to use the commercial car parking space;
 - (f) the removal of the vehicle prior to commencement of business hours will be of paramount importance to owners and occupiers of the commercial lots and the inability to ensure the vacation of the spaces with limited or no recourse will be untenable for the owners of commercial lots; and

¹ S45 *Strata Schemes Management Act, 1996*

(g) there is the risk that Owners and Occupiers in the building will abuse the right to park in the commercial car parking spaces outside "standard office hours" (i.e. Owners and Occupiers using the spaces to park second vehicles for which they do not have any allocated space for). We understand that this has been identified as a problem in the adjoining Cambridge development.

- 17 Noting the enforcement issues outlined above, we would recommend the Parking Restriction include conditions (in the terms of the restriction and positive covenant), which provisions would be included in the by-law instrument and strata management statement, that breach of the obligation to ensure the spaces are vacated prior to the commencement of standard office hours would result in the owners of commercial lots not being required to make spaces available. We note that the terms of the Parking Restriction must be acceptable to Council.

Strata Management Statement

- 18 The draft strata management statement attached to the contracts for sale with purchasers of the residential and commercial lots does not currently contain any specific by-laws regarding visitor car parking.
- 19 As noted in paragraph 14 above, the Strata Management Statement can be amended to include a by-law obligating owners to ensure that they comply with the Parking Restriction (and if applicable, any positive covenant) by ensuring, in the case of commercial lots, that the lots are available for use outside standard office hours and, in the case of the residential lots, ensuring the visitors vacate the spaces by commencement of 'standard office hours'.
- 20 However, the Strata Management Statement only binds Members, Owners, lessees, Occupiers and mortgagees in possession of a lot in the building. The Strata Management Statement does not bind invitees or visitors.
- 21 The enforcement issues noted in paragraph 15 above apply in the case of the strata management statement.

Strata By-Law Instruments

- 22 The draft strata by-laws attached to the contracts for sale with purchasers of the residential and commercial lots do not currently contain any specific by-laws regarding visitor car parking.
- 23 As noted in paragraph 14 above, the by-law instrument(s) can include a by-law obligating owners to ensure that they comply with the Parking Restriction (and if applicable, any positive covenant) by ensuring, in the case of commercial lots, that the lots are available for use outside standard office hours and, in the case of the residential lots, ensuring the visitors vacate the spaces by commencement of 'standard office hours'.
- 24 By-laws can be made for a number of matters including parking.² The Owners Corporation has the right to make rules about security, control,

² S43 *Strata Schemes Management Act, 1996*

management, operation, use and enjoyment of Lots and Common Property in their Strata Scheme³. This would extend to making rules regarding the use of the commercial car parking lots for visitor car parking.

- 25 By-law 3.3 of the strata by-law instrument for the commercial/retail strata scheme and by-law 3.4 of the strata by-law instrument for the residential strata scheme requires that owners and occupiers of lots in the respective strata schemes use reasonable endeavours to ensure that a "Permitted Person" (being a person on the land the subject of the strata scheme with the express or implied consent of an owner or occupier) comply with the by-laws in so far as they apply to Permitted Persons and does not behave in a manner likely to reasonably interfere with an owner or occupier's or any other Permitted Person's right to peaceful enjoyment of a Lot or Common Property.
- 26 Notwithstanding the provisions of the strata by-law instrument, the enforcement issues arise as set out in paragraph 15 above.

Other enforcement

- 27 As noted above, contractual enforcement (via the terms of the Parking Restriction, Strata Management Statement and by-law instrument) does not provide a practical means of ensuring the commercial spaces are available for use by the owners and occupiers of the commercial lots during office hours.
- 28 It will be critical for the commercial lot owners and occupiers to have access to the commercial car spaces at the commencement of 'standard office hours'. However, the owners and occupiers of commercial lots will not be permitted to ensure vacation of the commercial spaces through other forms of enforcement (ie: wheel clamps, towing or otherwise taking possession of a vehicle). The *Local Government Act 1993* (NSW) prohibits a person from taking these "practical" enforcement measures:
- (a) Section 651B of the *Local Government Act 1993* (NSW) prohibits a person from detaining or immobilising vehicles owned by any other person by means of wheel clamps or towing without the consent of that other person.
 - (b) Section 651C of the *Local Government Act 1993* (NSW) makes it an offence of up to \$2,200 if a person takes possession of a vehicle that has been left on the premises and either:
 - (i) fails to release the vehicle on demand to any person having a lawful right to the possession or control of the vehicle; or
 - (ii) demands any payment for or in relation to the release of the vehicle.

³ S47 *Strata Schemes Management Act, 1996*

Should you have any queries, please contact the writer.



Please call to
discuss any
aspects of this
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