

14 April 2022

Our Ref: HEM:MUL999/4014

Mr Cameron Sargent  
Team Leader, Key Sites Assessments  
NSW Department of Planning,  
Industry and Environment

**By Email:**  
**cameron.sargent@planning.nsw.gov.au**

Dear Sir

**SSD Consent Development Consent – SSD 7693 – Mod 2 (Modification Application)  
115–119 Macquarie Street and 99-113 Macquarie Street, Sydney**

**1. Introduction**

- 1.1 We refer to your letter dated 21 March 2022 to Michael Watt and in particular Attachment B comprising a submission dated 11 February 2022 prepared by Mecone (**Mecone Letter**) on behalf of Sir Stamford At Circular Quay (2000) Ltd (**Stamford**) and Attachment C comprising a letter dated 11 February 2022 from Norton Rose Fulbright (**NRF**) also on behalf of Stamford (**NRF Letter**) in response to the Modification Application.
- 1.2 The purpose of this letter is to respond to the issues raised by both Mecone and NRF and in particular the issue whether the development as proposed to be modified is substantially the same development as the development for which consent was originally granted, for the purposes of section 4.55(2)(a) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.
- 1.3 We reiterate that the consent authority could be so satisfied of the jurisdictional prerequisite in section 4.55(2)(a) and that contrary to the NRF Letter, there is no legal impediment to the consent authority approving the Modification Application. There are no issues raised in the Mecone Letter or the NRF Letter that lead us to alter the conclusions made in our letter of 7 December 2021, for the reasons set out below.

**2. No cogent reasons have been provided by Mecone or NRF as to why it is not open to the consent authority to be satisfied on substantially the same development**

**2.1 The NRF letter:**

- (a) Misstates our conclusion on this jurisdictional issue - compare paragraph 5 of the NRF Letter with paragraph 3.19 of our letter of 7 December 2021<sup>1</sup>;
- (b) States at paragraph 18 that the factual circumstances of the Land and Environment Court cases cited in paragraph 2.4 of our letter are not comparable to those of the Modification Application. We do not suggest that they are.

Although a comparison of factual circumstances to other cases may assist, it is the principles to be applied in these circumstances that are relevant when determining

---

<sup>1</sup> Our conclusion in paragraph 3.19 of the letter of 7 December 2021 is that “a finding by the consent authority that it is satisfied that the development as modified is substantially the same development as originally approved by the Concept Development Consent, as required by section 4.55(2)(a) of the EP&A Act, is a decision that is reasonably open to it to make”.

whether the Modification Application satisfies the “substantially the same development” test;

- (c) States that “*We strongly disagree with this [Addisons] conclusion for the reasons set out below*” (paragraph 5) and “*we disagree with views adopted by Addisons (and Urbis) to the subject MA*” (paragraph 17) but at best, states that “*there is a reasonable argument that the MA would radically transform the Mulpha Consent*” based on the following:
- (i) There are uncertain potential set of outcomes or multiple development outcomes. We reject this argument for the reasons set out in Sections 3 and 4 below;
  - (ii) That a concept proposal approval may not provide for alternative proposals and that if what is now proposed was originally sought in the concept development application, it could not have been lawfully approved (paragraphs 20-21). We reject this argument for the reasons set out in Section 3 below;
  - (iii) Uncertainty over the 10 year period for the temporary function centre structure and use. We reject this argument for the reasons set out in Section 4 below;
  - (iv) The Modification Application seeks to circumvent the application of Condition B2 requiring a competitive design process be undertaken before lodging the detailed design DA for the function centre. We reject this argument for the reasons set out in Section 5 below;
- (d) Asserts that ours and Urbis’ analysis unduly emphasises quantitative considerations. We do not agree. In our letter of 7 December 2021, we equally address the qualitative assessment on issues such as traffic, parking, overshadowing and noise (see paragraphs 3.2, 3.3, 3.15-3.18 of our letter);
- (e) Conflates a comparison of the amendments sought to Condition B2 (requirement to undertake a competitive design process – what Mecone calls “*the procedural elements of the concept approval*”<sup>2</sup>) with Condition B2 as originally imposed (paragraphs 26-27) (not the test), with a comparison of the development as originally approved with the development as proposed to be modified (which is the test). As Preston CJ stated in *Arrage v Inner West Council* [2019] NSWLEC at 85 [24], the essential elements to be identified are not of the development consent itself, but the development approved by the development consent.
- Further, Condition B2 applies to the future detailed design of the development, not the concept proposals;
- (f) Conflates a merits consideration, being the requirement in section 4.55(3) for the consent authority to take into consideration the Independent Planning Commission’s statement of reasons<sup>3</sup>, with the jurisdictional test under section 4.55(2)(a) (see paragraphs 25-27 of the NRF letter)<sup>4</sup>. This is contrary to Preston CJ’s statement in *Arrage* at [29];
- (g) Seems to suggest that Addisons and Urbis have asserted that the design excellence provisions in *Sydney Local Environmental Plan 2012 (SLEP 2012)* do not apply to concept development applications that involve building envelopes only.

No such suggestion has been made. See paragraph 3.13 of our letter and Table 2, pages 10-11 of the Urbis Planning Report dated December 2021 lodged with the modification application (**Urbis Report**). See further Section 5 below.

<sup>2</sup> Mecone Letter, page 7.

<sup>3</sup> The Mecone Letter also appears to conflate this issue with the jurisdictional pre-requisite: page 7-8.

<sup>4</sup> Correctly identified as a merits consideration in paragraph 28 of the NRF Letter.

See also the Response to Submissions report by Urbis at Section 4.

- 2.2 The Mecone Letter states that *“the relationship of the building to adjoining development will not remain generally as approved”* (page 7). That does not mean that the *“substantially the same development”* test is not satisfied. As we indicated in our letter of 7 December 2021 at paragraph 3.4, modifications to an approved development will result in some change, and that this does not mean that even quite extensive changes will result in the overall development becoming something other than substantially the same. It is necessary to focus on the overall approved development. Both Mecone and NRF’s positions rely significantly on the concept proposal for the function centre not being subject to Condition B2.
- 2.3 The Heritage Impact Statement prepared by Urbis for Mulpha has been supplemented and addresses, amongst other things, the external deck area (see letter dated 31 March 2022 from Alexandria Cornish, Associate Director of Urbis). It concludes that the deck would be entirely obscured by the existing parapet and accordingly, there is no potential for the deck to have any visual impacts.
- 2.4 An updated Noise Impact Assessment prepared by Acoustic Logic dated 31 March 2022 has also been prepared. It concludes that noise emissions from the proposed development can adequately addressed by managing activities on the deck, particularly at night in respect of the playing of music and permissible patron numbers. It considers and assesses the noise impacts if the proposed residential development is constructed on the Sir Stamford site, makes recommendations and concludes that acceptable noise levels within the future residential dwellings can be achieved.
- 2.5 In our view, neither the Mecone Letter nor the NRF Letter identify any real qualitative impacts that arise from the proposed concept proposal for the temporary function centre that could lead the consent authority to not be satisfied on the jurisdictional prerequisite. The matters referred to above do not change our conclusions as set out in our letter of 7 December 2021.

**3. There are no uncertain potential set of outcomes or uncertain multiple development outcomes**

- 3.1 The arguments that the introduction of a new temporary stage comprising the temporary function centre results in an uncertain potential set of outcomes (paragraph 9 of the NRF Letter) and multiple development outcomes (pages 6 and 7 of the Mecone Letter) are incorrect. There is no uncertainty about the development outcomes for Transport House. The concept proposals are staged and *sequential*, with the first stage being temporary. There is no uncertainty about the timeframe for the reasons set out in section 4 below.
- 3.2 Further, we do not agree with NRF’s assertion that the concept proposal provisions in the EP&A Act preclude sequential concept proposals over the same part of the site and note that no reasons have been provided by NRF to support its position.
- 3.3 Section 4.22(1) provides:

*“(1) For the purposes of this Act, a concept development application is a development application that sets out concept proposals for the development of a site, and for which detailed proposals for the site or for separate parts of the site are to be the subject of a subsequent development application or applications”.*

- 3.4 There is nothing in section 4.22(1) that precludes what is proposed by Mulpha.

**4. The modification application does not involve or result in uncertainty as to time frames as to when the function centre will be delivered and when the ballroom will be delivered**

- 4.1 Mecone criticises the Modification Application because *“There is no mechanism that would require the applicant to lodge the detailed design DA in a reasonable timeframe, and given the concept approval appears to have been activated, the consent would not lapse until the function centre OC is issued plus 10 years.”* (Mecone Letter, page 10).

- 4.2 NRF asserts that the 10 year timeframe would give Mulpha a broad discretion as to the commencement of the 10 year period and could indefinitely defer the delivery of the approved ballroom (NRF Letter, paragraph 23).
- 4.3 As the Urbis Report states (section 3.2, page 7), it is proposed that a condition of consent be imposed providing that *“Stage 1a, (being the Transport House Function Centre) is time limited to ten years following issuance of an Occupation Certificate for these works”*. A condition of consent limiting the period during which development may be carried out in accordance with a consent is authorised by section 4.17(1)(d) of the EP&A Act.
- 4.4 There is nothing unusual in what is proposed by the temporary structure and use.
- 4.5 It is noted that the City of Sydney imposed a time-limited consent on the deferred commencement development consent granted to DA D/2014/226 on 3 October 2014 in favour of Stamford for the construction and use of a temporary rooftop display apartment marketing suite on the roof of Stamford Hotel at 93-97 Macquarie Street, Sydney. In accordance with section 4.17(1)(d), condition 4 restricted the time period to 12 months from the date of the issue of the occupation certificate for the temporary display and marketing suite.
- 4.6 As the Department would be aware, a development consent authorises the carrying out of the whole or part of the development approved by a development consent, but it does not compel the person who has the benefit of the development consent to carry out the development: *F Lucas & Sons Limited v Darking and Horley Rural District Council* (1964) 17 PQ CR QBD 111.
- 4.7 There is no condition of consent that requires Mulpha to undertake the competitive design process and lodge the detailed design DA for the ballroom on the roof of Transport House within any specified timeframe. Nor is there any such time provision in the EP&A Act, where the development consent has been physically commenced which Mecone concedes has occurred (Mecone Letter, page 10).
- 4.8 Mulpha already has a broad discretion as to when it will deliver the ballroom. This is so irrespective of the Modification Application.
- 4.9 This same discretion is afforded to beneficiaries of developments consents, including concept development consents, once the consent has been physically commenced, unless there are conditions of consent limiting the time in which the development is to be carried out.
- 5. The competitive design process provisions and design excellence provisions in SLEP 2012 are not circumvented**
- 5.1 The proposed function centre envelope is significantly smaller than the building envelope for the approved ballroom, and importantly will be a temporary prefabricated structure which will be installed for a period of 10 years from the issue of an occupation certificate for the structure. The circumstances are such that the consent authority could be satisfied that a competitive design process would be unreasonable or unnecessary in the circumstances or that the development satisfies the criteria in paragraphs (a) to (d) of clause 6.21D of SLEP 2012. Further information justifying the exemption is set out in Section 4 of Urbis' Response to Submissions.
- 5.2 We note that the City of Sydney in its submission of 21 January 2022 *“agrees that the proposed Stage 1A function centre will not go through a formal design competition”*.
- 5.3 We agree with NRF (paragraph 24) that the design excellence provisions in Sydney LEP 2012 can apply to concept development applications that involve building envelopes only.
- 5.4 Conditions B2 and B3 will continue to apply to the ballroom on the roof of Transport House such that a competitive design process must be undertaken before lodging the detailed design DA for the ballroom. No change is proposed to this.

**6. A cogent explanation as to why a temporary function centre is sought has been provided**

6.1 The following paragraphs respond to paragraph 12 of the NRF Letter and page 10 of the Mecone Letter.

6.2 Mulpha does not assert in the Modification Application that it will take a 10 year timeframe for the international tourism market to rebound. However, given that it has owned the Intercontinental Hotel in Sydney and other tourist destinations in Australia (such as Sanctuary Cove and Hayman Island) since 2004, it has intimate knowledge of the international tourism market and expected projections for the market to return to its pre-Covid 19 pandemic levels.

6.3 Further information on the state of the international tourism market since the COVID 19 pandemic is provided by Urbis in the Response to Submissions.

**7. Conclusion**

7.1 For the reasons set out above, it is reasonably open for the consent authority to be satisfied that the modified concept development, both quantitatively and qualitatively, will be essentially or materially the same as that approved by the IPC and as such, will be substantially the same as that originally approved. No material or radical transformation is proposed.

Yours faithfully



**Penny Murray**  
**Partner**

Direct Line: +61 2 8915 1031  
Direct Fax: +61 2 8916 2000  
Email: penny.murray@addisons.com



**Helen Macfarlane**  
**Consultant**

Direct Line: +61 2 8915 1004  
Direct Fax: +61 2 8916 2000  
Email: helen.macfarlane@addisons.com