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NewCold Sydney Holding Pty Ltd as trustee for the  
NewCold Sydney Unit Trust Level 1, 140 Bourke Street  
Melbourne VIC 3000

**Attn: Edward McKenna**

Dear Edward

## **NewCold - acquisition of land in Marsden Park, Sydney Advice regarding section 96 application**

We refer to your request for advice regarding whether NewCold Sydney Holding Pty Ltd as trustee for the NewCold Sydney Unit Trust (**NewCold**) can obtain a modification application under section 96 *Environmental Planning and Assessment Act 1979* (**EP&A Act**) to modify an existing State Significant Development consent.

### **Background**

1 We understand that:

- (a) NewCold is proposing to purchase vacant land located on Hollinsworth Road, within the Sydney Business Park, Marsden Park NSW 2765 described as Lot 124 of Deposited Plan 1194052 (**the Site**);
- (b) On 22 July 2016, the Minister for Planning granted consent for State Significant Development 6799 for a 24 hour operated cold storage warehouse and distribution facility at the Site comprising:
  - (i) 34,135sqm warehouse, storage, and cold storage space;
  - (ii) 2,152sqm office space;
  - (iii) 128 car parking spaces; and
  - (iv) 35 loading docks**(SSD 6799)**;
- (c) NewCold seeks to modify SSD 6799 in accordance with the following plans:
  - (i) 'Proposed Elevations', Drawing No. AU0012 MDPFS10 200, Rev B dated 20 April 2017;

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- (ii) 'Proposed Site Plan', Drawing No. AU0012 MDPFS10 002, Rev B dated 13 April 2017;
- (iii) 'Proposed Site Plan W Swire Overlay', Drawing No. AU00sa12 MDPFS08 003, Rev A dated 27 March 2017.

**(Proposed Modification);**

- (d) Under the Proposed Modification NewCold intends to:
  - (i) increase the total building area of 36,287sqm to 37,682sqm, being 1,395sqm;
  - (ii) decrease the car parking spaces from 128 to 104 spaces;
  - (iii) increase the maximum height of the warehouse and distribution facility from 34.8m to 36.50m, being 1.70m; and
  - (iv) alter the elevation and internal layout of the warehouse and distribution facility;
- (e) NewCold does not intend to change the essential aspects of the approved development under SSD 6679 and as such the development will remain a 24 hour cold storage warehouse and distribution facility.

## Advice

### Modification under section 96(2) of the EP&A Act

- 2 Section 96(2) of the EP&A Act provides that:

*'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 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)" (our emphasis).'*

- 3 SSD 6799 could be modified under section 96(2) of the EP&A Act provided the consent authority:

- (a) satisfies itself that if the Proposed Modification were approved, the overall development would remain 'substantially the same development' as the development originally approved under SSD 6799; and
- (b) meets the remaining requirements contained in subsections 96(2)(b)-(d).

### Substantially the same development

- 4 The following legal principles are relevant when determining whether a proposed modification will be considered to be 'substantially the same' as the development for which consent was originally granted:

- (a) it is the state of mind of the consent authority that is relevant, rather than the existence of objective facts (*King, Marwick, Taylor & Ors v Bathurst Regional Council* [2006] NSWLEC 505);

- (b) the processes and outcomes of the existing development should be compared to the processes and outcomes of the proposed development to determine whether they both have essentially the same essence (*Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8);
  - (c) the qualitative and quantitative differences between the two developments should be considered in context. If the modification will involve the loss of something that was 'a material and essential physical aspect of the approved development' then the two developments will not be substantially the same (*Moto Projects No. 2 v North Sydney Council* (1999) 106 LGERA 298); and
  - (d) the relevant reference point for the courts is the original consent that was granted for the development, and not subsequent modifications that may have been made over time (*North Shore Property Developments Pty Ltd v Lane Cove Council* [2013] NSWLEC 1140)
- 5 Furthermore, we note that in *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* (1999) 46 NSWLR 598, the term 'modify' for the purposes of section 96 of the EP&A Act was taken to mean 'alter without radical transformation.' In order to rely on section 96(2) of the EP&A Act, NewCold will need to demonstrate that the Proposed Modification is not a 'radical transformation' of the existing development.
- 6 Having applied these principles, we are of the view that the overall operation of the proposed warehouse and distribution facility would remain 'substantially the same' if the Proposed Modification was granted. Our reasons for this conclusion are that:
- (a) the processes and outcomes remain largely the same with or without the Proposed Modification;
  - (b) the Proposed Modification does not change matters which are material and essential physical aspects of the approved development. The essential aspects of the 24 hour cold storage warehouse and distribution facility approved by SSD 6799 will remain unchanged as NewCold still intends to operate a cold storage facility at the Site under the Proposed Modification;
  - (c) it is expected that evening truck movements will decrease under the Proposed Modification;
  - (d) whilst the building area will be increased under the Proposed Modification, the increase will not result in environmental impacts that are materially greater than which was approved in the overall context of the features of the existing approved development and the location of the Site;
  - (e) whilst the maximum building height will be increased under the Proposed Modification which will exceed the building height standards under the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (Growth Centres SEPP)*, the existing SSD 6799 already permits the applicant to exceed the building height standard under the Growth Centres SEPP as the maximum building height approved under the consent exceeds the building height standards. The proposed maximum building height will not result in environmental impacts that are substantially greater than which was originally approved. It is also relevant that the Proposed Modification will continue to:
    - (i) satisfy the objectives of the IN2 General Industrial zone; and
    - (ii) incorporate a design that breaks down the bulk and scale, including a stepped design and a range of contrasting colours.
  - (f) in the context of the development under SSD 6799, the changes to the elevations and internal layout in this case are not material enough to be considered a substantial change; and

- (g) we understand that the remaining environmental impacts will not be materially greater than that which was originally approved.

7 For the reasons outlined above, we are of the view that the Proposed Modifications can be approved pursuant to section 96(2) of the EP&A Act.

## **Conclusion**

8 We are of the opinion that SSD 6799 can be modified pursuant to section 96(2) of the EP&A Act as the Proposed Modification will be 'substantially the same development' as originally approved.

Please do not hesitate to contact us if you have any questions in relation to this advice.

Yours sincerely



**Samantha Daly**  
Partner