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26 November 2015

Your Ref:
Our Ref: 205/15

Mr Brendon Roberts
Planning Services
Department of Planning and Environment
GPO Box 39
Sydney NSW 2000

Dear Brendon,

**RE: 185-195 Fifteenth Avenue, West Hoxton - Stage Commercial Precinct - State
Significant Development SSD 6407**

We act for the Noiosi Family Group owner of the Austral Shopping Centre at the corner of Fifteenth and Edmondson Avenues, Austral. Our client has requested that we make a submission to the public exhibition of the development proposal in respect of the abovementioned property. Please find enclosed a copy of such a submission.

Should you require clarification of any aspect of this correspondence please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "MJ Brown", is written over a horizontal line.

MJ BROWN
DIRECTOR
MICHAEL BROWN PLANNING STRATEGIES PTY LTD

**SUBMISSION IN RESPECT OF
PROPOSED RETAIL & COMMERCIAL
CENTRE - SSD 64070**

**Land Situated at 185-195 Fifteenth Avenue,
West Hoxton**

Prepared For:
Noiosi Family Group

Prepared By:



November 2015

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1 Brief

This submission has been prepared in respect of instructions from the Noiosi Family Group owners of the Austral Shopping Centre located on the corner of Fifteenth and Edmondson Avenues, Austral and owners within the West Hoxton Centre. The submission is in response to the NSW Department of Planning and Environment public exhibition and invitation for submissions for an application to construct a commercial and retail centre at 185-195 Fifteenth Avenue, West Hoxton.

The application by the Western Sydney Parklands Trust (SSD 64070) is submitted as a State Significant Development, with the Minister of Planning being the consent authority. The development qualifies as State Significant Development (SSD) under State Environmental Planning Policy (State and Regional Development) 2011 due to its location with land covered by State Environmental Planning Policy (Western Sydney Parklands) 2009 and capital investment value. The proposal will involve:

Stage 1 (proposed under SSD Application)

- Demolition;
- Subdivision;
- Bulk and detailed earthworks;
- Estate infrastructure;
- Concept estate landscaping;
- Conceptual site layout;
- Indicative building envelopes; and
- Land use approval.

Stage 2 (subject to separate Development Applications):

- Detailed land uses;
- Detailed built form;
- Estate landscaping.

Lots 304, 305 and 306

The abovementioned concept proposal and works specified under Stages 1 and 2 (excluding subdivision) apply only to Lots 345, 346 and 2. Lots 304, 305 and 306 are subject to subdivision only under Stage 1 of this SSD Application.

The application is accompanied by a number of supporting documents. However, the main reports that are of relevance to this submission are as follows:

- Urban Design Report prepared by LFA (Pacific) Pty Ltd (Appendix 5);
- Sequential Test and Economic & Community Impact Assessment – MacroPlanDimasi (Appendix 7);
- West Hoxton Precinct Retail Demand Assessment – HillPDA Consulting (Appendix 8);
- Assessment of Potential Access, Traffic and Transport Implications – Transport and Traffic Planning Associates (Appendix 21);
- Environmental Impact Statement – McKenzie Group;

There are a number of other supporting documents, such as Phase 1 Contamination, Bushfire Assessment, Noise Assessment, that are general requirements for lodging a development application and therefore are not addressed as part of this submission. The reports that are of relevance that impact on the economic viability of the Austral Shopping Centre and other existing Centres in Edmondson Avenue are of relevance and are addressed in this submission.

2 The Context

The subject property is located in the semi-rural area of West Hoxton, on the corner of Fifteenth Avenue and Twenty-Seventh Avenue. The land immediately joins the Sydney Water Water Race

The immediate locality could be described as mainly large rural lots to the north and west. To the east is land that forms the Western Sydney Parklands, which is reflected in the zoning under State Environmental Planning Policy (State and Regional Development) 2011, as shown in **Figure 1**. Further to the east are the suburbs of Middleton Grange and Hoxton Park, which have local shopping centres. To the south is a small subdivision that cannot be extended for subdivision purposes, as it is surrounded by the Parklands, as shown in **Figure 2** below. This subdivision contains a number of shops and a service station.

The aerial photograph below at **Figure 1** provides a contextual overview of the immediate area. As can be seen from the aerial photograph, the land is vegetated and a creekline appears to traverse the subject property.

A local shopping centre is located on the corner of Edmondson and Fifteenth Avenues (Nos 415-423) to the west of the subject site and is only 1.5km from the proposed centre. This centre provides local convenience shopping and includes a service station. A further shopping centre is located on the corner of Tenth Avenue and Edmondson Avenue, approximately 3.4km away from the proposed development. This Centre contains a number shops and a service station. There is a further Centre in Gurner's Avenue some 2.8km from the subject site (refer to **Figure 3** for a wider contextual view of the area). Leppington North will be the major shopping centre for the area and is located to the southwest. It would appear that the economic analysis by MacroPlan Dimasi ignores the zoning of these centres in the context of Retail Hierarchy, which is clearly the basis of Council establishing the location and size of centres.

FIGURE 1 - CONTEXT OF THE SUBJECT PROPERTY TO SURROUNDING LANDS



FIGURE 2 - WESTERN SYDNEY PARKLANDS EXTENT

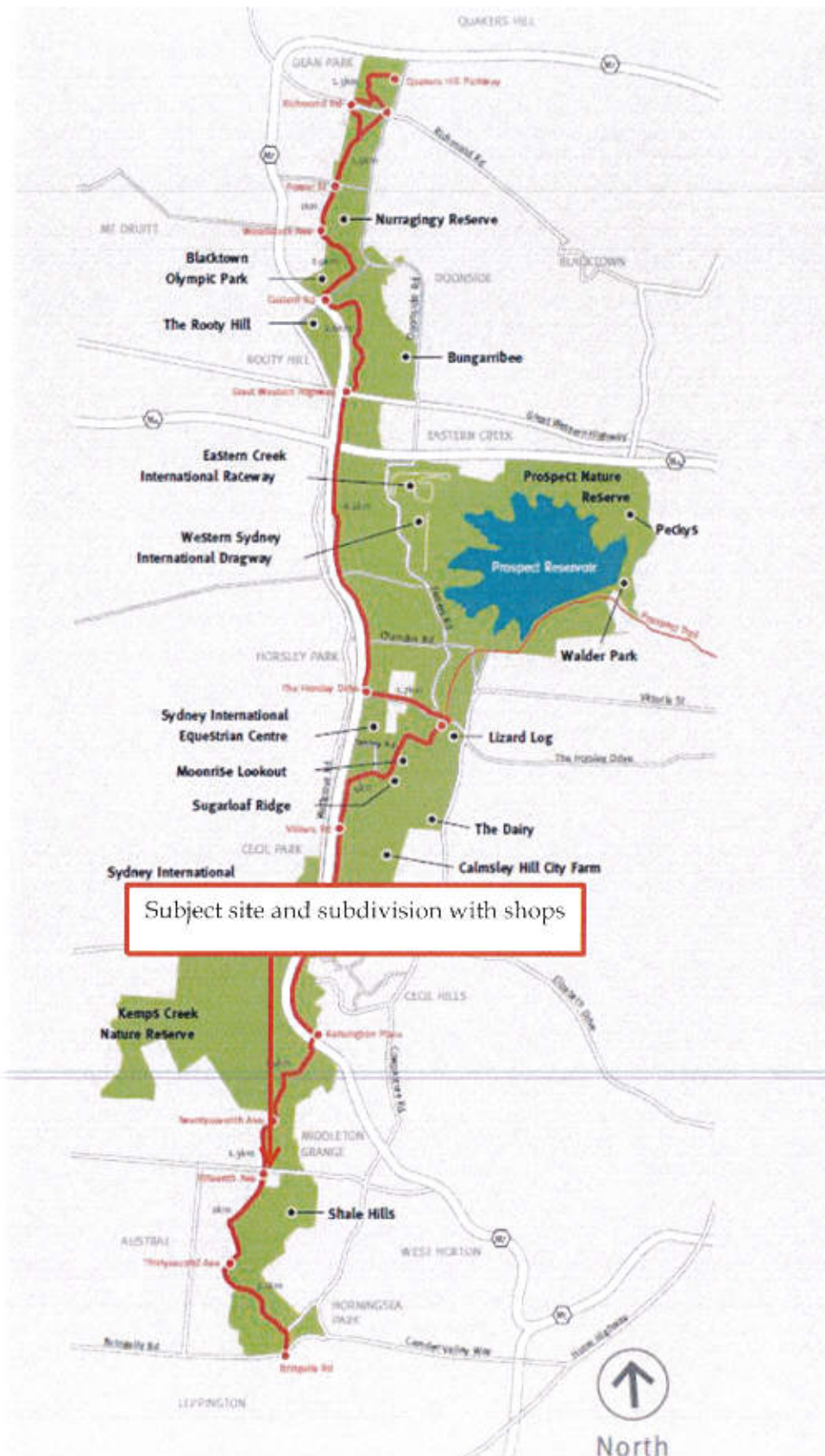
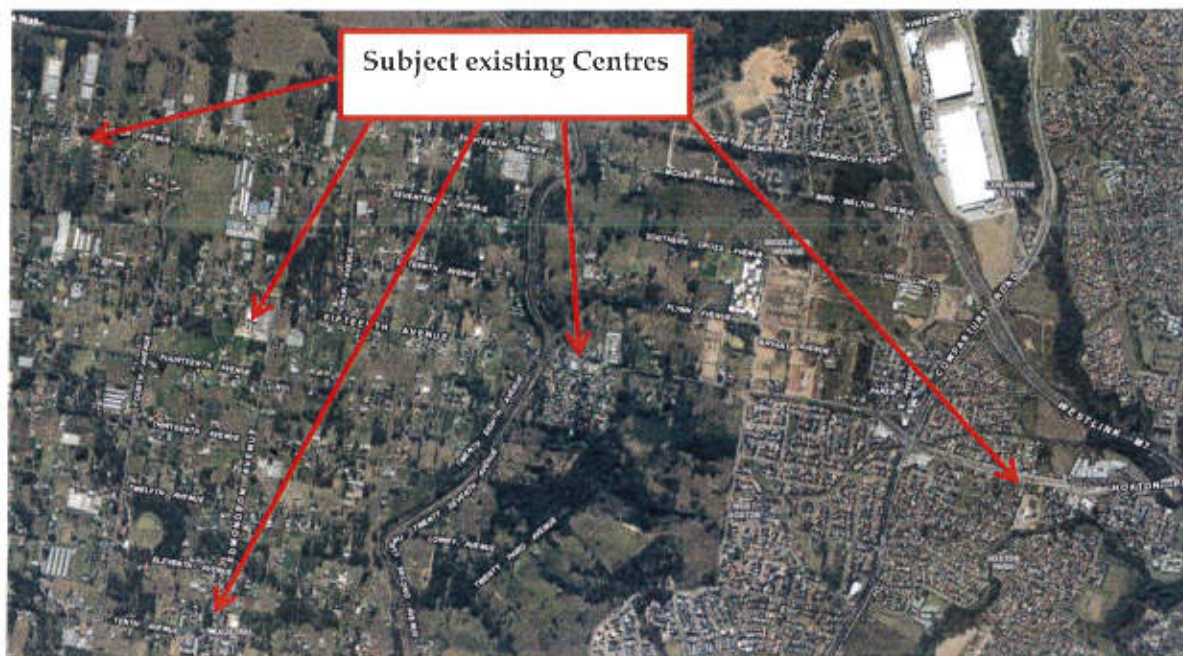


FIGURE 3 – LOCATION OF CENTRES IN IMMEDIATE AREA



2.1 EXISTING CENTRES OVERVIEW

2.1.1 FIFTEENTH AVENUE

Located immediately south of the subject site the Fifteenth Avenue centre is zoned B1 Neighbourhood Centre on land totalling 7,722m². The centre currently accommodated functional neighbourhood centre type uses including liquor store, hairdresser, real estate agent, Australia Post, service station and a garden equipment retailer.

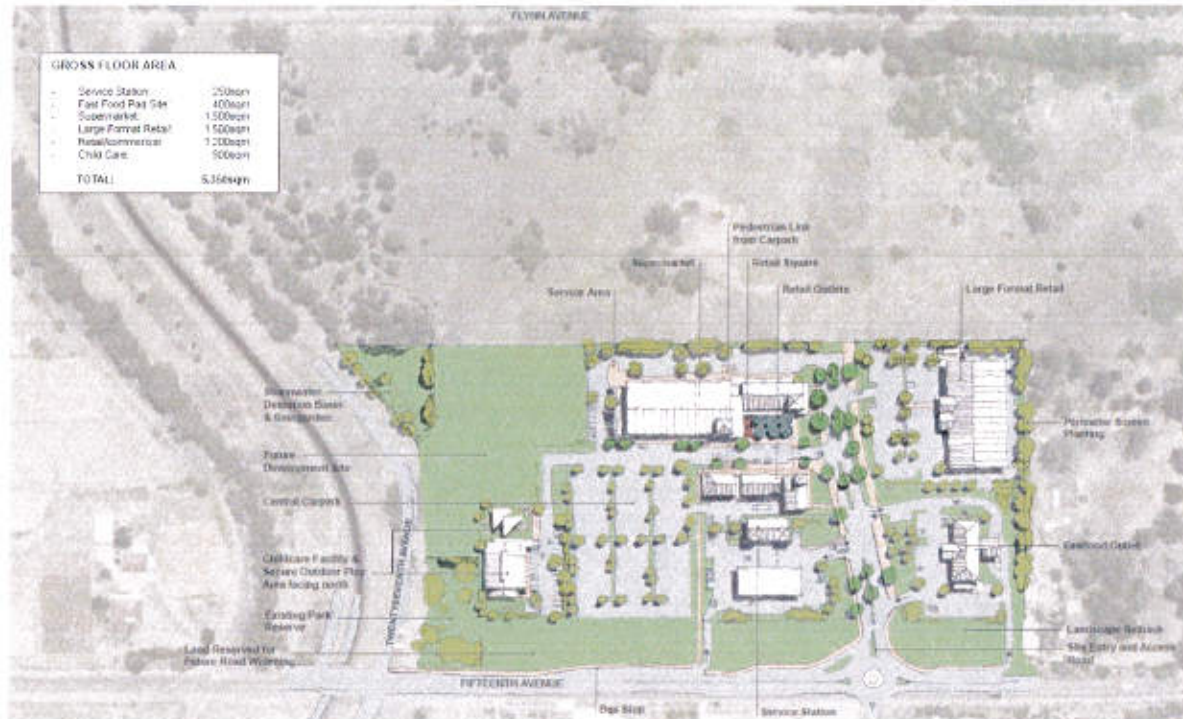
The economic report states that this existing centre is too small to accommodate the proposed uses because it is less than 2ha in size. That is not a valid planning reason for consideration of the proposed site being better based on size of land, particularly having regard to the fact that most of the subject site is occupied by landscaped setbacks and carparking areas, with the actual floor space proposed by the development proposal being 5,350m², as shown below in Figure 4. With a better layout of proposed uses, the carparking areas proposed could easily be consolidated, but the way the proposal is planned, customers to the proposed centre would drive from one use to the other. This is a poor urban design/planning outcome and results in unnecessary internal trips.

2.1.2 MIDDLETON GRANGE

Located north-west of the site, Middleton Grange incorporates a village centre approximately 3.7ha and zoned B2 Local Centre. The centre is currently vacant however, a concept plan approval exists for the centre including a full-scale supermarket (approximately 3,500m²) and supporting convenience orientated specialty retail.

The Middleton Grange site is stated to be inward facing and expected to trade as a localised catchment with limited main road exposure. It would appear that the comments surrounding this statement are based on the fact that the Centre must have main road frontage to be viable. The statement ignores the fact that a number of neighbour centres are located within suburbs.

FIGURE 4 – CONCEPT PLAN



2.1.3 AUSTRAL TOWN CENTRE

The Austral Town Centre is zoned B2 Local Centre and located approximately 1.5km west of the subject site along Fifteenth Avenue at the intersection of Edmondson Road. The site supports the existing West Hoxton Shopping Village (2,800m²) which includes an IGA supermarket and a Home Hardware store. The Centre is planned to accommodate higher order retail and supporting ancillary non-retail uses and is addressed below in this submission.

2.1.4 GURNER AVENUE CENTRE

The Gurner Avenue Centre is zoned B1 Neighbourhood Centre, totals 2.2ha in size and is located approximately 2.8km north-west of the subject site. The site is planned for future neighbourhood centre.

MacroPlan Dimasi state that whilst the site is technically large enough to support the proposed development concept, MacroPlan Dimasi concludes that this centre is located off the main road network and does not present a practical alternative to the proposed Fifteenth Avenue site.

Again it appears that the basis of supporting the proposed site is that it has main road frontage.

2.1.5 TENTH AVENUE

The Tenth Avenue Centre is zoned B1 Neighbourhood Centre and has an area of 3.6ha. Centre with developed buildings, planned to accommodate additional shopfront floorspace. Currently supports a small neighbourhood centre, anchored by an 800m² IGA on the eastern side of Edmondson Road. There are some small retail/commercial facilities on the western side of Edmondson Road.

This Centre has the opportunity to expand given the zoning and size of zoned land, as indicated in the MacroPlan report, which states that:

"There is an underutilised area of about 1ha east of the existing IGA anchored centre, which does not front Edmondson Road. This parcel would be too small to supposed the proposed development compared with the proposed subject site and does not have main road exposure."

Edmondson Avenue is the main northsouth link that connects the new Leppington Railway Station to Fifteenth Avenue. This road has the same status as Fifteenth Avenue and has a larger retail expenditure catchment than the proposed site. This aspect is addressed in this submission.

2.1.6 EIGHTH AVENUE

The Eighth Avenue Centre is zoned B1 Neighbourhood Centre and has an area of 3.1ha. The report states that this site is relatively isolated part of Austral, with the site located amongst an R3 zoned precinct.

The R3 zone is for medium density development. The subject site is isolated in our opinion being surrounded by the Western Sydney Parklands and low-density residential to the south, which includes shops referred to above in Section 2.1.1.

2.1.7 HOXTON PARK CENTRE

This Centre is zoned B1 Neighbourhood Centre and has an area of 1.3ha. Located on the southern side of Hoxton Park Road about 2.9km to the east of the subject site includes the Hoxton Park Shopping Centre which currently includes a small Friendly Grocer foodstore, a liquor store, a newsagent, baker, small scale business services and a popular neighbourhood restaurant.

The report states that this site is too small to accommodate the proposal. Again it appears that the basis of choosing the subject site is on the basis of a large area. The size of the site is not a justification for this site to be superior to any other existing or planned centre.

2.1.8 CARNES HILL MARKETPLACE

The Eighth Avenue Centre is zoned B2 Local Centre and has an area of 10.5ha. This Centre is located 3.9km to the southwest of the subject site. The centre accommodates the 17,208m² Carnes Hill Marketplace sub-regional shopping centre, which provides 964 at-grade car parking spaces. This centre is anchored by a Big W DDS and a Woolworths supermarket. The town centre also accommodates a stand-alone Aldi supermarket, with its own parking as well as surrounding pad-sites, including a medical centre, McDonalds, Pizza Hut and a service station.

This Centre is discounted because it only has 1ha of undeveloped land left and already has two supermarkets. It would be noted that the actual floor space proposed by the development proposal is 5,350m². In a well-planned centre there are cross-overs of spaces and as discussed above, the layout of the proposal results in a number of internal movements due to the distance between each use. In our opinion that is not a well-planned centre.

2.1.9 AUSTRAL & LEPPINGTON NORTH CENTRE

This is a major centre proposed for the Austral & Leppington North Release Area. These Centres are part of the South West Growth Centre.

FIGURE 5 - SOUTH WEST GROWTH CENTRE PRECINCT LAYOUT PLAN



3 The Planning Documents

3.1 PREVAILING PLANNING PROVISIONS

The subject land is the subject of the following planning controls:

State Environmental Planning Policy (State and Regional Development) 2011

Proposals involving development on sites that are listed in Schedule 2 of State Environmental Planning Policy (State and Regional Development) 2011 are declared to be State Significant Development (SSD) under the new framework introduced in October 2011.

Schedule 2 includes:

5 Development in the Western Parklands

Development that has a capital investment value of more than \$10 million on land identified as being within the Western Parklands on the Western Sydney Parklands Map within the meaning of State Environmental Planning Policy (Western Sydney Parklands) 2009.

State Environmental Planning Policy (Western Sydney Parklands) 2009

State Environmental Planning Policy (Western Sydney Parklands) 2009 (WSP SEPP) applies to land identified on the Western Sydney Parklands Map and includes the subject site. The relevant provisions of the Policy are address below.

Aims

The aim of the WSP SEPP is:

To put in place planning controls that will enable the Western Sydney Parklands Trust to develop the Western Parklands into a multi-use urban parkland for the region of western Sydney by:

- (a) allowing for a diverse range of recreational, entertainment and tourist facilities in the Western Parklands, and
- (b) allowing for a range of commercial, retail, infrastructure and other uses consistent with the Metropolitan Strategy, which will deliver beneficial social and economic outcomes to western Sydney, and
- (c) continuing to allow for and facilitate the location of government infrastructure and service facilities in the Western Parklands, and
- (d) protecting and enhancing the natural systems of the Western Parklands, including flora and fauna species and communities and riparian corridors, and
- (e) protecting and enhancing the cultural and historical heritage of the Western Parklands, and
- (f) maintaining the rural character of parts of the Western Parklands by allowing sustainable extensive agriculture, horticulture, forestry and the like, and
- (g) facilitating public access to, and use and enjoyment of, the Western Parklands, and
- (h) facilitating use of the Western Parklands to meet a range of community needs and interests, including those that promote health and well-being in the community, and
- (i) encouraging the use of the Western Parklands for education and research purposes, including accommodation and other facilities to support those purposes, and

- (j) allowing for interim uses on private land in the Western Parklands if such uses do not adversely affect the establishment of the Western Parklands or the ability of the Trust to carry out its functions as set out in section 12 of the Western Sydney Parklands Act 2006, and
- (k) ensuring that development of the Western Parklands is undertaken in an ecologically sustainable way.

The report prepared by the McKenzie Group state that in respect of permissibility that:

"The proposal is consistent with this aim as it provides for development within the Parklands that will financially support the functions of the Trust. The proposal will also provide employment opportunities for the Western Sydney Region in a location that will minimise environmental impact and relate to its contextual setting".

And that:

"All land within the Western Sydney Parklands is unzoned under the provisions of the WSP SEPP. Pursuant to Clause 11(2), the proposal represents an 'innominate development' and is therefore permissible with consent.

Nothing in the WSP SEPP prohibits or restricts the permissibility of any type of commercial development".

The permissibility of the proposal is based on the fact that the development will financially support the functions of the Trust and provide employment. It is noted that one of the aims is that any commercial or retail development are *consistent with the Metropolitan Strategy, which will deliver beneficial social and economic outcomes to western Sydney (aim b).*

The report does not address how the proposed development meets this aim.

This aspect is addressed in this submission under Section 5.2.

4 Review of Proposal

4.1 INTRODUCTION

An issues based review of the proposal has been adopted to bring into sharp focus the inappropriateness of the development proposal in the subject context. This approach importantly is not at the expense of a statutory compliance review (the more traditional approach), with such matter also being addressed in the issue analysis.

4.2 SOUTH WEST GROWTH AREA – LEPPINGTON & AUSTRAL RELEASE AREA

As stated above, lands have been identified in a number of planning documents, namely the Sydney Metropolitan Strategy and the Growths Centres as being proposed for future urban development. The subject property and surrounding properties are located with the West Hoxton Precinct. The subject property is indicated to be set aside as part of the Western Sydney Parklands. Some uses are permissible in the zone. Importantly the subject land is not nominated in the South West Growth Centres (SWGC) planning documents or the Metropolitan Strategy for retail and commercial uses. The SWGC shows land on the opposite side (Fifteenth Avenue) as a Centre.

The development of the West Hoxton Precinct needs to be considered from a number of aspects having regard to existing landuses within the immediate area and that proposed by the South West Growth Centres. Clause 16 of the SEPP states as follows:

16 Development applications in growth centres – matters for consideration until finalisation of precinct planning for land

- (1) Until provisions have been specified in a Precinct Plan or in clause 7A with respect to the development of the land, consent is not to be granted to the carrying out of development on land within a growth centre unless the consent authority has taken into consideration the following:
 - (a) whether the proposed development will preclude the future urban and employment development land uses identified in the relevant growth centre structure plan,
 - (b) whether the extent of the investment in, and the operational and economic life of, the proposed development will result in the effective alienation of the land from those future land uses,
 - (c) whether the proposed development will result in further fragmentation of land holdings,
 - (d) whether the proposed development is incompatible with desired land uses in any draft environmental planning instrument that proposes to specify provisions in a Precinct Plan or in clause 7A,
 - (e) whether the proposed development is consistent with the precinct planning strategies and principles set out in any publicly exhibited document that is relevant to the development,
 - (f) whether the proposed development will hinder the orderly and co-ordinated provision of infrastructure that is planned for the growth centre,
 - (g) in the case of transitional land – whether (in addition) the proposed development will protect areas of aboriginal heritage, ecological diversity or biological diversity as well as protecting the scenic amenity of the land.
- (2) This clause does not apply to land zoned under Part 3.

In relation to this Clause the following is provided.

Existing Centres

The existing Centres were identified above in Section 2.1. The economic analysis that accompanied the application clearly indicated that these Centres have potential for increased floor space. In particular, the Austral Town Centre has proposals to increase floor area and the owners have had prepared a masterplan and feasibility study for the property to understand development potential. One option was a compliant scheme under current zoning; whilst Option 2 would require a Planning Proposal (rezoning application).

Both options involved a substantial increase in retail and commercial floor space, including residential apartments. The only real difference between the two was the height of the residential apartment towers.

It is clear from the retail analysis that the proposed development relies on 'attracting' its retail catchment from this Centre as well as other areas and for the reasons espoused in the analysis, the proposed does not have a customer base and is only sustainable if it can attract customers away from other centres. Clearly that is not consistent with the abovementioned planning documents for the area.

On this basis alone, the application fails.

4.3 SITE CONSTRAINTS

As can be seen from the series of photographs and survey plan, the subject land is undulating, is impacted by a drainage line/creek system. The subject land would require significant cut and fill to provide suitable building sites and overcome the drainage issues that appear not to be addressed in the Concept Masterplan.

4.4 OVERLAND FLOWS

As stated in this submission the subject land and surrounding lands fall within the South West Growth Centre. As such the provisions of State Environmental Planning Policy (Sydney Region Growth Centres) 2006 apply and it would appear that the property is potentially affected by localised overland flows on part of the site that would need to be addressed.

The following sets of photographs show the centres referred to above in Section 2.1 and the subject site.

Photograph1: Shows the subject property. Note the dam in the bottom left corner and what appears to be a natural watercourse from the higher parts of the site.



Photograph 2: Shows part of the site heading east.



Photograph 3: Shows the site on the crest of the ridge, with the existing access driveway. It is proposed to construct a roundabout at this access point and the intersection with Kirkpatrick Avenue/Twenty-second Avenue). The traffic report does not address RMS required sight distances for an intersection at this location, which will be addressed in this submission. Refer to further photos below.



Photograph 4: Shows the location of the proposed roundabout. A red arrow points from the text to the location in the photo.



Photograph 5: Shows the crest of the ridge. Note the steepness of the road from the east and the poor sight lines. Traffic driving up the hill will be increasing speed due to the steep grades.



Photograph 6: Shows a truck heading west after heading up the hill from the east. The proposed roundabout is shown by the red arrow.



Photograph 7: Shows the location of the proposed roundabout looking west. Note the existing driveway to right of photo and shops in the background. This photo is at the top of the ridge



Photograph 8: Shows the subject shops and carparking area referred to below in Figure 4.



Photograph 9: Indicates the shops within the Austral Shopping Centre.



Photograph 10: Shows the directory shop signage, service station and some of the shops within the Austral Centre.



Photograph 11: Shows more of the shops. The Centre is proposed to expand, as discussed in this submission.



Photograph 12: Shows more of the shops in this Centre.



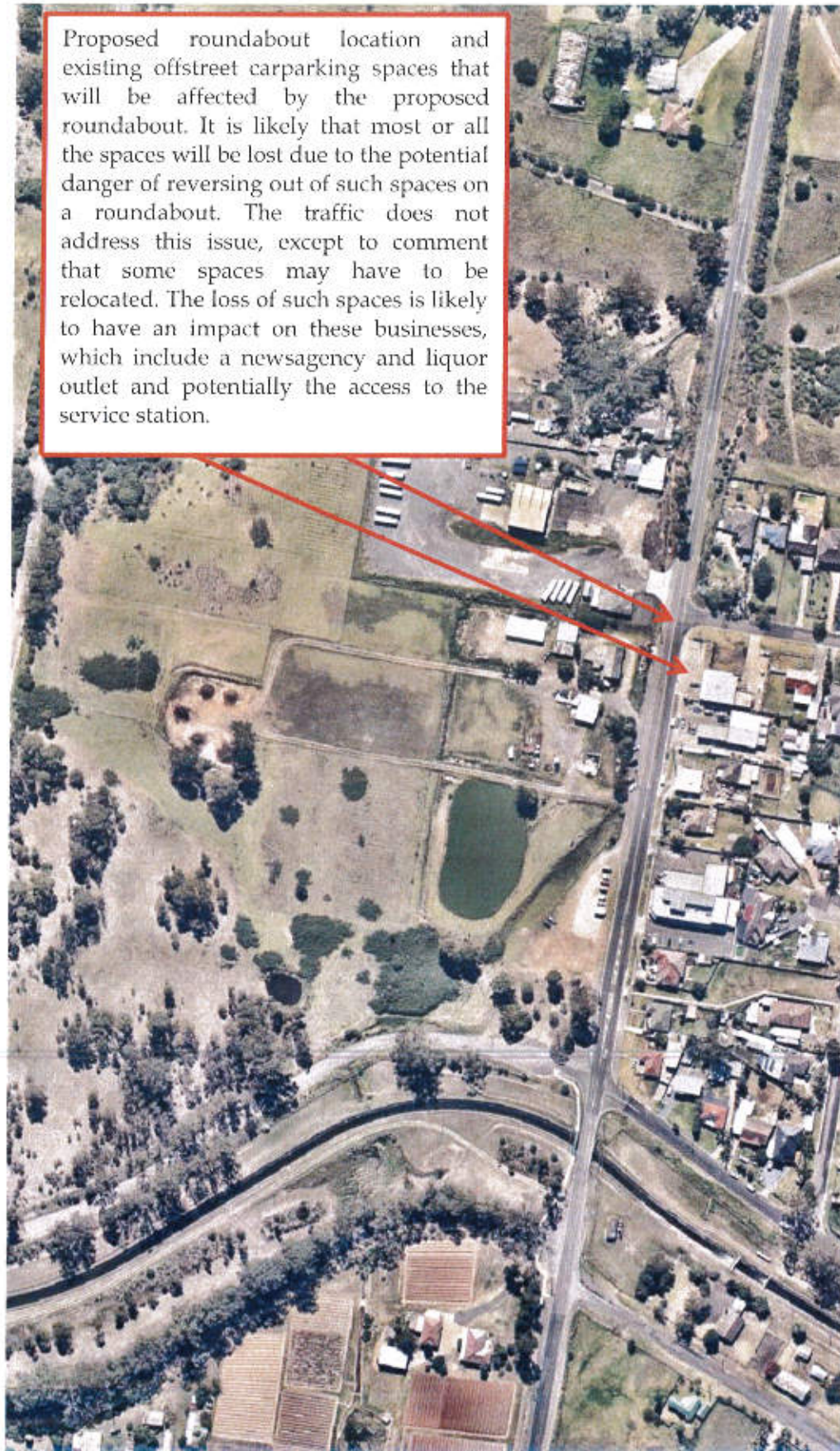
Photograph 13: This photograph is taken of the Tenth Avenue Shops.



Photograph 14: Shows shop on opposite side of road in the Centre known as Tenth Avenue.



FIGURE 4 – AERIAL PHOTO SHOWING SITE AND EXISTING CARPARKING



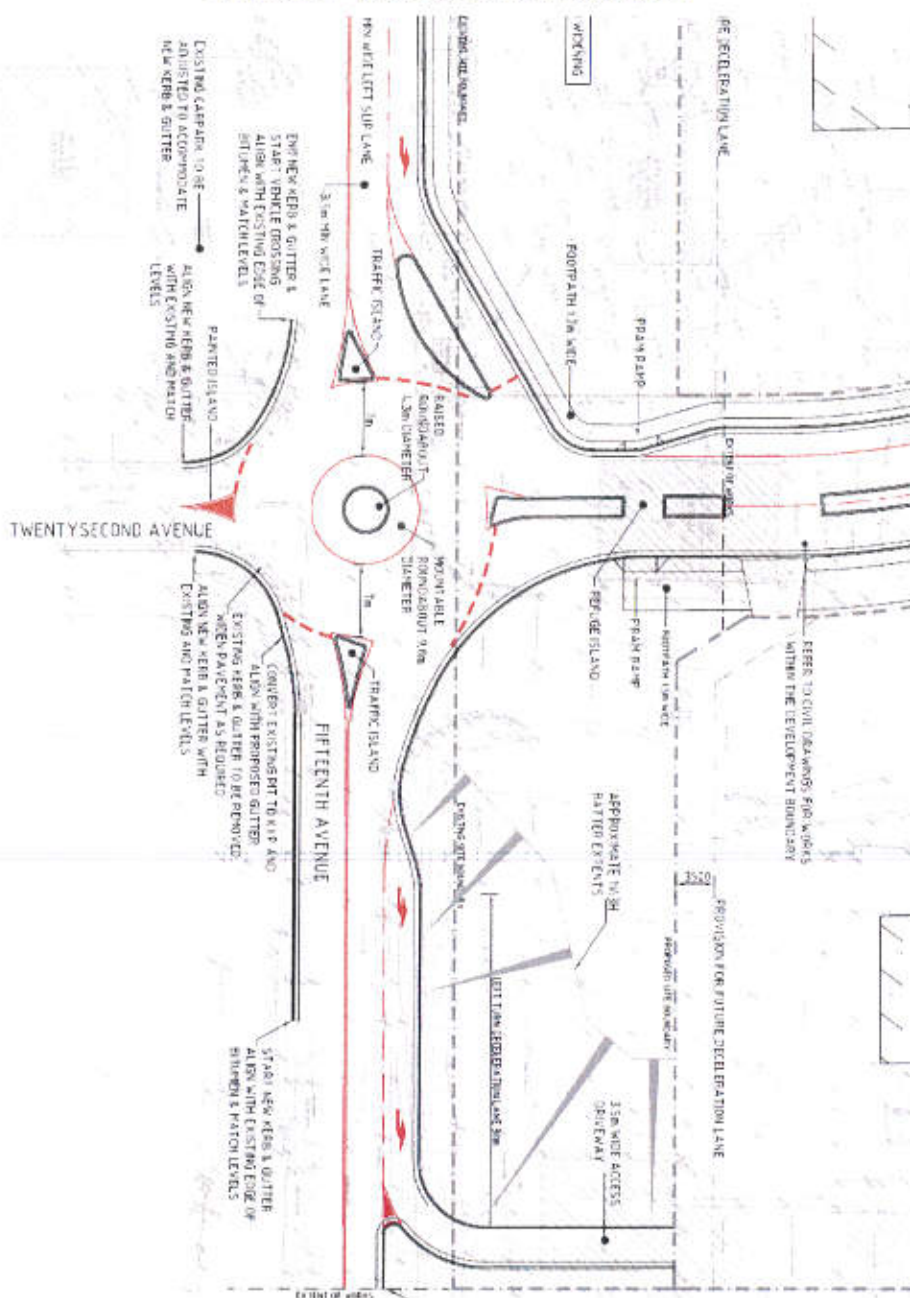
4.5 TRAFFIC ISSUES

The Traffic and Parking Assessment prepared by Transport and Traffic Planning Associates provides an assessment of the local road system and the potential traffic generated by the development. The report states:

"The potential to widen Fifteenth Avenue in conjunction with the development and provide a traffic signal controlled access intersection has been assessed however this was found to not be feasible and the development outcome adopts a roundabout control at the intersection of Fifteenth Avenue, Twentysecond Avenue and the FABH access road".

The report provides a design for the roundabout, as shown in **Figure 5** below.

FIGURE 5 - PROPOSED ROUNDABOUT



This roundabout arrangement is assumed to be based on a 60kph speed limit in Fifteenth Avenue (refer to 3.2 of traffic report), as to the west the speed environment is 80kph. However, there is no assessment for compliance with Australian Standards for this roundabout at this location. Indeed the report is silent on a number of very basic assessments that would be normally undertaken for this road with the proposed access arrangements. As evidenced in the above photos, when heading west up the steep hill, sight distance is virtually non-existent.

Reference is made to Austroads Part 5 in relation to 'sight distance' on a rural roadway reveal the following requirements:

	80kph	60kph
Safe Intersection Sight Distance	170m	113m
Minimum desirable	181m	121m
Entering Sight Distance	305m	160m

We are of the opinion that the available sight distance for this speed posted road of 60kph has not been met by this development, particularly from the east, which has a significant rise in the road and the road also rises from the west. This has particular safety aspects for customers and for persons driving on the road and in particular large delivery vehicles (semi-trailers making deliveries to the development sites (service station and supermarket). The photos attest to the issues of vehicles entering and leaving this development site.

In relation to the proposed access arrangements (driveway), the Austroads Part 5 publication also provides criteria in relation to the desirable geometry for an access intersection. The criteria for the provision of 'turning lanes' is contained in Figure 5.23a of this document and is based on the volume of the through and turning movements. Given the location of the proposed development and roundabout, the likely access driveway will accommodate all movements and needs to be accessed for compliance with Australian Standards, which have not been addressed for a major development of this nature.

We are of the opinion that the access arrangements to the proposed development pose a traffic safety issue for persons driving along such road, which clearly has not been addressed.

For this reason the application fails and should not be approved.

5.2 PERMISSIBILITY

5.2.1 LAND USE

As stated above, the proposed development may be a permissible landuse, however, we would suggest that it does not meet the aim of the SEPP, which was addressed above in Section 3.1.

In respect of meeting the aim of the SEPP, the following Court matters are provided:

In the matter of Dem Gillespies – v - Warringah Council (2002) NSWLEC 224, Judge Bignold considered the issue of zonal objectives, as follows:

"One of the zone objectives required the proposed development to be "compatible with existing or planned residential development....." (see at 438). It was in relation to a submission that in order to comply with that zone objective, "a positive finding of compatibility is required" that Stein J said at 439:

In my opinion, it may be concluded that this development is compatible with the existing residential development in the zone. I so find on the evidence notwithstanding that I do not accept that a positive finding of compatibility is required. Looked at objectively, and in the planning context, what is required is a finding that the development – taking account of its type and scale – is not incompatible or inconsistent with the residential development.

Taking into account all of the factors relevant to determine the compatibility of the proposal with the residential development, I am confident in the positive conclusion that it is compatible and does not conflict with the residential objectives of the zone.

*Whereas it is the case that his Honour expressly rejected the submission that “a positive finding of compatibility was required” his Honour nonetheless held that what was required was a finding that the development is “not incompatible or inconsistent with” the residential development. That remains a **positive** finding though expressed via a double negative and with great respect I do not for myself see much difference between a requirement that there be a finding that a proposed development is “consistent with” a zone objective and a requirement that there be a finding that a proposed development is “not inconsistent with” a zone objective.*

*70. With the benefit of the survey of the decided cases on the meaning that has been given to the word “consistent” in clauses in planning instruments that require an opinion by the consent authority that a proposed development be “consistent with the **zone objectives**”, I would for myself, conclude that the word “consistent” appearing in **cl 12(3)(b)** of the LEP, assumes its ordinary and natural meaning. That meaning in my respectful opinion is **not confined** to the notion of the proposed development “not being antipathetic” to the desired future character of the Locality.*

*The dictionary meaning of the word “antipathetic” (e.g. the **Macquarie Dictionary**: “having a natural antipathy, contrariety or constitutional aversion”) indicates a far stronger, but narrower, connotation than the connotation of the word “inconsistent”. Clearly, there can be an “inconsistency” with a stated object which does **not** involve any element of “antipathy” to that object.*

*When Clarke JA in **Coffs Harbour Environment Centre Inc** stated at 193 that whatever be the precise ambit of provisions in a local environmental plan which prohibited all development “unless the Council was satisfied that the carrying out of the development is generally consistent with one or more of the stated objectives of the zone” (and concurrently permitted development other than that which was prohibited) “the provisions do not permit an antipathetic development...”, his Honour was simply propounding the view that he had already expressed at 192 that the construction under land zoned “Public Recreation” of a sewerage treatment plant “could not possibly be regarded as being compatible with public recreational use of the land”.*

*His Honour had deliberately eschewed any attempt to define the ambit of the relevant planning provisions and his conclusion that they did not permit the carrying out of “antipathetic” development was nothing more than postulating an obvious and unarguable proposition that such a development could **not** qualify as being “generally consistent” with the **zone objectives**.*

Accordingly, it is clear in my opinion that whereas something that is antipathetic to a stated object is obviously inconsistent with that object, antipathy is not a true synonym of inconsistency and the meaning of inconsistency is not to be confined to the meaning of antipathy. Inconsistency can arise without any antipathy.

*On the other hand, “compatibility” in my judgment may reasonably be regarded, a synonym of “inconsistency” and the meanings of these words is very similar, although in **Coffs Harbour Environment Centre** Clarke JA at 192 rejected as “too expansive” an argument that “consistent” meant*

"compatible" and one of the dictionary meanings of the latter word was "mutually tolerant". I would respectfully agree with Clarke JA's conclusion that that particular meaning of "compatible" was too expansive in the context of its application to the statutory provision requiring the consent authority's opinion that the proposed development be "generally consistent" with the zone objective. However, the primary dictionary meaning of "compatible" (the *Macquarie Dictionary*: capable of existing together in harmony) is in my judgment, both apt and applicable to the interpretation of the word "consistent" in its context in **cl 12(3)(b)** of the LEP.

In so concluding, that the ordinary and natural meaning of the word "consistent" in its statutory context is to be applied as being appropriate to the true meaning of **cl 12(3)(b)** I have had regard to the function and effect within the LEP of the Locality Statements and of those components of such Statements that state the "desired future character" of each of the localities. I have earlier drawn attention to the particular provisions of the LEP that either incorporate or contain reference to the Locality Statements and those components of those Statements that state the Desired Future Character of each of the localities. The function within the LEP of the Locality Statements is self-evidently significant. I have also had particular regard to **cl 18** earlier recited where **subclause (2)** declares that "compliance with development standards, however, does not guarantee that the development is consistent with...the desired future character of the locality". This provision, in my opinion, is a reinforcement, and perhaps even an apt commentary upon, the true effect of the joint operation of the requirements of **cl 12(2)(b)** and **cl 12(3)(b)**.

Finally, and perhaps most importantly, I have had regard to **cl 3** of the LEP which expressly states the purposes of the LEP and in particular to purpose (b) which "describes the desired characters of the localities that make up Warringah and relate the controls on development **to the achievement of the desired characters of those places**" (my emphasis). This particular provision, in my judgment, of considerable importance inasmuch as it confirms the legitimacy of according to the word "consistent" in its context in **cl 12(3)(b)** its ordinary and natural meaning, in preference to a meaning (eg "not antipathetic" as pressed by the Applicant's argument) which "would not best meet the purposes" (cf "objects") stated in the LEP: see **s 25(3)** of the EP&A Act which states:

(3) Where a provision of an environmental planning instrument is genuinely capable of different interpretations, that interpretation which best meets the aims, objectives, policies and strategies stated in that instrument shall be preferred.

For the foregoing reasons, I am quite unable to accept the Applicant's argument that the word "consistent" in its context in **cl 12(3)(b)** means "not antipathetic". Rather I would hold that it has its ordinary and natural meaning (eg as in the *Macquarie Dictionary*: "1. agreeing or accordant; compatible; not self-opposed or self-contradictory; 2. consistently adhering to the same principles, course etc").

A finding of inconsistency with any relevant objective must result in the development application being refused and the appeal dismissed. The court has generally adopted "consistent with" as meaning not antipathetic, nor incompatible or inconsistent with (see *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21 and *Hospital Action Group Association Inc v Hastings Municipal Council* (1993) 80 LGERA 190) although the ordinary and natural meaning has also been used by the court (see *Dem Gillespies v Warringah Council* [2002] NSWLEC 224).

In the matter of the *Qur'anic Society v Camden Council* [2009] NSWLEC 1171, the issue of meeting the zonal objectives and rural character were considered by Commissioner Brown. At 29 Commissioner Brown states:

"I do not accept that because a school is a permissible use within the zone that this suggests that the proposed development should be given some greater entitlement to an approval.

To adopt such a stance effectively ignores the words "in some form" in BGP Properties. It may be that a school is suitable for the site but it does not follow that all schools are suitable. For example, Mr Dowd accepted that a school that contained only a very small number of classrooms may be acceptable on the site. The weight should be determined by the particular characteristics of the permissible use and this is appropriately achieved through consideration of the relevant planning instruments, including the zone objectives and the wider considerations in s 79C of the Environmental Planning and Assessment Act 1979 (the EPA Act)."

Whilst this development was for a school with a number of buildings on land zoned for rural purposes, at 37 Commissioner Brown states:

"Based on my previous findings on the locality, I agree with the conclusions of Mr Dowd. The locality is almost exclusively made up of grazing with little built form beyond scattered farm sheds and some farm homesteads. The lot sizes are large and generally reflect agricultural uses that would normally be associated with large lot sizes."

Having regard to our analysis above of the proposed development against the aim of the SEPP the Department cannot make a finding that that development is consistent with the aim and therefore the DA must be refused.

5.2.2 THE PUBLIC INTEREST

The proposal as established in this Submission is clearly not in the public interest by virtue of:

- Adverse impacts upon the local road system, including safety impacts.
- Potential economic impacts on existing centres.

6 Conclusion

This submission has raised several matters/issues whereby insufficient information has been provided with the subject development application. These matters relate to the following:

- The proposal is clearly not in the public interest as addressed in this submission.
- The potential traffic safety aspects of the proposal have not been addressed.
- The potential economic impact on existing centres.

The Development Proposal is initially considered to be a use that doesn't comply with the underlying aim of the prevailing SEPP and accordingly should not be approved.

The Department is accordingly petitioned to reject the subject application for the reasons contained in this submission.

SINCERELY YOURS,



M J BROWN
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