

Our Ref: 914929

8 February 2019

Caroline McNally
Secretary Department of Planning and Environment
320 Pitt Street
Sydney NSW 2000

Dear Madam

**Proposed s75W modification for 9-13 Dianella Drive Casuarina, Santai Tourist Resort ('Site')
Development Application 187-8-2004 MOD 5**

We Act for the Oaks Group, who is the owners corporation manager of the Santai Tourist Resort (**The Resort**) conducted on the Site, who strongly object to the modification application.

We refer to the proposed application under section 75W of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**) (as it then was) for the modification of a state significant development consent DA 187-8-2004 under Part 3A, submitted to the Department of Planning on 18 October 2017 (**The Consent**).

On 20 November 2018 our client recently purchased the rights to manage the resort on the basis of the existing use of short-term (tourist) accommodation. We consider that any change of use will significantly impact on our client's business as:

- the existing and continued use of the building for tourist accommodation and short term holiday rental conflicts with the proposed change of use for permanent residential accommodation;
- the existing building design is not suitable for permanent residential accommodation; and
- the proposed change of use will impact the economic viability of the Resort as a whole.

In furtherance of our client's objection, we have set out detailed reasons below.

1. Ownership Structure and background

- 1.1 The Resort is a strata development. The Oaks Group manages 67 units pursuant to an agreement with individual unit owners.

Adelaide
Brisbane
Canberra
Darwin
Hobart
Melbourne
Norwest
Perth
Sydney

Doc ID 616830353/v1

Level 14, Australia Square, 264-278 George Street, Sydney NSW 2000 Australia
GPO Box 5408, Sydney NSW 2001 Australia
DX 129 Sydney

Telephone +61 2 9334 8555
Facsimile 1300 369 656 (Australia) +61 2 8507 6584 (International)
hwlebsworth.com.au

ABN 37 246 549 189

- 1.2 The modification application indicates that Casuarina Corporation owns 22 units, consisting of 20 studio apartments and 2 x 1 bedroom apartments. Whilst some of these units are contiguous, most are located in various locations around the Resort.
- 1.3 The modification application proposes that the use permitted by the consent be for "tourist accommodation **and permanent residential**" use with the permanent residential use limited to the 22 units nominated in the application.
- 1.4 The Consent provides for a use of tourist accommodation and occupancy periods are limited by condition G12 of the Consent.

2. Incompatibility with Approved Use

- 2.1 The existing permitted use of tourist accommodation for short term holiday use is not compatible with a permanent residential use. Holiday lettings generate significant noise, particularly during busy holiday periods. The use of the common open spaces, specifically the pool area during evenings by short term guests are likely to result in adverse impacts on the proposed long term residents and lead to conflict and complaints. This is contrary to good planning and will have adverse social impacts.
- 2.2 The definition of residential accommodation in the *Tweed Local Environment Plan 2014* specifically excludes tourist and visitor accommodation. Tourist and visitor accommodation is separately defined and relevantly means a building or place that provides temporary or short-term accommodation on a commercial basis.
- 2.3 The proposed modification if approved would result in a resort facility that has both residential and commercial elements within it and would undermine the purpose and intent of the Consent.
- 2.4 Further, while section 75W is different in its terms to section 4.55 of the EP&A Act, however in our view the change of use of units to another use is not substantially the same development as that which was approved and the Minister should not be satisfied that the development falls within the scope of the section (see *Barrick Australia Ltd v Williams* [2009] NSWCA 275 at [38]).
- 2.5 We note previous attempts to modify the consent in a similar manner have been refused. The somewhat haphazard change of use of particular units is not consistent with the objective of the EP&A Act to promote the orderly and economic development of land.
- 2.6 The Site also includes a restaurant with late opening hours, being open until 12am Wednesday-Sunday. The restaurant is an open alfresco style, and is partially located in the outside courtyard area. The viability of this business will be threatened if long-term residents make complaints about any disturbance caused by the commercial operation.

3. Apartment Design Guide Issues

Relevantly, a change to the use of units as permanent residences means that *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65)* and the *Apartment Design Guide 2015 (ADG)* will apply. The units are not suitable for residential use because of the following non-compliances with SEPP 65 and the ADG:

Communal Open Space

- 3.1 There is insufficient communal open space as required by the ADG. The Site provides 15% communal open space, which is 10% less than the minimum of 25% prescribed by the ADG (objective 3D).

Deep Soil Landscaping

- 3.2 There is limited deep soil landscaping on the site, with the majority of planting restricted to raised garden beds and planter boxes. The ADG defines deep soil zones as 'areas of soil not covered by buildings or structures within a development'. The applicant appears to have incorrectly based its calculations of the deep soil landscaped area on the raised garden beds and planter boxes.

Privacy

- 3.3 The Resort is designed to maximise views to the pool area, rather than ensuring privacy within the apartments. This means that the apartments located on the eastern wing look directly into the bedroom area of the apartments on the opposite facing western wing and vice versa. This is not in accordance with objective 3F of the ADG.
- 3.4 These privacy issues are exacerbated by the internal configuration of the apartments, as the bathrooms are open without any screening. Consequently, it is possible to look straight into the bathroom area of the studio apartments from the opposite wing of the Resort. Whilst there are blinds in the apartments, this reduces the amount of available light and ventilation.

Insufficient light

- 3.5 The existing built form and design of the development is inconsistent with the solar access requirements in the ADG. This means that 70% of living rooms do not receive a minimum of three hours of sunlight per day. The ADG contemplates that buildings should be adapted to both summer and winter light conditions, with shade more acceptable during the summer months. In the Action Sustainability Report submitted by the applicant, it shows that air temperatures below 16°C during winter months occur 53% of the time (paragraph 3.2.5). This is below the comfort range of 17-26 degrees (page 2 Action Sustainability Report).
- 3.6 Whilst the applicant has focused on the subtropical climate of the Site in its modification application, the cooler winter months still justify compliance with the solar access requirements as permanent occupancy will be year round. This is reflected in the *Tweed Shire Development Control Plan 2008* (Design Control 7), which takes into account appropriate design for the local climate and still requires a minimum of 3 hours sunlight on the winter solstice. The current configuration of the development maintains

shade year round for some apartments, and thus reduces their amenity for permanent residential accommodation.

Ventilation

- 3.7 Not all habitable rooms are naturally ventilated in accordance with objective 4B-3 of the ADG, which requires 60% of apartments to achieve minimum cross flow ventilation to be deemed compliant. In support of its application, the applicant has submitted the Action Sustainability Report (**Report**), which analyses cross-ventilation in the subject apartments. The Report uses Australian Standard AS 1668.2 2012 as a baseline for comparing the ventilation in the apartments, and calculates that an air change rate of 0.47 per hour is the minimum standard for the predicted occupancy rate. Although the Report noted that the yearly air change rate per hour on average exceeded the AS 1668.2 2012 baseline, there were significant periods of time where the air change rate was far below the baseline. For example, Apartment 28 has a minimum air change rate of 0.07 per hour. This indicates that the current design of the development is not appropriate for long term use.

Ceiling height

- 3.8 The ceiling height in the habitable rooms is 2.6m, which is less than the minimum 2.7m recommended in the ADG and will result in exacerbating substandard units and the impacts discussed above.

Car Parking

- 3.9 We query whether there is enough parking on Site. Permanent residents are likely to use more than one vehicle while tourists will not. It appears that the applicant has counted car parking spaces designed for the on site restaurant into their parking calculation.
- 3.10 The development does not cater for long term residents as it does not have car washing facilities on site.

Storage

- 3.11 The ADG recommends the provision of adequate storage in apartment design. The apartments on the Site have been designed without significant storage as this is not required for short term letting. The lack of storage will affect the amenity of the apartments and their viability for use by long term residents. Without sufficient storage, long-term residents may opt to use their car parking bays for storage, and park in visitor car spaces. This will affect the car parking arrangements across the Site.

Waste Management

- 3.12 The applicant has not provided sufficient information on whether the existing garbage and waste management services are appropriate and adapted for long term residential accommodation.

4. Economic justification

- 4.1 The change of use will adversely affect the economic use of the land by compromising the viability of our client's business (see section 1.3(c) EP&A Act). Changing the use of some units will affect the feel of the Resort. If a significant number of the apartments are occupied by permanent residents, the apartment complex will cease to be viewed as a holiday resort. This will impact the occupancy rate across the Resort as a whole. This may have a flow on social impact on employment within the Resort and the community more broadly, thereby decreasing local and regional job opportunities (see section 1.3(b) of EP&A Act).
- 4.2 We are instructed that the Economic Analysis prepared by Denwol Group, lodged in support of the application is ill conceived and seeks to justify a change of use of an existing building designed for another purpose on the basis of an increase in single households in the region. While there may be a need for apartment housing in the Tweed Local Government Area, this can be supplied by purpose built development that complies with SEPP 65 and the ADG.
- 4.3 The submission does not look at growth in business in the area which is a relevant factor in any analysis. Our client, who operates businesses of this kind across Australia, disputes the figures in the economic analysis.

5. Comparison with *The Owners SP76023 v Tweed Shire Council and BRK (NSW) Pty Ltd* ('The Owners Case')

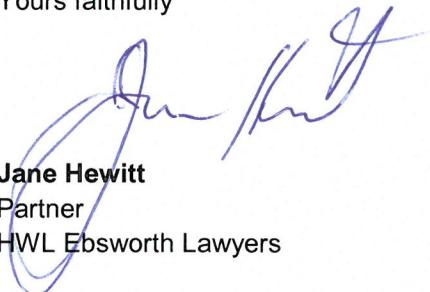
The applicant has submitted the above case in support of its application for modification. We consider that this case can be distinguished from the present development application on a number of key points and should not be relied on, namely:

- 5.1 The long term residential use of the units was limited to the period of February to October. During November to January the use of the units was limited to tourist use. This meant that there was less potential for conflict between simultaneous uses across the development.
- 5.2 The units in the Owners Case were not considered suitable for permanent residential use without modification. As a result, the consent contained two conditions to increase the amenity of the units:
- (a) The addition of skylights in the main living room for certain units; and
 - (b) The inclusion of at least 50% of the storage space requirement under the ADG for each of the units.

The applicant has not proposed to alter the existing units to increase their amenity for long term residential use. Accordingly, the above case is not a relevant precedent supporting the change of use.


On the basis of these issues, which are unresolved, the Department of Planning should refuse the application.

Yours faithfully



Jane Hewitt
Partner
HWL Ebsworth Lawyers

+61 2 9334 8639
jhewitt@hwle.com.au



Kat McVay
Solicitor
HWL Ebsworth Lawyers

+61 2 9334 8690
kmcvay@hwle.com.au