



SG/GK
14778
23 September 2015

Ms Carolyn McNally
The Secretary
Department of Planning and Environment
PO Box 375
SYDNEY NSW 2001

Attention: Simon Truong (Planner)

Dear Simon

**ADDITIONAL INFORMATION LETTER - MP 08_0224 S75W MOD 3
23-41 LINDFIELD AVENUE, LINDFIELD**

This letter has been prepared on behalf of Aqualand Lindfield Pty Ltd (Aqualand) in response to an additional information response from Ku-ring-gai Council received by email (via the Department of Planning and Environment (DPE)) on 14 September 2015.

It is noted that the additional submission by Council includes many of the same issues as were included in their submission dated 29 March 2015. All of these issues have been responded to as part of the Preferred Project and Response to Submissions Report (PPR/RtS) submitted in August 2015. As such, response has only been provided in relation to the items of shop top housing and 43-47 Lindfield Avenue, adjacent the site.

1.0 SHOP TOP HOUSING

Council has misunderstood the effect of s75W in so far as it authorises the Minister to (inter alia):

- approve a modification that is contrary to the objectives, zoning and other planning controls contained in a Local Environmental Plan; and
- approve a modification to an approval despite there being a prohibition contained in an Local Environmental Plan (in this case the permissible uses in the B2 Local Centres zone under *Ku-ring-gal Local Environmental Plan (Local Centres) 2012* (KLEP(LC))).

As stated in the legal advice provided with the PPR/RTS, the drafting of the statutory provisions indicates that the application of section 75R (of the EP&A Act) to section 75W is not displaced by clause 8O of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regs). Accordingly, since clause 8O does not apply to a modification pursuant to section 75W, the Minister may modify the Approval despite the fact that, assuming the modification results in the development including a residential flat building, the modification results in a use that would be prohibited by the KLEP(LC).

It is irrelevant that the KLEP(LC) identifies the site as being within the B2 Local Centres zone in which the only form of multi-unit residential accommodation that is permitted is 'shop top housing'. The Minister is not bound to abide by the B2 Local Centres zoning or the land use table applying to that zone in determining a s75W application. It is therefore irrelevant that the five apartments fronting Havilah Lane on the Ground Floor Plan do not constitute shop top housing. It is also irrelevant that the Council considers that the five apartments constitute a residential flat building. S75W empowers the Minister to approve the modified proposal for the reasons set out in the legal advice previously provided to the DPE.

The proponent does not consider that the inclusion of the five apartments now renders the project anything other than a mixed use development as approved. The development contains active frontages to Lindfield Avenue and Kochia Lane with retail tenancies and some 2,720m² of retail floor space. In context of the site and the proposal, this quantum of floor space is not a token amount. The amount of retail floor area has not been reduced from that approved under Modification 2.

In their submission Council have included reference to the case *Barrick Australia Ltd v Williams (2009) NSWCA 275*.

This case turned on whether the original judge erred in his conclusion that the proposed changes amounted to a “radical transformation of the terms of the existing development consent” and therefore fell outside the scope of s75W. The subject modification (Modification 3) is not a radical transformation of the original approval or of Modifications 1 or 2. The primary focus of the Court of Appeal proceedings appeal was the proper construction of the terms of s75W and particularly the meaning of “modification of approval”. In particular, the appellant challenged the finding of the primary judge that a proposal which involved a “radical transformation” of the project did not fall within the Minister’s power under s75W to modify the terms of an approval.

There were also issues of procedure in how the trial judge assessed the way s75W the application was dealt with. The original judge considered that the s75W request required such substantial changes as to take it outside the scope of s75W. The Court of Appeal found that if a request seeks something more than a modification, it is still open to the Minister to deal with it in the manner contemplated by the legislation. The original case (in the Land and Environment Court) concerned the Cowal gold mine, and the modification involved substantial changes to the volume of production, workforce, traffic movements and scale of mining. The circumstances are quite dissimilar to the Lindfield Modification.

The critical mechanism for approving Part 3A projects was the vesting of the power of approval in the Minister. That was deliberately accompanied by a degree of flexibility as to the circumstances in which the power of modification could be exercised. By contrast, under Part 4 of the EP&A Act, a consent authority (usually a local council) is empowered to modify a consent in quite limited circumstances. With the exception of minor errors, misdescriptions and miscalculations (see s 96(1)), modification by a consent authority under s96 (s96(1A) or s96(2)) requires it to be satisfied that the development to which the consent as modified relates is “substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all)”. This process is not the same for s75W. The Court of Appeal considered that it would erroneous to seek to impose by implication some similar constraint on the power of modification granted to the Minister under s 75W.

Moreover, the judges in the Court of Appeal considered that if a proponent makes a request that seeks something more than a “modification of approval” (on the proper construction of that expression), it is still open to the Director-General (Secretary) and the Minister to deal with the request in the manner contemplated by the legislation.

In respect to the subject modification (Mod 3), the proponent submits that the DPE and Minister are authorised to grant approval to the modification as requested and that the proposed changes are not a new or different project nor does it constitute a radical transformation of that which was previously approved under the original approval or the subsequent modifications.

The Court of Appeal decision in *Barrick v Williams* reaffirms the Minister’s authority to grant approval to the Lindfield Modification 3 and in so far as it overturned the *Williams v Minister for Planning* decision, the Court of Appeal finding is in the proponents favour.

MOD 3 is consistent with the objectives of the B2 Local Centres zone in that it:

- provides the opportunity for a range of retail uses to be located within the proposed development, which is in a location, highly accessible by public transport and other non-car modes of transport;
- provides residential accommodation within a location which is close to public transport, services and employment opportunities; and

- provides a mixed use development which integrates residential and retail uses.

The Council also expresses the view that the five apartments at ground level will be “substandard” and ought to be converted to retail or other non-residential use. The proponent submits that the five apartments will have good solar access as they are north facing, the awning above the Havilah Lane vehicle entry point and the solid upturn balconies will help to deflect any car noise, management controls are proposed to mitigate any noise from the loading dock and otherwise the outlook to Havilah Lane is one of a relatively quiet lane. Furthermore, these apartments achieve good levels of amenity given all:

- exceed the recommended unit size set out within the RFDC and ADG;
- achieves 2 hours of sunlight between 9am and 3pm on June 21;
- are provided with storage within the apartment and basement in accordance with the RFDC and ADG;
- have access to communal open space, BBQ facilities, and children’s playground; and
- are located in immediate proximity to services, retail, and transport hub (both by bus and rail).

Notwithstanding, the approval and modification has demonstrated appropriate levels of residential amenity will be achieved in the development as a whole.

Conversion of the units to retail or even office space as submitted by Council would not be practicable as it would necessitate a separate lift access from Havilah Lane (whereas the five apartments use the Tower B residential lifts) and/or a new passage around the supermarket floor area from the retail arcade off the Kochia Lane entry to provide access to the shops/offices.

Retail uses fronting Havilah Lane at ground level (in order to make the five apartments “shop top”) would result in unviable shops and cause amenity impacts on the residences opposite the site in Havilah Lane. The retail frontage should correctly be directed to Lindfield Avenue and Kochia Lane rather than Havilah Lane.

As demonstrated above, the proposed amendments do not fundamentally oppose the principles of the KLEP(LC) or intent of the mixed use zoning in this location. The overall development, including the modifications proposed, is aligned with the intentions of development intensification in the centre and delivers the intended mixed use character.

2.0 43-47 LINDFIELD AVENUE

Council’s submission is that the adjoining recently approved development at 43-47 Lindfield has addressed the relationship with the proponent’s project. This occurred after lengthy negotiations with the developers of that site and involved redesign of the proponent’s project under Mod 3 to address the visual and privacy interface. Council supported the adjoining development at 43-47 Lindfield Avenue even though it did not comply with the Rule of Thumb setback requirements for building separation.

3.0 CONCLUSION

We trust that this letter allows for the assessment of the application to be finalised, and determined. Should you have any queries about this matter, please do not hesitate to contact me on 9956 6962 or sgouge@jbaurban.com.au.

Yours faithfully



Stephen Gouge
Senior Planner