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Our ref: JZOS/AJWS/3433251

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Dear Travis

Proposed s.4.55 applications for modification at Moorebank Ave, Moorebank

We refer to your proposed s.4.55(2) modification applications in respect of State Significant Development Consent Nos. 5066 ('**SSD 5066**') and 7709 ('**SSD 7709**') in relation to Moorebank Precinct West ('**MPW**'), at Moorebank Avenue, Moorebank.

You have asked us to provide our legal opinion as to whether the proposed modifications could lawfully be approved by way of s.4.55(2) of the *Environmental Planning and Assessment Act 1979* ('**EPA Act**'). Specifically, you have asked us to consider whether the proposed modifications would still be '*substantially the same*' development as the development originally approved by SSD 5066 and SSD 7709.

Summary Advice

In our opinion, based on the material that we have been provided with, we consider that the proposed modifications are readily capable of being approved pursuant to s.4.55 of the *EPA Act*.

Whilst the proposed increase in building height from 21 metres to 45 metres across MPW is significant when considered in isolation, the character and purpose of the original development **as a whole** will remain unchanged (i.e. a 24/7 operational warehousing and distribution facility), as will the essential feature of the original development (i.e. achievement of a throughput volume of up to 500,000 TEUs).

The proposed changes to site layout and daily traffic movements are in our view, less significant and for similar reasons they do not materially alter the originally approved development.

Against that background, we consider that the proposed modifications would still be '*substantially the same*' development as the development originally approved by SSD 5066 and SSD 7709.

Background

In preparing this advice, we have understood the relevant facts to be as follows:

- On 3 June 2016, SSD 5066 was granted by the Minister for Planning for a Concept Proposal and Early Works (Stage 1) across MPW, which comprised of the following development particulars:
 - **Concept Proposal:** The Concept involves the use of the site as an intermodal facility, including a rail link to the Southern Sydney Freight Line, warehouse and distribution facilities, and associated works.

- Early Works (Stage 1): Involves the demolition of buildings, including services termination and diversion; rehabilitation of the excavation / earthmoving training area; remediation of contaminated land; removal of underground storage tanks; heritage impact remediation works; and the establishment of construction facilities and access, including site security.
- On 20 October 2019, modification of SSD 5066 (**'SSD 5066 MOD1'**) was granted by the Independent Planning Commission (**'IPC'**), which comprised of the following development particulars:
 - Importation of approximately 1,600,000 m3 of clean fill for bulk earthworks within the site;
 - Expansion of construction footprint to allow for Moorebank Avenue/Anzac Road intersection works;
 - Rearrangement of warehousing, freight village, internal roads and truck parking locations and layouts;
 - Additional onsite detention (**'OSD'**) basin near the norther boundary of the site and relocation to the western boundary and enlargement of the southern OSD basin;
 - Deletion of the port shuttle Import Export (**'IMEX'**) rail freight intermodal terminal and increase in the warehousing area;
 - Use of the interstate terminal for interstate, intrastate and port shuttle rail freight including one additional rail track;
 - Increase in building heights as a result of raising the site by up to 3.6m;
 - Reducing construction stages from four (excluding Stage 1 Early Works) with potentially only two future development applications;
 - Transfer of containers by heavy vehicles between the MPW warehouses and Moorebank Precinct East (**'MPE'**) rail terminal and between the MPE rail terminal and MPW warehouses;
 - Ability to subdivide the site as part of a future development application.
- On 11 November 2019, SSD 7709 was granted by the IPC for Stage 2 works at MPW and comprised of the following development particulars:
 - Construction and 24/7 operation of an Intermodal Terminal (**'IMT'**) facility;
 - Construction and 24/7 operation of a warehousing estate on the northern part of MPW servicing the IMT facility;
 - Intersection upgrades on Moorebank Avenue;
 - Construction and operation of on-site detention basins, bioretention / biofiltration systems and trunk stormwater drainage for the entire site;
 - Construction works and temporary ancillary facilities.
- Relevantly, with regard to SSD 5066, we note:
 - At Condition 7 of Schedule 2, concept approval was granted for interstate terminal container freight with a throughput of up to 500,000 twenty-foot equivalent units (**'TEUs'**) p/a if the combined movement of the container freight on the site does not exceed 1.05 million TEUs p/a;
 - At Condition 8 of Schedule 2, concept approval was granted for the IMEX terminal for the movement of container freight up to a throughput volume of up to 550,000 TEUs p/a;
 - At Condition 16 of Schedule 2, all future building heights on MPW are to be a maximum of 21 metres.
- Relevantly, with regard to SSD 5066 MOD1, we note:

- At Condition 7, Schedule 2 – as modified, concept approval was maintained for container throughput of up to 500,000 TEUs p/a (excluding IMEX freight) if the combined movement of the container freight on the Site does not exceed 1.05 million TEUs p/a;
- At Condition 8, Schedule 2 – as modified, concept approval was maintained for IMEX container freight up to a throughput volume of up to 550,000 TEUs p/a;
- At Condition 17A, Schedule 2 – as modified, the maximum GFAs for the following uses on MPW apply:
 - 300,000m² for the warehousing and distribution facilities; and
 - 800m² for the freight village;
- The IPC held SSD 5066 MOD1 to be consistent with the requirements of s.4.55(2) of the *EPA Act* (i.e. ‘*substantially the same*’ development) for the reasons provided by the NSW Department of Planning, Industry and Environment (‘**Department**’), which included:

“the application can be characterised as a modification, as the proposed changes to the approved Concept Proposal:

 - *would not significantly increase the overall environmental impacts of the project as approved (while recognising there would be an increase in temporary construction impacts due to fill importation and placement)*
 - *would involve only a small disturbance outside the already approved construction area for an intersection upgrade to provide access to the development and service the local road network*
 - *would not alter the purpose of the proposal for an IMT facility and associated warehouse estate and accordingly the proposed modification is substantially the same development as originally approved.”¹*
- Relevantly, with regard to SSD 7709, we note:
 - At Condition A1 of Part A, container freight throughput volume on the northern part of MPW must not exceed 500,000 TEUs p/a;
 - At Condition A16 of Part A, the maximum GFA for the following uses apply for the northern part of MPW:
 - 215,000m² for the warehousing and distribution facilities; and
 - 800m² for the freight village.
- The proposed modifications to SSD 5066 (‘**SSD 5066 MOD 2**’) include:
 - Reconfiguration of the MPW boundaries;
 - Amendment to the maximum building height established across MPW from approximately 21 metres up to and including 45 metres.
- The proposed modifications to SSD 7709 (‘**SSD 7709 MOD 1**’) include:
 - Amendment to the MPW boundaries, with respect to built form and site layout;
 - Amendment to the maximum building height established across MPW from approximately 21 metres up to and including 45 metres;
 - Construction and operation of 2 Warehouse and Distribution Facilities across MPW, including:
 - Ancillary hardstand,
 - Amenities,
 - Ancillary offices,

¹ Paragraphs 45 and 47, pages 9 and 10, Statement of reasons for decision re MPW Concept Proposal, prepared by the IPC dated 30 October 2019

- Associated car parking, and
 - Landscaping.
- The concept layout approved by SSD 5066 is identified by 'Figure 1.3 Project layout (at Full Build) on page 1-8 in the Moorebank Intermodal Terminal Response to Submissions Report, prepared by Parsons Brinckerhoff dated May 2015'. An extract of this plan is set out in **Figure 1** below:

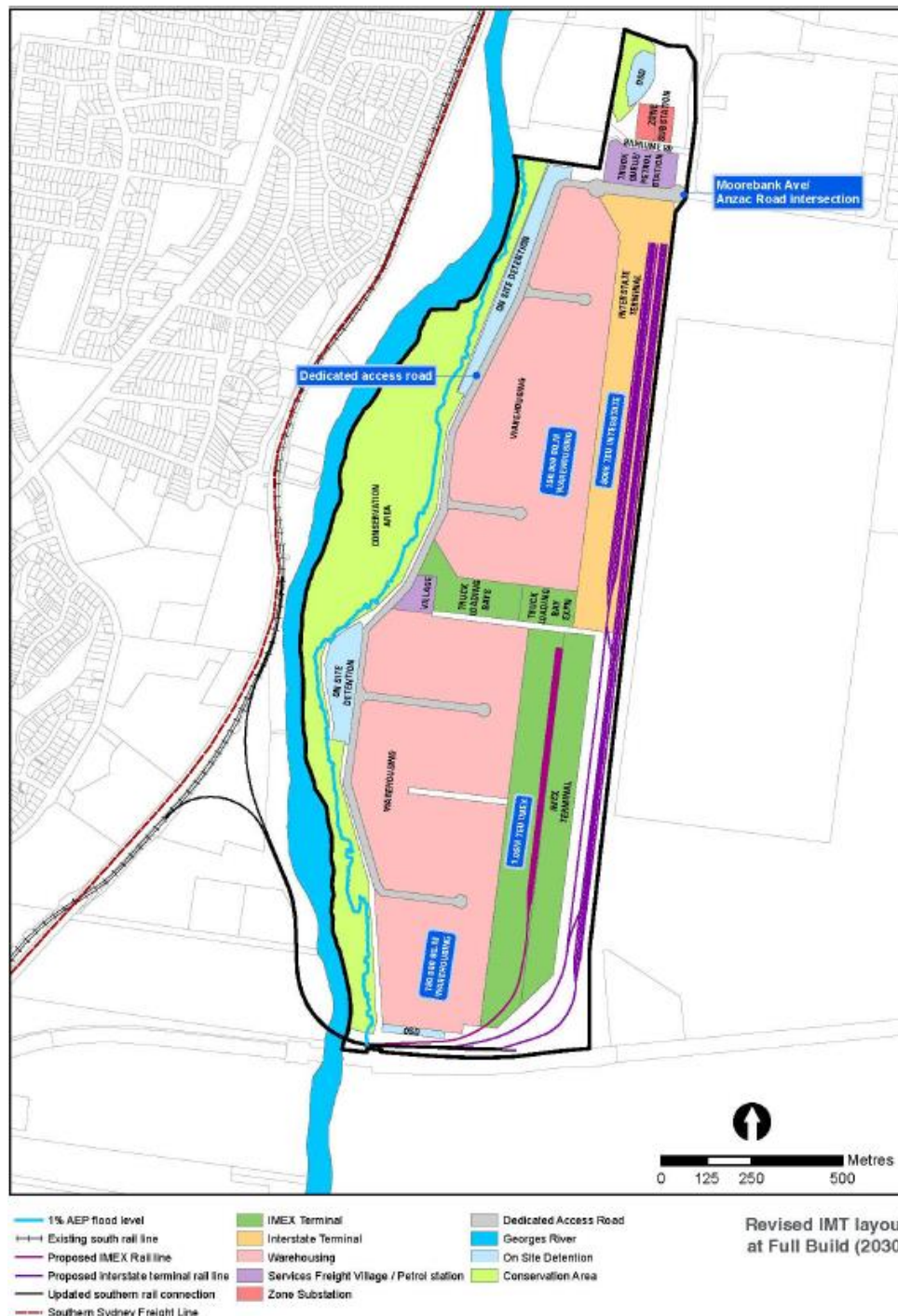


Figure 1: Figure 1.3 Project layout (at Full Build) on page 1-8 in the Moorebank Intermodal Terminal Response to Submissions Report, prepared by Parsons Brinckerhoff dated May 2015

- The site layout approved by SSD 7709 is contained in 'Drawing No. 115123_A_SSD_0012 (Rev K) – Proposed Stage 2 Site Plan, prepared by Reid Campbell dated 9 June 2017'. An extract of this plan is set out in **Figure 2** below:

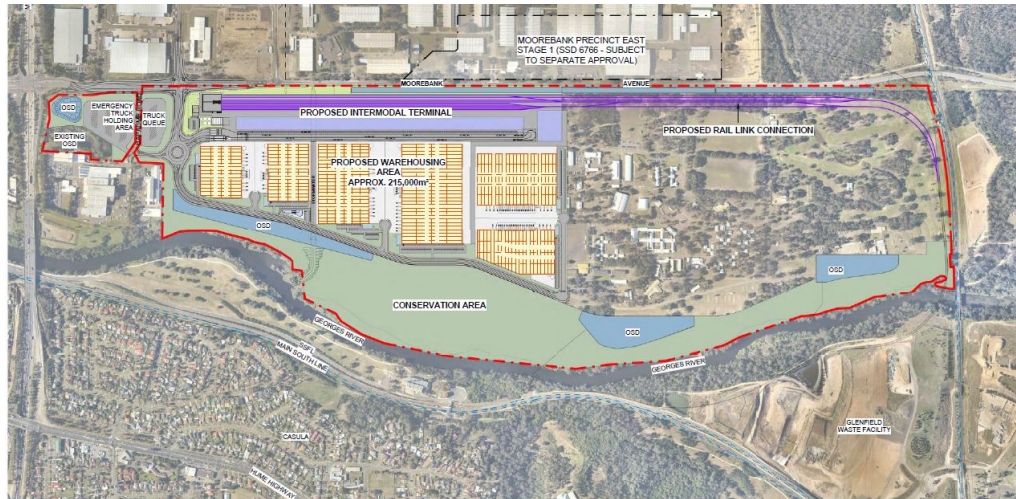


Figure 2: Drawing No. 115123_A_SSD_0012 (Rev K) – Proposed Stage 2 Site Plan, prepared by Reid Campbell dated 9 June 2017

- The layout approved by SSD 7709 is reproduced in '*Drawing No. JR-SK-A-A-9400 (Rev S3) – Precinct Plan, prepared by Bell Architecture dated 28 November 2019*'. An extract of this drawing is set out in **Figure 3** below:

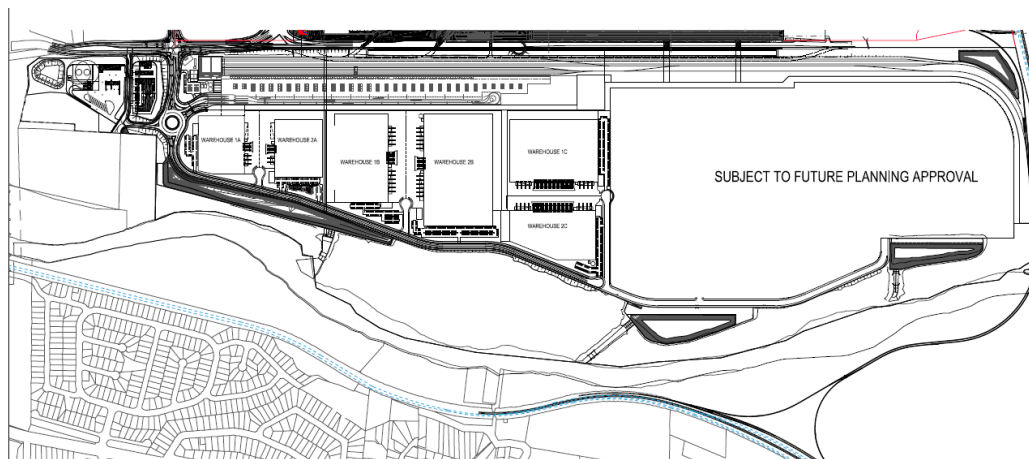


Figure 3: Drawing No. JR-SK-A-A-9400 (Rev S30 – Precinct Plan, prepared by Bell Architecture dated 28 November 2019

- The amended layout proposed to SSD 7709 is contained in '*Drawing No. JK-SK-A-A-9402 (Rev S3) – Precinct Modification Plan Proposed, prepared by Bell Architecture dated 28 November 2019*'. An extract of this drawing is set out in **Figure 4** below:

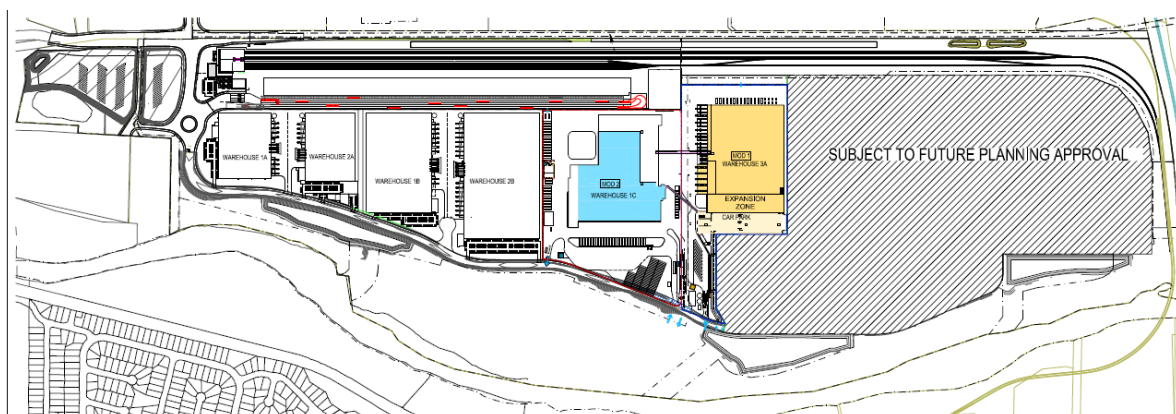


Figure 4: Drawing No. JK-SK-A-A-9402 (Rev S3) – Precinct Modification Plan Proposed, prepared by Bell Architecture dated 28 November 2019

- It is apparent from Figure 4 above that SSD 7709 MOD 1 proposes creation of a regional (Warehouse 1C) and national (Warehouse 3A) combined distribution centre located within the MPW.
- A comparison of GFA approved by SSD 7709 and as now proposed is contained in **Figure 5** below:

GFA SCHEDULE - MPW STAGE 2		
	APPROVED	PROPOSED
WAREHOUSE 1A	21,000m ²	21,000m ²
WAREHOUSE 2A	22,000m ²	20,600m ²
WAREHOUSE 1B	38,000m ²	39,500m ²
WAREHOUSE 2B	61,000m ²	57,958m ²
WAREHOUSE 1C	43,000m ²	33,721m ²
WAREHOUSE 2C	30,000m ²	DELETED
WAREHOUSE 3A	NOT APPLICABLE	42,221m ²
TOTAL	215,000m²	215,000m²

Figure 5: Drawing No. JK-SK-A-A-9401 (Rev S3) – Precinct Modification Plan, prepared by Bell Architecture dated 28 November 2019

- Finally, we are instructed to assume that the development of MPW pursuant to:
 - SSD 5066 would generate daily trips in the order of:
 - 4,855 light vehicle trips, and
 - 5,615 heavy vehicle trips²;
 - SSD 7709 would generate the following volume of daily traffic movements:
 - 2,670 light vehicle trips;
 - 1,458 heavy vehicle trips³;
 - The proposed modification application in relation to SSD 7709 would generate the following volume traffic movements in respect of Warehouse 1C and 3A, only:
 - 1,988 light vehicle trips⁴, and
 - 1,654 heavy vehicle trips⁵.
- Please let us know if any of the above assumptions are incorrect or otherwise do not apply to any of the recommendations we have made as our advice may change accordingly.

² Page 2, (Draft) Transport Assessment 'Janus Regional and National Distribution Facilities SSD 5066 MOD 2 & SSD 7709 MOD 1, Moorebank Intermodal Precinct West, prepared by Asongroup dated 6 February 2020

³ Page 3, *Ibid*

⁴ Page 20, *Ibid*

⁵ Page 24, *Ibid*

Substantive Advice

1. Section 4.55 Modification Applications

1.1 Section 4.55(2) of the *EPA Act* allows you to make a modification application in relation to a development consent. However, the power to modify a consent under section 4.55(2) of the *EPA Act* is conditional on the consent authority being satisfied that the proposed modified development is ‘*substantially the same*’ development as the originally approved development.

2. The proper approach to the ‘substantially the same’ test

2.1 The ‘substantially the same’ test is a threshold legal test that must be met before the modification can be dealt with on its merits.

2.2 In applying the ‘substantially the same’ test, the focus is on ‘the development’ as a whole. A comparison must be made between the development as modified and the development that was originally approved (*Scrap Realty v Botany Bay City Council* [2008] NSWLEC 333 at [16]).

2.3 Whether a modified development is ‘substantially the same’ is a factual finding but with a subjective element of opinion. As such, there is no ready legal answer to this question, as each application will depend upon its own set of plans/conditions and its own set of facts, but subject always to the opinion of the consent authority.

2.4 To pass the test, the result of the comparison must be a finding that the modified development is ‘**essentially**’ or ‘**materially**’ the same as the approved development (*Moto Developments (No 2) v North Sydney Council* [1999] NSWLEC 280 at [55]; *Vacik v Penrith City Council* [1992] NSWLEC 8).

2.5 Both a ‘**qualitative**’ and ‘**quantitative**’ assessment of the application is required. In that regard, the Courts have emphasised that a material change to **an essential feature** of a development may result in the development not being ‘substantially the same’ (*The Satellite Group (Ultimo) Pty Ltd v Sydney City Council* (unreported 2 October 1998). In that case, a proposed change of use at ground level only, for a 9 storey building, was held to be a ‘**radical transformation**’ of the originally approved development, even though the building envelope, size, shape and form would be identical. This is a classic example of a purely ‘qualitative’ change being too great to amount to a ‘modification’.

2.6 However, differences in qualitative and quantitative effects do not necessarily mean that the character of a development is changed in a **material respect** (*Davi Development v Leichardt Council* (2007) NSWLEC 106). Even if each of the changes to be made are significant in their own way, the proposed modified development may still be substantially the same **as a whole** (*Tyagrah Holdings v Byron Bay Shire Council* [2008] NSWLEC 1420 at [12]).

2.7 The qualitative comparison involves an appreciation of the developments **in its proper context**, which includes the circumstances in which the development was approved (*Moto Developments* at [55]-[56]).

2.8 In practical terms, these principles mean that the consent authority should:

- (a) Consider the numerical differences of the development (e.g. GFA, FSR, height etc.);
- (b) Consider the non-numerical differences (e.g. visual impact, traffic impacts, land uses etc.); and
- (c) Consider any changes relating to a material and essential feature of the originally development.

2.9 For clarity, it should be understood that even if the ‘substantially the same’ test is satisfied, a proposed modification is still then subject to a merit assessment by the consent authority.

3. Analysis of SSD 5066 MOD 2 and SSD 7709 MOD 1

3.1 We have detailed (above) the nature and scope of the original development consents and the proposed modifications.

3.2 As stated above, both a **quantitative** and **qualitative** assessment of SSD 5066 MOD 2 and SSD 7709 MOD 1 is required.

- 3.3 In the present circumstances, from a **quantitative** perspective:
- (a) Total warehouse GFA will remain unchanged (215,000m²);
 - (b) Total number of warehouses will remain unchanged (6);
 - (c) There will be a change with respect to built form and site layout, including:
 - (i) The creation of new Warehouse 1C (by combining warehouses 1C and 2C), new Warehouse 3A and associated car park and ancillary buildings;
 - (ii) An increase in the maximum building height from approximately 21 metres up to and including 45 metres;
 - (iii) Reconfiguration of the boundary of MPW (to enable construction on land for which development consent was not originally granted by SSD 7709);
 - (d) There will be a change with respect to traffic generation which will involve proposed Warehouses 1C and 3A only, generating:
 - (i) 40.1% of light vehicle daily traffic movements approved on MPW pursuant to SSD 5066;
 - (ii) 30% of heavy vehicle daily traffic movements approved on MPW pursuant to SSD 5066;
 - (iii) 74% of light vehicle daily traffic movements approved on MPW pursuant to SSD 7709;
 - (iv) 113% of heavy vehicle daily traffic movements approved on MPW pursuant to SSD 7709;
 - (e) Access to MPW will remain unchanged.
- 3.4 In our opinion, if one were to conduct a review of the before and after situations by looking at the particular site layout plans identified at Figures 3 and 4 above the proposed modifications do **not** materially alter the site layout of the approved development (*Gordon & Valich Pty Ltd v City of Sydney Council* [2007] NSWLEC 780).
- 3.5 In relation to the proposed reconfiguration of the MPW boundary, we note the power under s.4.55(2) of the *EPA Act* extends to permit the carrying out of development approved by the original consent on land **additional to** the land to which the consent as originally granted applied (*Scrap Realty Pty Ltd v Botany Bay City Council* [2008] NSWLEC 333 at [20]).
- 3.6 In relation to height, from a purely quantitative perspective an increase in building height from 21 metres to 45 metres is, when taken in isolation, significant (i.e. an increase of 214%). There is also no doubt that the proposed increase in height will significantly breach the applicable maximum building height standard contained in the *Liverpool Local Environmental Plan 2008* ('**LLEP 2008**'). The relevance of this to a modification application is discussed in greater detail below at paragraph 4. However, as stated above, even if changes to be made are significant in their own way, the proposed modified development **as a whole** may still be 'substantially the same'. In support of this position your consultants have conducted a visual assessment of the new proposed high bay Warehouses 1C and 3A and have concluded:
- (a) The significance of impact on the landscape is low/negligible due to the highly industrial nature of surrounding areas, future character of the precinct as an IMT facility with associated warehousing and introduction of native trees/landscape buffers compatible with the existing planting;
 - (b) Overall, the visual impacts assessed from multiple viewpoints surrounding the site result in impacts considered to be in the none/negligible to moderate ranges; and
 - (c) The proposed high bay component will constitute only a minor additional component of the total future terminal facility.⁶

⁶ (Draft) Visual Assessment Report – Moorebank JR (NTS2), prepared by Roberts Day dated January 2020 and (Draft) Visual Assessment Report – Moorebank JN (UNDC), prepared by Roberts Day dated January 2020

- 3.7 Having regard to the above assessment, we do **not** consider the significant increase in height a 'radical transformation' of the original consent. As stated above, the legal requirement is to assess the extent of modification to the development consent **as a whole**, rather than to focus on only one element of it in isolation.
- 3.8 Finally, whilst there is some change proposed in relation to light vehicle and heavy vehicle daily traffic movements when compared to SSD 7709, we understand there will be less overall daily traffic generation when compared to SSD 5066⁷ and therefore, in our opinion, this change is **not** a material change.
- 3.9 With regard to the **qualitative** assessment, on our review it is clear that:
- (a) The character and purpose of the original development is a 24/7 operational warehousing and distribution facility;
 - (b) The essential feature of the original development is to achieve a throughput volume of up to 500,000 TEUs; and
 - (c) Neither SSD 5066 MOD 2 or SSD 7709 MOD 1 materially change either of those features in a material respect.
- 3.10 Against that background, we consider that the proposed modifications (SSD 5066 MOD 2 and SSD 7709 MOD 1) are 'substantially the same' development as the development originally approved by SSD 5066 and SSD 7709.
- 3.11 We anticipate the Department will reach a similar a conclusion having regard to their earlier reasons provided in support of SSD 5066 MOD1 being 'substantially the same' development, which included that proposed modification "*would not alter the purpose of the proposal for an IMT facility and associated warehouse estate*".⁸
- 3.12 For completeness, we note that whilst the concept consent is in force (SSD 5066), the determination of any further development application in respect of MPW cannot be inconsistent with that consent, including the approved concept plans, unless the consent is modified (s.4.24(2) of the *EPA Act*). This is the reason why the Department has confirmed that 2 modification applications are required, being in relation to the approved concept plans in addition to the approved design plans.
- 4. Maximum building height LEP standard**
- 4.1 MPW is the subject of the *LLEP 2008*.
- 4.2 Pursuant to Clause 4.3 of the *LLEP 2008*, the maximum building height for MPW is 21m.
- 4.3 We assume Condition 16 at Schedule 2 of SSD 5066 was implemented to achieve consistency with Clause 4.3 of the *LLEP 2008*, that is, for all future building heights on MPW to be a maximum of 21 metres.
- 4.4 As you will be aware, a development application which seeks consent for a development that breaches a development standard in a Local Environmental Plan will ordinarily require:
- (a) A formal written request to Council pursuant to clause 4.6 of the applicable Local Environment Plan requesting the variation of the development standard; and
 - (b) Reasons justifying the variation before consent can be granted in accordance with a highly legalistic formula.
- 4.5 However, we note:
- (a) A modification application can be approved without a clause 4.6 variation request, notwithstanding the development would be in breach of an applicable development standard were it the subject of an original development application (*North Sydney Council v Michael Standley and Associates* (1998) 43 NSWLR 468, at [480]–[481];

⁷ Page 26, (Draft) Transport Assessment 'Janus Regional and National Distribution Facilities SSD 5066 MOD 2 & SSD 7709 MOD 1, Moorebank Intermodal Precinct West, prepared by Asongroup dated 6 February 2020

⁸ Paragraphs 45 and 47, pages 9 and 10, Statement of reasons for decision re MPW Concept Proposal, prepared by the IPC dated 30 October 2019

- (b) A modification application is legally distinct from a development application (*Peter Duffield and Associates Pty Ltd v Canada Bay City Council* (2002) 124 LGERA 349).
- 4.6 Against that background, the development standards in the *LLEP 2008* apply only to the determination of development applications and **not** to modification applications. Accordingly, a clause 4.6 request is **not** relevant or required for the determination of SSD 5066 MOD 2 or SSD 7709 MOD 1, noting the maximum building height across MPW is sought to be increased from approximately 21 metres up to and including 45 metres.
- 4.7 However, the above conclusion does not mean that a consent authority is at liberty to modify SSD 5066 and SSD 7709 in any way that it sees fit. The consent authority must still take into consideration the matters set out in s.4.15 of the *EPA Act*. For example, it must consider:
- (a) The likely social and economic impacts to the locality caused by the modified consent;
 - (b) Whether the site is suitable for the proposed modified development; and
 - (c) Whether the modification of the consent is in the public interest.
- 4.8 These are essential merit considerations that will ultimately not be governed by legal technicalities. Nonetheless, in considering these merit issues, the consent authority must **consider** the maximum building height standard, but will **not** be legally **bound** to apply it.
- 5. General merit considerations**
- 5.1 We note that in preparing this advice, we have had regard to:
- (a) (Draft) Statement of Environmental Effects – Section 4.55(2) Modification to SSD 5066 – Proposed Concept Proposal and Early Works for Intermodal Facility, prepared by Willow Tree Planning dated January 2020;
 - (b) (Draft) Statement of Environmental Effects – Section 4.55(2) Modification to SSD 7709 – Proposed Moorebank Intermodal Precinct West – Stage 2 MOD 1, prepared by Willow Tree Planning dated January 2020;
 - (c) (Draft) Visual Assessment Report – Moorebank JR (NTS2), prepared by Roberts Day dated January 2020;
 - (d) (Draft) Visual Assessment Report – Moorebank JN (UNDC), prepared by Roberts Day dated January 2020;
 - (e) (Draft) Transport Assessment ‘Janus Regional and National Distribution Facilities SSD 5066 MOD 2 & SSD 7709 MOD 1, Moorebank Intermodal Precinct West, prepared by Ason Group dated 6 February 2020.
- 5.2 Whilst we have not been asked to provide specific advice in respect of the merit considerations contained within those documents, we consider they are generally supportive of a favourable merit assessment in relation to SSD 5066 MOD 2 and SSD 7709 MOD 1.
- 5.3 We also note the following points which should be taken into consideration during any merit assessment by a consent authority:
- (a) The *LLEP 2008* maximum building height control is clearly outdated (i.e. 12 years since its introduction) and currently under review to align with the priorities outlined in the Greater Sydney Commission’s *Western City District Plan* for implementing the Greater Sydney Regional Plan, *A Metropolis of Three Cities*. Relevantly, the priorities of the *District Plan* include:
 - **Planning Priority W7** - Establishing the land use and transport structure to deliver a liveable productive and sustainable Western Parkland City
 - **Planning Priority W10** - Maximising freight and logistics opportunities and planning and managing industrial and urban services land
 - **Planning Priority W11** - Growing investment, business opportunities and jobs in strategic centres

- (b) There has been an undeniable change in commercial demand for MPW to be operated for its intended use since development consent was granted in relation to SSD 5066 and SSD 7709.

In conclusion, we consider that the proposed modifications would still be '*substantially the same*' development as the development originally approved by SSD 5066 and SSD 7709.

If you have any questions or require further information in relation to this advice, please do not hesitate to contact Anthony Whealy on +61 2 8035 7848 or James Oldknow of +614 8035 7875 or joldknow@millsoakley.com.au.

Yours sincerely



Anthony Whealy
Partner

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