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Our Ref: TM:OO:12835

18 August 2022

The General Manager
Mid-Western Regional Council
PO Box 156
MUDGEE NSW 2850

By Email: council@midwestern.nsw.gov.au

Dear Sir

Re: Submission re Application of Development Control Plan
Property: 99 Mount Pleasant Lane, Buckaroo NSW 2850

We act for Michael Ferris, who intends to lodge a development application (**DA**) for serviced apartments at the above property (**Property**).

We write with a submission in support of the foreshadowed development application.

Summary of submission

We respectfully submit that:

1. The clauses within 6.4 of the *Mid-Western Regional Development Control Plan 2013* (**MRDCP**) that purport to prevent serviced apartments being carried out on the Property are of no effect.

2. Even if that position were to be incorrect, the clauses would be capable of variation.

3. Additionally, Council must apply 4.15(3A)(b) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**), which provides that if a development control plan sets standards, a consent authority "*is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development*".

Background

We are instructed that Council attended a pre-lodgement development application meeting with our client on 20 October 2021 at which various defined uses were considered including "*eco-tourist facilities"*, "*farm-stay accommodation*" and "*camping grounds*". The minutes of that meeting provide as follows in respect of "*farm stay accommodation*" (our emphasis):

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…

- *The DCP requires that the property have a dwelling entitlement. A dwelling entitlement has not been established for this property. A variation to this requirement will need to be reported to Council.*

…

- *The DCP requires that the property have a dwelling entitlement. A dwelling entitlement has not been established for this property. The applicant asked if a DCP variation would be supported. <u>There is no precedence [sic], but it is considered that a DCP variation from this requirement will not be supported.</u>*

We are instructed to write to Council on our client's behalf to formally put forward our position on the comments set out in those minutes (in so far as they relate to tourist and visitor accommodation generally) and also the application of the MRDCP to the proposed development application for serviced apartments.

Zoning and Planning Controls

Local Environmental Plan

The Property is zoned RU4 Primary Production Small Lots under the *Mid-Western Regional Local Environmental Plan 2012* (**MRLEP**).

The MRLEP defines serviced apartments as follows:

> ***serviced apartment*** *means a building (or part of a building) providing self-contained accommodation to tourists or visitors on a commercial basis and that is regularly serviced or cleaned by the owner or manager of the building or part of the building or the owner's or manager's agents.*

The MRLEP defines tourist and visitor accommodation as follows:

> ***tourist and visitor accommodation*** *means a building or place that provides temporary or short-term accommodation on a commercial basis, and includes any of the following -*
>
> *…*
>
> *(e) serviced apartments,*
>
> *…*

The Land Use Table in the MRLEP for the RU4 zone lists "*dwelling houses*" as permissible with consent. Use for the purposes of "*serviced apartments*" is also permissible with consent in circumstances where it fits within the category of "*any other development not specified in item 2 or 4*" and neither "*serviced apartments"* or "*tourist and visitor accommodation*" are specified in item 2 or 4.

Clause 4.2A(3) of the MRLEP then sets out the controls that regulate dwelling entitlements in the RU4 zone. For the sake of brevity, we have not extracted that

sub-clause within this submission, however we note that it includes a requirement that the lot must be at least the minimum lot size (clause 4.2A(3)(a)).

Development Control Plan

Notwithstanding the permissibility of "*serviced apartments*" and "*tourist and visitor accommodation*", clause 6.4 of MRDCP provides as follows with respect to tourist and visitor accommodation (our emphasis):

> ***Location*** *(a) Must comply with the MLS map or demonstrate compliance with Clause 4.2A of the LEP 2012* [hereinafter referred to as **Clause (a)**].
>
> *(b) All tourist and visitor accommodation has a residential component and therefore Council will not consider the establishment of any tourist and visitor accommodation on land on which a single dwelling is not permissible in the LEP 2012* [hereinafter referred to as **Clause (b)**].

Submission

We respectfully submit that clause 6.4 of the MRDCP does not apply to the DA for the following reasons.

1. Clause (b) has no application to the Property

Clause (b) has no application to the Property. Clause (b) only applies to lots in which a single dwelling is "not permissible". As set out above, "*dwelling houses*" are permissible on the Property under the Land Use Table.

Clause 4.2A(3) does not change that position because clause 4.2A(3) is a development standard and not a prohibition. The provisions of clause 4.2A(3)(a) are directed to area, which is an attribute specifically included in the definition of "*development standard*" under the EPA Act. That position is supported by the decision of the Land & Environment Court in *Plannex Environmental Planning v Wingecarribee Shire Council* [2011] NSWLEC 1236. Although a different LEP was considered in that case, its provisions and the associated reasoning are analogous to clause 4.2A(3) of the MRLEP.

2. In any event, Clause (b) has no legal effect and cannot be applied

Even if we are incorrect in our interpretation above, and clause 4.2A(3) is a prohibition rather than a development standard, Clause (b) has no effect.

The only available interpretation of Clause (b) in those circumstances would be that it purports to prohibit "*tourist and visitor accommodation*" at any location where "*dwelling houses*" are also "*not permissible*". The terms "*will not consider*" could only be interpreted to mean the purported prohibition of "*tourist and visitor accommodation*" in this context.

Section 3.42(1)(b) of the EPA Act (formerly section 74BA(1)(b)) provides that one of the principal purposes of a development control plan is to "*facilitate development that is permissible under any [environmental planning instrument that applies to the*

development]". It is implicit from section 3.42(1) of the EPA Act that DCPs cannot prohibit types of development because any such prohibition would not accord with the purpose of "*facilitating*" permissible development. We submit on that basis that the coming into force of Clause (b) was ultra vires because the purported prohibition is not reasonably capable of reference to powers under the EPA Act given to Council to prepare the MRDCP. As Council would be aware, it is not generally the role of a DCP to identify development as permissible or prohibited, and that is reflected in the EPA Act provisions empowering a DCP to be made.

Even if we are incorrect in the position regarding Clause (b) being ultra vires, then Clause (b) cannot have any legal effect, by operation of section 3.43(5) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**), which provides (our emphasis):

> *(5) A provision of a development control plan (whenever made) has no effect to the extent that –*
>
> *(a) it is the same or substantially the same as a provision of an environmental planning instrument applying to the same land, or*
> *(b) <u>it is inconsistent or incompatible with</u> a provision of any such instrument.*

The question arises as to whether, for the purposes of section 3.43(5) of the EPA Act, Clause (b) is "*inconsistent or incompatible with*" the Land Use Table of the MRLEP. In that regard, the words "*inconsistent or incompatible*" adopt their ordinary and natural meaning (*Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWLEC 459).

Based on the natural and ordinary meaning, clause (b) is clearly inconsistent or incompatible with the Land Use Table in MRLEP because it purports to prohibit uses which are permissible in the MRLEP. The competing clauses are incompatible.

It follows that by operation of section 3.43(5), Clause 2 "*has no effect*" and cannot be applied by Council to our client's proposed development application.

3. Clause (a) is a purported prohibition and has no legal effect

The use of the word "must" in Clause (a) in effect purports to impose a requirement on our client's proposed development application to comply with the MLS map or demonstrate compliance with clause 4.2A of the MRLEP. There does not appear to be any provision in the MRDCP that allows a departure from this standard, and this is consistent with Council's comments in the pre DA meeting notes which maintain that there is no precedent to any variation to the requirement, and any such variation will not be supported.

We respectfully submit that in those circumstances, for the reasons set out above, Clause (a) is ultra vires, because it purports to prohibit a use that is permissible under the Land Use Table for MRLEP.

Even if we are incorrect in that position, clause (a) is clearly incompatible or inconsistent with the Land Use Table in the MRLEP, because it in effect seeks to prohibit any "*tourist and visitor accommodation*" in locations where such a use is permissible under MRLEP.

Consequently, by operation of section 3.43(5), Clause (a) "*has no effect*" and cannot be applied by Council to our client's proposed development application.

4. Even if Clause (a) is not a purported prohibition, it has no legal effect

Even if we are incorrect in our interpretation of Clause (a), such that it is a DCP standard capable of variation, and the use of the word "***must"*** does not prevent any such variation, we maintain that Clause 3(a) has no effect, because the clause remains "*inconsistent*" with MRLEP for the purposes of section 3.43(5) of the EPA Act.

In *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWLEC 459 the Court considered section 74C(5)(b) of the EPA Act, which is relevantly in comparable terms to section 3.43(5) of the EPA Act. Biscoe J said at 94 (our emphasis):

> *…In my opinion, the term "inconsistent" in this context is to be given its ordinary and natural meaning: Coffs Harbour Environment Centre Inc v Minister for Planning & Another (1994) 84 LGERA 324 (CA) at 331, approved in Castle Constructions Pty Ltd v North Sydney Council [2007] NSWCA 164 at [41], [107]. In Coffs Harbour at 331, Kirby P illuminated the ordinary and natural meaning of inconsistency as follows:*
>
> > *Here the dispute concerns, to the extent of any inconsistency, which of at least two laws enacted by or made under the same legislature is to prevail. The resolution of this dispute requires only that the word inconsistency be given its ordinary and natural meaning without the gloss which has necessarily developed around the meaning of the word in a constitutional setting. Upon that basis, there will be an inconsistency if, in the provisions of one environmental planning instrument, there is want of consistency or congruity ; lack of accordance or harmony or incompatibility, contrariety, or opposition with another environmental planning instrument.*

Having regard to that definition, clause (a) is inconsistent with Clause 4.2A of the MRLEP. We respectfully submit that clause 4.2A of MRLEP is intended to be an exhaustive code or exclusive statement (see *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWCA 164 Tobias JA (Bell J agreeing)) and only imposes development standards on "***dwelling houses"*** and "*dual occupancies*" whereas Clause (a) of the MRDCP seeks to extend the imposition of those standards to a much broader range of uses encompassed within the definition of "*tourist and visitor accommodation*". Having regard to the context, the minimum lot size control is clearly a control intended to be regulated exhaustively by the LEP. We respectfully submit that if Council wanted to apply the provisions of Clause 4.2A to "*tourist and visitor accommodation*" then it would have needed to do so in the MRLEP. Otherwise, to adopt the terms used in the authorities above, there is "*a want of consistency or congruity*" and a "*lack of accordance or harmony*" because the MRDCP purports to extend the application of clause 4.2A beyond that which is covered in the exhaustive provisions within the LEP.

Again, the consequence of the above is that, by operation of clause 3.43(5) of the EPA Act, Clause (a) has no effect.

5. Even if Clause 6.4 of MRDCP does apply, it is capable of variation

In light of the above, Clause (a) and Clause (b) have no legal effect. Even if Council were not to accept that position, Council has no reasonable grounds to maintain that clause 6.4 is incapable of variation.

For the reasons set out above, Clause (b) clearly has no effect. Relying on Clause (a) as a prohibition would also mean that Clause (a) has no effect. The only way that Council could potentially seek to invoke Clause (a) (a path that we do not accept is lawful) would be to accept that Clause (a) is capable of variation. According to the minutes, Council has not done so. It has maintained an inflexible approach to the provisions. Without considering the development application, and town planning submissions in support of the development application, the minutes state that there is no "*precedent*" and a variation to the requirement "*will not be supported*". Council's comments are in effect continuing to treat Clause (a) and Clause (b) as a prohibition.

Any consideration of a variation to clause 6.4 of MRDCP needs to be considered on the merits, and subject to any variation advanced in the statement of environmental effects. It is unlawful for Council to simply dismiss any proposal without such consideration.

Additionally, such an approach does not take into consideration the requirements of section 4.15(3A)(b) of the EPA Act, which provides that if a development control plan sets standards, a consent authority "*is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development*".

We thank Council for its consideration of our client's submission.

[redacted]