



26 October 2015

Mr Paul Lemm
Development Services Manager
Penrith City Council
P O Box 60
Penrith, NSW, 2751

Dear Paul

RE: Legal advice regarding DA13/1402 – Use of Site as Function Centre for no more than 14 days in Six Month Period

Following receipt of letters from Council on 19 March, 10 April and July 2015 regarding the alleged holding of functions without any approval, we have sought advice on the matter. Please see attached letter from Lindsay Taylor Lawyers. Their opinion is that we are not committing a breach of the EPA Act by continuing to conduct functions over no more than 14 days within any 6 month period. Their advice indicates the development rights of the consent have not expired and may be carried out for 14 days within a 6 month period, and when one 6 month period ends a new 6 month period, and a new 14 day use right commences.

We understand Council has expressed a preference for a more permanent solution. Ultimately this is our aim as we see it as integral to the vision we have always expressed in relation to establishing a sustainable, working heritage model for the property that also facilitates opening it up to the wider community. However, such an application would involve a lengthy process of preparing a submission and progressing it through Council and Office of Environment & Heritage approval processes. In the interim, the attached advice indicates the development rights of the consent allows us to host a limited number of functions.

I look forward to your reply regarding the attached advice received on the interpretation of the Consent.

Yours sincerely

Brenda Tripp
CEO
Fernhill Estate

Confidential

15 October 2015

Our ref: TRIP15001

Your ref:

The General Manager
Penrith City Council
PO Box 60
PENRITH NSW 2751

Attention: Jessie Soster

By Email

Dear General Manager,

**Application of DA13/1402
Temporary Use of Premises as Function Centre
Fernhill Estate Pty Limited (S. Tripp), 1041-1117 Mulgoa Road, Mulgoa**

Introduction

- 1 I act for Fernhill Estate Pty Limited (**Fernhill**), registered proprietor of land at 1041-1117 Mulgoa Road, Mulgoa (**Land**).
- 2 On 24 March 2014 Council granted a development consent for the Land for 'Use of Site as Function Centre for not more than 14 days in Six Month Period' (**Consent**).
- 3 The Notice of Determination identifies two relevant dates:
 - 3.1 the date from which the consent operates: 11 April 2014; and
 - 3.2 date that the consent expires: 11 April 2016.
- 4 The Consent states at Condition 1 that:

This consent permits the use of the existing and temporary buildings for a Function Centre for not more than 14 days in a six month period. Any future use of the site as a Function Centre would require a separate application for development approval, demonstrating compliance with all conditions of this consent and must be lodged, and approval obtained, prior to operation.
- 5 On 19 March 2015, Paul Lemm, an officer of Council, issued a letter to my client. The letter states:

It is Councils [sic] position that future events that are not one off private events for residents or owners of the property but for friends, acquaintances or affiliates would require development approval. Should Council become

aware that such events are being undertaken from the property whether for financial gain or not Council, [sic] will pursue the necessary compliance action for not obtaining the appropriate approvals beforehand.

- 6 On 10 April 2015, Jessie Soster, an officer of Council, issued a letter to my client. The letter states relevantly:

As you are aware in April 2014 consent from Council was granted for the use of the premises as a 'Function Centre' for no more than 14 days in a six (6) month period. This approval expired in October, 2014.

- 7 On 21 August 2015 an email was sent from Ms Soster, to John Veitch, an associate of my client, responsible for the management and operation of the Land.

- 8 In her email, Ms Soster states:

In April 2014 consent from Council was granted for the use of the premises as a 'Function Centre' for no more than 14 days within a six (6) month period. This approval expired in October 2014.

All functions after this date are unauthorised and Council is troubled that functions continue to occur.

- 9 Council subsequently wrote to my client requesting answers to questions which were posed in a fourteen (14) page document and to which my client submitted a response.

- 10 The responses given by my client are of no consequence to the proper legal construction of the use rights granted by the Consent.

Proper construction of the Consent

Lapsing of consent

- 11 The date of 11 April 2016 noted on the Notice of Determination, referred to as the 'Date that the consent expires', is the 'lapsing date', pursuant to section 95 of the *Environmental Planning and Assessment Act 1979 (EPA Act)*.

- 12 This is confirmed by the wording below the relevant dates, which provides: '*Please note that this consent will lapse on the expiry date unless the development has commenced in that time*'.

- 13 As the use of the Land pursuant to the Consent has actually commenced, the Consent is prevented from lapsing and the 11 April 2016 date is irrelevant.

Does the Consent limit the operation of the use to a specific time frame?

- 14 On the face of the Consent, there are no express terms which would limit its operation to only one fixed 6-month period.

- 15 Condition 1 of the Consent contains two (2) sentences:

15.1 That the consent is granted for the use to be carried out no more than 14 days in a 6-month period; and

15.2 Any future use of the 'site' as a Function Centre would require a separate application for development approval.

- 16 The second sentence is a statement of fact and does not limit the operation of the Consent. It is uncontroversial that a development application would be required for any future use of the Land as a Function Centre, outside the scope of the Consent, but not for a use that falls *within* the scope of the Consent.

- 17 The scope of the Consent is defined by the critical phrase in Condition 1, which states: '*...for not more than 14 days in a 6 month period*'.

- 18 The question to be considered is whether at the expiry of the first 6-month period, the Consent ceases to operate, or a new 6-month period commences, bringing with it a new entitlement to 14 days of use.
- 19 The answer must be in the express terms of the wording, having regard to its context and objective meaning, and without an eye to '*frustrate it; to oil its wheels ... put a spanner in its works nor even grit in its oil*' (see *Reysson Pty Ltd v Roads and Maritime Services* [2012] NSWLEC 17 at [21] (**Reysson**)).
- 20 Taking this approach, the only conclusion can be that the development rights have not expired. The use may be carried out for 14 days within a 6-month period. When one 6-month period ends and a new 6-month period begins, a new 14 day use right commences.
- 21 There is nothing about the wording of the Consent that suggests that the consent will cease to operate at a particular point. If that were the intention of Council, express words could have been included to that effect.
- 22 Additional words would need to be read into the Consent in order to reach the same conclusion as Council.
- 23 The fact that the use continues past the first 6 month period does not affect its 'temporary' character. The effect of the Consent is to create a temporary use of land limited to 14 days every 6 months; as opposed to the permanent, unrestricted use of the structures for the purpose of a Function Centre, 365 days a year.
- 24 It is not legally correct to suggest that a recurring temporary use becomes a permanent use.
- 25 In the absence of a definition of 'temporary' in the LEP and the EPA Act, one must look to the Macquarie Dictionary (**Dictionary**), which has been described by the Court of Appeal as the most authoritative Australian dictionary (see *House of Peace Pty Limited v Bankstown City Council* (2000) 48 NSWLR 498 at [33]).
- 26 The Dictionary defines 'temporary' to mean '*Lasting, existing, serving or effective for a time only; not permanent*'. The Consent does limit the use to a particular time only – 14 days within a 6-month period. The definition does not necessitate that something which is 'temporary' must come to a conclusion – only that it operates for a limited time. Accordingly, the use may be temporary, even if it is recurring.
- 27 This interpretation is consistent with the established principles of statutory construction articulated in *Reysson* and further set out in *Lake Macquarie City Council v Australian Native Landscapes Pty Ltd* (No2) [2015] NSWLEC 114, in that it:
 - 27.1 draws on the plain meaning of the terms in the Consent, without leading to an absurd, repugnant or inconsistent outcome;
 - 27.2 is consistent with the principle that a consent runs with the land (i.e. is not fixed to a single person for a single time);
 - 27.3 draws on and is consistent with all relevant documents that may be relied on to lend meaning to the terms of the Consent;
 - 27.4 produces a practical result;
 - 27.5 avoids uncertainty; and
 - 27.6 is consistent with the remaining conditions and wording of the Consent.
- 28 Notwithstanding my position in this regard, even if the Court found that the terms of the Consent were considered to be unclear as to the expiration of the development rights, they would be nonetheless construed in favour of my client, as the Consent holder.

The way forward

- 29 My client is not committing a breach of the EPA Act by continuing to conduct functions over no more than 14 days within any 6 month period.
- 30 My client seeks confirmation from Council that it shares my view on the interpretation of the Consent.
- 31 If Council holds a contrary view, I invite it to present that view for my client to consider.
- 32 I put Council on notice that my client reserves its right to approach the Land and Environment Court of NSW seeking a declaration pursuant to section 20(2)(c) of the *Land and Environment Court Act 1979*, that the development rights under the Consent have not expired.
- 33 If it does so, this letter will be produced in respect of its claim for costs.

Yours Sincerely,



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