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LAWYERS

20 May 2025

The General Manager
Northern Beaches Council

Dear General Manager

**RFI 17 APRIL 2025**
**1 NARRABEEN PARK PARADE, NORTH NARRABEEN**
**Our ref AWK:250275**
**Your ref DA2025/0181/Kye Miles**

We act for Olga Arslan with respect to development application DA2025/0181 for 1 Narrabeen Park Parade, North Narrabeen. We refer to Council's Request for Further Information dated 17 April 2025. The first two points in that letter raise legal questions and we provide this letter in response.

## 1. Existing Use Rights

> *The proposal involves alterations and additions to an existing restaurant/café (food and drink premises). However, food and drink premises are a prohibited land use within the R2 Low Density Residential zone.*
>
> *Insufficient evidence has been provided to confirm that the use qualifies as an 'existing use' under the Environmental Planning and Assessment Act 1979. In this regard, the onus is always on the applicant to demonstrate that the use has formal existing use rights. Additionally, the Statement of Environmental Effects (SEE) does not address the relevant planning principle for existing use rights, as established in Fodor Investments v Hornsby Shire Council [2005] NSWLEC 71.*
>
> *Further information is therefore required to demonstrate that existing use rights apply to the subject site, and to explain how the proposal aligns with the principles set out in Fodor Investments.*

The proposal includes food and drink premises at ground floor and use for the purposes of food and drink premises is prohibited in the R2 low density residential zone under *Pittwater Local Environmental Plan 2014*. The application relies on existing use rights for the food and drink premises.

Under section 4.65 of the *Environmental Planning and Assessment Act 1979,* existing use means:

> *(a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for this Division, have the effect of prohibiting that use, and*
>
> *(b) the use of a building, work or land—*
>
> > *(i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and*
> >
> > *(ii) that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse.*

We do not understand there to be any dispute that the building on the site is currently used for food and drink premises and has been used for some form of commercial premises since its construction in circa 1940.

Food and drink premises have been prohibited in the R2 low density residential zone at all relevant times since the commencement of *Pittwater LEP 2014*. On the assumption that the site was zoned 2(a) residential under *Pittwater Local Environmental Plan 1993*, commercial premises were prohibited since at least June 2001 prior to which the LEP is unavailable on the NSW Legislation website.

For existing use rights to apply the use must have been commenced lawfully. That means, upon the construction of the building in c.1940 planning approval was obtained or not required. We have no evidence in this regard.

We are instructed that:

1. Building Application BA1220/73 was approved by Council on 4 September 1973 for renovations to the interior of the existing shop;

2. Development Application DA 87/200 was approved by Council on 17 June 1987 for change of use from an existing shop (milk bar) with attached dwelling to a refreshment room (restaurant) with attached dwelling and detached garage;

3. Building application BA 1038/93 was approved by Council on 23 November 1993 for the erection of additions, including double garage at the rear of site;

4. Development application DA 2019/1478 was approved by Council on 4 November 2020 for alterations and additions to a restaurant, including operational changes relating to trading hours and seating capacity.

In the time available since we have been briefed, we have not been able to determine whether the use was originally commenced with or without planning permission and the date upon which the use became prohibited and therefore existing use rights accrued. In our view that is unnecessary as Council has granted several approvals for non-conforming uses in more recent years and so the administrative law principle of the presumption of regularity applies.

As stated by Griffith CJ in *McLean Bros & Rigg v Grice* (1906) 4 CLR 835 at [850], the presumption of regularity applies where "*… an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act*".

The presumption of regularity has been applied with respect to the concept of existing use rights under the *Environmental Planning and Assessment Act 1979*.

In *Australian Posters v Leichardt Council* (2000) 109 LGERA 343, Council had granted three consents in respect of a site on the "acknowledged basis" that the land enjoyed the benefit of existing use rights. In the absence of complete documentation to demonstrate the existing use rights, Bignold J applied the presumption of regularity and stated:

> *In the present case, there is nothing in the evidence that could operate to displace or rebut that presumption and there is a ready explanation for the absence of direct evidence, namely the Council has not obtained, or searched the relevant file pertaining to the appeal site held by the Council when it was the relevant consent authority for determining any development application made in respect of the appeal site.*

In *Dosan Pty Ltd v Rockdale City Council* (2001) 117 LGERA 363, Talbot J commented on the application of the presumption of regularity as follows:

> *I would limit the application of the presumption of regularity as found in Australian Posters and its predecessor cases to closely analogous situations. That is, to cases where there is no direct evidence of a consent having been granted and a public official of public authority has subsequently done an act or exercised a power which depended for its validity upon a prior consent having been granted.*

Those are the circumstances which apply here. Four development consents have been granted since the construction of the building. At least DA 2019/1478 was granted for a non-conforming use. Although there is no evidence that the use was lawfully commenced, the presumption of regularity would apply given Council has subsequently exercised a power which depended for its validity upon that use originally having been lawfully commenced.

Should Council remain concerned with respect to the existing use rights for the food and drink premises, our client would request additional time to enable a complete search of Council's files.

The matters for consideration under the planning principle in *Fodor Investments v Hornsby Shire Council [2005] NSWLEC 71* are issues which go to built for rather than legal considerations. As stated in paragraph [17]:

> *Four questions usually arise in the assessment of existing use rights developments, namely:*
> *· How do the bulk and scale (as expressed by height, floor space ratio and setbacks) of the proposal relate to what is permissible on surrounding sites?...*
> *· What is the relevance of the building in which the existing takes place?...*
> *· What are the impacts on adjoining land?...*
> *· What is the internal amenity?...*

Those are questions which should be can be readily addressed by qualified town planners.

**2. Permissibility**

> *The proposed development seeks consent for the construction of a dwelling house attached to the existing restaurant/café. The dwelling is proposed to be located above the back-of-house service areas and partially above the kitchen of the restaurant/café. In this regard, the proposal is classified as a "shop top housing" development.*
>
> *Shop top housing is a prohibited land use within the R2 Low Density Residential zone. As outlined in Point 1, insufficient information has been provided to demonstrate the permissibility of the proposed development.*

Shop top housing is an innominate prohibited use in the R2 zone. Use for a dwelling house is expressly permitted with consent.

We are of the view that Council's concern regarding permissibility of shop top housing is not an impediment to the grant of consent for three reasons:

1. The dwelling does not meet the definition of shop-top housing as part of it is located on ground floor of the building;

2. Even if the dwelling did meet the definition of shop-top housing, it also meets the definition of a dwelling house which is expressly permitted with consent and takes precedence over an innominate prohibited use;

3. The proposal could be simply amended so that part of the dwelling is located on ground floor such that it clearly would not meet the definition of shop top housing.

As defined under *Pittwater LEP 2014:*

> ***shop top housing*** *means one or more dwellings located above the ground floor of a building, where at least the ground floor is used for commercial premises or health services facilities.*
>
> ***dwelling house*** *means a building containing only one dwelling.*

The proposed dwelling meets the definition of dwelling house as it is a building containing only one dwelling, as opposed to a building which contains more than one dwelling (i.e. a dual occupancy, semi-detached dwelling, multi-dwelling housing or residential flat building).

Firstly, we say that the dwelling does not meet the definition of shop top housing. We note that there are parts of the dwelling itself (being stair, lobby and lift) which are located on ground floor. This along prevents the dwelling from meeting the definition. This can be contrasted to earlier decisions of the Court where lobbies, services, parking etc were for the shop top housing were permitted on the ground floor (*Lahoud v Willoughby City Council [2024] NSWCA 163, Arco Iris Trading Pty Ltd v North Sydney Council [2015] NSWLEC 1113, Hrsto v Canterbury City Council (No 2) [2014] NSWLEC 121*). In each of those cases there were more than two dwellings above the ground floor premises. Therefore the dwellings were also met the definition of a residential flat building. It was held that those ground floor facilities were shared facilities for the residential flat building that did not form part of any particular dwelling. That is not the case here as the ground floor area is part of the only proposed dwelling.

Secondly, the definitions of dwelling house and shop top housing are not mutually exclusive. Both can apply where a building includes only one dwelling.

In *Botany Bay City Council v Pet Carriers International Pty Ltd* [2013] NSWLEC 147*,* Chief Justice Preston considered an appeal where a proposed use for a pet transportation business could be characterised as being for the purpose of "commercial premises" and "airport-related land use" and "air freight forwarder", all of which were defined in the applicable environmental planning instrument. While commercial premises were expressly permitted with consent, the land use table operated to prohibit uses that were not otherwise specified as being permitted with or without consent. The operation of the land use table in that case, prohibiting innominate land uses, is analogous with the land use table for the R2 Zone under the Pittwater LEP 2014.

We extract Preston CJ's reasoning at [48]-[52] below:

> *Having regard to the structure and language of the land use table for Zone 4(b), the manner in which the terms of "commercial premises", "airport-related land use" and "air freight forwarder" are defined, and*

> *the nature, extent and other features of the proposed development, once the proposed development is properly characterised as being for the permissible purpose of "commercial premises" in item 3, it cannot be characterised as being for the purposes that are prohibited under item 4 of "airport-related land use" or "air freight forwarder".*
>
> *The structure of the land use table is to nominate the purposes of development that may be carried out without development consent (item 2) and with development consent (item 3) but to leave as innominate development which is prohibited (item 4). The mechanism by which the innominate purposes of development are prohibited is by way of prohibiting "Any development other than development included in item 2 or 3".*
>
> *Because the category of prohibited development is formulated as being "any development other than development included in item 2 or 3", it necessarily does not and cannot include any purpose of development that is specifically nominated in item 2 or 3: Friends of Pryor Park Inc v Ryde Council (Unreported, Land and Environment Court of NSW, Bignold J, 25 September 1995) at 6.*
>
> *The terms "commercial premises", "airport-related land use" and "air freight forwarder" overlap, although not entirely. They each deal with a building or place used for certain business or commercial purposes. The purpose of "commercial premises", which is "a building or place used as an office or for other business or commercial purposes", would include a building or place used as an office or for other business or commercial purposes related to Sydney Airport, which would fall within "airport-related land use", as well as "a building or place used for the assembly, storage or land transport or air freight", which would fall within "air freight forwarder".*
>
> *The consequence is that if, having regard to the character, extent and other features of Pet Carriers' proposed development, it can be characterised as being for "commercial premises" in item 3, it is not for a purpose of development "other than" development included in item 3.*

Applying the above authority to the subject DA, where in our opinion the proposal could be properly characterised as being for the purposes of a dwelling house and shop top housing, it is not for a purpose of development "other than" development specified in item 3 and is therefore not prohibited. This is so regardless of the fact that the development might otherwise meet the definition of shop top housing.

Thirdly, if Council disagrees with both of the above points we are of the view that the plans could be very simply amended to include a more substantial part of the

dwelling on ground floor in which case it certainly would not be shop top housing and must be a dwelling house.

We trust this is of assistance.

Yours faithfully

Alistair Knox
Partner
Accredited Specialist Planning & Environment Law