

26 March 2019

Ms Anna Pavoni  
by email

Dear Anna,

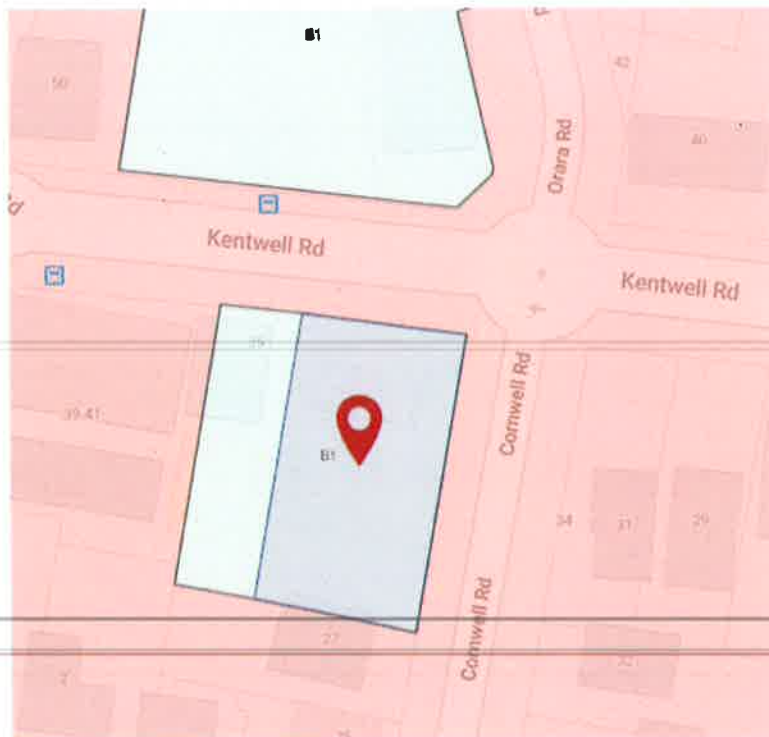
**RE: Shop 1, 33-35 Kentwell Road, Allambie Heights.  
Planning Advices and Planning Summary**

We refer to your request for planning advice as to whether exempt development provisions can be used to change the current use of the premises at Shop 1, 33-35 Kentwell Road, Allambie Heights (the premises) from a health clinic to an office.

The applicable Local Environmental Plan is Warringah LEP 2011. (WLEP 2011). The WLEP 2011 adopts the SEPP along with additional exempt and complying developments, none of which relate to this change of use as proposed.

**Warringah Local Environmental Plan 2011**

The site is shown on the map below and is zoned as Neighbourhood Centre – Zone B1. The zoning was obtained from the NSW Planning Portal Website.



Your solicitor holds a copy of a zoning certificate where the zoning can be confirmed.

## **Land Use Table - Zone B1**

### **Zone B1 Neighbourhood Centre**

#### **1 Objectives of zone**

- To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.
- To ensure that neighbourhood centres provide a village-like atmosphere and safety and comfort for pedestrians.
- To minimise conflict between land uses in the zone and adjoining zones and ensure the amenity of any adjoining or nearby residential land uses.

#### **2 Permitted without consent**

Home-based child care; Home occupations

#### **3 Permitted with consent**

Boarding houses; Business premises; Centre-based child care facilities; Community facilities; Food and drink premises; Medical centres; Neighbourhood shops; Neighbourhood supermarkets; Oyster aquaculture; Respite day care centres; Roads; Shop top housing; Shops; Tank-based aquaculture; Any other development not specified in item 2 or 4

#### **4 Prohibited**

Advertising structures; Agriculture; Air transport facilities; Amusement centres; Animal boarding or training establishments; Boat building and repair facilities; Boat sheds; Camping grounds; Car parks; Caravan parks; Charter and tourism boating facilities; Cemeteries; Correctional centres; Crematoria; Depots; Eco-tourist facilities; Entertainment facilities; Environmental facilities; Exhibition villages; Extractive industries; Forestry; Freight transport facilities; Function centres; Heavy industrial storage establishments; Highway service centres; Home occupations (sex services); Hospitals; Industrial retail outlets; Industrial training facilities; Industries; Information and education facilities; Marinas; Mooring pens; Moorings; Open cut mining; Passenger transport facilities; Pond-based aquaculture Port facilities; Pubs; Recreation facilities (indoor); Recreation facilities (major); Recreation facilities (outdoor); Registered clubs; Research stations; Residential accommodation; Retail premises; Rural industries; Service stations; Sex services premises; Storage premises; Tourist and visitor accommodation; Transport depots; Vehicle body repair workshops; Vehicle repair stations; Waste or resource management facilities; Water recreation structures; Wharf or boating facilities; Wholesale supplies.

#### **Existing development consent**

*Change of use to a health clinic with associated fit-out works* was approved by way of DA 2007/266 in May 7, 2007. We have been advised that this development consent was acted upon (last use within the tenancy reflects this approval). Although we

have been provided with a copy of the existing development consent, without obtaining a copy of the Council's planner's report it is unknown if the existing approval defined the use of the premises as a health clinic as a 'health care facility' or as 'business premises' as this is not specified on the development consent. Both uses are permissible with the consent of Council in the B1 Zone and therefore existing use rights do not apply as both uses could be approved under the WLEP 2011. This therefore complies with one of the provisions specified in Subdivision 10A. (detailed below).

However, an internet search indicates that the premises were last occupied by a physiologist's practice and a fertility clinic which also incorporated acupuncture practices. If the last Development Application made to Council incorporated plans which showed a reception desk and two or three consulting rooms for example, then it is likely that the use would have been defined as a 'medical centre'. This complicates the use of the exempt provisions as a medical centre, which is part of an overarching definition of a 'health services facility' is not found in Table 1 of Subdivision 10A. This is shown below. Therefore, exempt provisions cannot be used and a DA is required. As noted above, the use of an office is defined as 'office' under the overarching definition of 'commercial premises' which is not prohibited in the B1 Zone.

### **State Environmental Planning Policy (Exempt and Complying Development Codes) 2008**

We have assessed the proposal against the SEPP. Our comments are in red.

#### **Division 2 Exempt and complying development**

##### **1.15 What development is exempt development?**

(1) Development that is specified in an exempt development code that meets the standards specified for that development and that complies with the requirements of this Division for exempt development is exempt development for the purposes of this Policy.

(2) For the purposes of subclause (1), development that is specified includes any specified limitations as to the land on which that development may be carried out. Note. Under section 4.1 of the Act, exempt development may be carried out without the need for development consent under Part 4 of the Act or for assessment under Part 5 of the Act.

The section states that exempt development:

- (a) must be of minimal environmental impact, and
- (b) cannot be carried out in critical habitat of an endangered species, population or ecological community (identified under the Threatened Species Conservation Act 1995 or the Fisheries Management Act 1994), and

(c) cannot be carried out in a wilderness area (identified under the Wilderness Act 1987).

**Complies. The proposal is of minimal environmental impact. The site does not contain critical habitat or wilderness area.**

#### **1.16 General requirements for exempt development**

(1) To be exempt development for the purposes of this Policy, the development:

(a) must meet the relevant deemed-to-satisfy provisions of the Building Code of Australia, or if there are no such relevant provisions, must be structurally adequate, and

**Complies. Assuming compliance with the BCA.**

(b) must not, if it relates to an existing building, cause the building to contravene the Building Code of Australia, and

**Complies. Assuming compliance with the BCA.**

(b1) must not be carried out on land that is a declared area of outstanding biodiversity value under the Biodiversity Conservation Act 2016 or declared critical habitat under Part 7A of the Fisheries Management Act 1994, and

(b2) must not be carried out on land that is, or is part of, a wilderness area (within the meaning of Wilderness Act 1987), and

(c) must not be carried out on land that is, or on which there is, an item that is listed on the State Heritage Register under the Heritage Act 1977, or that is subject to an interim heritage order under that Act, and

(d) must not be carried out on land that is described or otherwise identified on a map specified in Schedule 4.

**Complies. The site is not a declared area of outstanding biodiversity, wilderness area, listed as a Heritage Item and is not listed within Schedule 4.**

(1A) Despite subclause (1) (c), if development meets the requirements and standards specified by this Policy and that development:

(a) has been granted an exemption under section 57 (2) of the Heritage Act 1977, or

(b) is subject to an exemption under section 57 (1A) or (3) of that Act,

the development is exempt development under this Policy.

**N/A. Not affected by the Heritage Act.**

(1B) If an item listed on the State Heritage Register is not located on, or does not comprise, the whole of the relevant land, subclause (1) (c) applies only to the part of the land that is described and mapped on that register.

**N/A**

(1C) If an item not listed on the State Heritage Register but identified as an item of environmental heritage in an environmental planning instrument does not comprise, or is not located on, the whole of the relevant land, any restriction on carrying out development on the relevant land on which the item is located applies only to the part of the land that is described and mapped on that instrument.

**N/A.**

(2) Development that relates to an existing building that is classified under the Building Code of Australia as class 1b or class 2–9 is exempt development for the purposes of this Policy only if:

(a) the building has a current fire safety certificate or fire safety statement, or  
(b) no fire safety measures are currently implemented, required or proposed for the building.

(3) To be exempt development for the purposes of this Policy, the development must:

(a) be installed in accordance with the manufacturer's specifications, if applicable, and

(b) not involve the removal or pruning of a tree or other vegetation that requires a permit or development consent for removal or pruning, unless that removal or pruning is undertaken in accordance with a permit or development consent.

Note. A permit for the removal or pruning of a tree or other vegetation may be granted under a local environmental plan. A development consent for the removal of native vegetation may be granted under the Native Vegetation Act 2003.

(4) (Repealed)

The premises are class 2-9. A fire safety certificate or fire safety statement must be current. Please refer to the certificate which you have been provided with. The proposal does not require the pruning of trees or the like.

## Part 2 Exempt Development Codes

Note 1. Schedule 2 contains the variations to this code.

Note 2. A person may carry out development specified in this code without obtaining development consent from a consent authority if the person complies with the development standards that apply to the development (which includes the deemed-to-satisfy provisions of the Building Code of Australia).

In addition to the requirements specified for development under this code, adjoining owners' property rights, the applicable common law and other legislative requirements for approvals, licences, permits and authorities still apply. For example, requirements relevant to development in this code may be contained in the Act, the Environmental Planning and Assessment Regulation 2000, various State environmental planning policies, the Protection of the Environment Operations Act 1997, the Roads Act 1993, the Swimming Pools Act 1992 and Acts applying to various infrastructure authorities. If the development is in proximity to infrastructure, including water, stormwater and sewer mains, electricity power lines and telecommunications facilities, the relevant infrastructure authority should be contacted before commencing the development.

Schedule 2 does not apply. The premises must comply with the deemed to satisfy provisions of the BCA. Confirm this requirement with a PCA.

## Subdivision 10A Change of use of premises

### 2.20A Specified development

A change of use from a current use specified in a category in Column 1 of the Table to this clause to a use specified in the corresponding category in Column 2 of the Table to this clause is development specified for this code.

#### Table

##### Column 1 Current use

##### Category 1

business premises

office premises

shop

public administration building

##### Column 2 New use

##### Category 1

business premises

office premises

shop

kiosk

public administration building

The definition which Council applied to the "health clinic" is unknown. It could have been defined as either 'business premises' or a 'medical centre' which is under the overarching definition of 'health care services'. If it was a small business with one practitioner, it is more likely than not that it would have been defined as a 'business premises'. If the use wasn't defined as "business premises" (it is not an office or a shop) then this subdivision doesn't apply.

***commercial premises means any of the following:***

- (a) *business premises,*
- (b) *office premises,*
- (c) *retail premises.*

***business premises means a building or place at or on which:***

- (a) *an occupation, profession or trade (other than an industry) is carried on for the provision of services directly to members of the public on a regular basis, or*
- (b) *a service is provided directly to members of the public on a regular basis, and includes a funeral home and, without limitation, premises such as banks, post offices, hairdressers, dry cleaners, travel agencies, internet access facilities, betting agencies and the like, but does not include an entertainment facility, home business, home occupation, home occupation (sex services), medical centre, restricted premises, sex services premises or veterinary hospital.*



**office premises** means a building or place used for the purpose of administrative, clerical, technical, professional or similar activities that do not include dealing with members of the public at the building or place on a direct and regular basis, except where such dealing is a minor activity (by appointment) that is ancillary to the main purpose for which the building or place is used.

**medical centre** means premises that are used for the purpose of providing health services (including preventative care, diagnosis, medical or surgical treatment, counselling or alternative therapies) to out-patients only, where such services are principally provided by health care professionals. It may include the ancillary provision of other health services.

**Note.**

Medical centres are a type of health services facility—see the definition of that term in this Dictionary.

**health services facility** means a building or place used to provide medical or other services relating to the maintenance or improvement of the health, or the restoration to health, of persons or the prevention of disease in or treatment of injury to persons, and includes any of the following:

- (a) a medical centre,
- (b) community health service facilities,
- (c) health consulting rooms,
- (d) patient transport facilities, including helipads and ambulance facilities,
- (e) hospital.

## **2.20B Development standards**

The standards specified for that development are that:

- (a) the current use must be a lawful use, and

**Complies. Consent provided.**

- (b) the current use must not be an existing use within the meaning of section 4.65 of the Act, and

**Complies. The use of business premises and medical centre are not prohibited in the zone.**

- (c) the new use must be permissible with consent under an environmental planning instrument applying to the land on which the development is carried out, and

**Complies. Office premises (commercial premises) not prohibited.**

- (d) the new use must not result in a change of building classification under the *Building Code of Australia*, unless the change of use is from a class 5 building to a class 6 building, or from a class 6 building to a class 5 building, and the building meets all the relevant provisions of that code for the new use, and

**Complies.**

- (e) the new use must not be carried out at premises that are a manufactured home, moveable dwelling or associated structure, temporary structure, tent, swimming pool, ship or vessel, and

**Complies.**

- (f) the new use must not be any of the following:

- (i) food and drink premises,
- (ii) a funeral chapel,
- (iii) a funeral home,
- (iv) retail premises where firearms within the meaning of the *Firearms Act 1996* are sold,
- (v) landscaping material supplies,
- (vi) a market,
- (vii) premises that are a beauty salon or hair dressing salon,
- (viii) premises where a skin penetration procedure within the meaning of section 51 of the *Public Health Act 1991* is carried out,
- (ix) restricted premises,
- (x) a roadside stall,
- (xi) sex services premises,
- (xii) vehicle sales or hire premises, and

**Complies.**

- (g) the new use must not involve building alterations, other than alterations that are exempt development under this Policy, and

**Complies.**

- (h) the new use must not result in an increase in the gross floor area of any building within which it is carried out, and

**Complies.**

- (i) the new use must not cause the contravention of any existing condition of the most recent development consent (other than a complying development certificate) that applies to the premises relating to hours of operation, noise, car parking, vehicular movement, traffic generation, loading, waste management and landscaping, and

**Complies.**

- (j) if there is no such existing condition applying to the premises relating to the hours of operation, the premises must only operate between 7.00 am and 7.00 pm on any day.

**N/A. Hours of operation applied on consent.**

## Summary

In order to use exempt provisions under the Exempt and Complying SEPP and occupy the premises as office use without a DA, the last lawful use of the premises must have been defined by Council as “business premises” and not a “medical centre”. This is unknown however the fact that the consent approved a health clinic’ suggests





to us that Council approved the use of the premises as a health clinic using the definition of a medical centre. It would be necessary to request the file under a GIPA application and look at the internal Council Planners report to check how the use was defined in 2007.

To use the SEPP for a change of Use, the existing use must be defined as any of the uses listed in the Column 1 of Category 1 in Subdivision 10A (business premises, office, shop). This is unlikely and therefore a change of use cannot be carried out without a DA being lodged (and approved by Council). As commercial premises and offices are not prohibited within the B1 Zone, the issue of a development consent by Council should not be problematic however the consent of the Owners Corporation may be required to lodge the application. This can be clarified with Council and may depend upon where the common property is located. The Strata Manager may have delegation to sign on behalf of the Owners Corporation for a minor application without the need to be considered by a meeting of the Owners Corporation.

If we can be of any further assistance, please contact Leonie on 0405750875.

Kind Regards

Leonie Derwent

Senior Consulting Planner  
Ingham Planning Pty Ltd.