

4th June 2009

The General Manager
Manly Council
1 Belgrave Street
MANLY NSW 2095

Attention: Joanne Bramma
Public Officer

Dear Madame,

**Stockland Balgowlah - 197-215 Condamine Street, Balgowlah
Café Balgowlah
DA 37/09 - Section 96(1A) Modification Application**

We refer to development consent DA 37/09 dated 13.03.09 (**the Consent**). This letter accompanies an application under s96(1A) to modify the Consent.

1. **Conditions to be modified**

Conditions **ANSO1** and **ANSO2** of this development consent address the use of plastic bags and plastic packaging. These conditions state:

ANSO1: *"Plastic bags shall not be issued to customers for the purposes of carrying items purchased from the premises".*

ANSO2: *"The business shall not provide prepared food/drinks to its customers in any non-recyclable or non-biodegradable plastic or foam."*

2. **Judgment in Stockland and anor v Manly Council**

You will be aware that plastic bag and plastic packaging conditions imposed in other development consents for retail tenancies at Stockland Balgowlah, in terms identical to those above, were considered by Commissioner Brown in the recent Land and Environment Court case of *Stockland and anor v Manly Council [2009] NSWLEC 1145*.

Commissioner Brown concluded that:

- The imposition of a condition prohibiting plastic bags was not fair and reasonable in the circumstances (paragraph 54); that
- Council's proposed condition concerning food and drink containers should be amended, and that a 12 month phasing in period is appropriate (paragraphs 75 and 76); and
- The imposition of the conditions would place the shops in the centre at a

competitive disadvantage (paragraph 66).

At paragraph 89, Commissioner Brown summarised his findings that the plastic bag and plastic packaging conditions imposed by Council should be deleted and replaced with the applicant's alternate conditions (see paragraphs 43 and 73 of Commissioner Brown's judgment). The applicant's alternate conditions give effect to a Plan of Management which formed exhibit R to the proceedings. A copy of the Plan of Management is attached to this letter for your ease of convenience.

3. Proposed replacement conditions

In light of the Commissioner Brown's judgment, we request that the subject consent be modified so that conditions **ANSO1** and **ANSO2** be deleted and replaced with the following conditions:

Plastic bags

'Plastic bags' may be used within the shopping centre, provided that Stockland and its retailers operate in accordance with the Plan of Management dated April 2009 and tendered on 9 April 2009 being Exhibit "R" (as may be amended in accordance with Part 9 of the Plan of Management) which sets out how Stockland and its retailers intend to reduce plastic bag usage by increasing usage of alternatives to plastic bags, training staff, educating customers and encouraging recycling of plastic bags.

*For the purposes of this condition a **plastic bag** means:*

- a. a carry bag, the body of which comprises (in whole or in part) polyethylene with a thickness of less than 35 microns; and*
- b. that includes handles.*

but does not include:

- a. a biodegradable bag certified to Australian Standard AS 4736; or*
- b. a plastic bag that constitutes, or forms an integral part of, the packaging in which goods are sealed prior to sale.*

Food and beverage packaging

By June 2010 all takeaway food and beverage packaging used at the premises shall be recyclable packaging or biodegradable packaging. Other forms of packaging may be used until that date.

For the purposes of this condition:

Recyclable packaging is packaging for which collection or drop-off facilities are available to a reasonable proportion of purchasers, potential purchasers or users of the product in the area which the product is sold (Standards Australia, 1999)

Biodegradable packaging is packaging which is able to be broken down by micro-organisms in the presence of oxygen (aerobic) to carbon dioxide, water biomass and mineral salts or any other elements that are present (mineralization). Alternatively, the breakdown of organic substances by micro-organisms without the presence of oxygen (anaerobic) to carbon dioxide, methane, water and biomass (Standards Australia, 2006)

Takeaway food and beverage packaging is packaging used for food and beverages prepared and/or packed on the premises and excludes:

(a) packaging that constitutes, or forms an integral part of, the packaging in which goods are sealed prior to sale; and

(b) barrier packaging which is essential for health and/or food safety (for example cling wrap, bags for barbequed chicken, or packaging to meet food safety requirements).

4. Minimal environmental impact

For the reasons set out in paragraphs 32 - 36 of the judgment, Council can be satisfied that the proposed modification is of minimal environmental impact and that it is appropriate to deal with this modification application under s96(1A).

5. Section 79C assessment

Section 96(3) requires an application to modify a consent to take into consideration the matters referred to in section 79C of the EP&A Act, as are relevant to the application.

The likely impacts of the development, and the proposed modifications, were comprehensively considered by the Court in the proceedings referred to above. Similarly, the applicable planning controls and all other relevant considerations under s79C were comprehensively considered by the Court in reaching the conclusion that the consents the subject of those proceedings ought to be modified. That conclusion is directly applicable to the subject modification application which relates to another tenancy within the same development.

6. Political donations disclosure

Please find enclosed a section 96 (1A) modification form together with a section 147 political disclosure statement.

7. Application fee and notification of application

In light of the findings of Commissioner Brown in *Stockland and anor v Manly Council*, the conditions originally imposed cannot be sustained. This modification application seeks to bring into line with the judgment a further consent issued by Council in respect of the same development. In this situation it is entirely appropriate for Council exercise its discretion to waive the application fee that would otherwise be payable for the section 96(1A) modification application, and we request that Council waive the fee.

Similarly, it is appropriate for Council to conclude that the subject application does not require notification under *Council's Development Control Plan for Notification 1999*.

8. Urgency

Finally, as retail trading is due to commence on 15 June 2009, we respectfully request that Council consider and determine this application as a matter of urgency.



Yours faithfully

Mark Wong

Encl:

1. Section 96(1A) modification application form
2. Section 147 Political Disclosure Statement
3. Exhibit R (Plan of Management accepted by Land and Environment Court)



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