

30 September 2024

Jeremy Bath
Chief Executive Officer
City of Newcastle
PO Box 489
Newcastle NSW 2300

Dear Sir

Advice - Rezoning of 505 Minmi Road Minmi

Your ref: PP-2021-2262

Our ref: 10394/KIN957-00001

We act for Kingston Minmi Road Pty Ltd, the owner of 505 Minmi Road, Fletcher (**Land**).

Planning proposal PP-2021-2262 was submitted to Council for gateway determination to rezone the Land from C4 Environmental Living to the R2 Low Density Residential Zone and C2 Environmental Conservation. The Hunter and Central Coast Planning Panel determined that the Proposal should be submitted for Gateway determination on 20 September 2021. The Department of Planning and Environment issued the planning proposal Gateway determination on 10 January 2023.

The Proposal was exhibited from 22 April to 21 May 2024. The NSW Environment Protection Authority (**EPA**) wrote to the Council on 27 May 2024 raising concerns with the proposal as a consequence of the proximity of the Land to the Summerhill Waste Management Centre (**SWMC**) and the potential for emissions, including odour, noise and sub-surface gas, from the SWMC impacting on the Land.

The SWMC is managed by the Council. The Council must operate the SWMC in accordance with Environment Protection Licence 5897 (**EPL 5897**) issued by the EPA under the *Protection of the Environment Operations Act 1997* (**POEO Act**).

Emissions from the SWMC can be considered in making planning decisions, but only if those emissions are lawful.

In *Bailey v Oberon Shire Council* [2008] NSWLEC 815, the Land and Environment Court (**Court**) considered that a timber plant adjacent to a development site which was emitting noise in breach of operating licences and that whether the issue could be used as a reason to refuse the development application. The Court found as follows:

51. I am of the view that it would be entirely improper for a member of this Court to rely on an unlawful activity to sustain an objection to warrant or contribute to the refusal of an otherwise lawful application.

The decision in *Bailey* was followed in *Warnes v Muswellbrook Shire Council* [2009] NSWLEC 1284 in the context of odour. The development application being considered by the Court was for a residential use that was affected by odour from the Muswellbrook sewage treatment plant.

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The Court considered s.129 of the POEO Act:

129 Emission of odours from premises licensed for scheduled activities

- (1) The occupier of any premises at which scheduled activities are carried on under the authority conferred by a licence must not cause or permit the emission of any offensive odour from the premises to which the licence applies.
- (2) It is a defence in proceedings against a person for an offence against this section if the person establishes that—
 - (a) ***the emission is identified in the relevant environment protection licence as a potentially offensive odour and the odour was emitted in accordance with the conditions of the licence directed at minimising the odour, or***
 - (b) the only persons affected by the odour were persons engaged in the management or operation of the premises.
- (3) A person who contravenes this section is guilty of an offence. (emphasis added)

The Court then considered the relevant environment protection licence for the plant that included the following condition:

L8.1 – No condition of this licence identifies a potentially offensive odour for the purposes of s.129 of the Protection of the Environment Operations Act 1997.

The Court found that condition L8.1 were not protective in the context of s.129 of the POEO Act. As a result, the Court concluded that the offensive odour emitted from the plant was unlawful.

108. As a consequence, as I observed in *Bailey v Oberon Shire Council* [2006] NSWLEC 815 at para 51, I do not think that an unlawfully produced impact can found refusal of a development application or, indeed, contribute to the refusal of such an application.

As noted above, the SWMC operates under EPL 5897. That EPL includes the following:

L3 Potentially offensive odour

L3.1 – No condition of this licence identifies a potentially offensive odour for the purposes of s.129 of the Protection of the Environment Operations Act 1997.

This condition is identical to the condition in *Warnes*.

EPL 5897 does not contain any provision relating to noise.

EPL 5897 condition O3.1 concerns dust emissions. It is in very general terms:

O3.1 – All operations and activities occurring at the premises must be carried out in a manner that will minimise emission of dust from the premises.

EPL 5897 requires the monitoring of subsurface gas at a number of locations. There are no thresholds for gas emissions set in the EPL.

What is apparent is that EPL 5897 does not provide any lawful basis for emissions of offensive odour, sub-surface gas, or noise from the SWMC onto the Land.

Given this, and applying the relevant case law, such unlawful emissions cannot provide a reason to prevent the Proposal for the Land progressing. We also note that there are already dwellings much closer to the SWMC than the Land.

Given the above, the issues raised by the EPA cannot lawfully be used to prevent the Planning Proposal from proceeding. Given Council's only objection to the Department of Planning Housing and Infrastructure was associated with matters raised by the EPA, it is clear that does not contain any proper basis for objection. For that reason, we ask the Council to withdraw any objection to the progress of the Planning Proposal and support the Gateway Review Request to facilitate the rezoning of the land.

Yours faithfully



Partner responsible:
Alan McKelvey

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Contact:
Grant Long, Consultant

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