STOREY & GOUGH
LAWYERS

Our Ref: APG:TE:APG:140590
Your Ref: Elisha Bickle

22 January 2015

Western Partnership Pty Ltd
PO Box 2573
FORTITUDE VALLEY BC QLD 4006

Dear Sirs

Re: Western Partnership Pty Ltd and Tweed Shire Council
Modification Application
Hideaway Motel, 21 Cyprus Crescent, Cabarita Beach

We refer to our letter of 14 November 2014. We have been requested to review our previous letter in light of a submission received by Tweed Council dated 10 January 2015.

The submission contradicts our opinion that condition No. 113A of development consent No. DA12/170 was not validly imposed as part of a modification application, citing two decisions of the Land & Environment Court: *Barton v Ku-ring-gai Council* [2006] NSWLEC 571 and *Jones v Mosman Municipal Council* [2006] NSWLEC 40. The submission opines that these decisions are authority for the proposition that "*Council's do in fact have the power to amend existing conditions or insert new conditions that amend a development even where those amendments do not form part of the modification application.* The submission states that Council's power to impose such conditions is triggered if the condition "*indirectly relate*[s] *to a planning matter*" and if a there is "*some nexus between any conditions imposed and the nature of the modification applications* (sic)"

Response to Submission

The two decision cited by the submissions are not authority for these propositions. These decisions are judgements of a Commissioner of the Court and both pre-date the decision of Justice Sheahan in *Greenwood v Warringah Council* [2012] NSWLEC 152.

The correct test is established in the decision of *1643 Pittwater Road Pty Ltd v Pittwater Council* (2004) NSWLEC 685. The question to ask is whether the condition in question relates to or arises out of the matters raised for consideration in the s.96 application: *Whitehouse Properties Pty Ltd v Waverly Council* [2007] 264 at [17], *Australia Leisure and Hospitality Group Ltd v Manly Council* [2010] NSWLEC 1113 at [39].

In the *Barton* case cited by the submission, the Court found that it was appropriate to limit the hours of an approved tennis court, which did not previously have such a restriction, as there would be a visual impact of proposed netting on an adjoining premises. In the *Jones* case, the condition in question was agreed to by the applicant.

ABN 98 262 716 211
Headmaster's Cottage, 3 Marist Place, Parramatta NSW 2150 - PO Box 2406, North Parramatta NSW 1750
T | 9630 2361 or 9683 2644 F | 9683 1605 DX | 28337 Parramatta W | www.sglaw.com.au
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In *1643* McClellan CJ provided a useful example of a situation where a consent authority would be acting outside its power: at [51]

> *...an application to change the colour of a building could not provide a basis to reconsider the provision of car parking for the development. The matter of car parking simply does not arise.*

In *King v Bathurst Regional Council* (2006) 150 LGERA 362 Jagot J endorsed the test established in *1643* and further held that *"the same planning matter formula, used by McClellan J...in 1643 Pittwater Road, in my view was not intended to suggest that any condition whatsoever, impinging upon the* ***same topic*** *no matter how tangential to it, would be within power."*

In the current application, we understand there was no proposed change to the operation or intensity of the pool or BBQ area. In granting development consent to the use of this area at first instance Council did not consider a trial period necessary in consideration of the planning matters and potential impacts. In our view there is no nexus either directly or indirectly between the modification application and the amended condition 113A. The condition is not valid simply as it relates to the same topic as the modification application, being the hours of operation of the internal dining area and bars.

The consequence of condition 113A would be to prohibit the use of the outdoor area if a further consent was not obtained at the expiration of the trial period. This result so alters the rights granted by the original development consent as to amount to no approval of the modification application. Such a result is analogous with the situation addressed in the decisions of *King* and in *Winn v Director-General of National Parks and Wildlife and Others* (2001) 130 GERA 508. In *King* Jagot J states:

> *That is the roadwork conditions had the effect of so significantly altering the modification for which approval had been sought, that the approval were not approvals of the modification applications at all. They were a unilateral act by the Council outside power.*

Finally a submission is raised that in the *"Pittwater Case... which sought to impose a sunset clause on a mining operation..."* the Court ruled against the impugned condition because of its severity. This appears an error, as it was not a Pittwater Case that involved mining operations, rather the Warringah Council case of *Greenwood*. In that decision the subject condition was not deleted due to its severity, rather it was deleted as in did not have the required nexus to the modification application.

Our opinions expressed in our letter of 14 November 2014 are not changed in light of the submission dated 10 January 2015.

If you have any questions please contact the writer.

Yours faithfully,
STOREY & GOUGH

Andrew Gough
Partner

Email: andrew@sglaw.com.au

Encl.