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21 September 2022

Mr Peter Prendergast
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By email: Peter.Prendergast@melville.wa.gov.au

Dear Peter

532 Canning Highway, Attadale – Intensification and entrenching of non-conforming uses

In your email of 19 September, you sought advice with respect to the non-conforming use rights attaching to premises at 532 Canning Highway, Attadale. More specifically you sought advice as to the City's position in relation to a Development Application which is seen as having the effect of intensification and entrenching of the non-conforming use rights attaching to the premises under the City of Melville (**City**) Local Planning Scheme No. 6 (**LPS 6**).

Background facts

The background facts provided are limited, amounting to the following:

- (a) 532 Canning Highway, Attadale (**532**) enjoys non-conforming use rights under LPS 6.
- (b) The non-conforming use rights relate to the ongoing use of the site as a motor vehicle sales/motor vehicle repair premises.
- (c) The zoning of the site has not been given, but this advice is given on the understanding that in the relevant zone, both the Motor Vehicle, Boat or Caravan Sales use class and the Motor Vehicle Repair use class are 'X' uses in the LPS 6 Zoning Table.
- (d) In 2021, the City received an Application for Development Approval for 532 which sought approval for some additions to facilitate the ongoing use of the site as a motor vehicle sales/motor vehicle repair premises. That proposal is understood to have involved the demolition of half the existing building on the site.
- (e) The City recommended to the JDAP in regard to the 2021 application, that the application not be supported as the proposed development would entrench and

intensify the existing land use, and would result in the site operating in a way which is further from the intended purpose of the zone in which the land is situated. The JDAP approved that application subject to conditions. The conditions have not been provided to me and I will proceed on the assumption that nothing in the conditions is relevant to the advice now being sought.

- (f) In September 2022, the City received a further application to redevelop and further intensify the development on the site, demolishing the other half of the existing building and redeveloping it as a large motor vehicle repair facility.
- (g) The City is seeking advice or relevant decisions which relate to the intensification or redevelopment of works associated with non-conforming uses relating to the question whether the City's position that redevelopment works which intensify and extend the lifespan of the non-conforming use should not be supported.

I offer my advice on the authorities relevant to that question as set out below.

Advice and comments

1. Cl.22(1)(a) of LPS 6 relevantly provides –

‘(1) Unless specifically provided, this Scheme does not prevent –

- (a) the continued use of any land or any structure or building on land, for the purpose for which it was being lawfully used immediately before the commencement of this Scheme; ...’.

2. Cl.23 of LPS 6 in its relevant parts provides –

‘(1) A person must not, without development approval –

- (a) alter or extend a non-conforming use of land; or
- (b) erect, alter or extend a building used for, or in conjunction with a non-conforming use; or
- (c) repair, rebuild, alter or extend a building used for a non-conforming use that is destroyed to the extent of 75% or more of its value;

(2) An application for development approval for the purposes of this clause must be advertised in accordance with clause 64 of the deemed provisions.’

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3. It appears incidentally that the combination of the 2021 and 2022 development applications involve the destruction of the existing building on the site to the extent of more than 75% of its value. In my opinion, it would be reasonable for the JDAP in dealing with the 2022 development application, to have regard to the close relationship in time to the 2021 development application, and the fact that the combined effect of the two development applications is to involve the destruction of the existing building to the extent of more than 75% of its value.

I note however that the fact of an existing building associated with the non-conforming use being destroyed to the extent of 75% or more of its value does not prohibit the proposal, but is simply one of the bases on which a development approval may be required. In the present case, it is clear that the building used for the non-conforming use on the site is to be altered, and under cl.23(1)(b) that fact alone would require development approval.

4. I also draw attention to the fact that under cl.23(2) of LPS 6, the application for development approval must be advertised in accordance with deemed cl.64. The same provision would have applied in regard to the 2021 development application, and I assume that the advertising provision was complied with in that case.

5. I note that the 2022 development application besides involving the demolition of the ‘other half’ of the existing building, also involves its redevelopment as ‘a larger motor vehicle repair facility’. It appears clear that the effect of the 2022 development application will involve the extension of the non-conforming use. The same may have been the case in the 2021 development application, as I note that the City recommended to the JDAP that that application should not be supported ‘as the proposed development would entrench and **intensify** the existing land use ...’. It appears that the present 2022 development application if approved would involve the extension/intensification of the non-conforming use, and it may be that the same applied to the 2021 approval. But in any event, it seems clear that the effect of the 2021 and 2022 proposals involves the extension and intensification of the non-conforming land use.

6. The fact that the 2022 development application would involve the extension and intensification of the non-conforming land use does not necessarily prevent the application from being approved. However the fact that application for planning approval must be made, and additionally the fact that the proposal must be advertised for public comment underlines the fact that the decision-maker must exercise a discretion as to whether or not approval should be given.

7. In exercising a discretion on the development application, it is necessary for the decision-maker, in this case the JDAP standing in place of the City, to have due regard to those of the matters set out in deemed cl.67(2) as are relevant to the development the subject of the application. The matters in deemed cl.67(2) that seem clearly to be relevant to the development proposed in the present case include –

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- ‘(a) the aims and provisions of LPS 6;
- (b) the requirements of orderly and proper planning;
- ...
- (m) the compatibility of the development with its setting, including –
 - (i) the compatibility of the development with the desired future character of its setting; ...
- (n) the amenity of the locality including the following –
 - (i) ...
 - (ii) the character of the locality;
- ...
- (y) any submissions received on the application;
- ...
- (zb) any other planning consideration the [JDAP] considers appropriate.’

8. I will not complicate this advice by dealing with the due consideration matters in (a), (b), (m), (n) and (y), as those matters are obvious, and I assume the JDAP will be alive to them and give them due regard, as is their duty.
9. Item (zb) in deemed cl.67(2) refers to any other planning consideration the [JDAP] considers appropriate, and in my opinion the JDAP should give due regard to the basic principles associated with non-conforming uses, and the planning principles and philosophy relevant to the consideration of applications for the extension or intensification of non-conforming uses. My following comments will focus on the planning philosophy and principles, and the planning strategy, associated with non-conforming uses, and their extension.
10. In my opinion, the authorities which consider the possibility of the perpetuation, extension or entrenchment of non-conforming uses are to the effect that non-conforming uses should be phased out and ultimately eliminated, rather than being perpetuated. I will refer to a number of cases where that principle is recognised.
11. In the case *Cross v Redcliffe City Council* [1984] QPLR 106, the application there under consideration was for replacement of an existing non-conforming use with another non-conforming use. That of course is not the situation in regard to the

present application at 532, but it is relevant to mention the following passages explaining the relevant philosophy in regard to non-conforming use applications that might result in the entrenchment or perpetuation of the non-conforming use. The relevant passage is at p.109 of the report –

‘As the Respondent contends (and as has been held on many occasions exercising planning jurisdiction ...) the general planning theory with respect of nonconforming uses tends towards their being gradually phased out rather than perpetuated. ... Thus to replace a nonconforming use, the viability of which is plainly exhausted, with another which is likely to prosper for an indefinite period, would lead to “entrenchment” of the kind of use which, by its very nature, conflicts with the expressed planning strategy of the scheme. ...’.

12. It can be equally said in the present case that approval of the present 2022 development application will necessarily lead to entrenchment of the existing non-conforming uses, which conflicts with the expressed planning strategy of the City’s LPS 6.

13. The case *K C Drew Pty Ltd v Brisbane City Council* [1990] QPLR 232 involved an application for rezoning to facilitate expansion of an existing use, but nevertheless the following comments at pp.236-36 of the report are relevant to the present case –

‘... Whilst the Town Plan, within its terms, gives protection to existing lawful non-conforming uses, the planning philosophy as exhibited in the Town Plan ... of the Respondent, are indicative that the planning strategy of the Respondent is that, in the long term, a non-conforming use should relocate to a more appropriate site where the particular use would not affect the amenity of the immediate neighbourhood or create any land use conflict. Such a principle accords with accepted town planning philosophy, and is reflected in many of the accepted text books on town planning. ...’.

14. The case *Edray Homes Pty Ltd Superannuation Fund v Ipswich City Council* [1990] QPLR 237 also dealt with an application for rezoning to facilitate the expansion of a non-conforming use, but the following comments at pp.239-40 are relevant for present purposes –

‘... Mr Wann failed to give sufficient weight to the fact that the proposed rezoning would result in an entrenchment of an existing non-conforming use and that such an action is inconsistent with the planning philosophies and strategies of the Respondent as reflected in both the 1976 and 1989 town planning schemes. ...’.

15. In the case *Zanow v Ipswich City Council* [2010] QPELR 721 at [45], DCJ Robin QC (referring to two planning cases reported in 1990) said –

‘These “old” cases are instructive in demonstrating that an established and confirmed planning intent pursued by the planning authority is not lightly overridden, even where a proposal appears to have no adverse effects and may exhibit some positive grounds for assessing it as a good idea that might represent a better use of the subject site. ... I am unpersuaded that the Appellant’s development application ought to be approved ...’.

16. In the case *Hymix Australia Pty Ltd v Brisbane City Council* [2014] QPLER 645, it was said at [22] –

‘There was never an inflexible rule that a lawful non-conforming use could not be the recipient of a development approval, although the evident planning strategy in the relevant planning instruments is not lightly put aside.’

17. A similar comment was made in the very recent case *Trowbridge v Noosa Shire Council* [2022] QPLER 504 at [102] as follows –

‘While there was never an inflexible rule that a lawful non-conforming use could not be entrenched by its substitution with another non-conforming use, an evident planning strategy in a relevant planning instrument should not lightly be put aside.’

18. The least that can be said for those very clear authorities coming from the Queensland jurisdiction, is that planning authorities should be slow to approve an application which would result in the entrenchment of an existing non-conforming use. They emphasise the fact that the general planning theory with respect to non-conforming uses is that they should be phased out rather than perpetuated or entrenched. The non-conforming use provisions in the City’s LPS 6, as in other local planning schemes throughout WA, indicate a clear planning strategy that in the long-term, a non-conforming use should relocate to a more appropriate site, rather than be entrenched and perpetuated on a site which is inappropriately zoned.

19. It is difficult to find such clear statements of principle in WA cases as appear in the Queensland cases referred to above. In my experience however, the tendency for planning decision-makers in WA has been to avoid planning approvals which would have the effect of extending or perpetuating non-conforming uses. The absence of reported cases emphasising the planning philosophy against perpetuation or entrenchment of non-conforming uses may reflect the fact that in WA the philosophy has generally been observed by the primary decision-makers.

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I hope the above advice and comments will be of use to you. Please don't hesitate to contact me if you think I can assist any further in this matter.

Yours sincerely



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