

12<sup>th</sup> October 2014

Housing, Growth & Economic Development,  
GPO Box 39,  
Sydney NSW 2001.

Dear Sir,

**Submission to Proposed Amendment of State Environmental Planning Policy - Expansion the Western Sydney Employment Area in Respect of Lot 4 DP 24094 Nos. 785 – 811 Wallgrove Road Horsley Park.**

## INTRODUCTION

This submission is in respect of Lot 4 DP 24094 Nos. 785 – 811 Wallgrove Road, Horsley Park and is lodged on behalf of the owner of the land (LWH Pty Limited). The use trades as Sydney Metro Tree Services Pty Ltd. The submission seeks the inclusion of the subject land within the Western Sydney Employment Lands given its location and, particularly, its current industrial type use (Rural Industry - being a type of Industry) with this now operating under the Existing Use Right Provisions of the Act and the Regulations made thereunder. The extent of this use is shown in an aerial photograph provided as **Figure 1** overleaf.

It is our position, as detailed later in this submission, that there can be no doubt as to the legality of the current use and the fact that the subject land benefits from the Existing Use Rights Provisions of the Act.

It is clearly evident from the aerial photograph and any site inspection that the current use represents a substantial industrial use of the land, albeit of a rural industry type – being the approved use. Site photographs included as Attachment 1 further indicate the extent of the use.

With the coming into effect of Fairfield LEP 2013, "Rural Industries" are no longer permitted under the current zoning of the land, however, nothing prevents the continuation of the use. We would also submit that any cessation of the use is unlikely in the extreme given the location of the land, the substantial site improvements, the nature of the use, its main road access (as approved and constructed) and its locational relationship to the Region the use serves.

The following sections provide additional detail in respect of the land, the current use and the planning controls that apply.

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**FIGURE 1 – SUBJECT LAND (Date 26<sup>th</sup> June 2014)**

## **1.0 SITE DETAILS**

### **1.1 Site Location**

The land the subject of this submission is known as Lot 4 DP 24094 Nos. 785 – 811 Wallgrove Road, Horsley Park (the subject land).

The subject land is situated on the western side of Wallgrove Road some 650m south of the Sydney Water Supply Line and 1000m north of The Horsley Drive. It is located within the suburb of Horsley Park and the Local Government Area of Fairfield City Council. The Western Sydney Employment Area immediately adjoins on the northern side, whilst the M7 and the Western Sydney Parklands are located to the east across Wallgrove Road with Prospect Reservoir further to the east.

**Figures 2 and 3** overleaf provides the location of the land in the neighbourhood context as well as the relationship with the zoned Western Sydney Employment Lands (SEPP Map).





FIGURE 2 – LOCATION OF SUBJECT LAND

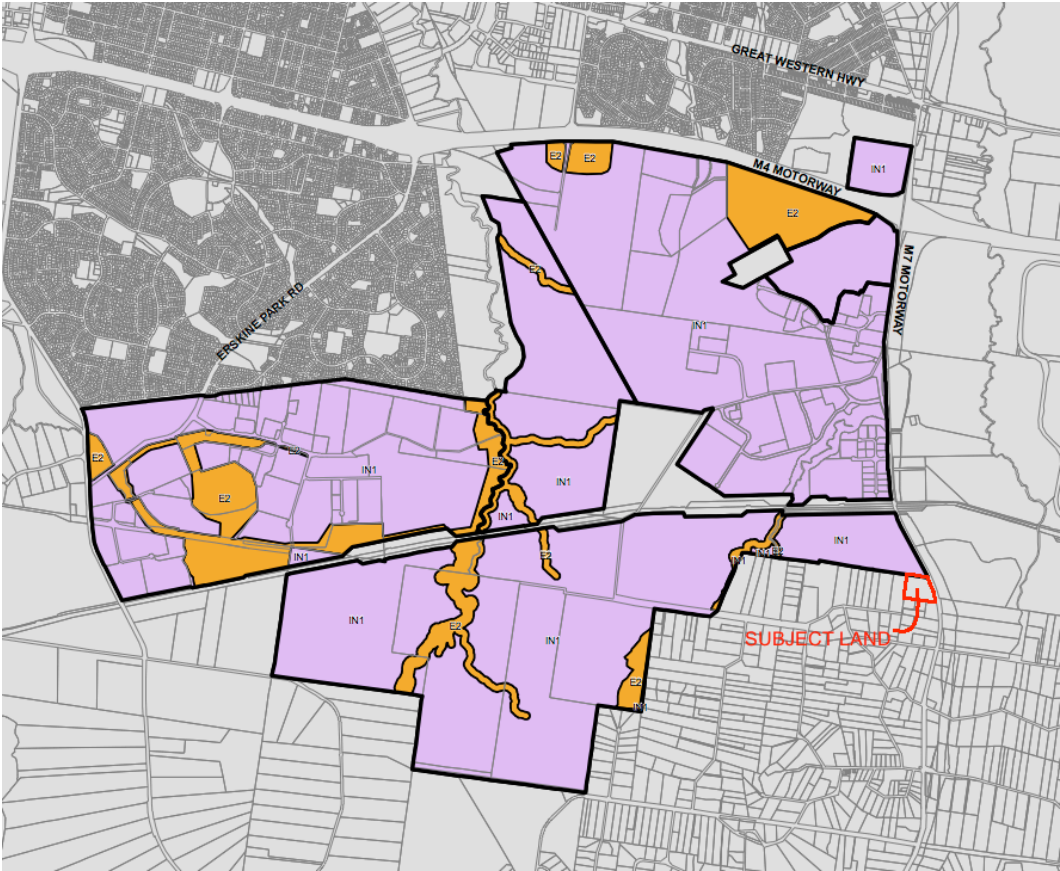


FIGURE 3 – LOCATION OF LAND RELATIVE TO THE WESTERN SYDNEY EMPLOYMENT LANDS

## 1.2 Site Description

The subject land is a regular shaped parcel, albeit with a splayed frontage to Wallgrove Road. The northern boundary has a depth of 177.908m, a rear (western) boundary of 200.393m, a southern boundary of 281.769m and a frontage to Wallgrove Road of 224.028m. The area of the land is 4.696 hectares (46960sqm).

The subject land was burdened by a 30.48m wide easement for transmission lines and this easement has now been widened to 60.0m. The easement traverses the land in a generally east/west direction.

## 1.3 Topography/Vegetation

The land falls gently down from the southeast corner to the northwest corner. Land slope does not represent a constraint on the development of the land with only minor earthworks required to form building/use pads. There is some scattered vegetation in the western (rear) section associated with a drainage depression, however, it should be noted that topographic mapping of the land does not indicate a "blue line" which would in turn indicate an intermittent watercourse.

With respect to vegetation, it is noted that a small section of the land is mapped as containing Terrestrial Biodiversity (Map BIO-005). The accuracy of this mapping is questioned.

## 2.0 THE CURRENT USE

The business, as conducted by Sydney Metro Tree Services, involves removal/lopping of trees and the use services Government, semi-government, asset management and corporate clients. The subject land forms the base of these operations with operational vehicles dispatched from and returning to the land. Removed trees (or parts of trees) are returned to the land where the resource is recovered by processing as firewood or mulch. Additional material is also sourced from suppliers such as Forests NSW. The recovered resource is then stored in stockpiles on-site pending its sale by wholesale or retail. Bulk product is delivered to customers' premises or customers collect product from the land, in the main, by box trailer or small rigid vehicle.

The subject land has a long history of firewood processing. In the 1980's and 1990's Council, in accepting the then use of the land, issued a series of 12 month consents and the use was operating at the time of purchase by the current owners/operators. Subsequently, Council has issued a further series of consents.

The following **Table 3** provides a summary of relevant consents related to the use.

**Table 3 Summary of Consents**

Matter	Description	Comments
26/10/2001 Consent for DA1272/2001	Plant Nursery – Storage/Cutting/Selling of Firewood and Mulch	1 year consent to 26/10/02 Plan No. DA 1272/01 dated August 2001
29/8/2003 Consent for DA1510/2002	Plant Nursery – Storage/Cutting/Selling of Firewood and Mulch and On-going base for Tree Lopping Business	3 year consent to 29/8/06
3/8/2005 Consent for DA1794/2004	Proposed plant nursery and rural industry including processing of logs into firewood and mulch, the erection of administration building and front boundary fencing and	Consent not time limited. Plans – DA01 –DA17 Issue F dated 26/4/06, CC02- cc11 issue 2 plus plans prepared by Cattarin &



	minor earthworks associated with drainage works on-site	Co – subject to changes in red.  This consent is considered to be the “base” consent from which impact of the proposed easement can be assessed. The consent has been substantially commenced by virtue of the Wallgrove Road intersection works as required under the consent.
1/2/05	Integral Approval	Includes conditions related to the existing easement
29/9/06 RTA Intersection Approval	“BAR” Intersection	Condition 8 of Consent DA1794/2004 Works carried out and DA substantially commenced
15/2/06 Consent for s96 Modification 31/2006 of consent DA1794/2004	Erection of front boundary fence (stage 1) and Proposed plant nursery and rural industry including processing of logs into firewood and mulch, the erection of administration building and front boundary fencing and minor earthworks associated with drainage works on-site (stage 2)	Proposed easement does not impact on fence. Impact on stage 2 to be assessed as per DA 1794/2004
13/3/07 Consent for DA70/2007 Weighbridge	Erection of a weighbridge and associated site office to be used in conjunction with the approved use of the premises as a plant nursery.	Plans SK-27-A, SK-29-30-C dated 22/1/07
4/8/2008 Consent for DA280/2008	Erection of a colorbond clad maintenance bay and erection of roofing over the existing fuel store, in conjunction with the approved use of the site as a plant nursery and rural industry.	Plans SK31 and SK36 issue A dated 18/3/08 and SK32 to SK35 issue A dated 8/2/08 Buildings beyond influence of proposed easement.
Building Certificate 76.1/2009	Metal shed	Shed as approved under DA280/2008
22/2/2010 Consent for DA1266.1/2009	Construction of an equipment storage shed	Plans by Misyl project no, HARWELL 10 – A-01 and A-02 issue B dated 23/11/09
15/9/2014 Consent for DA 262.1/2014	Erection of an awning and provision of a mezzanine level to existing workshop.	Provides cover for truck parking and secure storage of hand tools.

Further details of the consents are provided below.

- DA 1272/2001 was approved on the 26<sup>th</sup> October 2001 being for the use of the subject land as a “Plant Nursery – Storage/Cutting/Selling of Firewood and Mulch”. The consent was for a 12-month trial period. Condition 8 of the consent states *“There are to be no other products except firewood and mulch to be sold from the property without the prior written consent of Council”*
- DA 1510/2002 was approved on the 29<sup>th</sup> August 2003 being for “Plant Nursery – Storage/Cutting/Selling of Firewood and Mulch and On-going base for Tree Lopping Business”. Consent valid for three years (Condition 7). Condition 8 of the first consent repeated as Condition 13.

- DA 1794/2004 was approved on the 3<sup>rd</sup> August 2005 being for *“Proposed plant nursery and rural industry involving processing of logs into firewood and mulch, the erection of an administration building and front boundary fencing and minor earthworks associated with drainage works on site”*. Condition 31 of the consent makes reference to an Integral Energy letter of the 1<sup>st</sup> February 2005, which advises of no objection to the development subject to conditions. This consent was amended on the 15<sup>th</sup> February 2006 wherein the description of the development was changed to *“Erection of a front boundary fencing (stage1) and proposed plant nursery and rural industry involving processing of logs into firewood and mulch, the erection of administration building and minor earthworks associated with drainage works on site (stage 2)”*.
- DA 70/2007 was approved on the 13<sup>th</sup> March 2007 being for erection of a weighbridge and associated office.
- DA 280/2008 was approved on the 4<sup>th</sup> August 2008 being for the erection of a colorbond clad maintenance bay and erection of roofing over the existing fuel store.
- DA 1266.1/2009 was approved on the 22<sup>nd</sup> February 2010 being for the construction of an equipment storage shelter.
- DA 262.1/2014 was approved on the 15<sup>th</sup> September 2014 being an awning attached to the maintenance bay (DA280/2009) as well as a mezzanine level to the maintenance bay building.

The current built form consists of a weighbridge and an associated entry/exit control building located in the southern section of the land adjacent to the easement. In the northeastern section of the land is a cluster of buildings used for administration, storage, maintenance and amenities. Two dwellings are also erected in this area with one now used for administrative purposes pending the erection of the new office building approved under DA 1794/2004. Access is obtained off Wallgrove Road via a combined ingress/egress driveway at the southern boundary of the site with a deceleration lane provided as a condition of Consent 1794/2004. Two secondary access points are also provided.

A series of stockpiles are dispersed through the site with these having a combined area of about 11000sqm.

Approved, but yet to be constructed, is an office and storage building with this to be located in the southern section of the site adjacent to the main access and easement. In this regard it should be noted that further development of the site, in accordance with issued consents, has been constrained by negotiations and uncertainties related to the widening of the easement.

Beyond the built form, the remainder of the site (excluding the drainage depression area) is used for storage of product including large stockpiles of firewood and mulch, associated access and parking.

The hours of operation of the use are Monday to Saturday 7.00am to 5.00pm and Sunday 8.00am to 5.00pm

### **3.0 PLANNING REGIME**

Up until the coming into effect of Fairfield LEP 2013 (31<sup>st</sup> May 2013) the subject land was covered by the Provisions of Fairfield LEP 1994. This section considers both the previous and now current controls.

#### **3.1 Fairfield Local Environmental Plan 1994 (FLEP 1994)**

The subject land was covered by the Provisions of Fairfield Local Environmental Plan 1994 (FLEP 1994) with the land being within Zone Number 1 (a) Non Urban - Residential. The Land Use Table was:

##### ***Zone 1 (a) Non Urban—Residential***

##### ***1 What are the objectives of the zone?***

*The objectives of the zone are:*

- (a) to allow rural-residential development,*
- (b) to achieve attractive high quality development which is sympathetic to the rural environment and minimises risks from natural and man-made hazards,*
- (c) to ensure that development does not unreasonably increase demand for public facilities and services,*
- (d) to allow people to carry out a reasonable range of agricultural activities which are compatible with the living environment of neighbours, and*
- (e) to limit activities that have a detrimental effect on the environment, particularly on noise levels and on the quality of soil, air and water.*

##### ***2 What is allowed without development consent?***

*Nil.*

##### ***3 What is allowed only with development consent?***

*Any purpose other than a purpose included in item 2 or 4.*

##### ***4 What is prohibited?***

*Abattoirs, advertisements, amusement centres, amusement parks, brothels, bulky goods, salesrooms or showrooms, business premises, camping grounds and caravan parks, carparks other than those provided by the Council, clubs, communication facilities, entertainment facilities, extractive industry, gaming taverns, generating works, hazardous industry, hazardous storage establishments, heliports, hospitals, hostels, hotels, industry, institutions, intensive agriculture, junkyards, light industry, medical centres, mines, motels, motor showrooms, multi-unit housing, offensive industry, offensive storage establishments, plant hire, refreshment rooms, residential flat buildings, sawmills, service stations, serviced apartments, shops, stock and sales yards, transport depots, transport terminals, vehicle body repair workshops, vehicle repair stations, warehouses.*

The current use was approved as a “Plant Nursery” and a “Rural Industry”. Under FLEP 1994 these uses were defined as follows:



**Plant nursery** means a building or place used for growing and selling plants whether or not also for storing, handling and subsequent distribution of plants, landscape supplies (including earth products) or other horticultural products for wholesale or retail sale to the public.

**Rural industry** means an industry involving:

- (a) the treating or processing of primary products, or
- (b) the regular servicing or repairing of plant or equipment used for agriculture or for the treating or processing of primary products.

Under the former FLEP 1994 both uses were permitted with consent.

### **3.2 Fairfield Local Environmental Plan 2013 (FLEP 2013)**

FLEP 2013 was notified on the 17<sup>th</sup> May 2013 and commenced on the 31<sup>st</sup> May 2013. Under this LEP the subject land is within Zone No. RU4 - Rural Small Holdings. The Land Use Table for this zoning is:

#### **Zone RU4 Primary Production Small Lots**

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

- To enable sustainable primary industry and other compatible land uses.
- To encourage and promote diversity and employment opportunities in relation to primary industry enterprises, particularly those that require smaller lots or that are more intensive in nature.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To ensure that development is sympathetic to the rural environment and minimises risks from natural and man-made hazards.

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

*Environmental protection works; Home occupations*

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

*Agricultural produce industries; Animal boarding or training establishments; Bed and breakfast accommodation; Building identification signs; Business identification signs; Car parks; Cellar door premises; Child care centres; Community facilities; Crematoria; Dual occupancies; Dwelling houses; Educational establishments; Environmental facilities; Extensive agriculture; Farm buildings; Farm stay accommodation; Flood mitigation works; Forestry; Group homes; Home-based child care; Intensive plant agriculture; Landscaping material supplies; Places of public worship; Plant nurseries; Recreation areas; Recreation facilities (indoor); Recreation facilities (outdoor); Respite day care centres; Roads; Roadside stalls; Rural supplies; Veterinary hospitals; Water storage facilities*

##### **4 Prohibited**

*Any development not specified in item 2 or 3*

Relevant definitions under the Draft LEP are:

**landscaping material supplies** means a building or place used for the storage and sale of landscaping supplies such as soil, gravel, potting mix, mulch, sand, railway sleepers, screenings, rock and the like.

**Note.** Landscaping material supplies are a type of **retail premises**—see the definition of that term in this Dictionary.

**plant nursery** means a building or place the principal purpose of which is the retail sale of plants that are grown or propagated on site or on an adjacent site. It may include the on-site sale of any such plants by wholesale and, if ancillary to the principal purpose for which the building or place is used, the sale of landscape and gardening supplies and equipment and the storage of these items.

**Note.** Plant nurseries are a type of **retail premises**—see the definition of that term in this Dictionary.

Landscaping material supplies and Plant Nursery are uses permitted with consent.

**rural industry** means the handling, treating, production, processing, storage or packing of animal or plant agricultural products for commercial purposes, and includes any of the following:

- (a) agricultural produce industries,
- (b) livestock processing industries,
- (c) composting facilities and works (including the production of mushroom substrate),
- (d) sawmill or log processing works,
- (e) stock and sale yards,
- (f) the regular servicing or repairing of plant or equipment used for the purposes of a rural enterprise.

**Note.** Rural industries are not a type of **industry**—see the definition of that term in this Dictionary.

Rural Industries are no longer permitted on the land and this component of the use now benefits from the Existing Use Right Provisions of the Act and the Regulations made thereunder. These Provisions are discussed in **Section 3.4**.

### 3.3 FLEP 2013 PROVISIONS

As indicated earlier, part of the subject land is mapped as Terrestrial biodiversity. Clause 6.5 of the LEP provides:

#### 6.5 Terrestrial biodiversity

- (1) The objective of this clause is to maintain terrestrial biodiversity by:
  - (a) protecting native fauna and flora, and
  - (b) protecting the ecological processes necessary for their continued existence, and
  - (c) encouraging the conservation and recovery of native fauna and flora and their habitats.
- (2) This clause applies to land identified as “Biodiversity” on the Terrestrial Biodiversity Map.
- (3) Before determining a development application for development on land to which this clause applies, the consent authority must consider:

- (a) *whether the development is likely to have:*
  - (i) *any adverse impact on the condition, ecological value and significance of the fauna and flora on the land, and*
  - (ii) *any adverse impact on the importance of the vegetation on the land to the habitat and survival of native fauna, and*
  - (iii) *any potential to fragment, disturb or diminish the biodiversity structure, function and composition of the land, and*
  - (iv) *any adverse impact on the habitat elements providing connectivity on the land, and*
- (b) *any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.*
- (4) *Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:*
  - (a) *the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or*
  - (b) *if that impact cannot be reasonably avoided by adopting feasible alternatives—the development is designed, sited and will be managed to minimise that impact, or*
  - (c) *if that impact cannot be minimised—the development will be managed to mitigate that impact.*

Firstly, the currency and/or accuracy of the mapping is questioned, however to address this issue an Arboricultural Impact Assessment has been carried out by Concept Arbor Consulting (14<sup>th</sup> April 2014). Based on the findings of this assessment, it is concluded that the development of the land is not constrained.

There are no other special provisions under the LEP, which would constrain the approval of the proposed development.

### **3.4 EXISTING USE RIGHTS PROVISIONS**

Section 106 of the E P and A Act (the Act) provides:

#### **106 Definition of “existing use”**

*In this Division, **existing use** means:*

- (a) *the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4 of this Part, have the effect of prohibiting that use, and*
- (b) *the use of a building, work or land:*
  - (i) *for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and*
  - (ii) *that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse.*

Section 106 (a) is relevant and the use of the land was a lawful purpose prior to the coming into effect of Fairfield LEP 2012.

Section 108 of the Act provides:

#### **108 Regulations respecting existing use**

- (1) *The regulations may make provision for or with respect to existing use and, in particular, for or with respect to:*



- (a) the carrying out of alterations or extensions to or the rebuilding of a building or work being used for an existing use, and*
- (b) the change of an existing use to another use, and*
- (c) the enlargement or expansion or intensification of an existing use.*

*(2) The provisions (in this section referred to as **the incorporated provisions**) of any regulations in force for the purposes of subsection (1) are taken to be incorporated in every environmental planning instrument.*

*(3) An environmental planning instrument may, in accordance with this Act, contain provisions extending, expanding or supplementing the incorporated provisions, but any provisions (other than incorporated provisions) in such an instrument that, but for this subsection, would derogate or have the effect of derogating from the incorporated provisions have no force or effect while the incorporated provisions remain in force.*

*(4) Any right or authority granted by the incorporated provisions or any provisions of an environmental planning instrument extending, expanding or supplementing the incorporated provisions do not apply to or in respect of an existing use which commenced pursuant to a consent of the Minister under section 89 to a development application for consent to carry out prohibited development.*

Section 108 (1) is relevant as it enables alterations, extensions, rebuilding, change, enlargement, expansion, intensification and/or enlargement of the current use.

## **Environmental Planning and Assessment Regulation 2000**

Part 5 Section 39 of the Regulations provide:

### **39 Definitions**

*In this Part:*

**relevant date** means:

- (a) in relation to an existing use referred to in section 106 (a) of the Act—the date on which an environmental planning instrument having the effect of prohibiting the existing use first comes into force, or*
- (b) in relation to an existing use referred to in section 106 (b) of the Act—the date when the building, work or land being used for the existing use was first erected, carried out or so used.*

Section 39 (a) is relevant with Fairfield LEP 2012 coming into effect on the 31<sup>st</sup> May 2013.

Section 41 of the Regulations provide:

### **41 Certain development allowed**

- (1) An existing use may, subject to this Division:*
  - (a) be enlarged, expanded or intensified, or*
  - (b) be altered or extended, or*
  - (c) be rebuilt, or*
  - (d) be changed to another use, but only if that other use is a use that may be carried out with or without development consent under the Act, or*
  - (e) if it is a commercial use—be changed to another commercial use (including a commercial use that would otherwise be prohibited under the Act), or*
  - (f) if it is a light industrial use—be changed to another light industrial use or a commercial use*

(including a light industrial use or commercial use that would otherwise be prohibited under the Act).

(2) However, an existing use must not be changed under subclause (1) (e) or (f) unless that change:

(a) involves only alterations or additions that are minor in nature, and

(b) does not involve an increase of more than 10% in the floor space of the premises associated with the existing use, and

(c) does not involve the rebuilding of the premises associated with the existing use, and

(d) does not involve a significant intensification of that existing use.

(e) (Repealed)

(3) In this clause:

**commercial use** means the use of a building, work or land for the purpose of office premises, business premises or retail premises (as those terms are defined in the Standard Instrument (Local Environmental Plans) Order 2006).

**light industrial use** means the use of a building, work or land for the purpose of light industry (within the meaning of the Standard Instrument (Local Environmental Plans) Order 2006).

Section 42 of the Regulations provide:

**42 Development consent required for enlargement, expansion and intensification of existing uses**

(1) Development consent is required for any enlargement, expansion or intensification of an existing use.

(2) The enlargement, expansion or intensification:

(a) must be for the existing use and for no other use, and

(b) must be carried out only on the land on which the existing use was carried out immediately before the relevant date.

Section 43 of the Regulations provide:

**43 Development consent required for alteration or extension of buildings and works**

(1) Development consent is required for any alteration or extension of a building or work used for an existing use.

(2) The alteration or extension:

(a) must be for the existing use of the building or work and for no other use, and

(b) must be erected or carried out only on the land on which the building or work was erected or carried out immediately before the relevant date.

Section 44 of the Regulations provide:

**44 Development consent required for rebuilding of buildings and works**

(1) Development consent is required for any rebuilding of a building or work used for an existing use.

(2) The rebuilding:

(a) must be for the existing use of the building or work and for no other use, and

*(b) must be carried out only on the land on which the building or work was erected or carried out immediately before the relevant date.*

Section 45 of the Regulations provide:

**45 Development consent required for changes of existing uses**

*Development consent is required:*

- (a) for any change of an existing use to another use, and*
- (b) in the case of a building, work or land that is used for different existing uses, for any change in the proportions in which the various parts of the building, work or land are used for those purposes.*

Clearly the Existing Use Right Provisions enable the continuation of the current use in its current form as well as in some altered form as enabled by the Act and the Regulations. The nature of the use is such that its cessation to the extent that the use of the land reverts to “rural small lots” cannot be realistically expected.

**4 CONCLUSIONS**

The location of the land relative to the Western Sydney Employment Lands, the industrial type use of the land and the certainty of that use continuing is sufficient to suggest that an industrial zoning should apply to the land. The obvious way to remove the vagaries of the Existing Use Right Provisions and control use by zoning is to include the land within the Western Sydney Employment Land SEPP.

We would recommend that action.



Gary Rhodes  
Partner



ATTACHMENT 1 – SITE PHOTOGRAPHS - GENERAL VIEWS





















