



DEVELOPMENT CONSENT AUTHORITY

DARWIN DIVISION

MINUTES

MEETING No. 350 – FRIDAY 21 FEBRUARY 2020

**BROLGA ROOM
NOVOTEL DARWIN ATRIUM
100 THE ESPLANADE
DARWIN**

MEMBERS PRESENT: Suzanne Philip (Chair), Mark Blackburn, Marion Guppy, Simon Niblock and Robin Knox

APOLOGIES: Peter Pangquee

OFFICERS PRESENT: Margaret Macintyre (Secretary), Dawn Parkes, Amit Magotra and Richard Lloyd, (Development Assessment Services)

COUNCIL REPRESENTATIVE: Apology

Meeting opened at 10.30 am and closed at 12.15 pm

THE MINUTES RECORD OF THE EVIDENTIARY STAGE AND THE DELIBERATIVE STAGE ARE RECORDED SEPARATELY. THESE MINUTES RECORD THE DELIBERATIVE STAGE. THE TWO STAGES ARE GENERALLY HELD AT DIFFERENT TIMES DURING THE MEETING AND INVITEES ARE PRESENT FOR THE EVIDENTIARY STAGE ONLY.

ITEM 1

**PA2019/0377 RECONSIDERATION - UNIT TITLE SCHEMES SUBDIVISION TO CREATE TWO UNITS AND COMMON PROPERTY
LOT 9576 (247) TROWER ROAD, CASUARINA, TOWN OF NIGHTCLIFF**
APPLICANT/S Northern Planning Consultants Pty Ltd

Mr Brad Cunnington (Northern Planning Consultants Pty Ltd) and Ms Teresa Hall (Ward Keller) attended.

RESOLVED That, pursuant to Section 53(c) of the *Planning Act 1999*, the Development
18/20 Consent Authority refuse to consent to the application to develop Lot 9576 (247) Trower Road, Town of Nightcliff for the purpose of a unit title schemes subdivision to create two units and common property, for the following reasons:

REASONS FOR THE DECISION

1. Pursuant to section 51(a) of the *Planning Act 1999*, the consent authority must take into consideration the planning scheme that applies to the land to which the application relates.

Lot 9576, Town of Nightcliff (the site) is located in Zone C (Commercial) of the Northern Territory Planning Scheme (NTPS) of which the purpose is to provide for a range of business and community uses. The zone applies to shopping areas ranging from neighbourhood convenience shopping to regional centres. The zone also provides that development should be of a scale and character appropriate to the service function of a particular centre; respect the amenity of adjacent and nearby uses; and promote community safety in building design, having regard to adjacent and nearby uses.

The site is developed as a major shopping centre known as "Casuarina Square" containing about 54328m² of Gross Lettable Area - Retail (GLAR)¹ of floor space comprising major supermarkets and a series of internal shopping malls accommodating recreational and service land uses. The site also comprises the UniLodge student accommodation building and has extensive planning history.

The application proposes a unit title schemes ("UTS") subdivision of the existing development to create two units and is intended to facilitate new ownership arrangements by means of sale, transfer or partition, of the existing development. The application proposes that the UniLodge student accommodation will be contained within one unit title (unit 1), and remaining shopping centre area contained within the other (unit 2). While all driveway access to the proposed units is to be contained within the common property, the existing arrangements in relation to 22 car parking spaces required for UniLodge (unit 1) are proposed to be

¹ As per the recent development approval granted for the shopping centre DP19/0288

continued. As a result, if the application is approved, those car parking spaces for unit 1 will be located within the proposed unit title boundaries of the shopping centre (unit 2).

This application was first considered by the Authority at its meeting on 6 December 2019. The application was subsequently deferred to enable the applicant to provide the following additional information that the Authority considered necessary in order to enable proper consideration of the application:

A copy of the proposed Scheme Statement, including the By-Laws, to be registered on title and written confirmation from a suitably qualified professional and the scheme supervisor that the unit titling can be effected in such a way that proposed Lot 1 (UniLodge) retains a legal right to access and use the required number of carparks.

In response to the Notice of Deferral, the applicant provided the following information:

- Response letter outlining the response to the Notice of Deferral
- Draft Scheme Statement snapshot [with Note 9, referring to by-laws in the Scheme Statement]
- Draft By-Law for the car parking in the Scheme Statement
- Briefing paper from Ward Keller

The briefing paper stated that Ward Keller was in discussion with the Scheme Supervisor, and further details would be provided to the DCA at the hearing.

On that basis, and given that the majority of the information required by the Notice of Deferral was addressed by the Applicant, with the exception of written confirmation from the Scheme Supervisor (which appeared to be forthcoming), reconsideration of the application took place at the 21 February 2020 Development Consent Authority meeting.

Mr Brad Cunnington (Northern Planning Consultants Pty Ltd) and Ms Teresa Hall (Ward Keller) attended the meeting and spoke further to the application and points of deferral. Mr Cunnington told the Authority that while Ms Hall had had a number of discussions with the Scheme Supervisor, no formal written response had been provided by the Scheme Supervisor to date. In response to a question raised by the Authority in relation to why no written response had been received, Ms Hall explained that she had requested the necessary information on multiple occasions, and had been led to believe it would be provided. Ms Hall mentioned that the Scheme Supervisor had verbally raised a question of his authority to provide such advice and that this may therefore be a factor in the written confirmation not being forthcoming.

Notwithstanding that no written advice from the Scheme Supervisor had been provided, Ms Hall addressed the Authority in respect of the Applicant's position in relation to the provisions of the *Unit Title Schemes Act 2009* ("the UTS Act") dealing with unit title by-laws.

Noting that the matters of deferral had not been fully addressed, the Authority questioned the applicant as to whether or not they wanted to proceed with reconsideration of the application based on the information provided to date, and in the absence of the written advice of the Scheme Supervisor. The applicant confirmed that they wished to proceed and the Authority acceded to that request.

Of particular relevance to this application is the approval for UniLodge (proposed unit 1 of the UTS). That approval was granted through Development Permit DP14/0054 in January 2014 for purpose of a 303-bed student accommodation development (hostel) in an eight storey building including ground level car parking, which is developed on the southern portion of the site, between the existing Coles loading dock and adjacent to the Dripstone Road frontage.

Condition 28 of DP14/0054 states that:

“No further subdivision of the development area to create either a separate development parcel or unit titling is permitted (for clarity this includes subdivisions for the purpose of a lease in excess of 12 years).”

That approval also granted a reduction from the 64 parking spaces, assessed as required for the hostel, to 31 parking spaces. Of the 31 parking spaces, 9 spaces are provided in the undercroft of the UniLodge building, and 22 spaces are provided within the shopping centre as part of the Car Parking Management plan endorsed under Condition 7 of DP14/0052. These car parking spaces are provided on the Trower Road deck car park area of the shopping centre.

The Authority noted that determination of the present application required, firstly, consideration of a variation to DP14/0054 to remove condition 28, and, secondly, appraisal of whether there are special circumstances which allow the Authority to exercise its discretion to vary compliance with Clause 11.1.5 of the NTPS in relation to car parking.

Turning to the first matter, as the current application proposes a UTS subdivision of the site to create two units and common property, the Authority must first decide whether or not to vary and/or delete condition 7 of DP14/0054 which would then allow further consideration of the application. If the Authority determines to uphold condition 28 of DP14/0054 then no further consideration of the application is necessary.

The Authority's power to vary a permit is found in Section 57 of the *Planning Act 1999*. Subsection (3) provides –

(3) The consent authority may, in writing, vary a condition of a development permit if:

- (a) the proposed variation will not alter a measurable aspect of the development by a margin greater than 5% and, in the opinion of the consent authority, will not materially affect the amenity of adjoining or nearby land or premises; or*
- (b) in the opinion of the consent authority, the alteration resulting from the proposed variation is not conveniently measurable and*

the proposed variation will not materially affect the amenity of adjoining or nearby land or premises.

The power to vary granted by Section 57(3) is discretionary, provided that either of the conditions (a) or (b) are met. The only restriction placed upon the exercise of that discretion is a requirement in subsection (5) that, if refused, reasons must be provided.

In support of its application to vary Condition 28 of DP14/0054, the applicant relied on a statement contained in the Notice of Consent which accompanied that permit:

“A condition restricting subdivision of the site (including for the purpose of a lease in excess of 12 years) is included to ensure the applicant is aware of the limitations imposed on the development by clause 7.9 (residential development in Zone C) of the NT Planning Scheme which includes a non-discretionary requirement that residential buildings in Zone C include ground floor occupancies for commercial activity of a floor area that is consistent with the service function of the site. The DCA in determining this application has assessed compliance with this requirement having regard to the overall development on the Casuarina Shopping Square ‘site’ and any attempt to separately title this building / development would in the DCA’s view be prohibited under the NT Planning Scheme.”

The applicant argues that “there are two primary issues with both the consent authority’s explanation in the NOC and condition 28 of DP14/0054. Firstly, a development permit condition cannot prohibit a future application being made for either a specific development outcome or a variation to a previously issued permit, particularly when the Northern Territory Planning Act facilitates such application being made. Ultimately, it is up to the consent authority to consider any new proposal in the context of any previous decisions (as relevant), and to consider each matter on its merits.

Secondly, the consent authority’s interpretation of Clause 7.9 per DP14/0054 and the associated NOC is flawed. The definition of a site in clause 3.0 of the Planning Scheme provides that site “means an area of land, whether consisting of one lot or more, which is the subject of an application to the consent authority.” The definition of site clearly anticipates multiple allotments contributing to a single site, and thus by extension, subdividing components of a site does not automatically mean these components are no longer part of that site. Indeed in this instance, and despite the proposed unit title arrangements, both areas will remain intrinsically connected. The application proposes to create two unit title parcels, affecting lot 9576 in its entirety, thus proposed unit 2 (the remaining shopping centre area) is very much subject of this application, thus still very much part of the subject site.”

The Authority notes the abovementioned comments and the further information in support of a variation to DP14/0054 provided within the applicant’s statement of effect.

At the meeting Mr Cunnington further explained his opinion that the definition of site clearly anticipates multiple allotments contributing to a single site, and thus by extension, subdividing components of a site does not automatically mean these components are no longer part of that site. Indeed in this instance, and despite the proposed unit title arrangements, both areas will remain intrinsically connected. The application proposes to create two unit title parcels, affecting Lot 9576 in its entirety, thus proposed unit 2 (the remaining shopping centre area) is very much subject of this application, and thus still very much part of the subject site.

The Authority noted that no objection was raised in relation to Condition 28 at the time the permit was issued in 2014. The Applicant is correct that there is no power to “prohibit a future application being made for either a specific development outcome or a variation to a previously issued permit, particularly when the Northern Territory Planning Act facilitates such application being made”. The current Authority is fully at liberty to entertain an application such as the present one for variation of a previous permit condition and that is exactly what the Authority is so doing. Further, an earlier Authority cannot impose an undue fetter on the exercise of discretion by a subsequent Authority. However, while a condition such as Condition 28, cannot prevent the exercise of discretion by the current Authority, it is, nevertheless, a factor that the Authority is entitled to take account in reaching its own decision.

In this particular case, the threshold question is whether removal of Condition 28 is a variation that satisfies the tests in Section 57(3). The Authority considered it was a variation that was not conveniently measurable. However, it was not satisfied that the proposed variation would not materially affect the amenity of adjoining or nearby land or premises. In the alternative, even if amenity was not so affected and the threshold test satisfied, the Authority refused to exercise its discretion because of the nature of the application as a whole. The application to vary DP14/0054 is intrinsically linked to the application for a UTS subdivision (which is discussed further below) and therefore the Authority considered the variation in this context. The Authority concluded that a variation to amend condition 28 of DP14/0054 would materially affect the amenity of adjoining land or premises as it would facilitate the UTS subdivision, which in its current form, would result in uncertainty regarding the provision of car parking for the UniLodge student accommodation which has previously been granted a substantial reduction in car parking and has been the subject of a number of complaints to the City of Darwin in relation to car parking on adjacent streets and land. Further, the Authority noted Mr Cunnington’s arguments in relation to the definition of “site” but considered that the unique nature of the development as emphasised in the applicant’s submissions, the very substantial reductions given in relation to car parking and unusual arrangements in respect of the provision of that parking, which also underpinned DP14/0054, make it unsafe to remove that condition in the context of the current application for a non-compliant UTS.

While the applicant contended that condition 7 of DP14/0054 would still be valid and enforceable once the site was subdivided into units and therefore certainty regarding car parking would remain, the Authority was not confident that this would be the case given that the DP14/0054 would then relate to proposed unit 1 (UniLodge) rather than unit 2 (shopping centre). The permit requirement for the 22 car parking spaces for unit 1 would have to be enforced against the owner of a separate unit (2) which was not directly covered by the permit for UniLodge, making enforcement, at the very least, difficult and complex.

Further and in the alternative, notwithstanding the Authority's determination to refuse the application to amend condition 28 of DP14/0054, for completeness the Authority considered the applicant's proposal to subdivide the site for the purpose of a UTS subdivision. In summary (full discussion provided below) the Authority determined that there were no special circumstances to vary the requirements of Clause 11.1.5, in particular sub-clause 2(a).

The proposed UTS subdivision is subject to assessment against the following clause of the NTPS:

Clause 11.1.5 (Subdivision for the purpose of a Unit Title Scheme)

The purpose of this clause is to ensure that the new ownership arrangements resulting from a subdivision to create a unit title scheme allow each element of the development to continue to be available to the occupants of the development and where appropriate to visitors; older developments are upgraded; and development will not have a detrimental environmental effect on the land or result in a loss of amenity within the locality (underline emphasis added).

Sub-clause 2 further states that subject to sub-clauses 3, 4, 5 and 8 a subdivision to create a unit title scheme should meet the requirements of Part 4 of the planning scheme and in particular:

- a) all car parking provided as a requirement of a development must be available at all times for the use of the occupants of the development and their visitors or clients and be included:
 - i. in common property; or
 - ii. as part of the area under the title for the individual units;
- b) any loading bays provided for the development must be either in common property or if for sole nit must be within entitlement of that unit.
- c) any areas set aside for the communal storage and collection of garbage and other solid waste must be included in the common property.
- d) any private open space associated with a dwelling must be included in the unit entitlement of that dwelling.
- e) any communal facilities and amenities or open space provided for hostels, multiple dwellings and supporting accommodation must be included in the common property.

The approval granted for the UniLodge student accommodation (DP14/0054) included the provision of 22 car parking spaces within the shopping centre car park, which through a Car Parking Management

plan endorsed under Condition 7 of DP14/0052, are provided on the Trower Road deck car park area of the shopping centre. Any changes to the provision or location of these 22 car parking spaces would require a variation to condition 7 of DP14/0054.

The Authority noted the assessment of the Development Assessment Services (DAS) which concludes that the UTS subdivision is generally consistent with the clause including:

1. All loading bays required to service the shopping centre, and approved under previous approvals, are within the entitlement of the shopping centre. No loading bay is required for the UniLodge building;
2. Garbage collection areas are located within the respective unit entitlement;
3. Private open space areas, consisting of the unit balconies, are within the entitlement of the UniLodge building. There are no requirements for private open space for the shopping centre; and
4. The communal areas of the UniLodge building, located on Level 1 are within the unit entitlements of that unit. As these uses are for the exclusive use of the occupants of the UniLodge building, they are not considered as communal for units 1 and 2.

The current application proposes to maintain the arrangement of the provision of 22 car parking spaces within the shopping centre (in accordance with the Car Parking Management plan endorsed under DP14/0052) and as a result the car parking associated with unit 1 (UniLodge) is not within common property or within the unit entitlement of unit 1 as required by the Clause. This creates a non-compliance with sub-clause 2(a) which requires all car parking provided as a requirement of a development must be available at all times for the use of the occupants of the development and their visitors or clients and be included: in common property; or as part of the area under the title for the individual units.

Pursuant to Clause 2.5 (Exercise of Discretion by the Consent Authority) of the Northern Territory Planning Scheme the Authority may consent to a development that does not meet the standard set out in Part 4 and 5 of the Planning Scheme where it is satisfied that special circumstances justify the granting of consent.

In relation to the variation sought the applicant provided the following information within the written application and also spoke further to these points at the 6 December 2019 and 21 February 2020 meetings:

- The ongoing provision of the 22 spaces on the Trower Road deck is identified as part of the Car Parking Management Plan endorsed as part of DP14/0054. Encapsulating these spaces within either common property or proposed unit 1 would disjoint the unit title and/or common property layout, and restrict any future relocation of the car parking spaces if agreed between the unit title holders / licensees;
- The existing licence arrangement for the 22 car parking spaces is unique in that car parking spaces are already provided off-site. The distribution of unit title boundaries seeks to reflect the existing arrangement, with the continued provision of car parking

- for the student accommodation building within the main shopping centre car park, as part of a formal, legally binding agreement;
- The GPT (landowner of Lot 9576) plans to alter the use of the Ultratune tenancy from motor repair station to a shop (as a minor expansion of the existing shopping centre) at a point post the expiry of the current lease (2020), with modifications to negate the need for separate driveway access (through the ground floor of unit 1) or car parking. As a result of this, the 10 car parking spaces within the eastern undercroft car parking (currently reserved for Ultratune tenancy) area will be utilised by the UniLodge building. This will reduce the need for off-site parking from 22 to 12 car spaces.
- Advice from the legal advisor is that the proposed unit titling can be effected in such a way that unit 1 (UniLodge) retains a legal right to access and use of the required number of carparks.

At the 21 February 2020 meeting, the Authority was addressed at length by Ms Hall, as legal advisor to the applicant. In relation to the proposed by-law Ms Hall provided the following:

- The proponent has the authority to create by-laws through the Scheme Statement in relation to the obligations and rights of the body corporate, unit owners and unit occupiers relating to the use or control of the Scheme Land, in accordance with Section 95(2) of the *Unit Titles Scheme Act 2009* (UTS Act);
- The by-laws will not be able to be amended without the certification of the Scheme Supervisor, who will be aware of the development permit and requirement for the provision of the car parking spaces (including that the by-laws make specific reference to the requirements of any development permit);
- A Unit Owners Agreement will enable agreement and acknowledgement by the unit owners regarding the by-laws; and
- The by-laws will allow the proposed unit titling to be effected in such a way that UniLodge (proposed unit 1) will retain a legal right to access and use the required car parks.

At both meetings the Authority questioned the feasibility of providing an additional 10 spaces on-site if and when the Ultratune tenancy changes to a shop as it is more than likely the new tenants will also want access to conveniently located spaces. The Authority considered that prior to the granting of any approval for the UTS subdivision the applicant would need to provide a mechanism to ensure that the 22 spaces currently provided off-site continue to be available in a convenient and proximate location to the residents. The applicant contended that the Car Parking Management plan (endorsed through DP14/0054) already provides an appropriate mechanism to ensure this.

Speaking further to the demonstration of special circumstances, Mr Cunnington asserted that the site was unusual as it was a large regional shopping centre with constantly evolving tenancy and parking demands which is unlike other UTS subdivisions which normally consist of determined uses and parking requirements which are unlikely to change. The Authority asked the applicant if compliance with

Clause 11.1.5 was possible. The applicant conceded it was but would not provide the applicant with the flexibility that they would desire.

The Authority noted the applicant's comments but was not satisfied that the circumstances presented amounted to special circumstances as identified by *President Bruxner in Bradley v Development Consent Authority and Kalthmera Pty Ltd [2017] NTCAT 922*. Rather, the Authority concluded that the reasons for non-compliance with sub-clause 2(a) largely revolved around convenience and flexibility for the landholder.

In exercising its discretion under Clause 2.5, the Authority considered whether the arrangements as proposed by the applicant demonstrated that sufficient safeguards were put in place that would guarantee the same security of the 22 car parking spaces as would be achieved by compliance with the very clear requirements contained in Clause 11.1.5. The Authority noted the various matters put to it in relation to the proposed by-laws and the provisions of the existing permit and car-parking management plan. It considered that there remained a very significant degree of both complexity and uncertainty in relation to the proposed safeguards which did not justify departure from the requirements of Clause 11.1.5. The Authority was not convinced that the proposed by-laws were valid within the terms of Section 95 of the UTS Act. The Authority concluded that the proposal still fails to explain the special circumstances justifying a variation to this Clause or what safeguards can be put in place to guarantee the security of the 22 car parking spaces.

Over and above consideration of the current application, the Authority noted that if full compliance with Clause 11.1.5 can be achieved, i.e. that the required car parking for the UniLodge student accommodation (proposed unit 1) is provided on its respective title or in common property, then it would reconsider an application to vary condition 7 of DP14/0054 which would be assessed on its merits and in the context of a fully compliant UTS application.

2. Pursuant to section 51(n) of the *Planning Act 1999*, the consent authority must take into consideration the potential impact on the existing and future amenity of the area in which the land is situated.

The Authority noted that, the granting of Development Permit DP14/0054, approved a reduction to Clause 6.5.1 (Parking Requirements) from 64 car parking spaces to 31 car parking spaces. Given in this instance that of the 31 car parking spaces approved only 9 car parking spaces are proposed in the UniLodge entitlement (unit 1), any change in the continuous non-availability of the car parking in unit 2 will impact the amenity of the existing development and surrounding development. The Authority is not satisfied that a long term arrangement has been made available under the current proposal which guarantees that the unit owner or occupier of unit 2 (shopping centre), shall provide access to and use of the 22 car parks to a unit owner or occupier of unit 1 (UniLodge).

ACTION: Notice of Refusal

ITEM 2

PA2015/0010

VARIATION - EXTEND HOURS OF OPERATION

LOT 9228 (11) TANG STREET, COCONUT GROVE, TOWN OF NIGHTCLIFF

APPLICANT/S

Tomra Collection Solutions Australia Pty Ltd

DAS tabled information provided from the applicant on the proposed acoustic wall and the current operating hours of nearby businesses.

Mr Edgar Cupido (Projects Manager, Tomro Collection Solutions Australia Pty Ltd) attended.

**RESOLVED
19/20**

That, pursuant to section 57(3) of the *Planning Act 1999*, the Development Consent Authority refuse the application to vary condition 11 of DP15/0240A to extend the hours of operation for the recycling depot, for the following reasons:

REASONS FOR THE DECISION

1. Pursuant to section 57(3) of the *Planning Act 1999* the consent authority may, in writing, vary a condition of a development permit if:
 - (a) *the proposed variation will not alter a measurable aspect of the development by a margin greater than 5% and, in the opinion of the consent authority, will not materially affect the amenity of adjoining or nearby land or premises; or*
 - (b) *in the opinion of the consent authority, the alteration resulting from the proposed variation is not conveniently measurable and the proposed variation will not materially affect the amenity of adjoining or nearby land or premises.*

The definition of 'amenity' in relation to a locality or building as provided by the Northern Territory Planning Scheme (NTPS), means *any quality, condition or factor that makes or contributes to making the locality or building harmonious, pleasant or enjoyable.*

Development Permit DP15/0240 was issued in April 2015 for the purpose of a part change of use to a recycling depot. Condition 11 of DP15/0240 requires that 'the use may operate only between the hours of 8am – 6pm Monday to Friday and 8am – 1pm Saturday'.

The applicant requested an extension to the weekend hours of operation for the recycling depot, approved for the site in 2015 through Development Permit DP15/0240, to 1pm – 5pm Saturday and 8am – 5pm Sunday.

It is noted that the measurable aspect of a development as stated in section 57(3) of the *Planning Act 1999*, is considered only to apply to the performance criteria of the NTPS, i.e. aspects such as building heights, setbacks, parking requirements etc. Hours of operation is not a matter covered by the NTPS so is not considered a measurable aspect under section 57(3) of the Act.

The recycling depot is located within Zone LI (Light Industry), and the primary purpose of the zone is to provide for light industry uses or development activities that will not by the nature of their operations, detrimentally affect adjoining or nearby land. It is noted that the rear of

the site adjoins residential land zoned MD (Multiple Dwelling Residential). The rear of five other lots in the LI zone (along Tang St), also adjoin the residential land zoned MD. For the purposes of Section 57(3) the test is whether the variation will materially affect *the amenity of adjoining or nearby land or premises*. In this case, as the LI land immediately abuts MD land, the effect on amenity of those residential properties must be considered and is key to determining the degree of interference with amenity.

It is noted from the reasons for decision for the original planning application in 2015 that it was expected that the use (of the recycling depot) would not be inconsistent with the intent and objectives of Zone LI in providing a use that will not, by the nature of its operations, detrimentally affect adjoin or nearby land. It is considered that the depot's current operating hours (8am to 6pm Monday to Fridays and 8am to 1pm Saturdays), were essentially imposed to protect the amenity of the residential land at the rear of the site.

The original application for the recycling depot was advertised in the NT News in January 2015 and placed on public exhibition in accordance with the requirements of the *Planning Act 1999*. 48 people made public submissions under section 49(1) of the Act, with 28 people supporting the application and 20 objecting to it.

While a variation application does not require public exhibition under the requirements of the *Planning Act 1999*, this application was circulated to submitters who had identified an interest in the original application for the recycling depot during its exhibition period in 2015. Comments were received from seven of the previous submitters, plus one person who previously did not make a submission.

The main basis for objection contained in the comments related to the impacts of the recycling depot on amenity, particularly noise. Many comments also noted noise issues from the depot's current hours of operation with most of the submitters being residents living in the MD zone to the rear of the site.

In response to the submissions and to support the extension of hours of operation, the applicant commissioned a noise consultant (SLR Consulting Australia Pty Ltd), to prepare a site-specific acoustic assessment which considered the potential impacts the extension of operating hours could have on the adjoining residential properties. The assessment found that in order for the recycling depot to achieve compliance with the noise criteria specified in the Northern Territory Noise Management Framework Guidelines - at the residential properties to the rear of the site at weekends - the installation of a 2.8m high acoustic barrier was required at the rear of the site. The applicant committed to build the barrier prior to extending the hours of operation.

The Authority considers that even with the introduction of an acoustic barrier, to extend the recycling depot's operating hours from 8am - 5pm on a Sunday, would materially affect the amenity of the residential premises adjoining the rear of the depot, particularly because (as advised by the applicant), none of the businesses along Tang Street

which adjoin residential premises operate on a Sunday, and this contributes to making the locality pleasant or enjoyable on Sundays. It is considered that the amenity of the adjoining residential premises would still be materially affected through the introduction of recycling depot operations on Sundays, even if the noise received at the residential premises from the recycling depot was within the Northern Territory Noise Management Framework Guidelines (through the erection of an acoustic barrier at the rear of the depot). The Authority considers that noise would still permeate around and over the acoustic barrier and a level of general disturbance would still be experienced which is not currently evident in the vicinity on a Sunday.

The Authority considers that to extend the recycling depot's operating hours from 1pm - 5pm on a Saturday would also materially affect the amenity of the residential premises adjoining the rear of the depot particularly because (as advised by the applicant), the recyclable items that have been collected by the depot during operating hours are collected by truck at the end of the day, and to have this occurring at 5pm on a Saturday would have a material effect on the amenity of the adjoining residential premises. Also, if the items were not collected at the end of the day they would instead remain on site until at least Monday which would have the potential of materially affecting the amenity of the residential premises adjoining the rear of the depot through the emission of smell and/or the potential for the presence of vermin. While information provided by the applicant indicates that one of the businesses along Tang Street which adjoins residential premises, operates on a Saturday to 5pm (Top End Mechanix), the Authority considers that that business does not necessarily require a regular truck movement late on the Saturday afternoon impacting amenity.

As the Authority has found that the variation sought by the applicant will materially affect the amenity of the neighbouring residential area, it cannot grant the variation as sought. However the Authority further considered if any extension of the hours of operation would be acceptable in terms of amenity impacts and concluded that an extension of hours on Saturday afternoon could be supported. The Authority considers that, as there is a nearby business operating until 5pm, for the applicant to have the truck pick up the recycled items at 3pm would not materially affect the amenity of the locality, provided the noise received at the residential premises from the recycling depot is within the Northern Territory Noise Management Framework Guidelines. The Authority also considers that such an extension would not necessarily require the acoustic barrier. For a two hour extension of operating hours, it is not considered necessary for the proposed acoustic barrier to be built. The Authority however expects that the recycling depot will meet the relevant noise requirements of the Northern Territory Noise Management Framework Guidelines at all times.

As such, an extension of operating hours on a Saturday to 3pm is considered acceptable and a fresh application to vary Condition 11 to this effect under section 57(3) of the *Planning Act 1999* would be supported.

It is noted that the planning records for the site show that a Certificate of Compliance has never been sought for the existing development permit (noting it is not mandatory for one to be obtained under the *Planning Act 1999*), but it is recommended that the applicant obtain one so the recycling depot's compliance with the consent conditions, particularly landscaping, can be clearly demonstrated.

ACTION: Notice of Refusal

RATIFIED AS A RECORD OF ATTENDANCE AND DETERMINATIONS MADE AT THE MEETING

SUZANNE PHILIP
Chair

28 February 2020