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Dear Mr Fitchat

**Proposed Unmanned Road Train Refuelling Facility on Lot 3 Eyre Highway, Norseman**

In August 2020 Ms Liz Bushby, on the Shire's behalf, asked us to provide advice on a number of issues relating to a development application for approval of an unmanned road train refuelling facility (**Proposed Facility**) on Lot 3 Eyre Highway, Norseman (**Lot 3**):

At our request, the applicant was asked to provide further information on certain matters which are relevant to one aspect of our advice. Several months have since elapsed without the applicant providing the requested information. We have, therefore, proceeded to finalise our advice. However, as noted in paragraph 3.42 below, it will be necessary to review our advice on this aspect should the applicant provide the requested information in the future.

The specific issues on which we have been asked to provide advice are:

- (a) What is the correct land use classification of the Proposed Facility under the Shire's Local Planning Scheme No. 2 (LPS2)?
- (b) Does the Shire have discretion to grant development approval for the Refueling Facility?
- (c) Is the refueling facility ancillary to the existing BP development on Lot 2 Eyre Highway, Norseman?

## **1. Executive Summary**

The answers to the above questions are as follows:

- 1.1 The Proposed Facility consists of two separate components: truck parking and truck refuelling. Each is a distinct land use and must be classified separately.
- 1.2 The truck parking component is properly classified as a transport depot and can be approved on Lot 3.
- 1.3 The truck refuelling component is a 'use not listed' and cannot be approved on Lot 3.
- 1.4 The Proposed Facility is not ancillary to the existing BP development on Lot 2 Eyre Highway.

## **2. Background Facts**

- 2.1 In summarising the background facts, it is relevant to cover three related matters:
  - (a) Amendment 10 to LPS2;
  - (b) Amendment 9 to LPS2; and
  - (c) the development application for the Proposed Facility.

### ***Amendment 10***

- 2.2 Amendment 10 was gazetted and became operative on 1 November 2019.
- 2.3 Amendment 10 was a significant amendment and introduced many changes to LPS2. Relevant provisions prior to this amendment and the changes which it introduced are:
  - (a) Prior to Amendment 10, clause 5.12 was concerned with 'special purpose zones' in which the use of land was restricted to the uses set out in Appendix V. Appendix V included:
    - (i) Lot 3 Eyre Highway and specified its permitted use as 'truck parking only';

- (ii) Lot 2 Eyre Highway and specified its permitted uses as 'service station/roadhouse'.
- (b) 'Truck parking' was defined in Appendix 1 in these terms:
  - (i) *Land and structures predominantly used for the temporary parking or 'breakdown' of licensed trucks and articulated, passenger or other similar vehicles of an aggregate mass in excess of 4350kg as defined in the Road Traffic Drivers License Regulations, 1975 (as amended)'.*
- (c) Clause 5.12 did not permit the development and use of land within special purpose zones as of right. Rather, it indicated that approval was required for the use and development of land within these zones. Consequently, in so far as Appendix V provided for Lot 3 to be developed and used for 'truck parking only', it did not authorise this without an approval first being granted.
- (d) Amendment 10 deleted clause 5.12 and Appendix V and introduced clause 21 (special use zones) and included Table 4 which contains the land description, special uses and conditions for each special use zone.
- (e) While Appendix V was deleted, the special purpose sites which it contained were included as special use sites in Table 4. Consequently, Lot 3 was included in the new Table 4 as a special use site. The special use of Lot 3 was changed from 'truck parking only' to 'transport depot'.
- (f) Amendment 10 also deleted a number of existing use classes and their definitions and substituted new defined use classes. Relevantly, these new use class definitions included:
  - (i) transport depot;
  - (ii) roadhouse;
  - (iii) fast food outlet;
  - (iv) lunch bar;
  - (v) motor vehicle wash; and
  - (vi) restaurant\cafe.

*Amendment 9*

- 2.4 The impetus for Amendment 9 was an unsuccessful development application for approval of an unmanned fuel facility on Lot 3, which the Shire refused on 18 December 2018. The application was refused because the Shire did not have power under LPS2 at that time to approve this development. The only permissible use was 'truck parking'. To overcome this difficulty, the applicant was invited to pursue an amendment to LPS2.
- 2.5 This amendment, which became Amendment 9, was first submitted to the Shire in January 2019 by Dynamic Planning on behalf of the owners of Lot 3. As submitted, the amendment sought to expand the land uses for which Lot 3 could be used to include: truck depot, service station, roadhouse, fast food outlet/lunch bar, motor vehicle wash and restaurant/cafe.
- 2.6 Dynamic Planning's amendment report also stated that:
- (a) the intention of the amendment was to enable the additional uses on Lot 3 to enable the expansion of the existing fuel and roadhouse facility on the adjacent Lot 2 and to provide the flexibility to develop other complementary uses;
  - (b) the existing 'truck depot' on Lot 3 would be retained and even expanded;
  - (c) the truck depot had already been approved on Lot 3 (although we understand that the Shire has no record of any such approval); and
  - (d) the predominant proposed use was 'service station'.
- 2.7 Dynamic Planning's amendment report included a 'concept development plan' which was largely the same as the plan included with the development application refused by the Shire in December 2018. This concept development plan proposed a 24 hour refuelling facility for trucks and an area for truck parking which was said to be an important function of Lot 3 as it would allow truck drivers to rest. The amendment report referred to these two principal elements of the concept development plan as a proposed service station and an existing truck depot.
- 2.8 Amendment 9 was adopted by the Shire's council on 24 August 2019 with some changes, although not to the list of proposed specified uses.
- 2.9 Amendment 9 was approved by the Minister and then gazetted on 28 February 2020.
- 2.10 In the final version of Amendment 9 approved by the Minister, 'service station' was removed as one of the special uses for Lot 3.

- 2.11 The explanation provided by a planning officer (Brooke Hongell) at the Department of Planning Lands and Heritage for the removal of 'service station' was that the 'roadhouse' use class could be used to support the development of an unmanned fuel outlet on Lot 3 (see Ms Hongell's email dated 13 August 2020). Ms Hongell did not respond to Ms Busby's subsequent email on the same date which questioned this advice.

***The development application for the Proposed Facility***

- 2.12 The Shire has received an application for planning consent dated 9 June 2020. The application states the type of development for which approval is sought as an 'unmanned truck refuelling facility'. The application also provides details of carparking as 'truck parking for 7 road trains'.
- 2.13 The plans of the proposed refuelling facility show:
- (a) access and egress via Roberts Street;
  - (b) parking for 7 road trains (6 on the western side of Lot 3 closest to Roberts Street and one on the eastern side of Lot 3);
  - (c) two above ground diesel storage tanks each with a capacity of 110 kilolitres;
  - (d) three dual hose super high flow dispensers with overhead canopy;
  - (e) an enclosure with fuel dispenser control equipment.
- 2.14 The site plan for the Proposed Facility is materially similar to the site plan which formed part of the development concept plan included with the report prepared by Dynamic Planning for Amendment 9.
- 2.15 It appears that Amendment 9 was intended to facilitate approval of the Proposed Facility.

**3. What is the correct land use classification for the Proposed Facility?**

- 3.1 Clause 21(1)(b) of LPS 2 states that Table 4 sets out the classes of special use that are permissible in special use zones. Clause 21(2) provides that land in a special use zone cannot be used except for a class of use that is permissible in that zone. Consequently, it

is necessary to consider whether the Proposed Facility constitutes one or more of the Table 4 special uses.

- 3.2 It is apparent from Dynamic Planning's amendment report for Amendment 9 that 'service station' was proposed as one of the Table 4 special uses in order to enable approval of the truck refuelling component of the Proposed Facility. The Minister's decision to remove 'service station' as a special use in the final approved version of Amendment 9 means that unless one or more of the remaining special uses in Table 4 encompasses the Proposed Facility, approval could not be granted.
- 3.3 Of the six special uses in Table 4 it is only necessary to consider 'roadhouse' and 'transport depot'. The other four special uses (ie fast food outlet, lunch bar, motor vehicle wash and restaurant/café) are not presently relevant.

***Is the Proposed Facility a 'roadhouse'?***

- 3.4 There are 2 issues which require consideration in determining whether the Proposed Facility can be classified as a roadhouse:
- (a) is the Proposed Facility is a roadhouse in its own right; and
  - (b) is the Proposed Facility part of a roadhouse when combined with the existing BP development on Lot 2 Eyre Highway, Norseman (**Lot 2**).
- 3.5 Each of these possibilities requires separate consideration. However, it is first necessary to identify the requirements for classifying a development as a roadhouse under LPS2.
- 3.6 Clause 38 defines 'roadhouse' to mean:

*'premises that has direct access to a State road other than a freeway and which provides the services or facilities provided by a freeway service centre and may provide any of the following facilities or services-*

- (a) *a full range of automotive repair services;*
- (b) *wrecking, panel beating and spray painting services;*
- (c) *transport depot facilities;*
- (d) *short term accommodation for guests;*
- (e) *facilities for being a muster point in response to accidents, natural disasters and other emergencies; and*

(f) *dump points for the disposal of black and/ grey water from recreational vehicles.'*

- 3.7 A number of the elements of this definition require consideration.
- 3.8 First, to be a roadhouse, premises must have direct access to a 'State road'. The expression 'State road' is not defined by LPS2. LPS2 uses various words and expressions when referring to roads: 'primary distributor road', 'local distributor road', 'public road', 'road reserve' 'road', 'freeway' and 'street'. However, LPS2 does not clearly identify the differences between them.
- 3.9 Both 'primary distributor road' and 'local distributor road' are forms of road reserve under Part 2 of LPS2. Table 1 indicates that these types of road take their meaning from the 'Western Australian Road Hierarchy' which is defined as a document with this title maintained by the Department of Main Roads.
- 3.10 The Western Australian Road Hierarchy states that freeways, highways and main roads are collectively known as 'State roads' and are designated primary distributor roads in the hierarchy. In the absence of a definition of 'State road' under LPS2 and given the express reference to the Western Australian Road Hierarchy by LPS2, it is useful to use this document as a guide as to what is likely to have been intended by the reference to 'State road' in the definition of 'roadhouse' in LPS2.
- 3.11 Lot 3 has frontages to the Eyre Highway and to Roberts Street. The scheme map for LPS2 shows the Eyre Highway as a primary distributor road while Roberts Street is shown as a local distributor road. Under the Western Australian Road Hierarchy, primary distributor roads are State roads, but local distributor roads are not. The Western Australian Road Hierarchy itself shows the Eyre Highway as primary distributor road. Therefore, under both LPS 2 and the Western Australian Road Hierarchy, the Eyre Highway is shown as a primary distributor road, but Roberts Street is not.
- 3.12 On this basis the Eyre Highway should be regarded as a State road, but not Roberts Street.
- 3.13 While Lot 3 has frontage to the Eyre Highway, the Proposed Facility proposes access and egress via Roberts Street. Therefore, the Proposed Facility does not have direct access to a State road as required by the definition of 'roadhouse'. Despite the absence of this direct access, there is a strong argument that a roadhouse could be approved on Lot 3 without this direct access being provided.
- 3.14 The absence of any direct access from the Proposed Facility to Eyre Highway appears to reflect condition 4 in Table 4 of LPS2 which provides that *'all vehicular access shall be*

*from Roberts Road and no vehicular access to Eyre Highway shall be permitted.*’ Clause 21(2) prohibits the use of Lot 3 for any of the special uses (including a roadhouse) unless this is undertaken *‘subject to the conditions that apply to the use’*.

- 3.15 However, if condition 4 in Table 4 is complied with, it prevents compliance with the direct access requirement of the definition of ‘roadhouse’, which is one of the special uses which Table 4 specifies as capable of being approved on Lot 3. This inconsistency raises an issue regarding the correct interpretation of these provisions.
- 3.16 The State Administrative Tribunal has accepted that a defined word in a local planning scheme can be given a different meaning to its defined meaning where it is evident from the scheme that this was intended (*Franca and City of Nedlands* [2012] WASAT 53 at [17-23]). It is clear from Table 4 that while ‘roadhouse’ was one of the small number of special uses able to be approved on Lot 3, that direct access to Eyre Highway (the only State road to which direct access is possible for Lot 3) was not to be permitted. Table 4 indicates a clear intention that the direct access requirement of the ‘roadhouse’ definition was not to apply to a roadhouse on Lot 3. To give effect to this clear intention, it is necessary to interpret ‘roadhouse’ in Table 4 in relation to Lot 3 as modifying the definition of ‘roadhouse’ to exclude the requirement for direct access to a State road. However, there is no indication that any other requirement of the definition is also excluded from applying.
- 3.17 The second issue in classifying the Proposed Facility as a roadhouse is the need for a roadhouse to provide ‘the services or facilities provided by a freeway service centre’
- 3.18 The expression ‘the services or facilities provided by a freeway service centre’ is to be understood by reference to the separate definition of ‘freeway service centre’ which sets out these services and facilities. The definition provides that ‘freeway service centre’ means :

*‘premises that has direct access to a freeway and which provides all the following services or facilities and may provide other associated facilities or services but does not provide bulk fuel services –*

- (a) service station facilities;*
- (b) emergency breakdown repair for vehicles;*
- (c) charging points for electric vehicles;*
- (d) facilities for cyclists;*



- (e) *restaurant, café or fast food services excluding the sale or consumption of alcohol;*
- (f) *takeaway food retailing, without a drive-thru facility;*
- (g) *public ablution facilities, including provision for disabled access and infant changing rooms;*
- (h) *parking for passenger and freight vehicles;*
- (i) *outdoor rest stop facilities such as picnic tables and shade areas; and*
- (j) *dump points for the disposal of black and/or grey water from recreational vehicles.'*

3.19 Under this definition all these services or facilities must be provided to satisfy the definition. Among these are 'service station facilities'.

3.20 'Service station' is defined in LPS 2 to mean:

*'premises used for –*

- (a) *the retail sale of petroleum products, motor vehicle accessories and goods of an incidental or convenience retail nature; and/or*
- (b) *the carrying out of greasing, tyre repairs and minor mechanical repairs to motor vehicles.'*

3.21 While the Proposed Facility will be used for the retail sale of petroleum products (i.e. diesel fuel) it does not appear that motor vehicle accessories and goods of an incidental or convenience retail nature will be offered for sale at the Proposed Facility. It is doubtful that simply selling petroleum products in the form of diesel fuel, but not any of the other items referred to in the definition of 'service station', is sufficient for a development to be regarded as providing 'service station facilities'.

3.22 However, even if the Proposed Facility is regarded as providing service station facilities, this would not be sufficient to classify it as a 'roadhouse'. This would only be possible if the Proposed Facility provided all the services or facilities required for a freeway service centre. These services or facilities are listed in paragraphs (b)-(j) of the 'freeway service centre' definition. However, the only other facility or service which is to be provided by the Proposed Facility which appears in the definition of 'freeway service centre', is parking for freight vehicles.

3.23 In our view, the definition of 'roadhouse' is not satisfied by a proposed development which provides some but not all of the services or facilities required for a freeway service

centre. Had this been intended, it would have been a simple matter for the definition to say so. This has been done in a different part of the definition of 'roadhouse' itself, in relation to the additional facilities or services which it lists in paragraphs (a)-(f). This list is preceded by the words 'provide any of the following facilities or services'. This wording indicates that not all the listed facilities are required.

- 3.24 Similarly, there are other use classes defined in clause 38 of LPS2 that refer to a list of matters but these are not mandatory in order to satisfy the definition. This is indicated by expressions such as 'any of the following' or 'any of the following purposes'. No wording to similar effect is used in the definition of 'roadhouse' in relation to the requirement that premises must provide the services or facilities provided by a freeway service centre. Further, the definition of freeway service centre itself, expressly requires that all the listed services or facilities must be provided.
- 3.25 Finally, the use classes in clause 38 of LPS 2 are intended to identify and distinguish between different land uses. If selling diesel fuel for trucks was sufficient for premises to be a roadhouse, then it would be difficult to draw any meaningful distinction between a roadhouse and a service station. This is inconsistent with the purpose served by including different defined use classes in local planning schemes to identify distinct land uses.
- 3.26 As the Proposed Facility will only provide two of the ten services or facilities required for a freeway service centre, it would not be premises 'which provides the services or facilities provided by a freeway service centre' which is a requirement of the 'roadhouse' definition.
- 3.27 In summary, it is our view that because the Proposed Facility does not provide all the services or facilities of a freeway service centre, as is required by the definition of 'roadhouse', it cannot be classified and approved as a roadhouse in its own right.

***Is the Proposed Facility part of a roadhouse which includes the existing BP development on Lot 2 Eyre Highway?***

- 3.28 While the Proposed Facility could not be classified and approved as a roadhouse in its own right, the other possibility which requires consideration is whether it is possible to regard it as part of a roadhouse if the Proposed Facility and the existing BP development on Lot 2 are taken to be a single land use?

- 3.29 The definition of ‘roadhouse’ refers to ‘premises’ being used to provide the specified services or facilities. The word ‘premises’ is not defined by LPS2 itself, but is defined in clause 1 of the deemed provisions in schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015*, where it is defined to mean:
- ‘land, buildings or part of land or a building’*
- 3.30 Notably, ‘premises’ is not defined as a single lot. However, whether ‘premises’ is intended to refer to a single lot or a larger area, is a matter of the context in which it is used in LPS2 (*Optus Mobile Pty Ltd and City of Swan* [2016] WASAT 72 at [43-44]).
- 3.31 In considering whether Lot 3 alone, or Lots 2 and 3 combined, are the relevant ‘premises’ for a roadhouse development in a special use zone, it is necessary to have regard to Table 4 of LPS2. In Table 4, both Lots 2 and 3 are each identified as a separate special use zone and each has special uses which can be approved within the special use zone. With the exception of a roadhouse, there are no common special uses specified for Lots 2 and 3. Where multiple lots comprise a special use zone and can be developed for a common set of special uses, this is specified by Table 4. Special use zone 4 is an example of this.
- 3.32 These features of Table 4 indicate that the concept of a special use zone is that the land comprising the zone will be developed independently for the purpose of the specified uses for that zone. Where multiple lots comprise a single special use zone, and are to be developed together for the designated special uses then Table 4 includes all the lots in the same special use zone. This is not the case for Lots 2 and 3.
- 3.33 These considerations weigh against an interpretation which allows a single roadhouse to occupy Lots 2 and 3. Therefore, the question whether or not the Proposed Facility can be classified as a roadhouse cannot be approached by combining this development with the existing BP development of Lot 2. The Proposed Facility must be classified solely by reference to what is proposed for Lot 3. As concluded earlier, the Proposed Facility on Lot 3 cannot be classified as a roadhouse in its own right.
- 3.34 Even if it was possible for there to be a single roadhouse on Lots 2 and 3, it would be necessary that all elements of the definition of ‘roadhouse’ were met having regard to the combined development on these two lots.
- 3.35 If the Proposed Facility and the existing BP development are considered together, this combined development would not have a number of the required facilities or services required for a ‘freeway service centre’ which are incorporated into the definition of

‘roadhouse’. On the available information, the following services or facilities would not be provided:

- (a) emergency breakdown repair for vehicles;
- (b) charging points for electric vehicles
- (c) facilities for cyclists;
- (d) infant changing rooms, as part of the public ablution facilities; and
- (e) dump points for the disposal of black and / or grey water from recreational vehicles.

- 3.36 In the absence of these services or facilities, the combined development on Lots 2 and 3 would not be a roadhouse for the purposes of LPS2, even if it was possible to consider the classification of the Proposed Facility on this basis.
- 3.37 In summary, the Proposed Facility cannot be classified and approved under LPS 2 on the basis that it is either a roadhouse in its own right or on the basis that it would form part of a roadhouse when combined with the existing BP development on Lot 2.

***Is the Proposed Facility a ‘transport depot’?***

- 3.38 In addressing this question, two possibilities need consideration. The first is whether the Proposed Facility as a whole is a transport depot? The second is whether the truck parking component of the Proposed Facility is a transport depot in its own right, separate to the use of Lot 3 for truck refuelling?

- 3.39 ‘Transport depot’ is defined in clause 38 of LPS2 to mean:

*‘Premises used primarily for the parking or garaging of three or more commercial vehicles including –*

- (a) any ancillary maintenance or refuelling of those vehicles; and*
- (b) any ancillary storage of goods brought to the premises by those vehicles;*  
*and*
- (c) the transfer of goods or persons from one vehicle to another.’*

- 3.40 As the Proposed Facility provides for 7 road trains to be parked on Lot 3, it satisfies the requirement that three or more commercial vehicles be parked on the premises. However, to be a transport depot, the parking of commercial vehicles must be the primary use made of the premises. Further, where premises are used primarily to park commercial vehicles, any on-site refuelling must be ancillary to this parking use and must relate to the trucks parked on the premises.
- 3.41 Information relevant to these issues was requested from the applicant in August 2020. In particular, information was sought concerning the estimated number of trucks which were likely to use the refuelling facility over 24 hours and what percentage of these trucks were expected to park on-site. The applicant has not provided the requested information. In the absence of this information, we have assumed that trucks other than those parked on-site will be able to refuel and that there will be many more trucks refuelling than are parked on-site. On this basis, the refuelling activity would not be ancillary to the parking of trucks.
- 3.42 As a consequence, the Proposed Facility as a whole could not be properly classified as a transport depot. If in the future, the applicant provides information which is inconsistent with our assumptions, then our conclusion would need to be reviewed in light of that information.
- 3.43 It is also necessary to consider as a separate possibility, whether the use of a portion of Lot 3 for parking trucks could be a transport depot in its own right separate to the use of Lot 3 for the purpose of truck refuelling. This approach requires the Proposed Facility to be viewed as comprising two separate land uses: the refuelling use and the parking use.
- 3.44 A single development application can be considered for different and distinct uses on one site. The courts have emphasised that it is important that what are independent uses should not be lumped into one dominant use for the purposes of classification. The legal principles in relation to land use classification where two or more activities are proposed on a single development site are contained in the following extract from the decision of the Full Court of the Supreme Court of Western Australia in *Gull Petroleum (WA) Pty Ltd v Nashville Investments Pty Ltd* (1999) 102 LGERA 431 at [52]:

*‘However, it seems to me that each proposal must be looked at on its own merits. The classification of the proposed uses should not be carried out either in a mechanical or arbitrary way. If, in the particular case, the manner in which two uses are to be combined on a particular site makes it inappropriate to categorise*

*the resulting use as a dual use with each use falling within a definition in the Scheme, perhaps because the proposed manner of combining the two uses so changes the character of one or both of them that it or they can no longer sensibly be taken to fall within the definition or definitions in the Scheme, then there should be no such categorisation. Where, on the other hand, the character of each use remains unaffected by the fact that one site is shared between them there is no reason why the categorisation of each use should be any different than if each had been affected from its own site. If either use is unacceptable within the particular location it would not be approved. That consequence would not be altered by the fact that another, permitted, use would be effected from the same site.'*

- 3.45 The Proposed Facility has two distinct components: the truck refuelling facility and infrastructure and the truck parking areas. Neither use is dependent on the other for its operation. Both could operate independently. The truck refuelling facility and the parking area would both occupy substantial but separate portions of Lot 3.
- 3.46 The use of Lot 3 for parking trucks has taken place for many years, although the Shire has no record of the use being approved. The parking of trucks on Lot 3 was recognised by LPS2 when it was first gazetted in 1994. In its gazetted form, LPS2 included Lot 3 in Appendix V as a special purpose zone for the specific and only purpose of truck parking. This may have been in recognition of an established use of truck parking which existed prior to the gazettal of LPS2. In any event, the use of Lot 3 for truck parking appears to have a long history. This history establishes that truck parking on Lot 3 has been and can be a standalone use.
- 3.47 The definition of 'transport depot' requires that premises are primarily used for the parking or garaging of three or more commercial vehicles. The definition of 'commercial vehicle' in clause 37 is such that it would include road trains. While the definition of 'transport depot' refers to other ancillary activities, it is not necessary for these to be present in order for a transport depot to exist.
- 3.48 In our view, there is a strong argument that the parking of 7 road trains on Lot 3 would be a separate transport depot land use capable of being approved on Lot 3. On this basis, the truck parking component of the Proposed Facility could be approved as a separate land use. Given the distinct and separate refuelling and parking components of the Proposed Facility, we do not think its classification can be approached on the basis that some hybrid or unlisted use is created by the combination of these two elements on the one site.

- 3.49 The question of how the truck refuelling component should be classified under LPS2 is relevant only to the extent necessary to determine whether or not it is one of the special uses listed in Table 4 for Lot 3. For the above reasons, we have concluded that it is not one of these special uses.
- 3.50 As a separate land use the truck refuelling component is not easily classified under any of the defined use classes in LPS2. In our view, it is a 'use not listed' or innominate use. Uses not listed are ordinarily capable of approval under clause 18(4) of LPS2 which contains a discretion to approve uses which are not specifically referred to in the zoning table and which cannot reasonably be determined as falling within a use class referred to in the zoning table. This provision is directed at the zoning table of LPS 2 rather than the special uses in Table 4. Further, clause 21(2) provides:

*'A person must not use any land, or any structure or buildings on land, in a special use*

*zone except for a class of use that is permissible in that zone and subject to the conditions that apply to that use'.*

- 3.51 The effect of this provision is to prohibit any use of land, whether it is capable of classification within a defined use class or is a use not listed, unless it is a special use specified by Table 4.
- 3.52 Therefore, as a use not listed, the truck refuelling component of the Proposed Facility is not capable of approval on Lot 3.

***Can the Proposed Facility be approved as ancillary to the existing BP development on Lot 2?***

- 3.53 This is a different question to whether the Proposed Facility could be approved as part of a single roadhouse development comprising the existing BP development on Lot 2 and the Proposed Facility on Lot 3. Ancillary uses relate to activities undertaken on land which form part of a primary or dominant land use and do not require development approval.
- 3.54 The principles relating to ancillary uses have been considered by the State Administrative Tribunal in numerous cases (see for example: *G&G Corp Asset Management Pty Ltd and Presiding Member of the Metropolitan East Joint Development Assessment Panel [2018] WACT 9*). As discussed earlier, it is recognised that land can be used for more than one

use. Similarly, land can be used for more than one activity. However, not all activities constitute separate uses in their own right. Some activities may be ancillary and incidental to the primary use of a property. In these cases the activities will not be regarded as a separate use but will be part and parcel of the primary use.

- 3.55 Such ancillary activities are frequently referred to as 'ancillary uses', but this is something of a misnomer because they are really activities which are ancillary and part of the primary use. Ancillary activities may be undertaken without development approval because they are part of the approved predominant use made of a site.
- 3.56 There is no single test to determine whether activities are ancillary or amount to a separate land use. The cases refer to various factors such as the planning impacts of ancillary activities (eg. traffic and parking) and the scale and intensity of the activities. It is very much a question of fact and degree having regard to the circumstances of each case.
- 3.57 If the activities to be undertaken as part of the Proposed Facility (ie truck refuelling and truck parking) are ancillary to the existing BP development on Lot 2 then they would not require approval as a separate development although the physical works component of the Proposed Facility would need approval.
- 3.58 In our view, there are two reasons for concluding that the Proposed Facility is not ancillary to the existing BP development on Lot 2:
- (a) The concept of ancillary uses (ie. activities) relates to activities undertaken on premises on which an approved dominant use is being undertaken. In this case, the activities associated with the Proposed Facility would not be undertaken at the same premises as the existing approved BP development on Lot 2.
  - (b) The scale and intensity of the Proposed Facility is such that it is not ancillary in nature. Lot 3 has an area of 15,410m<sup>2</sup> all of which will be developed and used for the Proposed Facility. The Proposed Facility will operate 24 hours a day, 7 days a week. The cost of the Proposed Facility is estimated to be \$1.5M. Seven road trucks will be able to park on Lot 3 at any one time while other trucks will be able to refuel.
- 3.59 In view of these matters, it is our view that the Proposed Facility would not be ancillary to the existing BP development on Lot 2.



If we can be of further assistance, please do not hesitate to contact Andrew Roberts.

Yours sincerely

  
Castledine Gregory