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26 November 2012

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Mr Ian Cady
Associate Director
Urbis Pty Ltd
Level 23 Darling Park Tower 2
201 Sussex Street
SYDNEY NSW 2000

Our reference
2777596

Dear Ian

110-114 Herring Road, Macquarie Park
Section 75W Modification to Concept Plan Approval MP10_0112

Our client, Stamford Property Services Pty Limited has provided us with a copy of a letter from the Department of Planning & Infrastructure (**Department**) to you dated 12 November 2012 concerning the proposed s75W modification to Concept Plan Approval MP10_0112 (**the Modification**).

We have been asked to respond to the Department's request that the Modification should include "*justification on how the proposed modification is consistent with the provisions of s75W*". We assume that this question is directed towards confirmation that the proposed Modification falls properly within the ambit of the power to modify, contained within s75W.

The changes to the approved Concept Plan which are proposed in the Modification are set out in your letter to the Department dated 2 November 2012.

As you would be aware, the requirements of s75W of the *Environmental Planning & Assessment Act 1979* (**EP&A Act**) have been considered by the Courts on several occasions. The Land and Environment Court has observed that the language of s75W is **not** constrained by the qualification (contained in s96 of the EP&A Act) that the development as modified be "substantially the same" as the development already approved. (*Williams v Minister for Planning* (2009) 164 LGERA 204). In other words, the power under s75W to modify is broader than the test under s96. Biscoe J expressed the test another way, by stating that s75W does not contemplate a "*radical transformation*" of the terms of an existing approval (*Williams v Minister*).

The Court of Appeal subsequently cautioned against seeking to use any descriptive phrase to substitute for or explain the statutory language in s75W. That Court has noted that "*the fact that there are no express standards to be applied in considering whether a particular request falls within the terms of the section itself gives rise to an inference that no essential precondition to the consideration of a request was intended*" (*Barrick Australia Ltd v Williams* ((2009) 74 NSWLR 733 at [40]).

The power to modify under s75W is available both to change the terms of an approval, and to change conditions of the approval. The proposed amendments do not, on any view, constitute a radical transformation of the terms of the Concept Plan approval. Furthermore, the modifications sought are of a kind such that the modified Concept Plan would clearly satisfy the "substantially the same" test, if indeed that constraint applied to Part 3A applications.

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As the Court of Appeal has noted, the requirement for approval of a modification application under s75W must be understood in its statutory context. In our view, the Modification is plainly within the modification power conferred by s75W.

Please contact us if you have any questions.

Yours faithfully

Felicity Rourke
Partner
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