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Our ref JS:MP:5567230
Your ref DAP/16/01137

21 December 2023

Metro Inner-South Joint Development Assessment Panel
140 William Street
Perth WA 6000

Electronic

Dear Sir/Madam

Regulation 17(1) application - Metro Inner-South JDAP - 577/2016/B

Thomson Geer acts for LUX WA Pty Ltd, the owner of Lot 41 on Strata Plan 49233 (No.61) Great Eastern Highway, Rivervale ('**site**').

- 1 The Development Application for the Hotel and Restaurant / Bar on the site was originally approved by the Metro Central Joint Development Assessment Panel ('**DAP**') on 23 January 2017 (DAP Ref 16/01137). In terms of the timeframe for substantial commencement, Condition 27 of the approval:
 - (a) originally referred to substantial commencement within 2 years, by 23 January 2019;
 - (b) was amended on 9 January 2019 by the Metro Central JDAP, to extend the period for substantial commencement to 23 January 2021;
 - (c) was automatically extended to 23 January 2023, during the State of Emergency with the gazettal of the clause 78H Notice of Exemption, under the *Planning Requirements Planning and Development (Local Planning Schemes) Regulations 2015*; and
 - (d) was again amended by the Metro Inner-South JDAP on 22 February 2023.
- 2 The DAP's determination on 22 February 2023 has left Condition 27 framed with some ambiguity as to the period for substantial commencement, and with a final additional sentence which is of no legal effect.

23 January 2025 substantial commencement deadline

- 3 The notice of the DAP's determination on 22 February 2023 is the principal record for correctly understanding the current legal effect of Condition 27. The following are the relevant extracts of that notice –

**Determination on Development Assessment Panel
Application for Planning Approval**

Property Location: 61 (Strata Lot 41) Great Eastern Highway, Belmont
Application Details: 120 bedroom Hotel with ten (10) levels including 2 basement floors and 8 floors above ground. Land uses include Hotel (120 one bedroom hotel units), Restaurant/dining and bar, Administration/offices, reception/lobby and Business centre/room – internet, printing
Amendment Details: 2-year extension of time to validity of development approval and Amend Condition 27 to reflect the term of development approval.

Amended Condition 27

This decision constitutes planning approval only and is valid for a period of seven (7) years and twelve (12) months from the date of the original approval (i.e. 23 January 2024). If the subject development is not substantially commenced within this period, the approval shall lapse and be of no further effect. No further extensions shall be granted for this planning approval.

- 4 The reference to "*a period of seven (7) years **and** twelve (12) months*" (emphasis added), clearly highlights the meaning of a cumulative 8-year period for the substantial commencement of the approved development. This is also consistent with the noted detail of the amendment being for a "2-year extension to time to validity of development approval...".
- 5 While this is inconsistent with the date of "2024" that appears in the brackets that follow, the placement of that date within brackets and the inclusion of the notation "i.e." suggests that the date in the brackets is intended merely to further explain or illustrate the effect of the words of Condition 27, and that it is the words of Condition 27 that take precedence.

Final sentence of Condition 27

- 6 The final sentence of Condition 27, added by the DAP as part of its determination on 22 February 2023, purports to preclude the grant of any further, future application to extend the time for substantial commencement of the approval.
- 7 These words are beyond the power of the DAP in making its determination and clearly a jurisdictional error. There is no basis in law for the DAP to make a determination fettering the exercise of discretion as part of a future determination by a responsible authority, whether that is the local government, DAP, the State Administrative Tribunal on review or otherwise.
- 8 This sentence is to be ignored as having no legal effect in the correct understanding of Condition 27, and ought to be deleted.

Amendment to Condition 27

- 9 In light of the above, this application is made under regulation 17 (1) (b) of the *Planning and Development (Development Assessment Panels) Regulations 2011*, to amend the framing of Condition 27 and clarify its meaning. The application proposes that Condition 27 should be amended to read as follows, consistent with its existing legal effect:

This decision constitutes planning approval only and is valid for a period of ~~seven~~ eight (8) years ~~and twelve (12) months~~ from the date of the original approval (i.e. 23 January 2025~~4~~). If the subject development is not substantially commenced within this period, the approval shall lapse and be of no further effect. ~~No further extensions shall be granted for this planning approval.~~

Yours faithfully
Thomson Geer



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