

14 March 2013

The General Manager  
Holroyd City Council  
DX 25408  
MERRYLANDS NSW

Our File: SEP:130407  
Director: Simone Brew  
Contact: Megan Hardge 9806 7477

Attention: Stuart Nunn



Dear Sir

Re: **Advice re: proposed Stocklands Mall Free Parking Agreement**

Thank you for your instructions of 1 March 2013.

We set out below our response to the questions you have raised.

1. **Has Council followed the correct protocols as outlined in the dlq guidelines to assist Council to assess applications for private land owners for the creation of free parking areas on private land?**
  - 1.1 We have spoken with the Division of Local Government and confirmed that the "Guidelines to Assist Council's to Assess Applications from Private Landowners for Creation of Free Parking Areas on Private Land" ("the Guidelines"), despite being issued in 1998, remain current.
  - 1.2 Page 6 of the Guidelines sets out three key criteria that should apply in deciding whether or not Council should agree to enter into a Free Parking Area Agreement. These are:
    - Whether the land owner has already implemented all reasonable measures to deter vehicle related problems, including the erection of signs, fencing, gates and other barrier devices;
    - Whether the Council is satisfied that there is a genuine need, from a public policy perspective to assist the land owner in deterring vehicle related problems;
    - Whether the landowner understands that the Council will take control of the land and make it available for parking by the public free of charge and the landowner is agreeable to this occurring.

Matthews Folbigg  
Pty Limited  
ACN 078 845 271  
Level 7 The Barrington  
10-14 Smith Street  
PO Box 248  
Parramatta NSW 2124  
Australia  
DX 8233 Parramatta  
Tel (61 2) 9635 7966  
Fax (61 2) 9689 3494  
matthewsfolbigg.com.au

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- 1.3 The Council report dated 19 February 2013 (DCS 003-13) specifies the actions taken by Stocklands to deter and prevent inappropriate parking. Having regard to the information contained in the report we consider that it is open to Council to reach the conclusion that Stocklands has implemented all reasonable measures to deter vehicle related problems.
- 1.4 Similarly we note that one of the reasons for Council to enter into this Agreement is to maintain the availability of free parking. Again, we consider it open to Council to consider that this is of sufficient benefit to the public to warrant the entry into the Free Parking Area Agreement.

We understand that Council wishes to enter into a Free Parking Area Agreement in relation to:

- (a) A carpark at 249-259 Merrylands Road;
  - (b) Certain disabled carparking spaces located within the Stocklands Mall carpark at 101-201 Pitt Street, Merrylands.
- 1.5 The Guidelines do not give any clear guidance to circumstances where only part of a parcel of land is to be set aside as a free parking area. This is despite s650 clearly providing for this circumstance. In the present instance, it is proposed that only certain parts of the land forming Stocklands Mall will be set aside as a Free Parking Area. Our understanding is that the Merrylands Road carpark will be the whole of the land but a review of the aerial photo provided to us indicates a built structure on lots 5, 6, 7 and 8 of DP 244047. Please clarify whether parking occurs on these parcels.
- 1.6 There is no evidence contained within report DCS 003-13 that Stocklands is aware of the fact that the entry into the Agreement will result in Council taking "control of the land" and making it available for parking. However, the background material with which we were briefed contains a document entitled "*Free Parking Area Agreement Information Sheet for Landowners*", which appears to have been prepared by Council. We do not know if this information sheet has been given to Stocklands.
- 1.7 As this is not the first such agreement which Stocklands has entered into, we anticipate that it is well aware of the implications of doing so. Nevertheless, we consider that prior to entry into the Agreement with Council, it would be prudent for Council to specifically obtain confirmation from Stocklands that it is aware of the implications for this particular Agreement. In this regard, we suggest that an acknowledgement in the proposed agreement to that effect would be sufficient.
- 1.8 As presently drafted the Free Parking Area Agreement provides for Council to operate and manage a free parking area. This was done so as to restrict potential liability for matters that might arise beyond the policing of the car parking area. Having considered the background material which has now been provided to us, we are of the opinion that clause 3.1 of the agreement should be amended to more closely reflect the wording of s650 of the LGA.

- 1.9 We have not seen the terms and scope of the proposed notices to be erected in the free parking areas and therefore assume Council is satisfied that they comply or will comply with the provisions of Part 5 Chapter 16.
- 1.10 Subject to our comments above, it is our opinion that Council has complied with the steps set out in the Guidelines.
2. **Are Council's proposed actions under sections 31 and 34 of the Local Government Act 1993 classify the land as operational land for the purposes of a Free Parking Area Agreement appropriate?**
- 2.1 A "free parking area" is defined under the LGA to mean:
- any area of public land (other than a public road) for the accommodation of vehicles without payment of a fee or charge, and includes any area of land the subject of an agreement referred to in section 650 (6).*
- 2.2 "Public land" is defined under the LGA to include not only land which is vested in Council but which is under Council's control. All public land acquired after 1 July 1993 must be classified as either community land or operational land either prior to acquisition or within 3 months of acquisition (s31 of the LGA).
- 2.3 Prior to classification, Council must give public notice of a proposed resolution to classify the public land and the notice must include the terms of the proposed resolution and a description of the public land concerned (s34 of the LGA).
- 2.4 The Guidelines provide that entry into a free parking area agreement, will result in the land becomes public land because it becomes under the control of Council. Accordingly, Council "acquires" the land for the purposes of s31 of the LGA and therefore the land must be classified.
- 2.5 We have considered the advice of McKees dated 28 January 2004 and agree with the substance of that advice. In particular, we agree that the concept of "acquisition" is, on balance, broad enough to capture acquiring control for the purposes of a free parking area agreement. Further even though the LGA is not well drafted when it comes to classification of land which is under Council's control (as opposed to ownership) it must be given practical application.
- 2.6 Accordingly, prior to entry into the Free Parking Agreement or within 3 months of doing so, Council must comply with s34.
- 2.7 Given that only public land can be a free parking area, it is important that Council, clearly and as precisely as possible, articulates in any resolution or public notice, what land or part thereof is to become public land for the purposes of the Free Parking Area Agreement. As such, any proposed resolution or public notification should specify only those parts of the Stockland Mall Car park that are proposed to be set aside as a free parking area. It would not be accurate to simply refer to the whole of the site in the advertisement because the whole of the site will not be public land. This may require careful drafting as we understand the disabled care spaces are not all located in the one area and we would be happy to assist you in this regard if required.
- 2.8 If in the future Stocklands wants Council to manage other parts of the car park then this would require an amendment to the Free Parking Area Agreement and a new advertisement to comply with s34. Alternatively, if you would like us to amend the

agreement so as to allow for this extension to occur in the future, we can do so. Such an amendment would not, however, avoid the need to advertise Council's intention to pass a new resolution to classify any additional land which it intends will become subject to the Free Parking Area Agreement.

We trust the above comments are of assistance. Once you have had a chance to consider the matters raised in this letter, please confirm our instructions to amend the proposed agreement as suggested. In the meantime, please do not hesitate to contact the writer should you wish to discuss any part of this advice further.

Yours faithfully



**Sue Puckeridge**  
Special Counsel  
T 9806 7477 | F 9633 9400  
suep@matthewsfolbigg.com.au