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23 September 2013

Mr Sam Haddad  
Director General, Department of Planning & Infrastructure NSW  
GPO Box 39  
Sydney NSW 2001

Dear Mr Haddad

**Re: Sandy Shores Developments Pty Ltd  
Sandy Shores development at Hearn's Lake, s75W Modification Application**

We act for Sandy Shores Developments Pty Ltd (**our client**), being the registered proprietor of 49.5 hectares of land at Pacific Highway, Sandy Beach North, and 15 Pine Crescent, Sandy Beach, legally described respectively as Lot 22 DP 1070182, and Lots 497 and 498 DP 227298 (**the Land**).

The Minister previously granted Concept Approval under Part 3A of the *Environmental Planning & Assessment Act 1979* (**the Act**) (now repealed). Our client seeks to modify the Concept Approval pursuant to section 75W of the Act to reinstate stage 2 and the eastern portion of stage 1 which were previously excised from the approval by the Minister. Our client also seeks approval for direct access to the Pacific Highway.

As you are aware, during the course of the approval process, Council made various representations about the environmental sensitivity of some portions of the Land. In reliance on these representations, the Minister refused that part of the proposal which was to be constructed over the land that was presumed to be environmentally sensitive land. At the time, our client was critical and suspicious of Council's representations on the basis that they appeared to be unfounded and not grounded in any proper, considered studies or reports.

Based on Council's submissions, the Minister ultimately came to the view that large areas of the Land contained actual or suspected Swamp Scherophyll endangered ecological communities (**EECs**). As a result, the Minister required:

1. the deletion of stages 2 and 6, and the eastern portion of stage 1;
2. the provision of an extensive offset in exchange for development of stage 5; and
3. dedication of approximately 6 hectares of land.

By this s 75W application, our client seeks to:

1. reinstate stage 2 and the eastern portion of stage 1;
2. delete the requirement for an offset in exchange for development of stage 5; and

3. delete the requirement to dedicate 6 ha of land.

Our client does so after having spent considerable time gathering and reviewing a body of documentation and information which definitively establishes that the land in question is not environmentally sensitive and Council's submissions were entirely unsupported by any evidence. Further, Council has in fact now admitted that it had not carried out or commissioned any studies to support its representations made during the approval process as to the environmental sensitivity of the Land. In addition, our client has commissioned a full ecological study of the Land and has recently received a report from Conacher Environmental Group confirming that the eastern portion of the site contains sandplain vegetation communities that are not properly classified as coastal floodplain EECs. A copy of the report is included with the modification application.

It is clear that the Minister's concern in relation to the EECs was unfounded and the basis upon which he decided to withhold approval of stage 2 and the eastern portion of stage 1, and to require offsets and dedication of land, was mistaken.

The modification application provides the Minister with the opportunity to correct that error.

#### **Council's submissions on Concept Plan application**

1. Coffs Harbour Local Environmental Plan 2000 (**LEP 2000**) and Development Control Plan No. 1 (**DCP 1**) were in force at the time that our client indicated to Council that it would be submitting a Part 3A application to develop the Land. Those planning controls in tandem allowed a reasonable yet sensibly-conservative development yield upon the Land, with LEP 2000 maintaining the Residential zone for the southern section of the site, maintaining the 7B zone for the buffer area to the Pacific Highway, and rezoning that part of the site along the edge to Double Crossing Creek and to Hearn's Lake from 7(b) to 7A Environmental Protection Habitat and Catchment.
2. However, in response to our client's plans to develop the Land, Council had resolved by early 2005 to prepare and exhibit Draft Local Environmental Plan Amendment No. 29 – Hearn's Lake (**LEP 29**) to rezone approximately 80% of the Land as 7A - effectively to sterilise the vast majority of the Land. In doing so, Council repeatedly said that it relied on detailed Vegetation Mapping of the Land.
3. Similarly, Council also resolved to adopt the Hearn's Lake/ Sandy Beach Development Control Plan (**the new DCP**), which came into force in December 2005. In doing so, Council again repeatedly said that it relied on detailed Vegetation Mapping of the Land.
4. Council also made a submission to the Minister in opposition to the Concept Plan application indicating that detailed Vegetation Mapping and other studies had shown that the majority of the Land was environmentally sensitive and therefore, LEP 29 and the new DCP were necessary to take account of that fact.
5. **We now know that Council did not undertake any Vegetation Mapping.** In an internal email we have obtained from Council dated 16 December 2010 (enclosed), from Jeff Green to John Arkan, Steve McGrath and Keith Rhoades, Mr Green states in the plainest of terms:
 

*"It does not appear that Council has undertaken a trapping / quadrant study, a tree study or an ecological soil study of the site".*
6. This information was never admitted by Council at the time despite countless letters from our client, its consultants, its previous solicitors, and other affected landowners, in which the obvious absence of any detailed ground-truthing by Council was repeatedly raised.

7. Council's repeated earlier assertions made publicly, to our client and, specifically, **to the Department**, that it did in fact, undertake vegetation mapping of the Land (described by Council at various times as "*detailed investigations*", "*backed by environmental studies*" and "*based on the latest scientific data and methodology*" and having been "*ground-truthed*") were plainly **false, misleading and vexatious**, and were designed to prevent development of our client's land by falsely justifying the exhibition of LEP 29 and the adoption of the new DCP.
8. Our client was put to the significant expense of engaging its own environmental consultants to critique and respond (on numerous occasions) to the Vegetation Mapping that Council alleged had been undertaken in support of the new DCP and, subsequently, LEP 29. In that regard, Conacher Travers reported in March 2006 to Planning Workshop Australia that "*The Hearnese Lake DCP and LEP (No.29) were not supported by any ecological survey requirements / guidelines prepared by DEC or industry accepted guidelines. The DEC Ecological Survey Guidelines identify the type and extent of ecological surveys which are required for rezoning proposals, including LEPs*". Conacher Travers further expressed the view that the new DCP "*was based on inaccurate and outdated information and was not supported by any ecological surveys or assessments utilising current accepted standards*".
9. In relation to LEP 29, Conachers Travers later reported (in November 2006) that "*It has been proven by detailed site vegetation survey by Conacher Travers that the vegetation classification maps of this strategy do not correspond to the vegetation actually present on the site... No evidence of detailed site survey for vegetation types is provided in the Sainty and Associates Report.*" (Conacher Travers (November 2006) *Comments on Environmental Constraints Analysis Report*).
10. Similarly, from as early as March 2005, various landowners provided to Council detailed reports prepared based on site specific flora and fauna investigations, which concluded that the constraints mapping on which Council was relying, to formulate the DCP, was grossly wrong and could not be substantiated.
11. Our client's previous lawyers (Deacons) also wrote to Council on numerous occasions from late 2003 onwards, expressing concern in relation to the obvious inaccuracies of the draft Vegetation Strategy and the draft DCP, repeatedly requesting "*information about the work carried out for Council in support of the DCP*". Council never provided any evidence to support its claims in relation to the environmental sensitivity of the land.
12. Nevertheless, Council wrote to the Department on 15 March 2006 asserting that the Land was environmentally sensitive, and in doing so, Council again did not disclose to the Department the significant body of criticism that had been levelled at Council's complete absence of any on-site ground-truthing. Council's mapping had not been ground-truthed at all.
13. More importantly, Council's vegetation mapping used to support its new DCP appears to have been deliberately contrived. We have reviewed vegetation mapping prepared for Council over the same area, at the same time as the DCP map (May 2004), in which Council had identified the areas of the Land that were said to have 'very high' conservation areas. Those areas were minimal – consistent with our client's expert advice. However, for the purposes of the DCP, Council used a map having the same date and covering the same area but which now showed almost the whole of the Land as being designated 'very high' vegetation value.
14. Having relied on Council's alleged vegetation mapping, the Department commissioned Sainty and Associates to prepare an independent report based on Council's falsely prepared DCP and its underlying Draft Vegetation Conservation Strategy. The applicant has always been critical of the

Sainty report, as explained in detail in its Preferred Project Report, and maintains those criticisms.

15. The Department's only given reason for withholding approval of some stages, and for placing conditions on stage 5, was its concern, based on Council's assertions, that these areas contained Swamp Sclerophyll EEC. This conclusion was reached only as a result of verbal information from Council that it had performed formal scientific studies. We now know that those assertions were untrue.
16. In the final stage of assessment, the Department's understanding was based upon the report of Dr Stephen Jeffries of Biolink.
17. We note that Dr Jefferies states, in his report, that he is not an expert in Swamp Sclerophyll EEC or in Coastal soils. Our client's ecological and soil experts, on the other hand, who are appropriately qualified, have carried out extensive surveys, studies and testing which have clarified the characteristics of these areas to the extent that they can be classified with absolute certainty as not meeting the characteristics of a Swamp Sclerophyll EECs. These studies are set out below:
  - (a) Studies of tree communities and vegetation surveys (including detailed quadrat surveys) which identified mature examples of species that cannot live in a swamp Sclerophyll EEC as the regular inundation destroys them (see Conacher Travers (April 2005) *Flora and Fauna Assessment*, (August 2007 and September 2008) *Ecological Survey and Assessment Reports*, and Whelan InSites (August 2010) *Ecological Assessment*).
  - (b) Comprehensive soil investigation (including laboratory analysis) by Phillip Conacher, a known and respected expert in coastal soils, with samples extending 1.5-1.7 metres below the surface, identifying the eastern portion of the site as Coffs Harbour Soil Landscape (aeolian soils), which totally precludes the vegetation occurring on this part of the site from being identified as Swamp Sclerophyll EEC. As set out above, this report is enclosed with the modification application.
18. It is plain that the Department relied on the Council's false representations as to the ecological status of the Land in granting the Concept Approval subject to conditions of consent reducing the development potential of the site.
19. Further, it is clear that Dr Jeffries does not have the relevant expertise to determine the existence of EECs on the Land and therefore, the Department ought not to have relied on this report in forming its opinion as to the ecological status of the Land.

#### **Conditions A2 and B1 - offset**

20. Condition A2 excludes Stages 6, 2 and the eastern portion of Stage 1. Condition B1 requires these stages to be added to the conservation area set out in Schedule 3 of the Concept Approval. We understand from the assessment report that these stages were to act as an offset for the approval of other stages, which the Minister also thought contained some EECs of lower quality.
21. These stages were excluded from the Concept Approval, in part, in reliance on Council's misrepresentations as to the ecological status of the Land.
22. The "Conservation Area" was proposed to *improve* the ecological status of the site. The Concept Plan Application proposed development of the environmentally degraded parts of the site – those parts that had previously been used for grazing and which had low environmental significance. The environmental value of the site as a whole was to be improved as a result of the

development, by the revegetation, rehabilitation and ongoing conservation of approximately 50% of the site. The applicant proposed to manage the Conservation Area in perpetuity as part of the community title scheme, to avoid burdening the public with the costs of ongoing management and conservation.

23. To the extent that the Department retains any lingering concerns in relation to the environmental status of the parts of the land that have been approved for development, the establishment of the Conservation Area should more than allay these concerns. The public environmental benefit to be obtained from the Conservation Area by far outweighs any offset that may otherwise be required in exchange for development of the land. Our client therefore seeks deletion of condition B1.
24. Investigations carried out since the grant of the Concept Approval, set out above, clearly demonstrate that the eastern portion of the site does not contain any EECs. Therefore, our client seeks the following amendment of condition A2 as follows:

*A2. To avoid any doubt, this Concept Plan approval does not approve any future development within the areas described as Stage 6, ~~Stage 2, and that part of Stage 1 east of the extension of Ti Tree Road as depicted on the modified staging plan at Schedule 3.~~*

#### **Condition C11**

25. We understand from the assessment report that Stage 5 may be developed subject to an appropriate (onsite or offsite) offset for conservation purposes in perpetuity. According to the assessment report, the Department has determined that it can accept limited development within areas of EEC.
26. As it has been clearly demonstrated that the parts of the Land proposed to be developed, including, but not limited to, the area earmarked for Stage 5 does not contain any EEC, there is no need whatsoever for an offset. Accordingly, our client seeks the deletion of condition C11 excluding Stage 5.
27. In addition, as explained above, the Conservation Area is sufficient offset for development of all stages sought by the applicant and no further offset is justified.

#### **Condition C13 – Dedication of land**

28. As you know, the Concept Approval application sought approval for 280 lots across the various precincts. Notwithstanding our client's rejection of Council's representations as to the ecological status of the Land, our client, in good faith to assuage the Minister's concerns, offered to dedicate six hectares of land as an additional form of offset.
29. The Concept Approval omitted approval of Stages 6, 2 and the eastern portion of Stage 1 **and** required the dedication of the six hectares of land, **thereby requiring a considerable offset in respect of Land which it has now been established does not contain any EEC.** That is, an offset was required in exchange for nothing. Further, given that Stages 6, 2 and the eastern portion of Stage 1 were not approved, no offset for loss of a suspected EEC should be required.
30. As it is now clear that Stage 2 and the eastern portion of Stage 1 are precluded from being categorised as EECs, there is no reason why these stages cannot be approved without an offset. Accordingly, our client seeks the deletion of condition C13 requiring the dedication of land.

#### Condition B4 – Pacific Highway Access

31. We further note that the Department refused our client's proposed direct access to the Pacific Highway, despite the RTA's in principle approval of this access. We understand that this refusal was occasioned partly as a result of aggressive submissions and lobbying by Council, who were opposed to the access.
32. In circumstances where Council's conduct in relation to this application has been less than model, and it has gone to great lengths to oppose the application at any cost, including pursuing a legal challenge of the Minister's approval through to the Supreme Court, we ask the Department to reconsider the issue of Highway access.
33. We understand that the RTA had raised a few issues of detail that it said it would like to seek resolved before the access were to be implemented, and we confirm that our client would be very happy to provide these details, in the usual course, as part of its future discussions with RMS when the time comes and final plans are being developed.
34. Although it may be possible for Council to approve this access by way of future development application (with RMS concurrence), we do not see that as sufficient reason for withholding the approval as part of the Concept Plan. Our client is understandably anxious at the prospect of this matter being omitted from the Concept Plan Approval, leaving it at the mercy of Council, who have to date gone to great lengths to stop the development. Given Council's agenda of frustrating this development, we have no confidence that Council would act reasonably in relation to a future application from our client for this access.
35. Our client therefore requests deletion of condition B4.

#### Conclusion

Having regard to the documents produced contemporaneously by Council and the subsequent environmental studies conducted both by the NSW government and on behalf of our client, it is clear that Council's submissions to the Department in relation to the environmental sensitivity of the Land were unfounded and, simply put, false.

We trust this letter assists the Minister's understanding of the circumstances in which the Concept Approval was granted and the reasons why our client now seeks to modify the Concept Approval. Conditions A2, B1, C11, and C13 were imposed based on false information and our client, having demonstrated the inaccuracy of Council's submissions, now seeks to amend the Concept Approval to remedy this issue.

Should you have any further queries in relation to this letter, please contact Christina Renner on 9931 4701.

Yours sincerely



  
Anthony Whealy  
Partner

Accredited Specialist Local Government & Planning  
for GADENS LAWYERS

**Enclosures:**

Conacher Travers letter to Planning Workshop Australia dated 20 March 2006

Conacher Environmental Group (August 2013) *Soil and Soil Landscape Investigations Part Lot 22 Pacific Highway Sandy Beach North*

Email from Jeff Green to John Arkan dated 16 December 2010

**References:**

Conacher Travers (April 2005) *Flora and Fauna Assessment*

Conacher Travers (November 2006) *Comments on Environmental Constraints Analysis Report*

Conacher Travers (August 2007) *Ecological Survey and Assessment Report*

Conacher Travers (September 2008) *Ecological Survey and Assessment Report*

Whelan InSites (August 2010) *Ecological Assessment*

**Nicole Baker**

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**From:** Jeff Green  
**Sent:** Wednesday, 9 March 2011 3:14 PM  
**To:** Lisa Garden  
**Subject:** FW: Sandy Shores proposed development (Hearns Lake)  
**Attachments:** Picture (Metafile)

COPY

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**From:** Jeff Green  
**Sent:** Thursday, 16 December 2010 3:14 PM  
**To:** Cath Stretton  
**Subject:** FW: Sandy Shores proposed development (Hearns Lake)

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**From:** Jeff Green  
**Sent:** Thursday, 16 December 2010 10:32 AM  
**To:** John Arkan  
Steve McGrath; Keith Rhoades  
**Subject:** FW: Sandy Shores proposed development (Hearns Lake)

Good Morning John

With regard to your queries, this matter has been handled by several staff over recent years, some of which are no longer with Council as employees. Several relevant studies have been initiated by Council over the years, but generally cover a wide geographic range. Specific environmental Council studies that refer to Hearnes include:

**draft Priority Habitats and Corridors Strategy (2010)**

- Category 2 - High Conservation Lands (Endangered Ecological Communities; over-cleared vegetation types; mainland areas of the Solitary Island Marine Park (SIMP) plus a 100m buffer; other wetlands within mapped corridors)
- Regional Wildlife Corridor

**Coffs harbour Vegetation Management Study (Ecograph 2002)**

- 1 - Very High Ecological Status

**s Harbour Local Vegetation Management Plan (Ecograph 1999)**

- 1 - Very High Ecological Status

**The Vegetation of the Coffs Harbour City Council LGA (1996)**

- Mapped equivalent Endangered Ecological Communities
- N20 - Paperbark; N52 - Swamp Mahogany; SG5804/SG6402 - Sedgeland/Rushland

It does not appear that Council has undertaken a trapping / quadrant study, a tree study or an ecological soil study of this site.

Note: Council's Biodiversity officers inspected this site earlier this year in response to Department of Planning and the proponent's consultants reports to specifically examine the extent of wallum froglet habitat and EECs. Council's biodiversity staff recorded nearly 10 x fold the total number of individual records for the froglet, concentrated primarily in the areas now proposed for residential stages 4 and 5 of the Major Project.

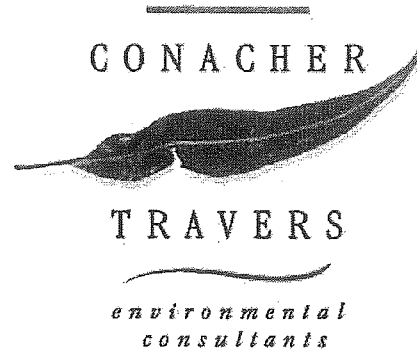
Further, Council engaged WBU Oceanics Australia in 2004/05 to prepare the Hearnes Lake Estuary Management Plan. This Plan was adopted by Council at its meeting of 27 August 2009. This Plan considered issues including catchment process and drivers, waterway usage, the physical, chemical and biological state of Hearnes Lake, the impact of pressures on the state of Hearnes Lake and management responses. A number of biodiversity considerations are included in this Plan. The Plan preparation was comprehensive and included considerable agency



Our Ref: 5091:PC

20 March 2006

Mr Charles Hill  
Planning Workshop Australia  
GPO Box 3275  
SYDNEY NSW 2001



Dear Charles,

**Re: Coffs Harbour City Council Hearn's Lake  
Sandy Beach, LEP Amendment No 29**

I have noted that Coffs Harbour City Council is proposing to rezone a large percentage of Lot 22 DP 1070182 to 7A Environmental Protection, Habitat and Conservation. It is understood that much of the rationale for the rezoning is based in the current Development Control Plan covering the site.

The current Development Control Plan was based on inaccurate and outdated information and was not supported by any ecological surveys or assessments utilising current accepted standards. It does not appear that the current Local Environmental Plan currently on exhibition is supported by any appropriate ecological surveys to substantiate the implementation of a 7A Environmental Protection Habitat and Catchment Zone over the subject land.

Extensive ecological surveys and assessments were completed by *Conacher Travers* on a seasonal basis in 2003, 2004 and 2005 with the results of these assessments continuously provided to Council. Council have not prepared any ecological assessments which were completed to the intensity that were completed by *Conacher Travers*.

Under its current zoning any development proposal is required to be assessed on its merits in relation to the current legislative requirements including the EP&A Act and TSC Act. Rezoning the site to 7A has potential to limit future land management options which might be negotiated by the landowners under the Biodiversity Banking Schemes enacted within the provisions of the Threatened Species Legislation Amendment Act (2004). Therefore rezoning to 7A Conservation Habitat and Catchment may result in inappropriate long term management of the land to achieve Council's objectives.

Based on the inadequacy of Council's ecological surveys to support a 7A zone and the limitations in regards to long term ecological management within a 7A (as compared to future management options under Biodiversity Banking Schemes). I believe that the proposed LEP is premature and inappropriate for this site. The current zoning should be retained to enable appropriate reviews of the proposal and ongoing negotiations regarding future land use and management of the site.

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Conacher Travers Pty Ltd - ABN 49 083 610 173

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I trust that the above comments are of assistance to you in preparing a submission on the Draft Local Environmental Plan.

Yours faithfully,

P A CONACHER  
Director  
**CONACHER TRAVERS PTY LTD**