

Our reference Isabella Ferguson 35602896
Direct line +61 2 9931 4828
Email isabella.ferguson@gadens.com
Partner responsible Christina Renner

gadens

Gadens Lawyers
Sydney Pty Limited
ABN 69 100 963 308

77 Castlereagh Street
Sydney NSW 2000
Australia

DX 364 Sydney

T +61 2 9931 4999
F +61 2 9931 4888

gadens.com

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Privileged and confidential

Carolyn McNally
Secretary
Department of Planning and Environment
23-33 Bridge Street
Sydney NSW 2000

Attention Marcus Ray, Deputy Secretary, Planning Services

Dear Ms McNally

Application for Modification of Concept Plan Approval pursuant to section 75W
Concept Plan Approval Application No. 05_0083
Land: Lot 22 DP 1070182 and Lots 497 and 498 DP 227298, Pacific Highway and Pine Crescent,
Sandy Beach, Coffs Harbour LGA

We act for the current owner of the above Land, Elite Constructions NSW Pty Ltd.

Our client purchased the Land on 18 February 2015.

Our client applies to modify the Concept Plan Approval (Application No 05_0083) approved by the Minister for Planning on **20 December 2010** for the Sandy Beach North Residential Subdivision by replacing **Condition A6** with the following new condition:

Limits of Approval

A6 This Concept Plan Approval shall lapse seven (7) years after the date of the approval is endorsed by the Minister, unless an application is submitted for approval to carry out a project or part of a project for which concept approval has been given under this Concept Plan before that lapse date.

The application involves 2 changes to the current Condition A6. The first relates to the timing of the lapse period, and the second relates to the action that must be taken in order to avoid lapsing of the Concept Plan Approval.

1. Timing

Our client seeks to change the lapse period from 5 years to 7 years. We note that this is possible because this particular Concept Plan Approval is subject to a lapsing provision imposed under section 75Y of the former Part 3A of the *Environmental Planning & Assessment Act 1979 (the Act)*, and as a consequence, clause 11(3)(a) of Schedule 6A of the Act does not apply.

As a condition imposed under section 75Y, Condition A6 may be amended under section 75W as this section continues to apply to allow the modification of Part 3A approvals, notwithstanding the repeal of Part 3A.

There are strong grounds to support an extension of the lapsing period:

- (a) On 15 March 2011, Coffs Harbour City Council (**Council**) challenged the validity of the Minister's Concept Plan Approval¹ in the Land and Environment Court, which was dismissed by the Court on 23 January 2012. Following that, Council appealed the decision of the Land and Environment Court to the Court of Appeal², which was also ultimately dismissed, but not until 6 March 2013;
- (b) During the period when the Concept Plan Approval was under challenge, it was not possible for the original proponent to commence the development as it was, understandably, unable to obtain the necessary funding to carry out the environmental assessment requirements required by Part C of the Concept Plan Approval and to prepare and lodge a project application under the Concept Plan;
- (c) As a result, for approximately the first half of the Concept Plan Approval's life, it was unable to be acted upon;
- (d) As a result of the delay (and consequent significant holding costs) and the expense involved in defending Council's legal challenge, the original proponent ultimately fell into financial difficulties from which it was unable to recover. Receivers were appointed in respect of the Land on 28 March 2014, and
- (e) The Land the subject of the Concept Plan Approval was sold by the original proponent's financier earlier this year, with that sale only settling on 18 February 2015.

As can be seen from the above, because of the legal challenge brought by Council, and the financial difficulties this caused the original proponent, it has not been possible, until now, for the development to be progressed.

Our client is keen to proceed with the development, but is now very short of time, given the current lapse date of 20 December 2015.

In the circumstances, we believe that an extension of time of the lapsing period would be fair and reasonable.

2. Action to Avoid Lapse

We note that section 75Y provides:

75Y Lapsing of approvals

- (1) An approval under this Part may be subject to a condition that it lapses on a specified date unless specified action with respect to the approval has been taken (such as the commencement of work on the project **or the submission of an application for approval to carry out a project for which the concept approval has been given**). [Emphasis added.]
- (2) Any such condition may be modified under this Part to extend the lapsing period. The Minister is to review the approval before extending the lapsing period and may make other modifications to the approval (whether or not requested by the proponent).

We have identified numerous concept plan approvals that include a lapse date under section 75Y which also provide that lapse can be avoided if a project application has been submitted before the lapse date. This type of provision expressly authorised by section 75Y(1).

The current condition A6 essentially provides that the development must be physically commenced within 5 years of approval of the Concept Plan. This would require the proponent to carry out all of the environmental assessment requirements of Part C of the approval, prepare and lodge a development application, obtain approval of that

¹ *Coffs Harbour City Council v The Minister for Planning and Infrastructure & Others* [2012] NSWLEC 4 (23 January 2012)

² *Coffs Harbour City Council v The Minister for Planning and Infrastructure* [2013] NSWCA 44 (6 March 2013);.

application, and physically commence work under the development consent, all within a 5 year period.

For the reasons explained above, this has been impossible to date, and there is a real risk that our client, the new owner of the land, will not be able to fulfil all of these requirements by 20 December 2015. While an extension from 5 years to 7 years would assist, we also believe it is necessary to change the basis upon which lapse may be avoided.

Given Council's previous conduct in relation to the Concept Plan Approval, and its staunch opposition to this development, our client has a reasonable expectation that it will be difficult to obtain a development consent from Council.

There is a strong likelihood that our client will have to appeal a deemed or actual refusal of consent in order to obtain a development consent. Given the timeframes involved in preparing a development application, the development assessment process, and the Land and Environment Court appeal process, it could be well over a year before a development consent is obtained.

There is also a risk that Council may seek to challenge a consent issued by another determining authority such as the JRPP or a Commissioner of the Court, which will further extend these timeframes and which could prevent physical commencement of any development consent that our client is able to obtain.

Alternatively, Council may issue a development consent subject to onerous or deferred commencement conditions that hinder the ability to physically commence the consent before the lapse date, and which may require legal challenge or merit appeal by our client.

Given Council's previous conduct in relation to this development, including legal challenges that took two years to be resolved, and its continued opposition to the development, it is not unreasonable to assume that substantial difficulties may be encountered by our client in attempting to progress this development.

For this reason, given the unusual circumstances involved, we request that the lodgement of a project application before the lapse date be the action specified by Condition A6 as sufficient to avoid lapse of the Concept Plan Approval.

Given the time constraints faced by our client in relation to this matter, we would be grateful if the Department could assess this application as quickly as possible.

Please contact Christina Renner (direct line: 9931 4701) or Isabella Ferguson (direct line: 9931 4828) if you have any questions or require submission of additional information in support of our client's application.

Yours sincerely



Christina Renner
Partner