

13 February 2017

Privileged and confidential

Carolyn McNally
Secretary
Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

Attention: Marcus Ray, Deputy Secretary, Planning Services

Our ref: AUM 35602896

Dear Ms McNally

Application for Modification of Concept Plan Approval No. 05_0083 pursuant to section 75W of Environmental Planning & Assessment Act 1979

Land: Lot 22 DP 1070182 and Lots 497 and 498 DP 227298, Pacific Highway and Pine Crescent, Sandy Beach, Coffs Harbour

We act for the owner of the above land (**the site**), Elite Construction NSW Pty Ltd.

Background

Our client purchased the site on 18 February 2015. The site was subject to a Concept Plan (Application No. 05_0083) approved by the Minister for Planning on 20 December 2010 for the Sandy Beach North Residential Subdivision.

Challenges to Concept Plan Approval

The Coffs Harbour City Council (**Council**) commenced class 4 judicial review proceedings in the Land and Environment Court on 15 March 2011 challenging the validity of the Concept Plan Approval. This appeal was subsequently dismissed by the Court on 23 January 2012.

Council then appealed the decision of the Land and Environment Court to the Court of Appeal and this appeal was also dismissed on 6 March 2013.

The significant cost and delay arising from the two court proceedings took a financial toll on the previous owner, who was then unable to proceed with the development and the mortgagee took possession of the site, ultimately selling it to our client.

We are instructed that Council continue to oppose residential development of the site, and are currently pursuing a rezoning of the land designed to frustrate its future residential development.

2015 Modification Application

Our client has previously obtained a s 75W modification of condition A6 to extend the original 5 year lapsing period to 7 years, on account of the delays caused by the legal challenge, which would otherwise have seen the approval lapse within a matter of months of our client's purchase of the site.

Early Works

Our client intends to commence development under the Concept Plan Approval as soon as possible.

One significant early item of work that will need to be undertaken is the creation of access to the site from Pine Crescent over both lots 497 and 498 in DP 227298, which is specifically required by condition B5 of the Concept Plan Approval. Lots 497 and 498 in DP 227298 are within the Concept Plan area and are included in the definition of "Land" on the first page of the approval document.

These lots are on existing urban land, and they each contain a dwelling house. Our client will need to demolish the dwelling houses to create the access, which will initially be used for construction purposes and will later be sealed when the formal access road is created before completion of the residential subdivision.

Demolition of the houses is complying development which may be carried out under a Complying Development Certificate. It is our view that the demolition of the houses to create this access would be physical commencement as required by condition A6 of the Concept Plan Approval. However, because of the history of this matter with the local council, we wish to avoid any risk of further legal challenge and, for abundant clarity, seek to amend condition A6 to clarify that it includes works under a Complying Development Certificate.

Because of difficulties encountered with the Stage 1 development application (the preparations for which are well underway), our client is concerned that it will not realistically be possible to both obtain a development consent for that stage, and to also physically commence works under that development consent, by 20 December 2017 (the current lapse date). An explanation of the current status of this application is contained at Annexure A.

The matter of the early works is therefore of vital importance.

Physical commencement under condition A6

It is our opinion that the demolition of the houses under a Complying Development Certificate will constitute the physical commencement required by condition A6 to prevent lapsing of the Concept Plan Approval.

We note that "physical commencement" is not a statutory test in relation to the lapsing of a Part 3A approval but rather, a test that has sometimes been adopted by condition of Part 3A approval. The law in relation to the physical commencement of a development consent therefore does not strictly apply to Part 3A approvals, although we understand that the intention in adopting such a condition is to borrow from this case law.

In this regard, it is well settled law that demolition alone is sufficient to establish "physical commencement"¹. Of course, for a consent that relates to demolition alone, completion of the demolition is more than just physical commencement, it is completion of the consent².

The ordinary test for physical commencement also requires that works must truly relate to the development that has been approved and must physically occur on land to which the approval relates. We understand that this aspect of the test is intended to be adopted by condition A6 of the Concept Plan Approval by the reference that the required works must be "the subject of any **related** development consent **within** the Concept Plan area" (our emphasis).

¹ *Smith v Wyong Shire Council* [2008] NSWLEC 115; *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* [2016] NSWSC 155; *Sharp v Hunters Hill Council* (2002) 120 LGERA 155.

² see paragraph 77 *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* [2016] NSWSC 155

Creation of an access road across lots 497 and 498 in DP 227298 is expressly required by the Concept Plan Approval and demolition of the existing houses on these lots, to facilitate this access, is clearly work that would truly relate the development approved by the Concept Plan Approval. The demolition would occur on land that is expressly included in the Concept Plan Approval.

This aspect of the test would clearly be met.

“Development consent” is defined in the *Environmental Planning and Assessment Act 1979 (the Act)* to include, unless expressly excluded, a complying development certificate. The Concept Plan Approval, including the modified Condition A6, does not expressly exclude a complying development certificate.

The demolition of a building is “development” as defined by the Act, and it is a form of development that generally (and specifically in this case, as it is not exempt development on the site), requires consent.

The Act makes it clear that a Complying Development Certificate is a form of development consent, for example:

76A Development that needs consent

(1) General

If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless:

(a) such a consent has been obtained and is in force, and

(b) the development is carried out in accordance with the consent and the instrument.

(2) For the purposes of subsection (1), development consent may be obtained:

(a) by the making of a determination by a consent authority to grant development consent, or

(b) in the case of complying development, by the issue of a complying development certificate.

(3), (4) (Repealed)

(5) Complying development

An environmental planning instrument may provide that development, or a class of development, that can be addressed by specified predetermined development standards is complying development.

We are therefore of the view that the demolition of the existing houses on lots 497 and 498 in DP 227298 would be:

- works the subject of a related development consent,
- within the Concept Plan area,

as required by condition A6.

However, for abundance of caution and the avoidance of any doubt, having regard to the substantial delay and expense that the previous developer (and the Department) experienced as a result of Council's previous legal challenge, and the fact that Council remains vehemently opposed to the development, our client requests that the wording of condition A6 be amended as follows:

- A6. *This Concept Plan Approval shall lapse seven (7) years after the date of the approval is endorsed by the Minister, unless the works the subject of any related development consent (**which, for the avoidance of doubt, includes a complying development certificate**), within the Concept Plan area are physically commenced on or before that lapse date.*

Please contact Adrienne McLoon on 9931 4795 or me on 9931 4701 if you have any questions or require any additional information in support of our client's application.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Christina Renner', with a large loop at the start and a wavy line extending to the right.

Christina Renner
Partner
Dentons Australia

Annexure A

Development Application for Stage 1

Our client is several months along in the preparation of its development application for Stage 1 of the subdivision. The further environmental assessment requirements set out at part C of the Concept Plan Approval are onerous, and require, amongst other things:

- compliance with certain Council specifications that are inconsistent with the Concept Plan Approval (this has made the subdivision design particularly difficult and is likely to result in another s 75W modification being necessary);
- an archaeological sub-surface investigation program requiring consultation with the former Director-General of Planning (now you), the local Aboriginal community, and DECCW (now OEH) to be finalised and implemented; and
- a detailed Conservation Area Management Plan, requiring consultation with Council, LPMA, and DECCW (now OEH).

The Conservation Area, in particular, has caused our client significant delay and is currently impeding the completion of the stage 1 development application. LPMA is referred to in the Concept Plan Approval as the authority to whom the Conservation Area should be dedicated. LPMA is now once again LPI, but its role as the owner of public land has changed and our client has, after some effort, determined that the relevant authority to whom the land should be dedicated is now the National Parks and Wildlife Service (**NPWS**). The NPWS has, to date, been reluctant to engage in relation to this site, and it appears unsure as to whether it wants to accept dedication of the land.

Because of the difficulties described above, it now appears likely that our client will need to lodge a s 75W application to resolve inconsistencies and remove any uncertainties in relation to compliance with Council specifications and the Conservation Area before it is able to lodge its development application for stage 1. Our client's request for a pre-DA meeting with Council to discuss these issues was declined by Council.

Even if it was able to lodge this development application tomorrow, our client is concerned that Council would not approve it in time for physical commencement to be able to occur before **20 December 2017**, the current lapse date.

Based on Council's previous conduct in relation to the challenges to the Concept Plan Approval and its staunch opposition to the development, our client is legitimately concerned that Council is likely to either delay or refuse the application, requiring our client to lodge an appeal with the Land and Environment Court. This delay in obtaining development consent will most likely hinder our client from physically commencing the works prior to the lapse period expiring.

Alternatively, Council may grant consent, but subject to onerous or deferred commencement conditions which could also prevent our client from physically commencing the works before the lapse date.

Our client is committed to the development and will take all necessary steps, including legal proceedings, to obtain development consent. Our client is confident it will succeed in any legal challenge but is concerned that any court granted consent is not likely to be issued in time for the consent to be physically commenced by 20 December 2017.