

# Request to modify a major project



NSW GOVERNMENT  
Department of Planning

Date duly made: \_\_\_\_/\_\_\_\_/\_\_\_\_

Modification No. CP06\_0318 (MOD 8)

## 1. Before you lodge

This form is required under section 75W of the *Environmental Planning and Assessment Act 1979* (the Act) in order to request the Minister to modify the Minister's approval to carry out a project or concept plan to which Part 3A of the Act applies.

Before making this request, it is recommended that you first consult with the Department of Planning (the Department) concerning your modification. The Director-General may issue environmental assessment requirements that must be complied with before your request will be considered by the Minister. If the changes proposed by the modification will result in a project that is consistent with the existing approval, the Minister's approval for a modification is not required.

### Disclosure Statement

Persons making a request to modify a project or concept plan are required to declare reportable political donations (including donations of or more than \$1,000) made in the previous two years.

Note: For more details about political donations disclosure requirements, including a disclosure form, go to [www.planning.nsw.gov.au/donations](http://www.planning.nsw.gov.au/donations).

### Lodgement

All modification requests must be lodged with the Director-General of the Department of Planning, by courier or mail. An electronic copy should also be e-mailed to the assessment contact officer assigned to the project.

NSW Department of Planning  
Ground floor, 23-33 Bridge Street, SYDNEY NSW 2000  
GPO Box 39 SYDNEY NSW 2001  
Phone 1300 305 695

## 2. Details of the proponent

Company/organisation/agency

PROJECT 28 PTY LTD

ABN

61 009 919 613

☐ Mr ☐ Ms ☐ Mrs ☐ Dr ☐ Other

First name

Family name

Position

STREET ADDRESS

Unit/street no.

46

Street name

CAVILL AVENUE

Suburb or town

SURFERS PARADISE

State

QLD

Postcode

4217

POSTAL ADDRESS (or mark 'as above')

P O BOX 1914

Suburb or town

SURFERS PARADISE

State

QLD

4217

Daytime telephone

07 5570 5500

Fax

07 5570 5050

Mobile

0467 492311

Email

mgeale@ledaholdings.com.au

### 3. Identify the land

STREET ADDRESS (where relevant)

Unit/street no.

Street or property name

DEPOT ROAD

Suburb, town or locality

KINGS FOREST, KINGSCLIFF

2487

Local government area(s)

TWEED

State Electorate(s)

TWEED

REAL PROPERTY DESCRIPTION

SEE ATTACHED SCHEDULE

Note: The real property description is found on a map of the land or on the title documents for the land. If you are unsure of the real property description, you should contact the Department of Lands.

Please ensure that you place a slash (/) to distinguish between the lot, section, DP and strata numbers. If the proposed modification applies to more than one piece of land, please use a comma to distinguish between each real property description.

OR: detailed description of land attached: ☒

**MAP: A map of the site and locality should also be submitted with this request.**

### 4. Details of the original major project or concept plan

Briefly describe what the original approval allows

For the carrying out of:

Residential development for approximately 4500 dwellings.

Town Centre and neighbourhood centre for future retail and commercial uses;

Community and education facilities;

Employment land;

A golf course;

Open space;

Wildlife corridors;

Protection and rehabilitation of environmentally sensitive land;

Utility services infrastructure;

Water management areas and lake; and

roads and pedestrian and bicycle paths.

What was the original project application no.?

06\_0318

What was the date of the approval?

19 AUGUST 2010

What was the original application fee?

Note: Clause 245K of the *Environmental Planning and Assessment Regulation 2000* provides information on calculating the maximum fee for a request for modification.

### 5. Describe the modification you propose to make to the development

Describe the proposed modification

Modify Condition A5 as follows:

In order that the approval remains relevant to the planning intent for the area, the approval shall lapse on 31 December 2016 2019 unless building, engineering or construction work relating the works authorised by works the subject of any related project approval or development consent is application are physically commenced on the land, on or before that lapse date.

The Secretary may extend this lapse date if the proponent demonstrates to the satisfaction of the Secretary that the project remains current, appropriate and reflective of the best use of the site at the date the approval would otherwise lapse.

See attached letter, Mills Oakley 20 February 2018 for details of the modification.

Your modification request may need to be accompanied by an Environmental Assessment, including plans. An electronic and hard copy of this document will be required.

#### ESTIMATED CAPITAL INVESTMENT VALUE

Please indicate the estimated capital investment value (CIV) of the modification to the project approval or concept plan (excluding GST).

\$NIL

#### FULL TIME EQUIVALENT JOBS

Please indicate the number of jobs created by the proposed modification. This should be expressed as a proportion of full time equivalent (FTE) jobs over a full year.

Construction jobs (FTE)

NIL

Operational jobs (FTE)

NIL

### 6. Landowner's consent (where required)

As the owner(s) of the above property, I/we consent to this request being made by the proponent:

Land

SEE ATTACHED SCHEDULE

Signature

See attached letter dated  
22 August 2017

Name

WILLIAM ROBERT ELL  
DIRECTOR & SECRETARY

Date

Land

Signature

See attached letter dated  
22 August 2017

Name

ROBERT JOHN ELL  
DIRECTOR

Date

Note: Under Clause 8F of the *Environmental Planning and Assessment Regulation 2000* (the Regulation), certain applications for approval under Part 3A of the Act do not require consent of the landowner, however, the proponent is required to give notice of the application (e.g. linear infrastructure, mining & petroleum projects, and critical infrastructure).

### 7. Political donation disclosure statement

Persons making a request to modify a project or concept plan are required to declare reportable political donations (including donations of or more than \$1,000) made in the previous two years.

Have you attached a disclosure statement to this request?

☐ Yes

☒ No

Note: For more details about political donations disclosure requirements, including a disclosure form, go to [www.planning.nsw.gov.au/donations](http://www.planning.nsw.gov.au/donations).

### 8. Proponent's signature

As the proponent(s) of the project and in signing below, I/we hereby:

- provide a description of the modification to the project approval or concept plan and address all matters required by the Director-General pursuant to Section 75W of the Act, and
- declare that all information contained within this form is accurate at the time of signing.

Signature

See attached letter dated  
22 August 2017

Name

WILLIAM ROBERT ELL  
DIRECTOR & SECRETARY

Date

In what capacity are you signing if you are not the  
proponent

See attached letter dated  
22 August 2017

Name, if you are not the proponent

ROBERT JOHN ELL  
DIRECTOR

**Land Description Schedule**

Lot 76, 272, 323 and 326 of DP 755701;  
Lot 6 DP 875446;  
Lot 2 DP 819015 (now Part Lot 50 DP 1188902);  
Lot 1 DP706497;  
Lot 40 DP7482;  
Lot 38A DP 13727;  
Lot 388 DP 13727;  
Lot 1 DP 129737;  
Lot 1 DP 781633;  
Lot 7 DP 875447;  
Lot 37 A DP 13727;  
Lot 2 DP 1159231 (closed road);  
Lot 1 DP 1178256 (closed road); and  
Lots 1, 2 & 3 DP 1157616 (closed roads).

# PROJECT 28 PTY LIMITED

(A.B.N. 61 003 919 613)

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22 August 2017

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

Dear Madam

**Kings Forest – Major Project Approval No. 08-0194 and Concept Plan  
Approval No. 06-0318**

Project 28 Pty Ltd, as owner of the Kings Forest site, being the land described in the Schedule below, hereby grants owner's consent to the lodgement of Section 75W Modification Applications in respect of Major Project Approval No. 08-0194 and Concept Plan Approval No. 06-0318.

**Land Description Schedule**

Lot 76, 272, 323 and 326 of DP 755701;  
Lot 6 DP 875446;  
Lot 2 DP 819015 (now Part Lot 50 DP 1188902);  
Lot 1 DP706497;  
Lot 40 DP7482;  
Lot 38A DP 13727;  
Lot 38B DP 13727;  
Lot 1 DP 129737;  
Lot 1 DP 781633;  
Lot 7 DP 875447;  
Lot 37A DP 13727;  
Lot 2 DP 1159231 (closed road);  
Lot 1 DP 1178256 (closed road); and  
Lots 1, 2 & 3 DP 1157616 (closed roads).

Yours faithfully  
Project 28 Pty Ltd



William Robert Ell  
Director/Secretary



Robert John Ell  
Director

20 February 2018

**Mills Oakley**  
ABN: 51 493 069 734

**Privileged and confidential**

Your ref:  
Our ref: AXGS/3183552

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

All correspondence to:  
PO Box H316  
AUSTRALIA SQUARE NSW 1215

**Contact**  
Paul Brazier +61 2 8035 7828  
Email: pbrazier@millsOakley.com.au

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Aaron Gadiel +61 2 8035 7858  
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**By email:** info@planning.nsw.gov.au

**Extension of the Minister for Planning's Concept Plan Approval 06\_0318**  
**Extension of the Minister for Planning's Project Approval 08\_0194**

We act for Project 28 Pty Ltd (**the proponent**).

The proponent is the registered proprietor of the land that is the subject of the above approvals.

This letter has been prepared to form part of two requests under section 75W(2) of the former Part 3A provisions of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**).

The requests relate to:

- the Minister for Planning's concept plan approval 06\_0318 in relation to the Kings Forest site (**the concept plan approval**); and
- the Minister for Planning's project approval 08\_0194 in relation to the Kings Forest site (**the project approval**).

**Summary of requests**

In brief terms these requests:

- in relation to the concept plan approval, seek a variation of condition A5 ('Lapsing of Approval') of schedule 2 of the concept plan approval;
- in relation to the project approval:
  - seek a variation of condition A17 ('Lapsing of Approval') of schedule 2 (of the project approval); and
  - seek the imposition of an additional condition of approval, being condition A18 ('Investigatory work') of schedule 2 (of the project approval).

The intent of the varied and additional conditions sought is to:

- extend the time for the physical commencement of works under **the concept plan approval** from 11 August 2018 to 31 December 2019;
- extend the time for the physical commencement of works under **the project approval** from 11 August 2018 to 31 December 2019; and
- clarify that a construction certificate may be issued under the project approval for the carrying out of preliminary investigative and monitoring work on the land, without complying with the existing body of 'before construction certificate' conditions.

## Detail of requests

### 1. Request in relation to the concept plan approval

- 1.1 Condition A5 ('Lapsing of Approval') of schedule 2 of the concept plan approval presently reads as follows:

In order that the approval remains relevant to the planning intent for the area, the approval shall lapse on 31 December 2016 unless works the subject of any related application are physically commenced, on or before that lapse date. The Secretary may extend this lapse date if the proponent demonstrates to the satisfaction of the Secretary that the project remains current, appropriate and reflective of the best use of the site at the date the approval would otherwise lapse.

- 1.2 It should be noted that on the 24 June 2015, the Secretary's delegate, Mr Daniel Keary, extended the lapse date (in the manner anticipated by the condition) from 31 December 2016 to 11 August 2018.

- 1.3 The request (in relation to the concept plan approval) seeks to vary this condition as follows:

In order that the approval remains relevant to the planning intent for the area, the approval shall lapse on 31 December ~~2016~~ 2019 unless building, engineering or construction work relating to the works authorised by works the subject of any related project approval or development consent is application are physically commenced on the land, on or before that lapse date. The Secretary may extend this lapse date if the proponent demonstrates to the satisfaction of the Secretary that the project remains current, appropriate and reflective of the best use of the site at the date the approval would otherwise lapse.

### 2. Request in relation to the project plan approval

- 2.1 Condition A17 ('Lapsing of Approval') of schedule 2 of the project plan approval presently reads as follows:

In order that the approval remains relevant to the planning intent for the area, the approval shall lapse 5 years after the determination date of this approval unless building, engineering or construction work relating to the works authorised by this approval is physically commenced on the land to which this approval applies before this date.

- 2.2 The determination date of the project approval was 11 August 2013. Accordingly, the current lapse date under condition A17 (in the absence of physical commencement) is 11 August 2018.

- 2.3 The request (in relation to the project approval) seeks to vary this condition as follows:

In order that the approval remains relevant to the planning intent for the area, the approval shall lapse ~~5 years after the determination date of this approval~~ on 31 December 2019 unless building, engineering or construction work relating to the works authorised by this approval is physically commenced on the land to which this approval applies before this date.

- 2.4 The request (in relation to the project approval) seeks to impose an additional condition of approval as condition A18 of schedule 2. It would be titled 'Investigatory and monitoring work'. The condition sought would read as follows:

Despite any other condition of the project approval, a construction certificate may be issued under a project approval for any investigatory or monitoring work relating to the works authorised by this approval, such as geotechnical work (including the drilling of bore holes), surveying activities (including the pegging out of land), monitoring environmental conditions, the taking of samples and the measurement of physical features. For avoidance of doubt, any other conditions precedent imposed by this project approval for the issue of a construction certificate do not apply to a construction certificate issued for investigatory or monitoring work under this condition.



### 3. Extension of lapse date — reasons in support

- 3.1 The concept plan approval was granted under the former Part 3A provisions of the EP&A Act. This means that it does not, in itself, authorise the carrying out of any development. As a result, even though the concept plan approval was given on 19 August 2010, the proponent was not able to physically commence the development at that point.
- 3.2 The role of the concept plan approval was to provide a basis for seeking further approval(s) that actually authorise the carrying out of the development. The proponent acted in a timely and appropriate way, by pursuing the project approval.
- 3.3 The project approval was given by the Planning Assessment Commission on 11 August 2013. It is the first (and only) 'related application' (within in the meaning of condition A5) to be approved. The Commission provided that the project approval does not lapse if it is physically commenced within five years from the date of that approval (ie by 11 August 2018).
- 3.4 The project approval has not yet been physically commenced. This is because:
  - (a) It has been necessary to seek a number of modifications to the concept plan approval and the project approval to ensure that it is practicable to carry out the urban development of the Kings Forest land.
  - (b) On 12 November 2012 the Commonwealth Government decided that the urban development of the Kings Forest land was a 'controlled action' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). As a consequence, the Kings Forest development cannot be carried out without Commonwealth approval. This approval was only given on 21 May 2015.
  - (c) It has been necessary for a modification requests to be made to the project approval to ensure that it is aligned with the Commonwealth approval.
- 3.5 There is a significant risk that it will not be possible to 'physically commence' the project approval before the current lapse date of the concept approval. This is because:
  - (a) The modification request to make changes to the project approval to ensure that it has been aligned to the Commonwealth approval has not yet been approved. In this regard:
    - (i) '08\_0194 Mod 4' (**Mod 4**) was lodged in relation to the project approval on 17 March 2017.
    - (ii) Mod 4 was placed on public exhibition between 29 June 2017 and 18 August 2017.
    - (iii) The proponent is presently reviewing submissions made as consequence of the public exhibition process.
  - (b) Once the terms of the project approval are settled it will be necessary to obtain a construction certificate to enable the actual carrying out of the first tranche of substantive urban development works on the site (bulk earthworks). It is expected that this will take an additional 6 to 12 months.
- 3.6 Our client has every intention of physically commencing the development as soon as is practicable. However, for reasons beyond the control of the proponent, there is a significant risk that this cannot occur by 11 August 2018.

#### **Currency of the approvals**

- 3.7 The concept plan approval and the project approval remains 'current'. We say this for two reasons.

- 3.8 **Firstly**, it is current in the sense that it accurately reflects a clear and contemporary planning direction for the Kings Forest site. It continues to be the basis for land use decisions, including:
- (a) the 21 May 2015 decision by the Commonwealth to grant approval under the EPBC Act;
  - (b) the 10 November 2015 decision by the Department of Planning and Environment to adopt a revised *Kings Forest Development Code* (as part of a modified concept plan approval) which expanded the range of uses permitted within the Kings Forest employment lands;
  - (c) the 20 February 2017 Land and Environment Court decision to allow the construction of a 998m<sup>2</sup> service station/food and drink premises in precinct 1; and
  - (d) the *North Coast Regional Plan* adopted in March 2017 (see below for more detail).
- 3.9 Nothing has happened that would call into question the underlying basis for the grant of the concept plan approval and the project approval.
- 3.10 **Secondly**, the proponent (and its associated entities) have continued to diligently progress this complex project in a timely and appropriate way. Significant public and private resources have been, and are continuing to be, invested for this purpose.
- 3.11 For completeness, the concept approval and the project approval are still expected to be current in 2019 and beyond.

#### ***Appropriateness of the concept approval***

- 3.12 The proponent says that:
- (a) Kings Forest is located on the far north coast of NSW in the Tweed Shire local government area approximately 20 kilometres south of the Queensland/NSW border, about 5 kilometres north of the village of Bogangar and approximately four kilometres south of Kingscliff. The site is 872 hectares.
  - (b) The envisaged residential precincts will provide a desirable mix of housing types including detached houses, terraces and attached dwellings, comprising 4,500 dwellings.
  - (c) The development will include community and education facilities including public primary schools over a substantial area of land.
  - (d) The development will provide for the employment needs of the community, with a substantial business park and the provision of local services.
  - (e) The development is sensitively designed to respond to the community's environmental requirements, including the creation of additional environmental protection areas.
  - (f) Generous provision is made for active and passive open space areas.
  - (g) In giving the concept plan approval, the Planning Assessment Commission was aware that the development would be carried out over an extended period of time, ie over a period of 15 to 20 years. This indicates that the concept approval has been framed in a way that ensures that its appropriateness will not dissipate with the passage of time.
- 3.13 In short, the proponent submits that the concept plan approval was appropriate when it was given in 2010, is appropriate today and will continue to be appropriate in 2019 and beyond. Similarly, the project approval, which authorises the initial stages of the Kings Forest development is equally appropriate for the same reasons.

### **Reflective of the best use of the site**

- 3.14 In a broad sense, alternative uses of the site might be thought to be agricultural, industrial, purely conservation, purely employment or purely residential. All of these broadly defined options, in the submission of the proponent, would represent an inferior use of the site (both now and on the date the approval would otherwise lapse, ie 11 August 2018 and 2019). The proponent says this for the reasons set out below.
- 3.15 Kings Forest was identified within the NSW Government's *Far North Coast Regional Strategy* (2006) and the Tweed Shire Council's *Tweed Urban and Employment Lands Release Strategy* (2009) as one of the largest contributors for the provision of new housing and employment within the Tweed Shire over the next 25 year time period.
- 3.16 The NSW Government's current regional strategy is the *North Coast Regional Plan 2036 (the regional plan)*. It was adopted in March 2017.
- 3.17 In the foreword it says that:
- New housing will be accelerated in other centres to maximise existing services, meet the community's diverse housing needs and to improve housing affordability.
- New release areas, including Cumbalum, **Kings Forest**, Cobaki and Thrumster will be new communities providing the North Coast with greater housing choice (bold added).
- 3.18 The regional plan anticipates population growth of 76,200 in the period 2016-2036, meaning that 46,000 extra homes are required. The regional plan says that the 'minimum additional dwellings required' for the Tweed from 2016 and 2036 is 11,600. This is an increase from 44,450 dwellings in the Tweed in 2016 to 56,050 in 2036.
- 3.19 The regional plan's direction 22 is to:
- Deliver greater housing supply
- 3.20 Under this direction the regional plan says:
- Having a ready supply of well-located land for residential development will create downward pressure on house prices, maximise the use of existing infrastructure and ensure that environmentally sensitive areas are avoided.
- Mapped urban growth areas** have identified land in sustainable locations to cater for overall housing needs (bold added).
- 3.21 Figure 18 of the regional plan is the 'Urban growth area map for the Tweed Local Government Area'. It expressly identifies the Kings Forest site as one the above-mentioned 'mapped urban growth areas'.
- 3.22 Under the heading 'housing' the regional plan identifies the following priorities:
- Deliver housing in Kingscliff, Cobaki, Bilambil, Terranora, and **Kings Forest** ...
- Enhance housing diversity by increasing the number of homes in Tweed Heads, Kingscliff, Cobaki, **Kings Forest** and Dunloe Park (bold added) ...
- 3.23 This regional plan alone is sufficient to demonstrate the continuing relevance of the concept plan approval and the project approval. Nonetheless, for completeness, it should be noted that:
- (a) The development incorporates significant measures to protect Koala Habitat and local ecological features.
  - (b) The development addresses multiple community needs, ie the need for:
    - (i) housing;

- (ii) employment of a kind suitable for integration into a master planned urban setting;
    - (iii) conservation and environmental protection; and
    - (iv) passive and active recreation.
  - (c) It does this in a balanced way as a result of a careful and extensive assessment process. By addressing multiple needs within the overall site, a better outcome is achieved than if the site's use was devoted to a single purpose.
  - (d) Agricultural and industrial use of the site would not deliver the environmental, social and economic benefits that flow from the development envisaged by the concept plan approval and the project approval.
  - (e) The environmental, social and economic objectives of the community are best served by the proposed use of the site, relative to the other possible uses of the site.
- 3.24 There is not likely to be, any significant changes between now and 31 December 2019 which will change this evaluation.

#### **4. Alignment of criteria for preventing the lapse of each approval— reasons in support**

- 4.1 Both the existing lapse conditions in the concept plan approval and the project approval allow the lapsing of the approval to be avoided by the physical commencement of the development.
- 4.2 However, the language used to define what must be done to preserve each approval is not the same. This creates a risk that a physical action on the land may be sufficient to preserve the project approval, but not the concept plan approval.
- 4.3 The language of the project approval closely mirrors the provisions of section 95(4) the EP&A Act (ie the provisions that deal with the lapsing of conventional Part 4 development consents). The physical acts that are necessary to prevent an approval from lapsing under that criteria has been the subject of extensive judicial consideration and is well-established.
- 4.4 However, the wording of the current condition A5 of schedule 2 of the concept plan approval does not adopt the language of either the project approval or section 95(4) of the EP&A Act.
- 4.5 The request seeks to vary the text of condition A5 so that it matches the existing wording of condition A17 ('Lapsing of Approval') of schedule 2 of the project approval (and section 95(4)).
- 4.6 This change is in the public interest because it is undesirable that there be any difference in the lapse dates — and the criteria to prevent lapse — between the concept plan approval and the project approval.
- 4.7 While the lapse of the concept approval will not, in itself, lead to the lapse of the project approval, there will be adverse planning consequences if the concept approval ends while the project approval is still on foot. These consequences can be summarised as follows:
  - (a) The project approval is only for a component of the overall Kings Forest development envisaged under the concept plan. In particular, it provided for the construction of the subdivision works precincts 1 and 5. However, the overall development envisaged by the concept approval has 14 precincts.
  - (b) The benefits of the holistic planning approach to the overall Kings Forest site will be lost, if the development authorised by the project approval is carried out, but the balance of the development is not able to be assessed under the concept

plan. It would mean that the clear planning direction established by the concept plan approval would not be available to govern the development applications for the remaining precincts. It would also involve huge waste, as the significant public and private resources that have been invested in finalising the concept plan will be for nought (other than for precincts 1 and 5).

**5. Issue of a construction certificate to be issued under the project approval for the carrying out of investigative and monitoring work — reasons in support**

5.1 At present there is some uncertainty as to what preconditions must be satisfied before a construction certificate can be issued for investigative and monitoring work (on the Kings Forest site).

5.2 **First**, it is necessary to explain why a construction certificate is necessary.

5.3 Section 75S(1)-(1A) of the former Part 3A provision of the EP&A Act says:

(1A) For the purposes of this section, a relevant provision is section 81A ...

(1) **A relevant provision applies to an approved project ... in the same way as it applies to development subject to a development consent**, subject to any necessary modifications and any modifications prescribed by the regulations. For that purpose, a reference in Part 4A to a development consent includes a reference to an approval of a project under this Part (bold added).

5.4 Section 81A(3)-(4) of the Act says the following:

(3) **Subdivision of land**

A development consent that enables the subdivision of land may authorise the carrying out of **any physical activity in, on, under or over land in connection with the subdivision**, including the construction of roads and stormwater drainage systems.

Note. A plan of subdivision cannot be registered under the *Conveyancing Act 1919* unless a subdivision certificate has been issued for the subdivision.

(4) **Subdivision work** in accordance with a development consent **must not be commenced until**:

(a) a construction certificate for the subdivision work has been issued by the consent authority, the council (if the council is not the consent authority) or an accredited certifier, and ...

5.5 Section 4 of the Act says that:

**Subdivision work** means any physical activity **authorised** to be carried out under the conditions of a development consent for the subdivision of land, as referred to in section 81A (3) (some bold added).

5.6 The effect of the above text is that no physical activity (in, on, under or over land) that is authorised to be carried out under the conditions of a project approval may be carried out **until a construction certificate is obtained**.

5.7 In *Hunter Development Brokerage v Cessnock City Council* [2005] NSWCA 169 it was held (at [109]) that a development consent may expressly — or by implication — **authorise** work which is a necessary step in the process required for (or involved in) the subdivision. A development consent authorises such work even — if conducted separately and unrelated to a development — it would be too minor to constitute an activity for which development consent is required. (This applies to project approvals under the former Part 3A because of section 75S(1) cited above.)

5.8 Accordingly, investigatory/monitoring work that is a necessary step in carrying out work authorised by the project approval requires the issue of a construction certificate before it is carried out. The broad definition of 'subdivision work' should be noted in this regard, which includes 'any physical activity'.

- 5.9 However, taken at superficial face value, the text of the project approval makes it clear that a range of investigatory/monitoring work may need to be carried out **before** 'a' or the 'first' construction certificate is issued. **For example:**
- (a) a structural engineer must take stock of aspects of the site (condition 4 of Part 1 of Schedule 2 of the project approval);
  - (b) additional surveying may be required to prepare revised civil engineering drawings (conditions 5, 10, 20, 22 and 23 of Part 1 of Schedule 2 of the project approval);
  - (c) additional geotechnical work may be required (conditions 10(b) and 11 of Part 1 of Schedule 2 of the project approval);
  - (d) soil testing may be required (condition 17 of Part 1 of Schedule 2 of the project approval); and
  - (e) baseline environmental monitoring must commence (condition 37 of Part 1 of Schedule 2 of the project approval).
- 5.10 It is likely that:
- (a) where a project approval requires physical activity to be undertaken before the issue of 'a' or the 'first' construction certificate; and
  - (b) the physical activity itself cannot be lawfully carried out without the issue of a construction certificate,
- the project approval will, by necessary implication, allow the construction certificate to be issued despite the fact that (at least some) **superficially apparent** preconditions for the issue of the construction certificate have not been satisfied (cf *K and M Prodanovski v Wollongong City Council* [2013] NSWCA 202 at [34]).
- 5.11 However, this legal position is confusing for certifiers, the local council, project managers and department officers concerned in the oversight of this project.
- 5.12 The request is intended to simplify the legal position and promote clarity. This is achieved by the insertion of the proposed condition A18 of schedule 2 of the project approval.
- 5.13 This provision makes what is implied by the existing project approval explicit. That is, that a construction certificate can be used for investigatory/monitoring activities for the approved project without the need to satisfy the preconditions that are applicable to substantive works (ie works that are not of a preliminary nature).

The facts set on in this document are as per instructions given to us by the proponent.

Yours sincerely




**Aaron Gadiel**  
**Partner**

Accredited Specialist — Planning and Environment Law