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Attention: Donette Holm

**Project 28 Pty Ltd v Minister for Planning
Land and Environment Court of NSW proceedings numbers 103952 and 103957 of 2018**

You have asked the applicant to respond to the submissions from the Office of Environment and Heritage (OEH) that you received on 8 May 2018. You have asked for this response urgently.

Our submission of 7 May 2018 is, in part, already an appropriate response to this submission.

However, there are some additional matters to be said. These are set out below.

1. The fact that more than six months has passed since the Commonwealth approval has been given

1.1 The OEH says:

[T]here are several consent conditions set by the Land and Environment Court Judgment/Order dated 20 February 2017 that have not been met to date. These include the preparation of environmental management plans (Flora and Fauna Monitoring Report, Buffer Management Plan, Weed Management Plan and Threatened Species Management Plan) to be finalised and submitted to the Secretary for approval **within six months of the approval** or prior to the issue of any construction certificate, whichever occurs first (bold added).

1.2 We take this to be a reference to conditions 41, 43, 45 and 46 of part 2 of schedule 2 of the project approval.

1.3 Condition 41 is titled 'Buffer Management Plans'. Condition 41(3) says:

The final Buffer Management Plans shall be prepared in consultation with Council and submitted to the Secretary for approval **within 6 months** of the date of determination of the application (No. 2012/2328) mad[e] under sections 130(1) and 133 of the Commonwealth *Environmental Protection and Biodiversity Conservation Act* or prior to issue of any construction certificate, whichever occurs first (bold added).

1.4 Condition 43 is titled 'Threatened Species Management Plans'. Condition 43(5) says:

The final Threatened Species Management Plans shall be prepared in consultation with Council and submitted to the Secretary for approval **within 6 months** of the date of determination of the application (No. 2012/2328) made under sections 130(1) and 133 of the Commonwealth *Environmental Protection and Biodiversity Conservation Act* or prior to issue of any construction certificate, whichever occurs first (bold added).

1.5 Condition 45 is titled 'Koala Plan of Management'. Condition 45(2) says:

The revised KPoM approval shall include details of the Koala food tree planting schedule with numbers and staging and be prepared in consultation with Council and submitted to the Secretary for approval **within 6 months** of the date of determination of the application (No.

2012/2328) made under sections 130(1) and 133 of the Commonwealth *Environmental Protection and Biodiversity Conservation Act* or prior to issue of any construction certificate, whichever occurs first (bold added).

- 1.6 Condition 46 is titled 'Flora and Fauna Monitoring Report'. Condition 46(6) says:

The final Flora and Fauna Monitoring Report shall be prepared in consultation with Council and submitted to the Secretary for approval **within 6 months** of the date of determination of the application (No. 2012/2328) made under sections 130(1) and 133 of the Commonwealth *Environmental Protection and Biodiversity Conservation Act* or prior to issue of any construction certificate, whichever occurs first (bold added).

- 1.7 The OEH's reference to the weed management plan appears to be an error.

- 1.8 There are several things to be said about these conditions in response to the submission of the OEH.

- 1.9 **Firstly**, the OEH refers to the conditions as if they are imposed by the Land and Environment Court. It should be understood that the most recent form of these conditions is in a Court order, **but this merely is a consequence of an unrelated modification application that was appealed to the Court**. These conditions were not imposed by the Court. They were imposed by the Minister for Planning.

- 1.10 **Secondly**, each of these conditions purport to require certain action within six months of the date that a Commonwealth approval is given. However, the legal effect of these conditions only extends as far as the terms of the *Environmental Planning and Assessment Act 1979* (the EP&A Act) allow. Irrespective of what the conditions say, they can have no more legal effect than the EP&A Act gives them.

- 1.11 It is well-established in the planning law that conditions of development consent are only binding on a person who is carrying out development. This was explained by the Chief Judge of the Land and Environment Court (Preston J) in *North Sydney Council v Moline*; *North Sydney Council v Tomkinson (No 2)* [2008] NSWLEC 169. The Court said (at [21]) that:

A person who does not "carry the development out" cannot be in breach of s 76A(1) and hence cannot commit an offence against s 125(1) of the Act. In the same way, civil enforcement orders can only be made against a person who is actually carrying out development on land in breach of the Act ...

- 1.12 While the (former) section 76A(1) of the EP&A Act only applied to development consents, section 75D of the former Part 3A provisions of the EP&A Act is in similar terms.

- 1.13 Accordingly — irrespective of the time limits that the above conditions purport to apply — those conditions cannot impose any actual binding time constraints until '[a] person' elects to 'carry out development' set out in the project approval (as per section 75D(1)).

- 1.14 At this time, no person has commenced carrying out the development (as no construction certificate has been issued).

- 1.15 No adverse inference can or should be drawn against Project 28 Pty Ltd merely because the above plans have not been finalised. Project 28 is under no legal obligation to finalise those plans at this time.

- 1.16 **Thirdly**, despite the fact the Project 28 is not under any **legal** obligation to finalise the above plans, it has, nonetheless, been working very hard (at great expense) towards that goal. To this end, the highest priority has been to reconcile the Commonwealth approval (under the *Environment Protection and Biodiversity Conservation Act 1999*) with the project approval conditions. This exercise is being progressed by way of a separate modification request ('MOD 4') and the revised Koala Plan of Management.

- 1.17 The table below details the amount the applicant and its related entities have spent on in relation to the Kings Forest approvals (to 28 February 2018):

Expenditure item	Amount spent (\$)
Rezoning	307,572
Statutory assessment DoP	188,739
Consultants pre-development/approvals	1,958,448
Concept plan	1,078,744
General scheme/approvals	408,136
Project approval	4,093,398
EPBC approval	1,147,579
Precinct 1 service station mod and appeal	480,362
Total	9,662,978

2. The delineation of environmentally sensitive areas

- 2.1 The OEH says:

The court's order also required the delineation of environment protection zones and buffers and the Cudgen Nature Reserve boundaries prior to the commencement of works for any stage of the project to prevent unauthorised access to these protected areas.

- 2.2 We infer that this is a reference to condition 3 of part 1 of the schedule 2 of the project approval. Condition 3 says:

Prior to commencing any Bulk Earthworks in a Precinct, or as otherwise agreed between the Proponent and the Secretary, the Proponent shall:

- a) **engage a registered surveyor to prepare survey plan(s) and permanently mark the boundaries of the:**
 - i) **the contiguous area of Potential Council Land;** and
 - ii) **the contiguous area of Future OEH Land**

immediately adjacent to the Precinct (unless the relevant contiguous area has already been marked due to the earlier commencement of Bulk Earthworks in another Precinct). A staging plan for the survey works is [to] be submitted to the Department prior to the commencement of the project.
- b) where relevant, submit amended plans of proposed subdivision to the Secretary for approval that show the relevant contiguous Potential Council Land and the relevant contiguous Future OEH Land as separate lots;
- c) ensure that the boundaries **marked by the surveyor remain marked at all times in a permanent manner** that allows operating staff, the landowner and inspecting officers to clearly identify those boundaries; and
- d) submit for the Secretary's approval, a form of dealing(s) to be registered on the title to the Potential Council Land and the Future OEH Land that must:
 - i. bind all future landowners;
 - ii. provide for the management of the Potential Council Land and the Future OEH Land for conservation purposes including the implementation of relevant Environmental Management Plans, in perpetuity;

- iii. permit access to the Potential Council Land and the Future OEH Land by the Department, the OEH and Council at all times for the purpose of monitoring compliance with relevant covenants and the Environmental Management Plans; and
- iv. provide for a release of any registered dealings in circumstances where all or part of the Potential Council Land or the Future OEH Land are transferred to a public authority.
- e) Where the Potential Council Land or the Future OEH Land is not subject to any amended plans of subdivision, the Proponent must within 1 month of the Secretary's approval of the dealing(s) referred to in condition 3(1)(d), lodge for registration the dealing(s) on the relevant titles to the Potential Council Land or the Future OEH Land and provide to the Secretary evidence of such registration within 10 days of the dealing(s) being registered.
- f) Where Potential Council Land or the Future OEH land is subject to any amended plans of subdivision, the Proponent must within 3 months of the later of the Secretary's approval of the amended plans of subdivision under condition 3(b) or the Secretary's approval of dealing(s) referred to in condition 3(d), lodge for registration the dealing(s) on the relevant titles to the Potential Council Land or the Future OEH Land to the Director-General evidence of such registration within 10 days of the dealing(s) being registered.

Note: For the purpose of this condition, commencement is taken to mean any physical works including clearing vegetation, the use of heavy duty equipment for the purpose of breaking ground for bulk earthworks, or infrastructure for the proposed project (bold added).

- 2.3 We have already demonstrated (in our submission of 7 May 2018) that survey pegging — which is required by a condition of a project approval (for subdivision works) — cannot be lawfully carried out without a construction certificate.
- 2.4 Accordingly, it is (with respect) an error for the OEH to object to the modification request on the grounds that the survey work to identify the boundaries of the environmentally sensitive land has not been carried out. That necessary survey work can only be carried out if a construction certificate is first issued for it. Project 28 is presently unable to obtain that construction certificate because of the circular nature of the conditions. This modification request will resolve that circularity and allow, among other things, condition 3 to be implemented.

3. Environmental impact of investigative or monitoring works

3.1 The OEH says:

[There is] a potential issue that the proposed modification for a construction certificate for investigatory or monitoring works does not appear to be necessary to meet the above conditions of consent and may authorise works that could impact on environmental values that are yet to be delineated. For example, the final koala habitat and conservation rehabilitation areas have not yet been agreed.

- 3.2 The nature of these investigate and monitoring activities are sufficiently trivial that, if they were being carried out for reasons unrelated to the project approval, that they would not be a 'use of land' and would not require development consent.
- 3.3 The only reason that these transitory activities require a construction certificate is because they are authorised (and required) by conditions of a project approval (see our submission of 7 May 2018).
- 3.4 There is no basis to suggest that there could be any adverse environmental impact of any consequence from such simple activities. Furthermore these activities have, in any event, already been the subject of environmental assessment (by reason that they are authorised and required by the project approval).

4. The need for this modification

4.1 The OEH says:

We consider that the monitoring and surveying works can be undertaken without the need for this modification.

- 4.2 As quoted above, the OEH said that the monitoring and surveying works should not be carried out because they 'could impact on environmental values that are yet to be delineated'. However, the OEH also says that such works can be undertaken 'without the need for this modification'. The OEH submission is not internally consistent.
- 4.3 In any event — for the reasons advanced in our submission of 7 May 2018 — the monitoring and surveying works cannot be lawfully carried out without a construction certificate. The OEH has not explained the legal basis for its contrary view. There is no credible legal basis for a contrary view.

Please contact us should you require further information or clarification.

Yours sincerely



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