

7 May 2018

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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 three submissions you have received. You have asked for this response by close of business today.

Those submissions are:

- A submission from the Tweed Shire Council (**the Council**) dated 2 May 2018.
- Two identical email submissions from Essential Energy dated 30 April 2018.

We have sought and obtained the opinion of the applicant's town planner on these two submissions. Please find enclosed for your consideration a letter from Mr Daryl Anderson of DAC Planning Pty Ltd, dated 7 May 2018. Mr Anderson's views are adopted by the applicant.

There are also some issues raised by the Council's letter which also require a legal response. The Applicant's legal response is set out below.

**1. Whether a construction certificate is needed for preliminary investigative and monitoring work**

**1.1 The Council says:**

Council would question the legality of Condition A18 in regard to whether: ... A Construction Certificate is even needed for the preliminary and investigative monitoring work ...

**1.2** There is no room for legal debate on this point. The courts have decisively ruled that a construction certificate is required for even simple preliminary activities in relation to a development consent that authorises subdivision work.

**1.3** Section 81A of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**) has been repealed. However, this provision is presently in force (until 1 September 2018) under clause 18 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (**the Transitional Regulation**).

**1.4** Section 81A(3)-(4) said 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 (some bold added) ...

1.5 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).

1.6 In *Hunter Development Brokerage v Cessnock City Council* [2005] NSWCA 169 the Court of Appeal held that a development consent may expressly — or by implication — **authorise** work that 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. The specific words of the Court (Tobias JA with Santow JA and Stein AJA agreeing) were (as per [109]) are as follows:

In my view a development consent to a subdivision involving the laying out of lots and roads and requiring by way of conditions (as in the present cases) the construction of those roads as well as drainage, sewerage and other facilities, **either expressly or by necessary implication authorises any physical work on the land that is necessary to enable the consent to be implemented in accordance with those conditions.** Neither Cessnock nor Shoalhaven has directly suggested that the carrying out of the relevant survey work and/or geotechnical investigation work constituted of itself development requiring development consent. Although it was submitted that the subject work was "not part of the work consented to" in that it did not involve the actual construction of roadworks or drainage or sewerage works, the consents must be taken to have authorised (so far as the EPA Act is concerned) not only the construction of the works the subject of the consent, but also the carrying out of engineering work associated therewith and/or which was necessary to enable those works to be undertaken. **Survey and geotechnical investigation work is such work** (bold added).

1.7 Hence, survey and geotechnical investigation work that is necessary to comply with the conditions of a development consent **is** work that is '**authorised**' by a development consent (within the meaning of the definition of 'subdivision work'). As this work involves 'physical activity' it is plainly 'subdivision work' within the meaning of the EP&A Act definition.

1.8 In *Young v Warringah Shire Council* [2001] NSWLEC 208 the Land and Environment Court considered the legal status of certain work, namely:

- (a) the pegging of land; and
- (b) the connection of a water supply.

1.9 The Court said (at [18]):

The requirements of s81A(4) of the EP&A Act are both explicit and mandatory **and prohibit the commencement of any subdivision work until a construction certificate has been issued.** A clear legislative intention to invalidate any actions undertaken without such authorisation pursuant to s81A of the EP&A Act can be inferred in accordance with the principles explained by the High Court of Australia in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-389.

1.10 In *Young* the Court concluded (at [20]) that:

**all work** relied upon by the applicants does not satisfy the requirements of s81[A](4) (bold added).

1.11 This meant that:

- (a) the work of pegging out the land was **subject to** section 81A(4); and
- (b) the work was unlawful because it had not been carried out **in accordance** with section 81A(4).

This is consistent with *Hunter Development Brokerage*.

1.12 In *Detala v Byron Shire Council* [2002] NSWCA 404 this issue was again dealt with by the Court of Appeal. The Court considered whether certain 'minimalist' work could lawfully be carried out without a subdivision certificate. This work was the placement of reinforcement in a small excavation trench. The work was to be carried out by two men in less than two hours (*Byron Shire Council v Detala Pty Ltd* [2000] NSWLEC 48 [7], [33] and [37]).

1.13 The Court of Appeal concluded (at [44]):

As no construction certificate issued, the work ... was unlawful, being in breach of s 81A(4) of the EPA Act.

1.14 Section 81A(4) applies to the present project approval by reason of section 75S(1A) of the former Part 3A provisions of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**) — as continued in force by clause 3(1) of schedule 2 of the Transitional Regulation.

1.15 Accordingly, a construction certificate must be issued before the carrying out of any physical activity authorised to be carried out under the conditions of a project approval for the subdivision of land.

1.16 From 1 September 2018 the position will not relevantly change, other than a subdivision works certificate will be required for simple activities such as pegging out (as per section 6.13 of the EP&A Act). The applicable definition of 'subdivision work' will be materially the same (as per section 6.1).

1.17 Accordingly, before 'any physical activity' that is 'authorised' by the project approval can be carried out a construction certificate must be obtained for that physical activity. A range of physical activity is required on the land as preliminary and/or investigative work.  
**For example:**

- (a) a structural engineer must take stock of aspects of the site (condition 4 of part 2 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 2 of schedule 2 of the project approval);
- (c) additional geotechnical work may be required (conditions 10(c) and 11 of part 2 of schedule 2 of the project approval);
- (d) soil testing may be required (condition 17 of part 2 of schedule 2 of the project approval); and
- (e) baseline environmental monitoring must commence (condition 37 of part 2 of schedule 2 of the project approval).

1.18 This work cannot be lawfully carried out without a construction certificate (or from 1 September 2018, a subdivision works certificate).

## 2. Whether it is pre-emptive to carry out preliminary/investigative work before all management plans have been finalised

### 2.1 The Council says:

If [investigative and monitoring works constitute lawful physical commencement] it would appear pre-emptive of the finalisation of the environmental management plans on which the consent substantially relies. Council has consistently argued that environmental management plans need to be approved prior to commencement.

### 2.2 This point is inconsistent with the Council's first point above. The Council appears to be unaware that preliminary subdivision work authorised by a project approval (as simple as the pegging out of land) requires a construction certificate before it can be lawfully carried out. Yet, it also says, in the same letter, that the carrying out of such work prior to the finalisation of environmental management plans is 'pre-emptive'.

### 2.3 It is beyond any reasonable argument that investigative and/or preliminary work can and should be carried out sooner rather than later — even if environmental management plans have not been finalised. The applicant is, by the modification request, simply seeking to obtain the lawful means for it to carry out its component of such work sooner, rather than later. By reference to the **examples** cited above:

#### (a) **Condition 4 of part 2 of schedule 2 of the project approval**

Condition 4 says:

The Proponent is to engage a qualified structural engineer to prepare a Pre-Construction Dilapidation Report detailing the current structural condition of all retained existing and adjoining buildings, infrastructure and roads. The report shall be submitted to the satisfaction of the Certifying Authority prior to the issue of the Construction Certificate for Stage 1 bulk earthworks. A copy of the report is to be forwarded to the department and council.

There is no rational reason why the physical activity required for the preparation of a pre-construction dilapidation report should not take place before all environmental management plans are finalised.

#### (b) **Condition 5 of part 2 of schedule 2 of the project approval**

Condition 5 says:

Prior to the issue of the first construction certificate for bulk earthworks, all civil works drawings shall be amended and submitted to the department for approval. The amended plans must clearly demonstrate that there will be no earthworks activities in the full 50 metre width of the ecological buffers anywhere across the site, with the exception of Precinct 5, as outlined in Condition A12 above and Roads 9, 10 and 23 that traverse the ecological buffers to access the southern and western precincts.

There is no rational reason why the physical activity required for the preparation amended civil works drawings should not take place before all environmental management plans are finalised.

In this regard, whether the Department forms the view that it does not want to **approve** the amended drawings until environmental management plans are finalised (for merit reasons) is a **separate question** from whether the proponent should be prevented from having its engineers attend to site and carry out physical activity for that ultimate purpose.

(c) **Condition 10 of part 2 of schedule 2 of the project approval**

Condition 10 says:

The Proponent shall submit the following plans and specifications with an application for construction certificate for the Bulk Earthworks:

- a) Natural and finished development levels (spot levels and contours) clearly detailed with a legible scale.
- b Sediment and erosion control plans
- c) Geotechnical compliance
- d) Planting/hydromulching for short term and long term batter slopes
- e) An earthworks phasing diagram that defines maximum exposed areas
- f) Maximum batter slopes shall be consistent with the recommended maximum batter slopes for stability in the geotechnical report titled "Geotechnical Investigation proposed residential subdivision Depot Road Kings Forest" prepared by Cardno Bowler dated 7 April 2011.
- g) Areas in which the natural slope exceeds 25%, a qualified geotechnical engineer is to provide further advice in relation to cut / fill construction for the bulk earthworks.
- h) A shake down area along the haul road immediately before the intersection with the road reserve.
- i) Compliance with the provisions of Council's Design Specification D6 – Site regarding.
- j) Measures to be implemented during bulk earthworks operations to ensure the existing 600mm trunk water main is protected.

The applicant agrees that the construction certificate for **substantive** bulk earthworks should not be issued before environmental management plans are finalised. However, there is no rational reason why the physical activity required for the **preparation** of a construction certificate plan/specifications for bulk earthworks should not take place before all environmental management plans are finalised.

(d) **Condition 20 of part 2 of schedule 2 of the project approval**

Condition 20 says:

The Proponent shall engage a suitably qualified person to prepare a revised Integrated Water Cycle Management Plan for the whole site, to be submitted to the satisfaction of the PCA prior to the issue of a construction certificate for Stage 1 civil works. The Plan shall be prepared generally in accordance with the Integrated Water Cycle Management Plan contained in the PPR, and shall include, but not be limited to the following:

- 1) Engineering designs for stormwater, drainage and water sensitive urban design measures at the site, including rainwater tanks, infiltration systems, vegetated swales, bioretention trenches, pervious parking areas and constructed wetlands.
  - a) Water Sensitive Urban Design measures are to be designed in accordance with the Water Sensitive Urban Design Technical Design Guidelines for South East Queensland (Healthy Waterways) and Council's Development Design Specification D7 - Stormwater Quality.
  - b) Stormwater mitigation measures shall be designed to comply with section 120 of the Protection of the Environment Operations Act 1997 to prohibit the pollution of waters from the operation of the Project.

- c) The design of any constructed wetland must be in accordance with any Harvestable Right Order published under Section 54 of the Water Management Act 2000.
- d) All water quality treatment and/or detention devices that are constructed below the water table must be lined (clay or geo-fabric) to minimise the hydraulic connection with the surrounding groundwater system.
- 2) Hydrology and hydraulic calculations based on models described in the current edition of Australian Rainfall and Runoff.
- 3) A maintenance plan for all stormwater mitigation measures including Water Sensitive Urban design to be maintained to their design specifications into perpetuity.
- 4) The Plan must be consistent with the Kings Forest Stage 1 Management Plan.

The applicant agrees that the construction certificate for **substantive** stage 1 civil earthworks should not be issued before environmental management plans are finalised. However, there is no rational reason why the physical activity required for the **preparation** a revised integrated water cycle management plan should not take place before all environmental management plans are finalised.

(e) **Condition 22 part 2 of schedule 2 of the project approval**

Condition 22 says:

- 1) Each stage of the development must be designed to ensure that the flood management (including evacuation measures to ground above the Probable Maximum Flood) arrangements for the site (as it relates to the relevant stage of the project) is consistent with the Flooding and Flood Management Assessment prepared by Gilbert & Sutherland dated June 2011, the Preliminary Flood Assessment prepared by Gilbert & Sutherland dated December 2012 and the NSW Coastal Planning Guideline: Adapting to Sea Level Rise 2010 or successive documents.
- 2) Compliance with the requirements of part 1) of this condition must be certified by a suitably qualified hydrology/hydraulic engineer and submitted to the Certifying Authority prior to the issue of a Construction Certificate for Stage1 bulk earthworks.

There is no rational reason why the physical activity required for the certification by a suitably qualified hydrology/hydraulic engineer should not take place before all environmental management plans are finalised.

Again, the applicant does not require the **issue** of a construction certificate for substantive stage1 bulk earthworks before the finalisation of environmental management plans — just the physical activity required to obtain the certification of the engineer under condition 22(2).

(f) **Condition 23 of part 2 of schedule 2 of the project approval**

Condition 23 says:

- 1) Kerb and gutter (kerb/edge restraint on one way cross fall roads) stormwater drainage, full road width pavement including traffic facilities (roundabouts, median islands etc) and paved footpaths shall be constructed along the full length of the new roads.
- 2) The design of all roads shall be consistent with the Stage 1 Project Application Road Hierarchy (Plan No. 06) prepared by RPS dated 23 August 2012 and the Stage 1 Project Application Precinct 5 Road Network plan (Plan No. 15) prepared by RPS dated 29 August 2012, except where amended by this condition.
- 3) Final road design plans shall be prepared by a qualified practising Civil Engineer and submitted to the Certifying Authority prior to the issue of a Construction Certificate for civil works for each stage of the project.

- 4) Construction of all roads must be to an urban, asphalt road formation to Council's Development Design Specification D1 – Road Design.
- 5) All landscaping indents along Kings Forest Parkway for the entire proposed length from Tweed Coast Road through to proposed Road 9, that reduce the pavement width to less than 9m shall be removed or reduced in size such that the road carriageway may be constructed to a minimum pavement width of 9m.
- 6) Kings Forest Parkway road carriageway is to be constructed to a minimum pavement width of 9m from the entry with Tweed Coast Road through to proposed Road 9. These details are to be provided on an application for a Construction Certificate.
- 7) All proposed roads (laneways) shall provide a minimum pavement width of 6m.
- 8) Access roads are to have a minimum horizontal curve radius of 10m for access roads and 15m for neighbourhood collector roads to eliminate sharp curves.
- 9) All batter slopes for road embankments greater than 1:4 are to be planted. The planting details are to be shown on a landscaping plan prepared by a suitably qualified person.
- 10) Details of fauna exclusion fencing and underpasses for roads traversing Environmental Protection Areas are to be provided to the Director-General Secretary for approval prior to the issue of a construction certificate for bulk earthworks in the southern and/or western development precincts. This may include temporary fencing and underpasses during the construction phase.

There is no rational reason why the physical activity of a civil engineer required for the preparation of final road design plans (under condition 23(3)) should not take place before all environmental management plans are finalised.

Similarly, there is no logic to preventing any physical activity that is required to establish the details of fauna exclusion fencing and underpasses for roads traversing environmental protection areas (under condition 23(10)).

These are separate issues from the timing as to when those details are actually approved by the Department. The proposed modification does not affect that timing.

**(g) Condition 11 of part 2 of Schedule 2 of the project approval**

Condition 11 says:

Each stage shall be preceded by an endorsement of detailed earthworks design plans by a practising geotechnical engineer to certify compliance of the plans and implementation strategy with the conclusions and recommendations of the Geotechnical Report prepared by Cardno Bowler titled Geotechnical Investigation proposed subdivision Depot Road, Kings Forest dated 7 April 2011.

There is no rational reason why the physical activity of a geotechnical engineer required for that engineer to give the endorsement required by condition 11 should be delayed under the finalisation of all environmental management plans.

**(h) Condition 17 of part 2 of Schedule 2 of the project approval**

Condition 17 says:

- 1) Where soil testing prior to the commencement of construction identifies the presence of acid sulphate soils, a detailed Acid Sulfate Soil Management Plan shall be prepared by a suitably qualified person in accordance with the Acid Sulfate Soil Assessment Guidelines (Acid Sulphate Soil Management Advisory Committee, 1998). The Management Plan shall be prepared in consultation with the NSW Office of Water and submitted to the Certifying Authority prior to the issue of a construction certificate for Stage 1 bulk earthworks.
- 2) The Plan must be consistent with the Kings Forest Stage 1 Management Plan.

There is no rational reason why the physical activity of soils testing should be delayed until the finalisation of all environmental management plans.

(i) **Condition 37 of part 2 of Schedule 2 of the project approval**

Condition 37 says:

- 1) Prior to the issue of the first Construction Certificate, the proponent must demonstrate to the satisfaction of the Department that sufficient baseline monitoring has commenced in accordance with the relevant Environmental Management Plans, including the following:
  - a. Flora and Fauna Monitoring Report;
  - b. Groundwater Management Plan;
  - c. Overall Water Management Plan; and
  - d. Stormwater Management Plan. There is no rational reason why the physical activity of soils testing should be delayed under the finalisation of all environmental management plans.

It is entirely perverse to argue that the commencement of baseline monitoring (which plainly requires physical activity) should be delayed or postponed to any degree. The public interest is **obviously** served by the commencement of baseline monitoring sooner, rather than later. Accordingly, there is no merit reason why a construction certificate to authorise the physical activity necessary for baseline monitoring should not be issued as soon as the proponent is in a position to commence that monitoring.

- 2.4 These are just examples only. The modification request in relation to the project approval does not simply apply to those cited conditions. It relates to **any** investigatory or monitoring work relating to the works authorised by the project approval. Similar arguments can be made in relation to the need for physical activity for all investigatory or monitoring work required by the conditions of consent.

Please contact us should you require further information or clarification.

Yours sincerely




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