

Volume 1:

Annex G: Legal Opinion SEPP 50

MQEIS

CRIGHTON PROPERTIES PTY LIMITED:

MYALL QUAYS DEVELOPMENT

ADVICE

TESORIERO HENDERSON COTTER

Solicitors

DX 7209

GOSFORD

Attention: Don Henderson

CRIGHTON PROPERTIES PTY LIMITED:

MYALL QUAYS DEVELOPMENT

ADVICE

Introduction

Crighton Properties Pty Limited (**the Company**) is the owner of a large tract of land at Tea Gardens on the lower north coast of New South Wales. This land is known as "Myall Quays".

The Myall Quays development site is approximately 230 hectares in area. It lies immediately to the west of the Myall River.

Up until 1999, approximately 40 hectares of this area had been developed for residential purposes in accordance with the zoning applicable to it under *Great Lakes Local Environmental Plan 1996* (**the LEP**). By Amendment No.5 to the LEP published in the Gazette on 28 June 2000, the balance of the land comprising the Myall Quays development area was rezoned so that the bulk of it became residential 2(f) with those areas closest to the Myall River being zoned wetlands 7(a) and conservation zone 7(b).

2.

As part of the residential development already carried out at Myall Quays there is provided an artificial waterbody or lake occupying a surface area of approximately 7 hectares. I am told that this lake was formed and provided with the approval of Great Lakes Shire Council (**the Council**) as an essential element of infrastructure for the first stage of Myall Quays, namely to provide an appropriate stormwater detention system for new residential development, thereby controlling the rate of runoff into the Myall River.

This lake is said to have a narrow outlet swale that discharges outflows into a wetland on the western bank of the Myall River. This outlet also allows tidal inflow to the lake at the top of the tide as it flows up the Myall River from the Myall Lake system. Apparently, by reason of the design of the lake and other measures taken to treat runoff from existing development, the present 7 hectare lake is reported to support a thriving aquatic ecosystem, including a range of fish species that has been the subject of study by the Australian Museum.

The Company now intends to develop a further 81 hectares of Myall Quays in accordance with Amendment No.5 to the LEP. This will involve primarily residential development together with a 9 hole golf course in the northern section of the development area.

In order to address runoff from the 81 hectares intended for development, the Company has retained Cardno Willing, consulting engineers, to consider that matter. A number of options have been considered but that selected as being the most appropriate solution to

3.

address stormwater flows is an 11 hectare extension to the existing detention lake, resulting in a total surface area of that lake of 18 hectares.

Detailed design of this extended detention lake is yet to be undertaken. However, the conceptual design involves a northerly extension to both the eastern and western sides of the existing lake such that it will take the shape of an elongated circle, with the land in the middle developed for residential purposes in accordance with development consents that I am told presently relate to that land. Future commercial and residential development is proposed overlooking the eastern, northern and western edges of the extended lake.

As the intended extension to the lake will result in an artificial waterbody having a surface area in excess of 0.5 hectares and by reason both of its proximity to the Myall River and the high water table existing in the area, it constitutes *designated development* under the provisions of the *Environmental Planning and Assessment Act 1979*. Thus, an environmental impact statement is required to be prepared. However, in the course of considering the proposal, a question has arisen as to whether the provisions of *State Environmental Planning Policy No.50 - Canal Estate Development (SEPP 50)* prohibit the proposed extension of the detention lake. It is upon that matter that I am asked to advise.

Present Planning Controls

As I have earlier indicated, the applicable local environmental plan is the LEP of 1996, as relevantly amended by Amendment No.5. Apart from altering the LEP map, that amending instrument introduced a new cl.33A that made express provision relating to development at Myall Quays. The objective of the clause is expressed to be to ensure that development on land at Myall Quays is controlled so that (inter alia) *"...any waterbody is maintained under the provisions of a community or neighbourhood scheme."*

Of particular relevance is subclause (2) of cl.33A. It provides as follows:

- "(2)(a) *This subclause applies to development on land within Zone No.2(f) for the purpose of a lake or other waterbody.*
- (b) *In determining an application for development to which this clause applies, the Council must not grant the application except with the concurrence of the Department of Urban Affairs and Planning.*
- (c) *In considering whether to give concurrence, as referred to in paragraph (b), the Department must take into consideration:*

 - (i) *the extent to which the proposed development is likely to affect the environmental qualities on the adjoining wetlands within Zone No.7(a) or wet heath areas within Zone 7(b); and*

5.

- (ii) *the likely cumulative impact (in conjunction with existing water bodies) on the Myall River."*

The operation of cl.33A of the LEP is expressly qualified by subclause (4). It provides that nothing in the LEP *"... modifies or otherwise affects the application of State Environmental Planning Policy No.50 ... Nothing in this plan allows development prohibited by the Policy to be carried out on that land."*

In conjunction with the preparation of Amendment No.5 to the LEP, Great Lakes Shire Council also prepared and adopted *Development Control Plan No.22 – Myall Quays Estate (the DCP)*. This DCP became effective on 20 July 2000. Paragraph 1.6 of that DCP expresses an objective of the Plan as being *"... to provide an opportunity to develop residential lots, with particular aesthetic values such as water views, park views or golf course views which supplement rather than compete with the market for conventional lots"*. Paragraph 1.8 further provides that development *"... of an artificial inland lake will be dependent upon the findings of an Environment Impact Statement which will be required to be prepared in support of a Development Application"*.

The need to address water quality in development of land at Myall Quays is addressed in section 2.4 of the DCP. The objectives for water quality are expressed in paragraph 2.4.1 in the following terms:

6.

"The standard of discharge of water from the site to the Myall River is to meet primary contact recreation requirements.

The principal function of the water quality treatment system is to detain stormwater run off and provide a water quality control system. The stormwater detention system may also provide aesthetic value and opportunities for secondary contact recreation."

There is then set out in the same subparagraph the policies by which those objectives are to be met. The policies include a requirement that stormwater detention is to be designed and developed in association with a water quality treatment system for the site and that the performance criteria for the water quality treatment system and for any artificial waterbody forming part of that system to be consistent with ANZECC guidelines and *"maintained to secondary contact recreation standards as a minimum."*

It is readily apparent from both clause 33A of the LEP and the provisions of the DCP that the creation of an artificial waterbody to enhance the aesthetics of residential development in proximity to that waterbody was very much part of the planning that led to the rezoning of land comprised within the Myall Quays estate. Further, there was recognition given, particularly in the DCP, to the need for provision of an appropriate water quality detention and treatment system for water discharged from the site but which could serve a secondary aesthetic function. The only qualification to this is that reflected in subclause (4) of cl.33A to the LEP whereby the planning controls were not to be taken to override the operation of SEPP 50.

SEPP 50 prohibits the carrying out of *canal estate development*. The expression *canal estate development* is defined in cl.3 of SEPP 50. That definition is in the following terms:

"3. In this Policy, **canal estate development** means development that:

- (a) incorporates wholly or in part a constructed canal, or other waterway or waterbody, that is inundated by or drains to a natural waterway or natural waterbody by surface water or ground water movement (not being works of drainage, or for the supply or treatment of water, that are constructed by or with the authority of a person or body responsible for those functions and that are limited to the minimum reasonable size and capacity to meet a demonstrated need for the works), and
- (b) includes the construction of dwellings ..., and
- (c) requires the use of a sufficient depth of fill material to raise the level of all or part of that land on which the dwellings are (or are proposed to be) located in order to comply with requirements relating to residential development on flood prone land."

It will readily be apparent from the terms of the definition of *canal estate development* that in order to be comprehended by it three elements in respect of a given development must be satisfied. The first is that the development relevantly involves the construction of an artificial waterbody having some connection to a natural waterway or waterbody, subject to the exception that such waterbody is not a work of drainage or for treatment of water. It is to this exception that I will return shortly.

The second element is that the development involves the construction of dwellings and the third is that fill material is required to raise the level of at least part of the land on which dwellings are proposed to be constructed in order to meet requirements relevant to development on flood prone land. It is certainly the case that the intention of the development involving the construction of the lake extension is to have residential development undertaken adjacent to it. Indeed, it is such development that is said to engender the need for the lake extension. It seems to me, therefore, that the second element of the definition is satisfied.

I am informed that the area of the Myall Quays development that is the subject of rezoning under Amendment No. 5 is not shown on any flood level mapping undertaken by or for Great Lakes Shire Council. This being the case it is not land that is defined as "*flood-labile land*" under the provisions of the LEP. However, I am also informed that the Council is currently undertaking a supplementary flood study in the area which may result in some change to the current flood mapping. There is no other information with which I am supplied indicating that the area of Myall Quays proposed to be developed, or any part of it, is *flood prone land* requiring its level to be raised in order to facilitate the erection of dwellings.

Assuming this position pertained at the date of determination of any development application lodged by the Company, for extension to the existing lake, then the third element of the definition of *canal estate*

development would not be met. As a consequence, such development would not be prohibited by SEPP 50. This follows from the interpretation of the definition to which I have earlier adverted, namely that it is necessary for all three elements to be present in a given development before the Policy applies.

Notwithstanding the opinion just expressed, the exception contained in paragraph (a) of the definition needs to be considered on the basis either that the further studies being undertaken by the Council will show some part of the land requiring fill in order to address flooding requirements or that, prior to determination of any development application, there is other information at hand indicating a part, at least, of Myall Quays is *flood prone land* necessitating some fill being placed on it in order to render it suitable for residential development. It is to that matter that I now turn.

Works of Drainage or Water Treatment

In order to satisfy the requirements of the exception contained in paragraph (a) of the definition of *canal estate development*, there are three matters about which the consent authority would need to be satisfied in order to make the exception applicable. Relevantly, they are –

- (i) that the works are either for the purpose of drainage or treatment of water;

- (ii) that such works are constructed by or with the authority of the body responsible for those function; and
- (iii) that the extent of works or rather the resulting waterbody is limited to the minimal reasonable size and capacity required to meet the demonstrated need for those works.

It is convenient to deal with the second of those requirements first.

I am told that the entity having responsibility for drainage works of Myall Quays is the Council. But for the operation of *State Environmental Planning Policy No. 71* applying to the proposed development upon the subject land, the consent authority would have been the Council. By dint of the operation of that Policy, the Minister is the consent authority. Nonetheless, the Council has spoken through the DCP in specifying the requirements for drainage of Myall Quays development. The drainage scheme for the development would, in any event, be submitted to the Council and given these two circumstances, I believe it can properly be said that if the extended waterbody is otherwise properly categorised as a drainage work or one required for the treatment of water or both, then, assuming the Council's agreement in it, such work would be regarded as a work constructed *with the authority* of the Council.

That then leaves for consideration the first and third elements of the exception contained within paragraph (a) of cl.3 of SEPP 50. It is convenient to deal with these elements together.

As I have earlier indicated, the appropriateness of and means by which stormwater runoff from the further development of Myall Quays might be addressed has been referred to Cardno Willing, consulting engineers, for consideration. In a number of reports in which the question has been assessed and addressed conceptually, that firm has indicated that the extended lake is the preferred option for dealing with the matter. In a summary paper prepared in July 2003 it is stated by that firm that water detention lakes and associated systems are a proven means of managing surface water runoff and preventing them from potentially polluting receiving waters and ecosystems downstream of a catchment. As to the size of that which is proposed the following statement appears:

"The overall size of the proposed detention lake has been determined through a series of technical investigations and studies. The existing detention lake supports a thriving aquatic ecosystem, including a range of fish species, Further, drainage and water quality assessments conducted by Cardno Willing have concluded that in order to maintain salinity and dissolved oxygen regimes that support the aquatic ecosystem at levels similar to that of the existing detention lake, a detention lake of 18 ha in total size is needed to treat runoff from the completed development."

The same report indicates that the proposed extension to the detention lake would, of itself, be insufficient to address the need to maintain water quality both into the existing lake environment and, in turn, that which would be discharged through the existing swale connection to the Myall River. In that regard the report contains the following statement:

"A series of planning, ecological and engineering measures will be adopted to manage the surface water runoff in an efficient manner, in line with the important environmental principles already established for this development. The system includes a series of engineered swales, holding ponds and wetlands, in addition to the detention lake. This is similar to the measures that have already been implemented in the development completed to date The water management scheme requires both the detention lake and these other measures to achieve the environmental objectives. Neither is sufficient in its own right."

The report concludes that the lake extension "... is the minimum reasonable size and capacity to meet statutory requirements and the management objectives of the LEP and DCP ... ". For the purpose of this advice, I must and do accept these expressions of expert opinion.

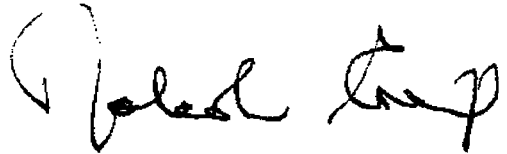
In order to better understand the issue upon which I am asked to advise, I have conferred with Dr Brett Phillips of Cardno Willing, Dr Phillips being the principal of the firm responsible for the work that has been undertaken to date in respect of the proposed drainage and water treatment design for the development of Myall Quays. In addition to reinforcing the matters that I have quoted from the earlier

reports, he has indicated that the total catchment, extending beyond Myall Quays, has been taken into account for the purpose of assessing drainage; that the existing lake or, rather, the area immediately to the north of it, is the logical area to which drainage should be carried from the proposed development and that the elongated circular shape is proposed because it assures the efficiency of circulation within the lake, thereby minimising the opportunity for "dead areas" that might otherwise become stagnant, leading to the growth of harmful algae and other environmental pollutants. He has also advised that the water table in the area is high with the result that capacity to retain stormwater in the extended lake necessarily involves a much greater surface area than would be the case if the water table was at depth. These factors, together with the need to maintain the present quality of water in the existing lake, have dictated the extension to 18 ha.

Accepting this evidence, it seems to me that it demonstrates fulfilment of the matters identified in the exception to paragraph (a) of cl.3 of SEPP 50. Clearly enough, both the LEP and DCP contemplated a waterbody in the Myall Quays area serving the function of a stormwater detention and water treatment system. The circumstance that the area surrounding this waterbody is to be developed for residential purposes with the artificial lake affording an aesthetic and "unusual" feature for this area, is entirely consistent with the objective expressed in paragraph 1.6 of the DCP to which I have earlier referred.

14.

I am therefore of the opinion that development proposing the extension of the lake is not *canal estate development* within the meaning of cl. 3 of SEPP 50. Thus, it is not prohibited development.



MALCOLM CRAIG QC

Martin Place Chambers

1 March 2004