

Confidential and privileged

To Anthony Savenkov - TRUenergy
Copy Katherine Sheppard, Don Fox Planning Pty Ltd
From Christine Covington, Louise Camenzuli
Date 16 February 2009
Subject **Subdivision and rezoning of the Tallawarra lands and Part 3A of the Environmental Planning and Assessment Act 1979**

Dear Anthony,

You have asked us to advise whether there is any legal impediment to the Minister for Planning (**Minister**) conducting an assessment of a concept plan application for the subdivision and development of the Tallawarra lands (**Project**) at the same time as Wollongong Council (**Council**) is in the process of effecting the rezoning of the land.

In providing this advice, we understand that the Project:

- will be undertaken on land that is either or both within an environmentally sensitive area of State significance or a sensitive coastal location; and
- is for a land use that is presently prohibited.

1 EXECUTIVE SUMMARY

- (a) There is no legal impediment to the Minister undertaking an *assessment* of a concept plan application while the Council is concurrently rezoning the land. However, the Minister cannot determine the concept plan application until such time as the Project becomes a permissible use
- (b) Set out below are several examples of projects that the Minister has assessed while a local council has concurrently rezoned the subject land by way of an amendment to its local environmental plan.

2 ADVICE

2.1 Section 72J of the *Environmental Planning and Assessment Act 1979 (EPA Act)* specifically provides that nothing in the Act prevents:

- (a) *the making of a development application to a consent authority for consent to carry out development that may only be carried out if an environmental planning instrument applying to the land on which the development is proposed to be carried out is appropriately amended, or*
- (b) *the consideration by a consent authority of such a development, subject to [the] Division.*

See also the decision of Spigelman CJ at paragraph 45 in *Woolworths Ltd v Pallas Newco Pty Ltd & Anor* [2004] NSWCA 422.

- 2.2 By virtue of section 72I(2) of the EPA Act, section 72J applies to Part 3A applications.
- 2.3 Under section 75O(3) of the EPA Act, the Minister may, but is not required to, take into account the provisions of any environmental planning instrument when assessing a concept plan application, subject to the Regulations. Specifically, section 75(O)(3) of the EPA Act states:

In deciding whether or not to give approval for the concept plan for a project, the Minister may (but is not required to) take into account the provisions of any environmental planning instrument that would not (because of section 75R) apply to the project if approved. However, the regulations may preclude approval for a concept plan for the carrying out of a class of project (other than a critical infrastructure project) that such an instrument would otherwise prohibit.
[emphasis added]

- 2.4 Clause 8N of the *Environmental Planning and Assessment Act Regulation (2000) (EPA Regulation)* states:

For the purposes of sections 75J (3) and 75O (3) of the Act, approval for a project application¹ may not be given under Part 3A of the Act for any project, or part of a project, that:

- (a) *is located within an environmentally sensitive area of State significance or a sensitive coastal location, and*
- (b) *is prohibited by an environmental planning instrument that would not (because of section 75R of the Act) apply to the project if approved.* [emphasis added]

- 2.5 Clause 8N of the EPA Regulation precludes the granting of **approval** by the Minister of a concept plan application that permits, within an “environmentally sensitive area of State significance or a sensitive coastal location”,² any use of land that is prohibited by any applying planning instrument. However, clause 8N **does not prohibit the assessment** by the Minister of a concept plan application concurrently with a rezoning application that, if approved, would result in the Project being a permissible use within the zoning of the subject land. The Minister is prevented by clause 8N from **approving** the concept plan application until such as time as the proposed land use is permissible

¹ “Project Application” is defined in clause 8A of the EPA Regulation to mean, amongst other things “an application for the Minister’s approval for a concept plan for a project under Part 3A of the Act”. Similarly, “Project” is broadly defined to mean “any development to which Part 3A applies”.

² “Environmentally sensitive area of State significance” and “sensitive coastal location” have the meaning given to them in the *State Environmental Planning Policy (Major Projects) 2005*. We have assumed, on the basis of the instructions received from Don Fox Planning, that the proposed Project falls within the meaning of one or both of these terms and, therefore, we do not set the definition of these terms out here.

2.6 From a review of the Department of Planning's website, we have identified several examples of concept plan applications and major project applications that have recently been or are presently being assessed by the Minister in circumstances where the proposal would be prohibited, but for a rezoning of land to convert the proposal to a permissible use. In each instance, such rezoning of the land is or has occurred concurrently with the Minister's assessment of the relevant application. These examples include:

- 06_0068 Tathra River Estate (DGRs issued 04/10/2007) seeking approval for a Concept Plan Application and part Project Application: see letter from Clare Gilligan of CIC to Sam Haddad, dated 23 February 2006. See also letter from Chris Wilson of the Department of Planning to Clare Gilligan, dated 28 February 2008, attaching amended Director General's Requirements. Copies of these documents are **attached**, for your reference.

Details available at: http://majorprojects.planning.nsw.gov.au/page/coastal-areas/subdivisions/?action=view_job&job_id=1129.

- 07_0126 Sussex Inlet Golf Course Badgee Lagoon - Sussex Inlet (DGRs issued 20/02/2008) seeking approval for a Concept Plan Application: see the 'Preliminary Concept Plan' prepared for Lucas Property Group Pty Ltd by Julius Bokor Architect Pty Ltd (at page 3) and the letter from Chris Wilson of the Department of Planning to Lucas Property Group, dated 20 February 2008, which attaches the Director General's Requirements. Copies of these documents are **attached**, for your reference.

Details available at:

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=2119.

- 06_0049 Batemans Bay Marina - Batemans Bay (DGRs issued 14/01/2008) seeking approval for a Project Application: see the "Project Application: Outline and Preliminary Environmental Assessment" prepared by Place Design Group and submitted on behalf of Ariadne Marinas, dated November 2007 (at page 7) and letter from Chris Wilson of the Department of Planning to David Mann of Batemans Bay Marina Developments Pty Ltd, dated 14 January 2008, which attaches the Director General's Requirements. Copies of these documents are **attached**, for your reference.

Details available at:

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=1332.

3 CONCLUSIONS AND RECOMMENDATIONS

- (a) There is no reason why the Minister cannot assess TRUenergy's concept plan application at the same time as an application to rezone the subject land is being assessed by the Council. The Minister is only prohibited from approving the

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Concept Plan Application until such time as the land is rezoned to permit the land use contemplated by the Concept Plan Application.

- (b) In lodging the Concept Plan Application for assessment and approval by the Minister, we recommend that the steps, progress and program to effect the rezoning of the subject land to permit the land use contemplated by the Concept Plan Application, be outlined in the covering letter to the Department of Planning.

Please contact us if you have any queries.

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