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Your Ref: Garry Ryman
2010/LD-00074 REV01

The General Manager
Cobar Shire Council
36 Linsley Street,
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27 February 2012

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Dear General Manager

Re: Wonawinta Silver Mine Project - Application to modify Development Consent

We refer to the email received from Garry Ryman of Council dated 22 February 2012 concerning an application to modify the development consent granted to develop and operate an open cut silver and lead mine on the property known as "Manuka", Lot 3632 DP 766014 in the Cobar Shire Local Government Area.

The modification application is due to be considered by the Western Regional Joint Planning Panel ("Panel") at a meeting to be held on 29 February 2012 and we have been asked to advise on the question of whether the applicant may amend or vary the application for modification of the development consent prior to the application being determined by the Panel.

Advice

There is no specific provision in either the Environmental Planning and Assessment Act 1979 (EP&A Act) or the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) to enable an application for modification of a development consent under Section 96(2) of the EP&A Act to be amended or varied by the applicant before the application is determined. However, it was held by Justice Craig of the Land and Environment Court of NSW in the case of *Jaimee Pty Ltd v Council The City of Sydney (2010) NSWLEC 245 (17 December 2010)* that a consent authority has the power to allow an application made under Section 96 of the EP&A Act to be amended prior to the application being determined.

At paragraph 38 of the decision in *Jaimee Pty Ltd v Council The City of Sydney* Justice Craig said:

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"38. Given the discretion that a consent authority has, when determining an application made to it in accordance with s 96 of the Act, I would have thought that the power to determine the application extends to allowing that application to be amended prior to determination. Provided the amendment sought does not convert the original application into a new application, I do not perceive that allowing an amendment would be inconsistent with the purpose of the Act as it addresses the modification of development consent".

It follows that the Panel (exercising the functions of the Council in relation to determining the modification application) would have the power to accept an amendment by the applicant to the modification application at any time before the application is determined provided that it is satisfied that the amendment does not convert the original modification application into a new application. In other words the panel would need to be satisfied that the amendments proposed to the modification application do not convert the original modification application into something substantially different. In that regard Justice Craig said at paragraph 48 of the decision in *Jaimee Pty Ltd v Council The City of Sydney*:

"It can be accepted, as the Council contends, that it is not open to the Court to entertain what is tantamount to a new application."

It follows that it would be necessary for the Panel to determine whether the change brought about by the amendments to the modification application would result in the amended modification application being substantially different to the original modification application.

If the Panel considers that the amendments proposed to be made to the modification application would convert the original modification application into something substantially different it would have no jurisdiction to allow the amendment to the modification application. If the applicant wished in those circumstances to pursue the amendments to the modification application it would be necessary for the applicant to withdraw the current modification application and to make a new modification application incorporating the changes proposed.

We trust that the above advice is of assistance and remain available to discuss the advice with you or to provide further advice should the need arise and in that regard, please do not hesitate to contact Adam Seton at our Campbelltown Office.

Yours faithfully

MARSDENS LAW GROUP



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