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15 January 2014

The General Manager
Newcastle City Council
PO Box 489
NEWCASTLE NSW 2300

Attention: Mr Wesley Wilson

By email to: wwilson@ncc.nsw.gov.au

Dear Sir

Advice regarding DA 12-419 - Shortland Waters - 90 Vale Street, Birmingham Gardens

Reference is made to your email to Martin Ball of our office on 9 January 2014 requesting legal advice in relation to DA 2012/419 (the **"DA"**) which is currently before the Joint Regional Planning Panel ("**JRPP**") for determination. The DA seeks consent to a staged concept proposal for a Seniors Living Development (including 189 villas, 56 apartments and a 127 bed residential care facility), golf course works (including remediation and redesign), additional works and subdivision on a site comprising four adjoining parcels of land, comprising Lot 103 in DP 881682, Part Lot 10 in DP 1149782, Lot 151 in DP 1143683 and Part Lot 101 in DP 881682.

The Council's email dated 9 January 2014 included the following documents which we have reviewed in preparing this advice:-

1. Copy of Assessment Report to the JRPP prepared by TCG Planning on behalf of the Council;

2. Minutes of the Hunter and Central Coast JRPP meeting held on 4 December 2013;

3. Copy of legal advice dated 4 December 2013 prepared by HWL Ebsworth;

4. Copy of legal advice dated 7 January 2014 prepared by HWL Ebsworth;

5. Copy of submission dated 9 January 2014 prepared by City Plan Services.

Having reviewed the abovementioned documents we understand that the following facts are relevant to our advice:-

1. The development site comprises four adjoining parcels of land, one of which is described as the "Lorna Street site" (part Lot 10 in DP 1149782) which is owned by Newcastle City Council.

2. The Lorna Street site was previously used as a landfill site, and as such is contaminated.

3. The DA is a staged development application pursuant to section 83B of the *Environmental Planning & Assessment Act 1979 (*the **"EPA Act"**), and the proposal comprises a "concept" approval and as such no works are proposed as part of the application.

4. The Applicant has lodged as part of the development application the following documents that address site contamination:-

    a. Phase 1 Environmental Site Assessment (Golf Course) by RCA Australia – this was a desktop review in respect of the golf course site only and identified potential contamination from several sources. The report makes several recommendations, including that further sampling be undertaken for construction of buildings and alternative fairways and holes;

    b. Remediation Action Plan (Lorna Street) by RCA Australia – this RAP applies to the Lorna Street site only and identifies that the most appropriate strategy for the remediation of soil at the site was to cap and contain in situ, with appropriate ongoing management controls for the site;

    c. Groundwater Investigation Report by RCA Australia – this report applied to the Lorna Street site only and concluded that groundwater contamination existed but concentrations were decreasing. It recommended ongoing groundwater monitoring continue on the site and other safety measures during construction activities;

    d. Site Audit – Interim Advice – Review of Existing Reports and Remediation Strategy by GHD – this interim advice was based on a review of existing reports and a brief site inspection. It made a number of recommendations, including confirmation of the remediation strategy, an indication that further assessment would be required prior to any works being undertaken on the site, but that these further investigations could be carried out as final design and documentation in preparation for construction and could be subject to a condition of consent in future detailed DAs.

5. As Council was the owner of one of the development parcels, it engaged TCG Planning to carry out an independent planning assessment of the DA. TCG Planning prepared a report (the **"Assessment Report**") for consideration by the JRPP and that report recommended refusal of the DA as the concept application was unsatisfactory having regard to the potential contamination of the land and the associated risks to human health and the environment, including the adjacent SEPP14 wetland.

6. The Assessment Report was considered by the JRPP at is meeting on 4 December 2013 at which time the panel indicated that it was generally supportive of the

proposed use of the site as a seniors' housing development and golf course, but would require further legal advice supported by Council to the effect that the additional information sought in respect of the contamination and remediation issues is not required for the purpose of this stage of the approval, and/or that the Applicant provide the additional reports sought by Council's planning consultant outlined in the Assessment Report. The panel unanimously agreed to defer determining the application to allow the Applicant to address the matters referred to in their resolution.

7. The Applicant's planning consultants, City Plan Services, have subsequently provided a submission dated 9 January 2014 to the Council addressing the issue of the legal advice in relation to the site contamination raised by the JRPP. As part of that submission, City Plan Services have provided two legal advices prepared by HWL Ebsworth, dated 4 December 2013 and 7 January 2014 respectively.

8. The HWL legal advices express the view that the level of detail provided in relation to contamination is sufficient for a determination of the concept proposal. They indicate that being a concept proposal it does not propose the carrying out of development on the site and as such the provisions of clause 7 of SEPP 55 do not arise. They indicate that the DA simply sets out the parameters in concept form for the future undertaking of development and that such development will be the subject of future development applications which must be consistent with the approved concept.

9. The HWL legal advice is inconsistent with the advice of Council's lawyer that was set out at page 21 of the TCG Planning Assessment Report. That advice expressed the view that it was necessary that Council had sufficient information to assess whether development is hazardous or offensive and whether to impose conditions to reduce or minimise any adverse impact. It further indicated that if a condition is so uncertain so as to leave open the possibility that compliance with it may alter the nature of the development for which this application was made, the application is invalid. On that basis the Council had indicated to the Applicant that further reports regarding the contamination were required prior to determination of the DA.

Advice

Special provisions facilitating the staging of development applications were introduced into the EPA Act in 2005 (Part 4, Division 2A). Section 83B of the EPA Act provides as follows:-

*"83B (1) For the purposes of this Act, a **staged development application** is a development application that sets out concept proposals for the development of a site, and for which detailed proposals for separate parts of the site are to be the subject of subsequent development applications. The application may set out detailed proposals for the first stage of development.*

(2) A development application is not to be treated as a staged development application unless the applicant requests it to be treated as a staged development application.

(3) If consent is granted on the determination of a staged development application, the consent does not authorise the carrying out of development on any part of the site concerned unless:

(a) consent is subsequently granted to carry out development on that part of the site following a further development application in respect of that part of the site, or

(b) the staged development application also provided the requisite details of the development on that part of the site and consent is granted for that first stage of development without the need for further consent.

(4) The terms of a consent granted on the determination of a staged development application are to reflect the operation of subsection (3)."

As previously mentioned, the Applicant has applied for a staged development application comprising five stages, however, the current DA is only a concept approval and does not incorporate stage 1. That is, it does not propose any works as part of the application. If approved, each of the five stages would need to be the subject of a separate development application which would be assessed by the Council (see section 83B(3)(a)). Therefore, we would agree with the advice provided by HWL Ebsworth that approval of the concept proposal would not authorise the carrying out of development on the land.

In the Assessment Report, TCG Planning refer to the applicability of SEPP 55 to the DA as the golf course land is potentially contaminated and the Lorna Street site is confirmed as being contaminated land. Reference is made to the provisions of clause 7 of the SEPP which provide as follows:-

"Contamination and remediation to be considered in determining development application

(1) A consent authority must not consent to the carrying out of any development on land unless:

(a) it has considered whether the land is contaminated, and

(b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and

(c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.

(2) Before determining an application for consent to carry out development that would involve a change of use on any of the land specified in subclause (4), the consent authority must consider a report specifying the findings of a preliminary investigation of the land concerned carried out in accordance with the contaminated land planning guidelines.

(3) The applicant for development consent must carry out the investigation required by subclause (2) and must provide a report on it to the consent authority. The consent authority may require the applicant to carry out, and provide a report on, a detailed investigation (as referred to in the contaminated land planning guidelines) if it considers that the findings of the preliminary investigation warrant such an investigation.

(4) The land concerned is:

(a) land that is within an investigation area,

(b) land on which development for a purpose referred to in Table 1 to the contaminated land planning guidelines is being, or is known to have been, carried out,

(c) to the extent to which it is proposed to carry out development on it for residential, educational, recreational or child care purposes, or for the purposes of a hospital—land:

(i) in relation to which there is no knowledge (or incomplete knowledge) as to whether development for a purpose referred to in Table 1 to the contaminated land planning guidelines has been carried out, and

(ii) on which it would have been lawful to carry out such development during any period in respect of which there is no knowledge (or incomplete knowledge)."

As clause 7(1) of SEPP 55 refers to the "carrying out of any development", we would agree with the advice of HWL Ebsworth that the concept proposal does not trigger the provisions of that clause having regard to the provisions of section 83B(3)(a) of the EPA Act. However, this does not mean that the Council is not obliged to consider the contamination issue as part of its 79C assessment, particularly its obligation to have regard to the likely impacts of the development, and the suitability of the site for the development as required by 79C(1)(b) and (c) respectively.

We should note that we have not been provided with the full legal advice provided by the Council lawyer or the questions he was asked to advise upon in providing that advice. However, the legal advice provided by the Council lawyer as set out in the Assessment Report, is referring to the principles laid down in *Mison v Randwick Municipal Council [1991] 23 NSWLR 731*. In that case the Court of Appeal held a purported development consent invalid because a condition of the consent stipulated that the height of the dwelling house be "*reduced to the satisfaction of the Councils chief town planner*". The condition was held to preclude the consent from complying with what is now the provisions of section 80(1)(a) of the EPA Act. The *Mison* Principle focusses on the following two requirements:-

(a) There is no *"consent to the application"* if a condition has the effect of significantly altering the development of leaving open the possibility that the development carried out in accordance with the condition will be significantly different to that applied for;

(b) The act of granting consent imports a requirement of finality, so that there is no *"consent"* if the purported consent leaves for later decision an important aspect of the development which could alter it in a fundamental respect.

The NSW Court of Appeal has repeatedly approved the *Mison* Principle (see for example *Winn v Director-General of National Parks and Wildlife [2001] NSWCA 17, Warehouse Group (Australia) Pty Ltd v Woolworths Ltd [2005] NSWCA 269* and *Kindimindi Investments Pty Ltd v Land Cove Council [2006] NSWCA 23.*

As Biscoe J stated at paragraph 86 in the decision of *GPT Re Limited v Wollongong City Council & Anor [2006] NSWLEC 303*:

"86 The rationale of the finality principle is that it is designed to protect both the developer and the affected neighbourhood against a consent authority's reservation of power to alter the character of the development significantly, thus changing the expectations settled by the consent already granted."

Whilst the *Mison* Principles still exist and are applicable where appropriate, Justice Biscoe in GPT referred to the introduction of subsequent statutory provisions into the Act which to some extent may qualify the application of the *Mison* Principle. At paragraphs 89 – 91 His Honour stated as follows:-

*"89 The term "principle of finality" is peculiarly applicable to the construction of planning statutes but is no more than a process of statutory construction. Spigelman CJ has cautioned that "such terminology must be approached with care. The issue always turns on the construction of the particular statute": **Winn** at 514 [15]. **Mison** was decided before legislative changes in 1993 which provided for the grant of an "in principle consent", a label that was changed in 1994 to "deferred commencement" consent. As a matter of statutory construction, it has been held that **Mison** has no application to the staged development provisions of the Act in their immediately pre September 2005 form: **Patrick Autocare Pty Ltd v Minister for Infrastructure, Planning and Natural Resources** [2004] NSWLEC 687 at [22] (Cowdroy J). As a matter of statutory construction, it has been accepted that the EP&A Act ss 79C, 80(4), 80A(1)(a) and (g) "mean that, in the particular circumstances dealt with by those provisions, conditions may be imposed that have the effect that the development approved is substantially different from that applied for. In my opinion, the statement in **Mison** is still correct... but in order for that principle to apply in those circumstances, the alteration must go beyond alterations of the kind contemplated by those sections": per Hodgson JA in **Warehouse Group (Australia) Pty Ltd v Woolworths** [2005] NSWCA 269; (2005) 141 LGERA 376 at 412 [89].*

*90 In my view, as a matter of statutory construction, the provisions of the EP&A Act which qualify the Mison principle are more numerous than those referred to by Hodgson JA in **Warehouse Group**, and include provisions introduced into the Act in 2005 after that case was decided. Applying his Honour's view, the principle in **Mison** is still correct, but in order for it to apply in the circumstances of these post **Mison** legislative provisions, the alteration must go beyond alterations of the kind contemplated by those provisions. Current provisions which qualify **Mison** may include at least some of the following.*

§ Section 83B, which permits staged development applications.
§ Section 80(3), which permits deferred commencement conditions.
§ Sections 80(4) and (5), which permit total or partial consent.
*§ Section 80A(2), which permits a condition that a specified aspect ancillary to the core purpose is to be carried out to the satisfaction of the consent authority or a person specified by the consent authority. This substantially reflects the dictum of Samuels JA in **Scott v Wollongong City Council** (1992) 75 LGRA 112 at 119.*
§ Section 80A(4), which permits a condition that identifies outcomes or objectives and clear criteria against which they must be assessed.

§ Section 80A(1)(a), which permits a condition relating to any relevant matter referred to in s 79C(1).
§ Section 80A(1)(g), which permits a condition modifying details of the development the subject of the development application.

91 *In **Kindimindi**, Basten JA indicated at [54] that when considering whether a consent leaves open the possibility of a significantly different development, an evaluative judgement is required and the whole development must be considered in context."*

As set out above, staged development application provisions under section 83B of the EPA Act are amongst those provisions which His Honour suggest may need to qualify the *Mison* Principles. Therefore, there may need to be a qualification of the *Mison* Principles given that a concept approval may not need to have the same level of finality in relation to aspects of the development, given that there will be further applications at a later stage which will be assessed and if warranted approved. We should note that there is little case law dealing with section 83B of the EPA Act so as to assist in taking this aspect any further.

Further, we note that section 83D(3) provides that a staged development consent can be modified in accordance with the EPA Act. Accordingly, it may be possible to modify the concept consent to accommodate changes to the development even after one or more stages have been completed. However, such modifications would be subject to the usual requirements for modification of a consent.

Conclusion

Having reviewed the documentation that was provided with Council's email dated 9 January 2014, we would agree with the provisions of the legal advice provided by HWL Ebsworth that the concept plan does not authorise the carrying out of development, and as such, the provisions of clause 7 of SEPP 55 would not be triggered. Council should have regard to the submission from City Plan Services, together with the documents provided in the DA relating to the contamination issue, and decide whether having regard to the provisions of section 79C of the EPA Act, the application should be recommended for approval.

Should you require any further information or need to discuss this matter please do not hesitate to contact me on 4978 4003.

Yours faithfully
Local Government Legal

Tony Pickup
Principal Lawyer