

<b>JRPP No</b>	<b>2012STH015</b>
<b>DA Number</b>	<b>RA12/1001</b>
<b>Local Government Area</b>	<b>Shoalhaven City Council</b>
<b>Proposed Development</b>	<b>Extension of area over the Shoalhaven River where sand is won via dredging (to be then processed at the existing land based facilities)</b>
<b>Street Address/ Development Site</b>	<b>Shoalhaven River and Lot 1 DP 787495 (No.123) and Lot 2 DP 787495 (No.125) Terara Road, Terara</b>
<b>Applicant</b>	<b>Allen Price and Associates (as agents for Shoalhaven Sands Pty Ltd)</b>
<b>Recommendation</b>	<b>Deferral</b>
<b>Report by</b>	<b>Andrew Lissenden, Senior Development Planner</b>

### **SUPPLEMENTARY REPORT**

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## **1. Purpose of the Report**

To provide additional information to the Joint Regional Planning Panel - Southern Region (JRPP) relating to concerns that have been raised by Herbert Geer Lawyers on behalf of Burraga Island Pty Ltd who own land know as Burraga/Pig Island. This land physically adjoining part of the above development site (i.e. the works proposed in the Shoalhaven River).

## **2. Background**

On 14 June 2013 Shoalhaven City Council received a request from the JRPP Secretariat to provide a response to a submission received from Herbert Geer Lawyers, dated 13 June 2013, who are acting for the owners of Pig Island. The concerns raised in the submission relate to land ownership and the obtaining of consent of all land owners whose properties form part of the subject site. Specifically, the land ownership issues raised can be summarised as follows:

1. No consent has been obtained from the owner of Pig Island in relation works (e.g. mitigation works) that are proposed on the island as are detailed in the applicants Environmental Impact Statement (EIS) and supporting documentation. These works requiring the consent from the owner of Pig Island;
2. The General Terms of Approval (GTA) issued by the NSW Environmental Protection Authority (EPA) require works to be undertaken on Pig island and therefore the consent from the owner of Pig Island is required; and
3. The sediment trench located on Pig Island, as approved under DA91/2897, is not approved as part of the current application and as such must be included in the current application and therefore requires consent from the owner of Pig Island.

Further discussion of each of the above issues is provided in the following sections of this supplementary report.

## **3. Amendments to the current Proposal**

The applicant, having regard to concerns raised by Herbert Geer Lawyers, amended the development application on 17 June 2013. The amendment seeking to delete all references to works as detailed in submitted Environmental Impact Statement, Supplementary Report and supporting studies that are to be undertaken on Pig Island as part of this application. All

other components of the proposed development are as detailed in the Assessment Report that has previously been submitted to the JRPP for consideration. Council has formally accepted the amendment to the application.

#### **4. Other Issues**

The following provides comments on the issues raised in the submission from Herbert Geer dated 13 June 2013 or related matters:

- a) *Consent in Relation to Mitigation Works Proposed on Pig Island:* It is acknowledged that the EIS, associated supplementary information and supporting documentation makes a number of references to works that can be undertaken on Pig Island so as to assist in mitigating any potential impacts the proposal may have. Council's assessment report acknowledges this and that no land owner's consent from the current owner of Pig Island has been provided as part of the application. As such, Council's assessment report has recommended that proposed alternative measures be implemented to mitigate any potential impact from the proposed works (e.g. increased buffer from the works to the Pig Island mean high water mark). Council's assessment report fails to recognise that as the works have been proposed by the applicant on land which they do not own, that this land owner's consent is required prior to the determination of the application. To address this issue, the applicant has now informed Council that they wish to amend the current application to delete reference to any works previously identified in the submitted information that were proposed to be undertaken on Pig Island as part of the application. As no works under this amended application are to be undertaken on Pig Island, land owner's consent from the owner of Pig Island is no longer required.

The previously provided conditions of development consent can be amended to ensure all mitigation works referenced include a reference that excludes any works that are required to be undertaken on Pig Island for which land owner's consent has not been provided as part of this application (e.g. amendments to Condition 43 (Mitigation Measures) and 45).

- b) *Community Consultation:* A formal public exhibition and notification process was not undertaken for the amended proposal as is described in this supplementary report. In accordance with the requirements of Section 79, subsection 6 (Circumstances in which public exhibition may be dispensed with) of the Environmental Planning and Assessment Act (EPA Act), Council is of the opinion that the amended application differs only in minor respects from the original application and has complied with the requirements of public exhibition and notification as detailed in subsections 1, 2 and 3 of this section for the original application. In addition, written notice of Council's decision in accordance with Section 79, subsection 7 has been given to the applicant.
- c) *NSW Environment Protection Authority (EPA) Comments:* The EPA has been provided with a copy of the applicant's request to amend the application. They have been requested to advise of any concerns and if changes to the current General Terms of Approval (GTA) are required. The EPA has subsequently informed Council that they have no concerns and/or issues with the proposed amendment to the application. They have also advised that the change will not require the EPA to amend its previously issued GTA's for the proposal. The EPA, in their comments to Council, state that the GTA's do not apply to any activity which was proposed in the original application to take place on Pig Island. It was also advised that, in the absence of the Unit Head for the South East

Region of the EPA, the above advice was provided acknowledging the timing of the panel meeting. However, the Unit Head for the South East Region will follow up on their return.

The previously provided conditions of development consent can be amended to include reference to the email from Allen, Price and Associates dated 17 June 2013 (e.g. amendment to Condition 1). In addition, an amendment has been made to Condition 29 (Noise Attenuation Barrier) to ensure the timeframe as specified in this condition is the same as required by the EPA in their GTA's (i.e. 3 months)

- d) The Sediment Trench on Pig Island: The existing sediment trench on Pig Island was approved under DA91/2897. A review of the assessment report on the file has indicated that the trench was approved as a sediment control facility for the dredging operation in the Shoalhaven River, not specifically specifying an area in which dredging associated with the trench was to occur. The trench not classified as designated development at this time as it was categorised under DA91/2897 as being alterations and additions to an existing designated development (i.e. sand dredging/extractive industry) that was of a minor nature and did not to any significant extent change the scale, size or degree of the existing development. The development consent subsequently issued for the trench and its proposed extension containing a condition (Condition 5) outlining in part that it *"is to be used in such a manner so that it does not involve a significant change in the scale, size or degree of sand dredging operations. Such is required to ensure that the proposal does not constitute a designated development under the provisions of the Environmental Planning and Assessment Act 1979 and Regulations 1980"*. It should be noted that the sediment trench has not at this time been expanded to its full length as approved under DA91/2897.

The submission from Herbert Geer outlines that it is their opinion that the sediment trench on Pig Island is not approved as part of the current application and, as such, must be included in the current application and therefore requires, consent from the owner of Pig Island. It is Council's opinion that the above condition is reasonably broad and general and, as a consequence, there is not sufficient certainty as to what it relates to and whether the current application before the JRPP requires owner's consent for the use of the sediment trench on Pig island. As a consequence, the matters raised by Herbert Geer in relation to the sediment trench could be reasonably argued by the owners of Pig Island and/or their lawyers. At this time, the applicant has not been provided with an opportunity to provide formal comment on/respond to this issue raised by Herbert Geer in their submission. In this regard, it is considered reasonable that any decision in relation to this application should be deferred so as to enable the applicant to provide a formal response to this issue and to enable Council and the JRPP to further consider its position once this response has been received.

- e) Legal Advice: As outlined above, Council has obtained interim legal advice in relation to the issues raised by Herbert Geer Lawyers in their submission dated 13 June 2013. A copy of this is provided to the JRPP as a separate confidential attachment (refer to **Attachment 'A'**). This legal advice is confidential under Section 10A(2)(g) of the Local Government Act 1993 as it contains legal advice which would otherwise be privileged from production in legal proceedings on the grounds of legal profession privilege.

## 5. Conclusion

Having regard for the submission from Herbert Geer Lawyers dated 13 June 2013 and Council's consideration of the matters that have been raised, Council is of the view that Development Application No RA12/1001 (2012STH015) should be deferred to allow the


applicant to respond to the legal and land ownership concerns of the owner of Pig Island and for Council to formally review such advice prior to determination by the JRPP.

## **6. Recommendation**

RECOMMENDED that, in respect of RA12/1001 (2010STH015) for the extension of area over the Shoalhaven River where sand is won via dredging (to be then processed at the existing land based facilities), the application be deferred to enable further consideration of the land ownership issues associated with the existing sediment trench located on Pig Island by both the applicant and Council.



Signed: Andrew Lissenden  
Senior Town Planner  
Shoalhaven City Council  
Date: 18/06/13



Robert Russell  
Development Manager,  
Shoalhaven City Council  
Date: 18/06/13