



HENRY DAVIS YORK  
LAWYERS

2 November 2012

Our Ref NGB/ACK/3124448

The Directors  
Breen Property Pty Limited  
Level 9  
92 Pitt Street  
SYDNEY NSW 2000  
**ATTENTION Tom Breen**

Dear Sirs

**Opinion regarding Draft Conditions of Consent - Shearwater Landing - DA 012/0476**

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1. We refer to the report of Annette Birchall - Environmental Assessment Officer (Planning), undated, in relation to DA No. 12/0476 and JRPP No. 2012SYE065 (the **Assessment Report**).
2. The Assessment Report relates to the staged development application (**Staged DA**) lodged by Breen Property Pty Limited (**Breen**) on 8 June 2012 pursuant to section 83B in Division 2A of Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).
3. Appendix A to the Assessment Report contains draft conditions of consent (the **Draft Conditions**).
4. In our view, a number of the Draft Conditions are legally flawed and fail to comply with the EP&A Act. We set out below our specific opinions.

**Failure of the Draft Conditions to address the development application lodged**

5. First, the Draft Conditions fail to approve the actual development application that has been lodged.
6. The Staged DA lodged by Breen on 8 June 2012 was lodged as a staged development application pursuant to section 83B in Division 2A of Part 4 of the EP&A Act. The Staged DA was clearly described in the Statement of Environmental Effects (see page IX in the Executive Summary).
7. The Staged DA sought consent for the overall conceptual layout of the development, including:
  - (a) the proposed road and residential lot layout comprising 161 residential lots, which is to be delivered in two precincts (Precinct 1 and Precinct 2); and
  - (b) an infrastructure concept for the development,

together, the **Concept Proposal**.

8. In addition, the Staged DA sought consent for the Stage 1 works, which generally comprise the subdivision of the land into 6 lots, soil remediation, bulk earthworks, construction of roads and infrastructure, landscaping, and stormwater treatment (**Stage 1 Works**).
9. Section 83B(2) of the EP&A Act requires a consent authority to treat a development application as a staged development application if the applicant requests that it be so treated. Further, section 80(1) of the EP&A Act requires a consent authority to determine a development application by either granting consent (conditionally or unconditionally) or refusing consent to the application.
10. The Land and Environment Court has held that section 80(1) requires a consent authority to exercise its powers only in respect of the particular development application which was lodged: *Carr v Minister for Land and Water Conservation* (2000) 109 LGERA 175 at 186.
11. If the Draft Conditions were to be adopted by the JRPP, the Staged DA would not be determined as a staged development application because there is no condition in the Draft Conditions which expressly approves the Concept Proposal for which development consent has been sought. The Draft Conditions (in condition 9) only approve the Stage 1 Works.
12. By failing to expressly approve or refuse the Concept Proposal which is fundamental to the Staged DA and any staged development application (see section 83B(1)), section 80(1) has not been satisfied.
13. In effect, the whole objective of lodging a development application pursuant to the staged development application provisions in the EP&A Act, is undermined by the Draft Conditions. This is because there is no approval of the Concept Proposal, being the 161 lot subdivision and associated infrastructure. The purpose of section 83B is to enable such a concept to be approved and any future consents are not to be inconsistent with the approved concept, see section 83D(2).

**Deferred Commencement Conditions 2(b) and 6 lack certainty and finality potentially rendering any consent void**

14. The Land and Environment Court and the NSW Court of Appeal have held that if conditions are imposed that have the effect of significantly altering the development in respect of which a development application is made, this renders the consent uncertain and lacking in finality. This would mean that the consent cannot be said to be finally determined nor would it be properly characterised as a consent at all: *Carr and Mison v Randwick Municipal Council* (1991) 23 NSWLR 734.
15. Taken together, the deferred commencement conditions (**DCC**), in particular, conditions 2(b) and 6 leave for later determination fundamental aspects of the development, such as design changes relating to road and lot layout (DCC 2(b)) and the whole remediation and the suitability of the site for its proposed use (DCC 6).
16. In particular, DCC 6 requires a new remediation action plan (**RAP**), and new site audit report and a new site audit statement. This leaves for a later determination the question of whether the site is capable of being suitable for residential use. This



would, in our view, make the consent lacking in finality as there is no certainty about the nature of the remediation works that may be proposed and whether the site auditor would issue a site audit report and site audit statement verifying the RAP: see *Mison and Weal v Bathurst CC* (2000) 111 LGERA 181 at [94].


#### Failure of DCC 1,2, 3 and 4 to comply with the EP& A Act

17. Clause 95(2) of the *Environmental Planning and Assessment Regulation 2000* (the **Regulations**) states that a deferred commencement consent must clearly distinguish conditions concerning matters as to which the *consent authority* must be satisfied before the consent can operate from any other conditions. In this case, the consent authority is the JRPP, not the Council.
18. Section 23G of the EP&A Act, confers functions on the JRPP to the exclusion of Council, subject to any delegation of the relevant function under the EP&A Act.
19. The only relevant delegation is Instrument of Delegation Sydney East Region Joint Planning Panel dated 24 November 2010. However, this delegation does not apply because part of the development is on land owned by the Council (the stormwater treatment facility).
20. The JRPP cannot make any further delegation without the approval of the Minister: section 23(1B) of the EP&A Act. We are not aware of any further delegation approved by the Minister.
21. Accordingly, because DCC 1, 2, 3, and 4 state that various revised plans and reports are to be submitted to Council for approval, these conditions do not comply with the EP&A Act.
22. Given the above, we recommend that conditions 1, 2, 3 and 4, as modified in the Response to Conditions Report prepared by JBA, be made standard conditions of consent in the normal manner. This would enable the relevant plans and requirements to be returned to Council. There is no need to defer these matters for later approval as deferred commencement conditions.

#### Legal Review of Draft Conditions

23. We have carried out a careful review of the document entitled "Response to Conditions Report" prepared by JBA Planning. We have made appropriate drafting changes to ensure the legality and appropriateness of those draft conditions.
24. In our opinion, the proposed amendments to the Draft Conditions identified by JBA are reasonable and appropriate in the circumstances.

Yours faithfully  
Henry Davis York

  
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