Mills Oakley
ABN: 51 493 069 734

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Your ref:
Our ref: AXGS/AZSS/3194015

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215

Contact
Amelia Stojevski +61 2 8289 5802
Email: astojevski@millsoakley.com.au

Partner
Aaron Gadiel +61 2 8035 7858
Email: agadiel@millsoakley.com.au

Goldcoral Pty Ltd
PO Box 3441
AUSTRALIA FAIR QLD 4215

By email: graeme@inglesgroup.com.au

Attention: Graeme Ingles

Dear Graeme

Amendment of DA2015/0096 — Proposed Residential Subdivision at Iron Gates, Evans Head

You have informed us that you propose to vary the above development application as follows:

- You will request that the development application be treated as a concept development application under section 4.22(3) of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**).
- The variation will include a new drawing that sets out concept proposals for two stages of development.
- The development application will continue to include detailed proposals (based on existing documentation with a new proposed plan of subdivision).
- The detailed proposals will comprise the first stage of the development (as per section 4.22(2) and section 4.22(4)(b) of the EP&A Act). That is, development consent will be sought for:
  - the concept proposals for the whole site (including the first and second stages); and
  - the carrying out of the first stage of the development (so there is no need for further consent for that first stage).
- The first stage of the development (**stage 1**) is as follows:
  - completion of all subdivision work for the stage 1 and future stage 2 lots, including but not limited to:
    - clearing and earthworks;
    - roadworks and drainage;
    - sewer and water supply (including service connections to the stage 1 lots and future stage 2 lots); and
    - electricity and communications (including connections to the stage 1 lots and future stage 2 lots);
  - embellishment of the proposed public reserves adjacent to the Evans River foreshore;
  - creation of:
    - 135 residential lots (comprising lots 1 to 135);
    - four public reserve lots (comprising lots 139 to 142);

  - one sewer pump station lot (comprising lot 144);
  - one drainage reserve lot (comprising lot 143);
  - three super lots (comprising lots 145, 146 and147);
  - a residue lot (comprising lot 138);
  - two rainforest lots (comprising lots 137 and 136); and
- upgrading of Iron Gates Drive.

- The second stage of the development (**stage 2**) is the subdivision of certain super lots created in stage 1 (being lots 145,146 and147) to create 40 residential lots. No subdivision work is included for stage 2 as all necessary civil works will be provided in stage 1.

We understand that you will also be withdrawing the master plan that you have provided to the Minister for Planning and Public Spaces (**the Minister**) under clauses 20-21 of *State Environmental Planning Policy No 71—Coastal Protection* (**SEPP 71**). You will instead be seeking to include in your variation a 'Concept proposals outline' that will be closely based on the master plan most recently given to the Minister.

You require our opinion as to the answers to the following questions:

- **Question 1**: Can the subject development application be determined by the grant of development consent once the master plan is withdrawn?

- **Question 2**: Can the development application be varied as proposed under clause 55(1) of the *Environmental Planning and Assessment Regulation 2000* (**the EP&A Regulation**)?

Our opinion is set out below.

Summary advice

In our opinion:

- The requirement for a 'master plan' is now (as a matter of law), a requirement for a development control plan that deals with the matters as set out in clause 20(2) of SEPP 71.

- The requirement for a development control plan under clause 18(1) of SEPP 71 (as modified by the transitional provisions) may be satisfied by the grant of a development consent for concept proposals.

- The subject development application can be determined by the grant of development consent — even when the master plan is withdrawn — provided that the application is varied as you propose.

- In the circumstances of this application, the overall essence of the development remains as a residential subdivision within a generally consistent development area as already proposed in the development application.

- It would be lawful for the consent authority to agree to allow the variation under clause 55(1) of the Regulation.

- The development application can be varied as proposed under clause 55(1) of the EP&A Regulation.

Background

We understand and assume the relevant facts to be as follows:

- In October 2014, you lodged development application 2015/0096 (**the subject development application**) with Richmond Valley Council (**the Council**).

- The application proposes a residential subdivision, the construction of subdivision infrastructure, Evans River foreshore embellishment and road upgrades.

- On or about the same time, you requested that the Department of Planning waive the requirement for a master plan under clause 18(2) of SEPP 71. The Department declined to waive the requirement for a master plan.
- Subsequently, you submitted a further draft master plan dated July 2015 to the Department of Planning and Environment.
- In October 2019, you submitted a revised draft master plan to the Department of Planning, Industry and Environment (**the Department**).
- In July 2020, the Council agreed to amend the subject development application to include, among other things, a revised plan of proposed subdivision (dated 23 March 2020). This plan reflected the evolution of the draft master plan.
- You intend to withdraw the draft master plan.

Detailed advice

1. Can the subject development application be determined by the grant of development consent once the master plan is withdrawn?

1.1 SEPP 71 continues to apply in relation to the subject development application despite its repeal due to clause 21(1) of the *State Environmental Planning Policy (Coastal Management) 2018* (**the Coastal Management SEPP**).

1.2 Clause 18(1) of SEPP 71 relevantly says:

> (1) A consent authority must not grant consent for:
>
> (a) subdivision of land within a residential zone, or a rural residential zone, if part or all of the land is in a sensitive coastal location, or
>
> (b) subdivision of land within a residential zone that is not identified as a sensitive coastal location into:
>
> (i) more than 25 lots ….
>
> unless:
>
> (d) the Minister has adopted a master plan for the land …

The transitional provisions — overview

1.3 Clause 95 of schedule 1 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (**the EP&A Transitional Regulation**) is relevantly as follows:

> **95 Master plans under existing instruments**
>
> (1) This clause applies to any provision of an environmental planning instrument that is in force on the commencement of this clause and that **requires, before the grant of development consent, a master plan** (within the meaning of clause 92A of the *Environmental Planning and Assessment Regulation 2000* as in force before its amendment by the 2005 Amending Act) for the land concerned.
>
> (2) While that provision continues in force, **it is to be construed as requiring a development control plan under section 74D** (as inserted by the 2005 Amending Act) with respect to the matters required to be included in the master plan, and in accordance with the procedures provided for making the master plan, by the environmental planning instrument (bold added) …

1.4 This provision was formerly clause 95 of schedule 6 of the EP&A Act. It was transferred into the EP&A Transitional Regulation. The transfer does not affect the operation or meaning of the provision. This means that the provision is to be interpreted as if it had

not been so transferred (section 30A(2) of the *Interpretation Act 1987*; clause 5 of the EP&A Transitional Regulation).

1.5 The above clause 95 commenced on 1 August 2005 (Government Gazette No 96 of 29 July 2005, 4031).

1.6 Clause 289(7) of the EP&A Regulation extends the application of clause 95:

> **Master plans under epis made before 31 December 2005** A reference in clause 95(2) of Schedule 6 to the Act to a provision of an environmental planning instrument that requires, before the grant of development consent, a master plan for the land concerned extends to a provision of that kind in an environmental planning instrument that is made before 31 December 2005.

1.7 In short, clause 95 applies to relevant provisions of an environmental planning instrument that was made before 31 December 2005.

1.8 SEPP 71 was made on 1 November 2002. The provisions of SEPP 71 set out in section 1 of this advice were in force both:

(a) on 1 August 2005; and

(b) during the period before 31 December 2005.

The transitional provisions — clause 95(1)

1.9 Clause 95(1) says that clause 95 applies to an 'environmental planning instrument'. SEPP 71 is such an instrument.

1.10 It applies if a provision in the instrument requires a 'master plan' **within the meaning of clause 92A of the EP&A Regulation** before its amendment by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* in 2005.

1.11 Prior to this amendment, clause 92A relevantly said the following:

> **92A Preliminary planning: sections 79C (1) (a) (iv) and 80 (11) of the Act**
>
> (1) This clause applies to land if an environmental planning instrument made before or after the commencement of this clause provides, or **has the effect of providing, that consent is not to be granted to a development application relating to the land unless**: …
>
> (d) **there is a master plan for the land**.
>
> (2) Pursuant to section 80 (11) of the Act, a development application relating to land to which this clause applies must not be determined by the consent authority granting consent (unconditionally or subject to conditions) unless: …
>
> (d) there is a master plan for the land that has been available for inspection by the public since it was made or adopted …
>
> (4) For the purposes of section 79C (1) (a) of the Act, the provisions of any master plan for land to which this clause applies are prescribed as matters to be taken into consideration by the consent authority in determining a development application in respect of that land.
>
> (5) In this clause: …
>
> ***master plan*** means a plan, whether it is referred to as a master plan, a development plan, a precinct plan or otherwise (but not an environmental planning instrument, a development control plan or a contributions plan):
>
> (a) that makes provisions for or with respect to the development of land, and
>
> (b) that has been made or adopted by the Minister or a public authority (some bold added).

1.12 The master plan required under clause 18(1) of SEPP 71 was a master plan to which clause 92A applied, **prior to its amendment**. This means that clause 95(1) of the EP&A Transitional Regulation applies to the SEPP 71 requirement (and therefore the whole of clause 95 applies to the master plan regime under SEPP 71).

The transitional provisions — clause 95(2)

1.13 Clause 95(2) affects the interpretation of clause 18(1) of SEPP 71.

1.14 It requires the clause to be 'construed' (interpreted) as requiring a **development control plan** under (what was once known as) section 74D of the EP&A Act:

(a) with respect to the matters required to be included in the master plan; and

(b) in accordance with the procedures provided for making the master plan,

under SEPP 71.

1.15 This means that — as matter of legal form — the 'master plan' that was sought by you, if adopted, would have been made as a 'development control plan'.

1.16 The reference to 'section 74D' in clause 95(2) is a reference to the former section 74D of the EP&A Act. This provision remains in force and is now known as section 3.44. It relevantly says:

> **3.44 Development control plans required or authorised by environmental planning instruments (cf previous s74D)**
>
> (1) An environmental planning instrument **may require or permit a development control plan to be prepared before any particular development or kind of development may be carried out** (and make provision with respect to the preparation and content of any such plan).
>
> (2) Any such development control plan may outline the development of all the land to which it applies.
>
> (3) Any such development control plan may be prepared (and submitted to the relevant planning authority) by the owners of the land to which it applies or by such percentage of those owners as the environmental planning instrument concerned allows. A person authorised by those owners may act on their behalf for the purposes of this subsection.
>
> (4) The relevant planning authority may make a development control plan submitted to it under this section, including with such changes as it thinks fit (some bold added) …

1.17 The effect of clause 95(2) is that section 3.44(1) is now the statutory provision authorising the requirement for a 'master plan' imposed under clause 18(1) of SEPP 71. The requirement for a 'master plan' is now (as a matter of law), a requirement for a **development control plan** that deals with the matters as set out in clause 20(2) of SEPP 71. This provision is as follows:

> A draft master plan is to illustrate and demonstrate, where relevant, proposals for the following:
>
> (a) design principles drawn from an analysis of the site and its context,
>
> (b) desired future locality character,
>
> (c) the location of any development, considering the natural features of the site, including coastal processes and coastal hazards,
>
> (d) the scale of any development and its integration with the existing landscape,
>
> (e) phasing of development,
>
> (f) public access to and along the coastal foreshore,
>
> (g) pedestrian, cycle and road access and circulation networks,

(h) subdivision pattern,

(i) infrastructure provision,

(j) building envelopes and built form controls,

(k) heritage conservation,

(l) remediation of the site,

(m) provision of public facilities and services,

(n) provision of open space, its function and landscaping,

(o) conservation of water quality and use,

(p) conservation of animals (within the meaning of the Threatened Species Conservation Act 1995) and plants (within the meaning of that Act), and their habitats,

(q) conservation of fish (within the meaning of Part 7A of the Fisheries Management Act 1994) and marine vegetation (within the meaning of that Part), and their habitats.

Concept development application as an alternative to a development control plan

1.18 Section 4.23 of the EP&A Act is relevantly as follows:

> **4.23 Concept development applications as alternative to DCP required by environmental planning instruments …**
>
> (2)…. [I]f an environmental planning instrument requires the preparation of a development control plan before any particular or kind of development is carried out on any land, **that obligation may be satisfied by the making and approval of a concept development application in respect of that land**. …
>
> (3) Any such concept development application is to contain the information required to be included in the development control plan by the environmental planning instrument or the regulations (some bold added).

1.19 This means that the requirement for a development control plan under clause 18(1) of SEPP 71 (as modified by the transitional provisions) **may be satisfied by the grant of a development consent for concept proposals**: *SJ Connelly CPP Pty Ltd v Byron Bay Council* [2010] NSWLEC 1182 at [35] and [41].

In short

1.20 The subject development application can be determined by the grant of development — even when the draft master plan is withdrawn — provided that the application is varied as you propose.

2. Can the development application be varied as proposed under clause 55(1) of the EP&A Regulation?

2.1 Clause 55(1)-(2) of the EP&A Regulation is as follows:

> **55 What is the procedure for amending a development application? (cf clause 48A of EP&A Regulation 1994)**
>
> (1) A development application **may be amended or varied by the applicant** (but only with the agreement of the consent authority) at any time before the application is determined, by lodging the amendment or variation on the NSW planning portal.
>
> (2) If an amendment or variation results in a change to the proposed development, the application to amend or vary the development application must include particulars sufficient to indicate the nature of the changed development (some bold added) …

2.2 The changes you propose involve:

(a) a new phasing of the development;

(b) an amended plan of subdivision; and

(c) the inclusion in the application for concept proposals that largely reflects the substance of what the application is already seeking.

2.3 You can rely on the decision of the Land and Environment Court in *Radray Constructions Pty Ltd v Hornsby Shire Council* [2006] NSWLEC 155. This decision adopts the description of the power to amend a development application given in *Ebsworth v Sutherland Shire Council* [2005] NSWLEC 603. The power is 'beneficial and facultative'.

2.4 In *Radray*, the Court said that the test for granting permission to amend is not to be regarded as so narrow as the power to modify a development consent that is contained in section 4.55 of the EP&A Act. There is no 'substantially the same' test. The Court said that an amended application will involve a changed development, but one which in essence remains the same (at [17]).

2.5 In a later decision, known as *Ambly Holdings Pty Limited v City of Sydney* [2016] NSWLEC 38 the Court said that clause 55(1) empowered the making of both 'amendments' and/or 'variations' to formalise the changed development (at [8]-[9]).

2.6 An 'amendment' constitutes tinkering with or adjustment of a development proposal by moving walls around and changing layouts and other things of that nature, being an amendment to that which is originally proposed (at [10]).

2.7 A 'variation', on the other hand, encompasses the possibility of more than a mere change in design, but a change in the nature of the development, provided its overall essence is capable of being regarded as the same (at [11]).

2.8 In the circumstances of this application, the overall essence of the development remains as a residential subdivision within a generally consistent development area as already proposed in the development application.

2.9 It would be lawful for the consent authority to agree to allow the proposed variation under clause 55(1) of the Regulation.

2.10 We also note that, if the application is appealed to the Land and Environment Court, the Court would have this power in lieu of the local council. The Court would be likely to agree to the variation, in the circumstances.

2.11 In short, the development application can be varied as proposed under clause 55(1) of the EP&A Regulation.

Please do not hesitate to contact me on (02) 8035 7858 if you have any queries regarding this advice.

Yours sincerely

Aaron Gadiel
Partner
Accredited Specialist—Planning and Environment Law