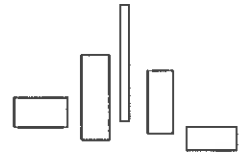


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**PIKES & VEREKERS**  
LAWYERS

15 February 2016

The Joint Regional Planning Panel (Northern Region)  
Regional Panel Secretariat  
23 - 33 Bridge Street  
SYDNEY NSW 2000

**BY EMAIL** jrppenquiry@jrpp.nsw.gov.au  
cc ksc@kempsey.nsw.gov.au

Dear Panel Members

**DEVELOPMENT APPLICATION 2015 NTH002**  
**32 WAIANBAR AVENUE, SOUTH WEST ROCKS**  
Our ref **SNG:GT:140902**

We are instructed by Tee Bee Holdings Pty Limited with respect to development application T6/14/62, lodged with Kempsey Shire Council, referred to the Joint Regional Planning Panel (Northern Region) ("the Panel") and assigned JRPP No. 2015 NTH002.

The development application has been lodged as a staged development application and seeks approval for a residential subdivision concept plan with approximately 338 lots and approval for stage 1 of that concept plan (29 lots), at 32 Waiianbar Avenue, South West Rocks.

The development application is the subject of a JRPP meeting scheduled for 17 February 2016, at which meeting it would ordinarily be anticipated that the development application would be determined.

We are instructed to write to the Panel (copy care Kempsey Shire Council) urging that the application not be determined at the meeting of 17 February as the Panel will not have before it a Council Report that properly assesses the development application.

### **Executive Summary**

The Council Report, dated 27 January 2016 (with minor errors corrected to February 2016) fails to properly assess the development application as a staged development application seeking concept plan approval. The degree of information which Council asserts should be provided is the degree of information and the level of detail which would be anticipated at individual development applications (ie: those development applications made under the umbrella of the concept approval), or even construction certificate stage approval.

There is clearly sufficient information before the Council and the JRPP to determine and approve not only the stage 1 subdivision, but also the overall concept plan, pursuant to which further development applications would be made in the future.

The vast majority of Council's concerns as to the future operation of the overall subdivision and the manner in which that is to be carried out, can clearly be addressed by conditions in the concept plan approval setting the parameters of that approval and the manner in which the subdivision should be undertaken.

There is ample information before Council to undertake an assessment of that nature and furthermore to lead to an approval of the concept plan.

Accordingly we urge the Panel to refer the application back to Council for proper consideration as a concept approval and preparation of conditions of consent which would address any concerns Council may have with respect to the manner in which the development is to be carried out into the future.

### **Assessment Approach**

The Council in its assessment report relies on the decision in *Anglican Church Property Trust v Sydney City Council* (2003) 139 LGERA 231 in which the Court made some observations about the extent of detail to be provided at different stages of a multi staged development application process.

It is accepted that that decision does provide some guidance, however, it should be applied with a degree of caution. At the time of the decision, whilst Sections 80(4) and (5) of the Environmental Planning and Assessment Act ("the Act") permitted development consent to be granted with certain matters deferred (to be subject of further development applications which would provide additional detail), there was at that time no specific provision in the Act dealing with staged development applications.

In the present matter, guidance should be taken firstly from the express provisions of the Act. Division 2A of Part 4 deals with staged development applications. Significantly, Section 83B(1) provides:

*"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."*

It is clear that the Act draws a distinction between the extent of information to be provided at the "concept" level and the information to be provided at the "detailed" level.

Further, Section 83B(3) prohibits the carrying out of development on any part of the site unless a further development application is approved, or detail is provided for the development of that part of the site as part of the concept plan approval consent is granted for that first stage. Thus any approval of the current application would permit development on stage one, but would not permit any development of the remainder of the land to which the concept approval applied.

Further, the matters for consideration for a staged development application are governed by Section 79C(1) of the Act (as with any other development application). It is important to reiterate, however, the chapeau to that subsection:

*"In determining a development application, a consent authority is to take into consideration such of the following matters **as are of relevance to the development the subject of the development application.**"*

Thus the question of what must be considered (and hence the question of what information must be available), must be guided by the fact that the development application, except as it relates to stage 1, is for a concept only and no development will be permitted.

The approach taken by Council, conversely, seeks a degree of detailed information be provided by the applicant which would reflect final construction methods of the various components of the overall subdivision (eg: stormwater detention facilities and sewerage and water infrastructure). The degree of detail sought by Council is appropriate to the subsequent detailed development applications but are not necessary to the understanding, determination and approval of the "concept".

They are not relevant to the development the subject of this development application.

In *Amalgamated Holdings Limited v North Sydney Council* (2012) 191 LGERA 51, proceedings which related to the manner in which the Sydney East JRPP had exercised its powers on an application on a staged development application made pursuant to Division 2A of Part 4 of the Act, His Honour Justice Biscoe described the assessment approach as follows:

*"There should be taken into account that the development application is for a staged concept approval without requisite details and that consideration of the design principles [being the design principles in the Seniors Living State Environmental Planning Policy] must **take place at that level of generality.**"*

Thus the fundamental aspect of the consideration of a staged development application is that the consideration must be undertaken at a level of generality. His Honour does not explain in detail what is meant by generality, although it may be accepted that it does not involve a high degree of detail. "Generality" is defined in

the Macquarie Dictionary to mean relevantly "a general or vague statement", or alternatively a "state or quality of being general."

"General" has a number of meanings, most relevant of which are "not limited to a detail of application; not specific or special; indefinite or vague."

Thus when assessing a concept plan, details of the application, or the specifics of the final proposal are not necessary. Sufficient information must be provided to understand the concept, but not the final resolution of all potential issues.

Council in its approach seeks the final resolution of all of the matters it sees as being potentially of some concern as the overall development proceeds. That is clearly not the correct approach.

### **Conditions**

Sufficient information is required to ensure that the concept can, generally, be put into effect. In our view, where the ultimate development may give rise to particular impacts or consequences that are to be avoided, conditions of consent can be imposed on any concept approval which specify that particular outcomes be achieved by the future detailed development proposals.

Such conditions would be consistent with both Section 80A(1)(g) and 80A(4) of the Act.

It is clear from Council's extensive report that there are a number of outcomes with respect to intersection with the water table, sewerage and water infrastructure connection, fill and flood plain management sought. With proper consideration of the material before Council, including comments from the concurrence authorities which are extensively referenced in the report, appropriate conditions of concept approval consent could be drafted.

The most obvious example is with respect to stormwater management. Council at a number of points in its report, but most notably at Section 8.1.3 refers to the interaction of potential stormwater management measures with the water table. The Department of Primary Industry – Office of Water ("the DPI") – have provided detailed commentary on that potentiality, summarised at Table 14 of the Council's report.

It is apparent from the DPI comments that the broad concept of the stormwater treatment and retention methods are understood (those methods including bio retention basins, swales and the like). DPI make certain recommendations as to how those measures should operate.

For example in the second row of table 14, DPI makes specific recommendations for filter media depths, that the system be either closed or with designated entry and exit points. In the second row, it is recommended that no water quality treatment devices including trenches, swales and bio retention basins be cut into the water table. A monitoring plan is recommended in the third row and treatment measures for the "soak away basins" are recommended. It is apparent from DPI's comments and Council's own comments that the concern is that there are potential impacts on the adjacent water impact, including Salt Water Creek and Salt Water Lagoon.

Conditions could readily be drafted that adopt all of DPI's recommendations and express, consistent with section 80A(4) an outcome that the detailed design, adopting DPI's recommendations demonstrate no significant impacts on the nearby sensitive water systems. Council should be put to the task of properly undertaking that assessment and preparing the necessary conditions, sewer and water connections proposed for the development.

The applicant and Council both agree that existing trunk water can be extended to the development when demand requires it and so it appears to be agreed between Council and the applicant that a solution is available. Conditions on the concept plan requiring that solution to be put into effect could readily be drafted. Again Council should be put to the task of undertaking that assessment and drafting the relevant conditions.

The situation is almost identical with respect to sewerage treatment. The applicant has relied upon particular pumping stations in the belief that they were not at capacity and pressurised arrangements to take up any subsequent effluent once those stations were at capacity. Council's view is that the pumping stations are at capacity and alternative arrangements need to be made. Those alternative arrangements are clearly the pressurised system that the applicant has proposed. It is a workable solution, but the final construction detail of that solution is not necessary at this early stage. It should simply be conditioned that that is the manner in which sewerage is to be removed from the subdivision.

A proper assessment of all matters raised by Council, premised on the development application seeking approval for a concept plan and not final development approval, should be undertaken generally along the lines of that which is described above.

### **Critical Aspects**

Such an approach is entirely consistent with the "critical aspects" approach advocated in the *Anglican Church* case.

It should be firstly stated that the *Anglican Church* case clearly identifies that it is not desirable to put an applicant to the expense and time of undertaking a fully detailed investigation of all aspects of a proposed development absent some confirmation by way of approval of a concept plan that the development may generally proceed:

*"We accept that multistage applications are useful for large or controversial projects as they provide the applicant with certainty about **the major parameters of a proposal** before it embarks on the expensive exercise of preparing detailed drawings and specification for a development application."*

The Court goes on to state that the information provided in stage 1 (ie: with what would now be called the concept proposal), should respond to all those matters that are critical to the assessment of the proposal. The Panel would no doubt read Council's recommendations at Section 2 of its report and the list of matters Council considers critical at Section 6.2 (page 15) and readily come to the conclusion that Council seeks detailed information not on matters critical to the final development, but on matters generally of some concern to Council. That is clearly not the approach advocated in the Act, nor is it the approach advocated by the Court in the *Anglican Church* case.

Even accepting that some of the matters raised by Council may be in some way critical, the real "critical" question is whether an appropriate outcome can be achieved, not the detailed specifics of how it is proposed to achieve that outcome. That is to say the questions should be: Can sewerage infrastructure be provided? Can potable water infrastructure be provided? Can stormwater treatment measures be introduced which do not deleteriously impact on the sensitive water systems?

In each case it is clear from the material provided by the applicant that the answer is yes. The critical aspect has been answered favourably and consent can and should be granted. This is not to say that the concept approval should not include measures to ensure that those critical aspects are properly addressed in the future detailed proposals. Conditions in the nature of those discussed above would readily achieve that outcome.

It is clear that the proposal should be referred back to Council for a proper assessment as a concept proposal, whereby the detailed construction method of the particular components are not required to be considered.

### **LEP Clause 6.3**

Clause 6.3 of Kempsey Local Environmental Plan 2013 prevents the grant of development consent for development on the subject and unless a development control plan that includes specific controls and addresses a list of specified matters has been prepared for the land.

Council's report suggests that no such DCP has been prepared and that, consistent with section 83C(2) and (3) the subject development application should contain all of the material required by clause 6.3. That assertion, however, fails to acknowledge the existence of Chapter D2 of Kempsey Control Plan 2013 which relates specifically to the subject land, includes specific controls and provides for all of the matters required by clause 6.3.

Accordingly no further DCP is necessary and the concept plan need only be consistent with the DCP and does not need to provide for those matters required for clause 6.3.

Save for the question of a master plan and supporting strategies, discussed below, the proposed development is generally consistent with the requirements of Chapter D2 of the DCP.

### **Master Plan**

In addition to the muddled approach taken by Council to this staged development application, a further matter ought be touched on. Council's report refers to Chapter D2 of its DCP and the requirement for a Master Plan therein.

It is clear from Sections 3.0 and 4.1 of chapter D2 that the Master Plan which is required by Council and for which the DCP specifies the content is the Master Plan required by clause 18 of State Environmental Planning Policy No. 71 – Coastal Protection. Thus Council in its DCP specifies additional detail that is required to be included in the Master Plan over and above that which is required by the SEPP itself. The reference to SEPP 71 is at Section 3.0 of Chapter D2 of the DCP and also at Section 4.1 (a) (and it is noted that the subject application is for more than 29 lots).

Reading Chapter D2 as a whole, it is clear that subsequent provisions seeking strategy documents and plans such as traffic management plans, infrastructure servicing strategy, landscaping requirements, infrastructure requirements and the like are all matters that go to the detail in the Master Plan, as required by desired outcome DO2 in Section 4.1 of Chapter D2.

In discussing these requirements in detail, Council fails to acknowledge that the Department of Planning and Environment has waived the requirement for a Master Plan. That reference is tucked away in the discussion of SEPP 71. A copy of that letter of waiver is **enclosed** hereto.

Given that the effect of Chapter D2 of the DCP does no more than prescribe further detailed requirements for the SEPP 71 Master Plan, once the requirement for the Master Plan under SEPP 71 is waived, those provisions of Chapter D2 of the DCP have no work to do.

### **Conclusion**

The above analysis is not intended to address line by line all of the matters discussed in Council's lengthy report, rather it is intended to explain the approach to be undertaken when assessing a concept plan as part of a staged development application and the manner in which approval for such a concept plan may be granted by reference to and for examples in Council's report.

It will readily be appreciated by the panel that Council's approach treats the application as one for final development approval and seeks a level of detail in information commensurate to such an application. That is patently incorrect and the matter should be referred back to the Council for assessment as a concept plan with the onus being put to Council to formulate conditions which would set the limits of the concept and guide the ultimate form and detail.

If you have any queries any of the above, please do not hesitate to contact the undersigned.

Yours faithfully



Stephen Griffiths  
Partner  
Accredited Specialist Local Government and Planning Law

encl

cc     The General Manager  
         Kempsey Shire Council  
         PO Box 3078  
         WEST KEMPSEY NSW 2440  
         Attention: Erin Fuller





## Planning & Infrastructure

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Mr G Smyth  
Geoff Smyth Consulting  
PO Box 1925  
COFFS HARBOUR NSW 2450

Our ref: 13/14504  
Your ref: GS1302.5

22 October 2013


Dear Mr Smyth

**Request to waive a Master Plan for Subdivision of Lot 35 DP 1167775 Waiianbar Avenue  
South West Rocks.**

I refer to your letter of 28 August 2013 and the above request under clause 18(2) of State  
Environmental Planning Policy (SEPP) No 71 – Coastal Protection.

Following examination of the application to waive a master plan and supporting information, it is  
considered that due to the extensive investigation of the land during the rezoning process and  
the existing planning controls applying to the land, a master plan can be waived pursuant to  
clause 18(2) of SEPP 71.

Yours sincerely

  
Denise Wright  
Acting Team Leader, Local Planning  
Northern Regions  
Planning Operations & Regional Delivery