

AU16/1074
ED17/65245
MW/MC

6 June 2017



Ms S Jattan
Western Joint Regional Planning Panel
Department of Planning and Environment
PO Box 39
SYDNEY NSW 2001

Dear Ms Jattan

**PROPOSED DEVELOPMENT: EXTRACTIVE INDUSTRY (QUARRY)
PROPERTY: LOT 211 DP 1220433, 20L SHERATON ROAD, DUBBO**

I refer to the meeting of the JRPP at Dubbo on Thursday 31 May 2017 regarding Development Application D16-482 for an extractive industry at Lot 211 DP1220433, 20L Sheraton Road, Dubbo and the JRPP's determination, as it is understood, to defer the matter pending further legal advice from Council regarding the issue of permissibility.

While Council acknowledges that the formal advice of the JRPP's determination has not yet been provided, in light of the email of 2 June 2017 from Mr Maas, Council would like to again confirm that it has sought and received legal advice regarding the permissibility of the development on the subject site and has accepted this advice as detailed in the assessment officer's report. This was again highlighted by Mr Reynolds during his overview of the issues and by Mr Mass at the meeting.

Whilst it is not a common practice of Council to publish its legal advice in the event that it may prejudice any further actions Council may wish to bring, however in the interests of assisting the JRPP, the advice previously received from Council's legal advisors, Marsdens, is provided and is attached.

As explained in the assessment officer's report, Council has accepted the advice from both the applicant's and its own solicitor in respect of the issue of permissibility. It is the impact and precedent of the construction of the statute or, in other words, the merits of the proposal that is of concern as also explained in the assessment officer's report.

Given the above, Council would consider that it would not be appropriate for it to seek or obtain any further formal legal advice in this matter but rather, the JRPP should, if it so wishes, seek further advice from the Department of Planning's legal advisors on aspects that are of concern to it. This would be consistent with the advice provided to Council by the Department dated 13 April 2017 and also detailed in the report which stated:

All communications to: **THE INTERIM GENERAL MANAGER**

ABN 53 539 070 928

PO Box 81 Dubbo NSW 2830

T (02) 6801 4000 **F** (02) 6801 4259 **E** council@dubbo.nsw.gov.au

Civic Administration Building Church St Dubbo NSW 2830

W dubbo.nsw.gov.au



"Following our discussion yesterday, the advice we sought favours the interpretation that Clause 7 of the Mining SEPP operates to make the development for an extractive industry (quarry) permissible with consent at the subject Sheraton Road site.

While Council should seek and rely solely on its own legal advice, the permissibility matter may be considered further by the JRPP if raised in Council's recommendation."

I trust this is of assistance.

Yours faithfully



Mark Riley
Interim General Manager

Attachment: Legal advice provided by Marsdens dated 17 February 2017

Our Ref: DB:LMK:388006
Contact: David Baird
Contact Tel: 4640 3694
Contact Email: dbaird@marsdens.net.au

ABN 59 874 202 316

Your Ref: D2016-482 Part 1 Parcel 26717 SPR:EMMX
Attention: Melissa Watkins

All correspondence to
 PO Box 291
 Campbelltown NSW 2560
 DX 5107 Campbelltown
www.marsdens.net.au
email@marsdens.net.au

The Interim General Manager
 Dubbo Regional Council
 PO Box 81
 DUBBO NSW 2830

17 February 2017

Dear Sir,

Re: Advice concerning development application D2016-482 for extractive industry
Ppty: Lot 211 DP 1220433 (20L) Sheraton Road, Dubbo

We refer to the above matter and to Council's instructions seeking our advice.

We confirm that we have been requested to review a development application seeking development consent from Council for an extractive industry (quarry) on the abovementioned land as well as an advice by Ashurst Lawyers dated 28 November 2016 ("Ashurst advice"). Our opinion is sought as to whether or not we agree with the Ashurst advice which concludes that development for the purpose of extractive industry is permissible on land zoned RE2 Private Recreation.

Summary of Ashurst advice

The Ashurst advice concludes that development for the purposes of an extractive industry is permissible on land zoned RE2 Private Recreation under the *Dubbo Local Environmental Plan 2011 ("Dubbo LEP")* having regard to clause 7(3)(a) of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 ("Mining SEPP")*.

Summary of our advice

It is strongly arguable, though not certain, that for the reasons detailed in the Ashurst advice development for the purposes of an extractive industry is permissible on land zoned RE2 Private Recreation under the Dubbo LEP.

There may be some argument that because "aquaculture" is a species of "agriculture" as defined and only aquaculture (and no other form of agriculture) is permissible on land zoned RE2 Private Recreation that aquaculture is not development for the purposes of agriculture for the purpose of clause 7(3)(a) of the Mining SEPP.

Partners
 J H Marsden OAM
 J B Adam
 A J Seton
 D R Baird
 P J Crittenden
 T C Reeve
 G P Butterfield
 J Bonura
 E M White
 N M Youssef
 J R Thornton
 E Macfarlane
 A L Johnson
 D Mosca
 R Lachman
 B Wong
Consultants
 K J Searle
 J T Henshaw
Senior Associates
 P D Hudson
 T M Danjoux
 N M Arias-Alvarez
 S L Ramden
 K A Wolthers
Associates
 D A Vardy
 J A McCullan
 J D Alim
 K A Buttriss
 D G Friend
 K L Ennever
 W D Thomas
 A N Deo
 A M Mokhtar
 B P McGrath
 K A McLellan
 B M Balasubramanian
 C R Walsh

Campbelltown
 T: 02 4626 5077
 F: 02 4626 4826

Camden
 T: 02 4655 7121
 F: 02 4626 4826

Sydney
 T: 02 9233 1133
 F: 02 4626 4826

Liverpool
 T: 02 9601 5666
 F: 02 4626 4826

Oran Park
 T: 02 4601 1811
 F: 02 4626 4826

24 Hour Contact
 M: 0416.184 412

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After considering the literal interpretation of the relevant clauses within the relevant environmental planning instruments however this would not seem to be a strong argument and the conclusion reached in the Ashurst advice would seem to be preferred.

Advice

We have continued to assume for the purpose of this advice that the development as proposed by development application D2016-482 is properly characterised as extractive industry. We have also assumed for the purpose of the advice that the other background as detailed in the Ashurst advice is correct.

In particular it is to be noted that the majority of the land the subject of the proposal for extractive industry is zoned RE2 Private Recreation under the Dubbo LEP. The Land Use Table in the Dubbo LEP for land zoned RE2 Private Recreation relevantly provides as follows:

1. Objectives of zone

- *To enable land to be used for private open space or recreational purposes.*
- *To provide a range of recreational settings and activities and compatible land uses.*
- *To protect and enhance the natural environment for recreational purposes.*

2 Permitted without consent

Environmental protection works; Roads

3 Permitted with consent

Amusement centres; Aquaculture; Boat launching ramps; Boat sheds; Camping grounds; Caravan parks; Cemeteries; Charter and tourism boating facilities; Community facilities; Crematoria; Eco-tourist facilities; Educational establishments; Entertainment facilities; Environmental facilities; Food and drink premises; Function centres; Information and education facilities; Jetties; Kiosks; Mooring pens; Moorings; Places of public worship; Recreation areas; Recreation facilities (indoor); Recreation facilities (major); Recreation facilities (outdoor); Registered clubs; Signage; Tourist and visitor accommodation; Veterinary hospitals; Water recreation structures; Water reticulation systems; Wharf or boating facilities

4 Prohibited

Advertising structures; Bed and breakfast accommodation; Farm stay accommodation; Pubs; Any other development not specified in item 2 or 3."

It is to be noted that neither agriculture nor extractive industry is a use identified in the Land Use Table for the zone as being permitted without consent or permitted with consent and therefore use of the land in this zone for agriculture or extractive industry is prohibited under the Dubbo LEP as it is "Any other development not specified in item 2 or 3". It is noted however that development for the purpose of Aquaculture is permitted with consent.

The note to the Land Use Table states that "*A type of development referred to in the Land Use Table is a reference to that type of development only to the extent it is not regulated by an applicable State environmental planning policy*". The note thereafter identifies the Mining SEPP as a State environmental planning policy that may be relevant to development on land to which the Dubbo LEP applies.

Clause 1.9 of the Dubbo LEP then relevantly provides:

"(1) *This Plan is subject to the provisions of any State environmental planning policy that prevails over this Plan as provided by section 36 of the Act.*"

Section 36 of the *Environmental Planning and Assessment Act 1979* ("EPA Act"), to which clause 1.9 refers relevantly provides:

"(1) *In the event of an inconsistency between environmental planning instruments and unless otherwise provided:*

(a) *there is a general presumption that a State environmental planning policy prevails over a local environmental plan or other instrument made before or after that State environmental planning policy, and*

(b) *(Repealed)*

(c) *the general presumptions of the law as to when an Act prevails over another Act apply to when one kind of environmental planning instrument prevails over another environmental planning instrument of the same kind.*

(2), (3) *(Repealed)*

(4) *Nothing in this section prevents an environmental planning instrument from being expressly amended by a later environmental planning instrument, of the same or a different kind, to provide for the way in which an inconsistency between them is to be resolved."*

The Mining SEPP is a State environmental planning policy that clause 1.9 of the Dubbo LEP and section 36 of the EPA Act applies to so that the Mining SEPP, if it applies to the land, prevails over the Dubbo LEP in the event of any inconsistency between them.

Clause 3A of the Mining SEPP confirms that Council is the consent authority for the purposes of the Mining SEPP and clause 4 confirms that the Mining SEPP applies to "the State".

The important clause of the Mining SEPP is clause 7 which relevantly provides:

"(3) Extractive industry Development for any of the following purposes may be carried out with development consent:

(a) extractive industry on land on which development for the purposes of agriculture or industry may be carried out (with or without development consent),"

The matter to be determined is whether or not the land the subject of this proposal which is zoned RE2 Private Recreation under the Dubbo LEP is "*land on which development for the purposes of agriculture may be carried out (with or without development consent)*".

There is no definition for agriculture in the Mining SEPP. Clause 3 of the Mining SEPP however confirms that a word or expression used in the Mining SEPP has the same meaning as in the standard instrument prescribed by the *Standard Instrument (Local Environmental Plans) Order 2006* ("**Standard Instrument**") unless it is otherwise defined in the Mining SEPP.

The definition for agriculture as prescribed by the Standard Instrument, consistent with the definition as provided in the Dubbo LEP, is:

"agriculture means any of the following:

- (a) aquaculture,*
- (b) extensive agriculture,*
- (c) intensive livestock agriculture,*
- (d) intensive plant agriculture.*

Note.

Part 6 of the Plantations and Reafforestation Act 1999 provides that exempt farm forestry within the meaning of that Act is not subject to the Environmental Planning and Assessment Act 1979."

Accordingly, so it is argued in the Ashurst advice, as aquaculture falls within the meaning of agriculture as defined and aquaculture is permissible on land in the RE2 Private Recreation zone the land the subject of the development application is land on which development for the purpose of agriculture may be carried out with development consent and therefore land upon which development for the purpose of extractive industry may be carried out with development consent because of clause 7(3)(a) of the Mining SEPP.

Focus has necessarily been placed on the definition of agriculture as outlined above and the words "*means any of the following*" within that definition. In particular focus has been placed in the Ashurst advice upon the word "any". The Ashurst advice focuses on undertaking the task of statutory interpretation of the definition and these words by giving the relevant words a literal interpretation by taking what is known as the literal approach. We respectfully agree with this approach.

The literal approach to ~~the~~ statutory interpretation was explained by Justice Higgins in the case of **Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28CLR 129** at 161-2 as follows:

"The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable."

In applying the literal approach it is recognised that the case of **Grey v Pearson (1857) 6HLC 61** at 106 placed a limitation on the approach when Lord Wensleydale said:

"I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no farther."

In undertaking the exercise of literal interpretation of the word "any" within the definition of agriculture we respectfully agree with the conclusion reached in the Ashurst advice that the natural and ordinary meaning of "any" is things in whatever quantity or number (that is "one or more, or some") of the types of development listed in paragraphs (a) – (d) of the definition of agriculture.

The definition of agriculture also is specific in stating that development for the purpose of agriculture "means" any of the types of development specified in paragraphs (a) – (d). The ordinary English meaning of the word "mean" as contained in the Macquarie Dictionary is expressed to be "to have in mind as an intention or purpose" or "to intend for a particular purpose".

In this way the definition of agriculture might be interpreted so that agriculture is intended to be for the purpose of one or more or some of the types of development specified in paragraphs (a) – (d) of the definition.

In this way it would seem to be intended by the definition of agriculture that it is to be development for the purpose of aquaculture or for the purpose of extensive agriculture or for the purpose of intensive livestock agriculture or for the purpose of intensive plant agriculture. It does not have to be all of the descriptions in subparagraphs (a) to (d). It need only be one of them.

Aquaculture is expressed in the Land Use Table for the RE2 Private Recreation zone to be permissible with consent. The Mining SEPP adopts the definition of agriculture as detailed above for the purpose of giving meaning to the word agriculture when used in the Mining SEPP. Accordingly having regard to the principles and reasons as detailed above it seems to us to be strongly arguable that when considering the meaning of development for the purposes of agriculture for the purpose of clause 7(3)(a) of the Mining SEPP it can be considered that agriculture means aquaculture so that development for the purpose of extractive industry may be carried out with development consent on land on which development for the purposes of aquaculture may be carried out. For this reason it is strongly arguable that it does not matter that agriculture, or indeed any of the other species of the definition of agriculture (apart from aquaculture), is not included within the Land Use Table for the RE2 Private Recreation zone as permitted without consent or permitted with consent.

As the principles of statutory interpretation as elicited in the Ashurst advice and cases above make clear the exercise to be undertaken is one of examining the particular language used in the particular statute or written instrument. In undertaking the task of the examination of the particular words in the Dubbo LEP and the Mining SEPP it seems to us to be strongly arguable that clause 7(3)(a) of the Mining SEPP applies so as to make permissible on land zoned RE2 Private Recreation development for the purpose of extractive industry.

Yours faithfully

MARSDENS LAW GROUP



DAVID BAIRD
Partner