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14 October 2021

Garry Styles
General Manager
Orange City Council

Dear Mr Styles,

Re: Advice with respect to modification application DA 432/2019(3) for solar farm at Lot 200 DP1194585, 643 Mitchell Highway, Orange

1. By way of introduction, we act for ITP Development Pty Ltd (**ITP**). ITP is the applicant with respect to the modification application DA 432/2019(3) relating to a solar farm at Lot 200 DP1194585, 643 Mitchell Highway, Orange (**Modification Application**).

2. We are writing to make representations on behalf of our client with respect to recent case law relating to the power to approve modification applications, and the relevance of this to the Modification Application.

3. In summary, the consent authority has the power to approve the Modification Application and to do so would be consistent with the judgment of *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177 (***Ku-ring-gai Council v Buyozo***).

4. We explain our advice in detail below.

Background

5. The following matters and approvals are of relevance to the modified development:

    a. The original development application DA 423/2019 sought consent for the construction and operation of an electricity generating works comprising a 5MW solar energy facility (**Original Application**).

    b. The Original Application was regionally significant development, pursuant to *State Environmental Planning Policy (State and Regional Development) 2011*. The Original Application comprised electricity generating works with a capital investment value of more than $5 million.

    c. The Western Regional Planning Panel (**WRPP**) granted a deferred commencement consent to the Original Application on 8 December 2020 (the **Original Consent**).

    d. Condition 1(b) of the Original Consent relevantly provides that the solar farm is to operate for a maximum period of 25 years from the date of occupation. Similarly, Condition 44 of the

Original Consent authorises the Electricity Generating Works (solar farm) to operate for a maximum period of 25 years from the date of occupation.

e. The Modification Application was lodged on 15 June 2021 and seeks to modify the Notice of Determination by amending Condition (1)(b) and Condition (44) of Part B, to extend the maximum period of the lifespan of the approved solar farm from 25 years to 35 years.

Legislation

6. Section 4.55(2) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**) states:

> *(2) **Other modifications** A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—*
>
> > *(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and*
> >
> > *(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and*
> >
> > *(c) it has notified the application in accordance with—*
> >
> > > *(i) the regulations, if the regulations so require, or*
> > >
> > > *(ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
> >
> > *(d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.*
>
> *Subsections (1) and (1A) do not apply to such a modification.*

7. Section 4.56 of the EPA Act is directed at modifications to development consents granted by the Court. Section 4.56(1) of the EPA Act relevantly states (with *emphasis* to illustrate where the provision differs from section 4.55(2)):

> *(1) A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with the regulations, modify the development consent if—*
>
> > *(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and*
> >
> > *(b) it has notified the application in accordance with—*
> >
> > > *(i) the regulations, if the regulations so require, and*

(ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and

(c) it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person, and

(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

Case law of importance

8. The NSW Court of Appeal recently delivered judgment in *Ku-ring-gai Council v Buyozo* in which it held that the power to modify a development consent only arises where the proposed modification changes the development itself.

9. By way of background:

   a. The appeal to the Land and Environment Court related to Ku-ring-gai Council's (**Council**) deemed refusal of a modification application to vary a condition of consent for the construction and use of a building for storage premises and commercial premises.

   b. Condition 30 of the development consent required $987,242.37 in the form of a monetary contribution imposed under section 7.11(1) of the EPA Act. Buyozo Pty Ltd (**Buyozo**) sought to reduce the contributions amount required under Condition 30.

   c. In the first instance, Pepper J of the Land and Environment Court upheld the appeal, approving the modification application and amending condition 30. Council then appealed the primary judge's decision.

   d. As the original consent for the development was granted by the Court under section 34(3) of the EPA Act by agreement of the parties in *Buyozo Pty Limited v Ku-ring-gai Council* [2018] NSWLEC 1206, rather than section 4.55(1A), section 4.56 regarding modification of a consent granted by the Court applied in this instance.

10. Upon appeal, the Court of Appeal considered several issues, including whether the primary judge had erred in deciding that condition 30 (regarding the payment of a contribution, which had already been paid) could be modified under section 4.55 of the EPA Act.

11. Basten and Payne JJA decided that condition 30 could not be amended under section 4.56 of the EPA Act, finding that as the modification proposed no change to the development, the provision could not be engaged. Section 4.56(1A) of the EPA Act requires the consideration of matters under section 4.15(1) "as are of relevance to the development". Basten and Payne JJA considered this wording to support the conclusion that a modification under section 4.56 is "*only available where some change is proposed with respect to the development for which consent was granted*".

12. Basten and Payne JJA relevantly stated (with *emphasis* added):

Secondly, although both sections speak of modifying a development consent, the conditions for the exercise of the power demonstrate that it is "the development to which the consent as modified relates" which is modified: s 4.56(1). The development (as modified) must be "substantially the same development" as that for which consent was originally granted: s 4.56(1)(a). Under s 4.55(1A)(a), the proposed modification is to be "of minimal environmental impact". To similar effect, in determining an application for modification the consent authority "must" take into consideration the matters referred to in s 4.15(1) "as are of relevance to the development". Because the proposed modification had no environmental, or any other, effects, that exercise was otiose. In fact, there was no proposal to modify or change in any way the development to which consent had been granted. The same building (which had already been completed) was to be used for the same purpose (which was its current use).

To say that the development proposed to be modified will be not merely substantially the same as, but identical with, the existing development, so that none of the factors identified in s 4.15(1) is engaged and the modification should therefore be granted, is to miss the point. The question of statutory construction is not answered by having regard to the circumstances of the particular case. The point is rather that s 4.56(1), read as a whole, demonstrates that a modification is only available where some change is proposed with respect to the development for which consent was granted. None was proposed in the present case, so that the power to modify was not engaged.

13. Similar reasoning was also applied in Preston CJ's decision regarding the absence of the primary judge's power to modify the development consent under section 4.56 of the EPA Act. Preston CJ considered that in order for section 4.56 to be operative, the modification must effect some change to the development.

14. Preston CJ referred to the "essential characteristic" of a development consent, which is that development consent can only prospectively and not retrospectively approve a development. That is to say, a development consent is to approve the "carrying out of development in the future". This similarly applies to conditions of consent. Accordingly, a condition under section 7.11 of the EPA Act can only be modified where the modification would require the "dedication of land or payment of a monetary contribution in the future". As such, Preston CJ found that condition 30 could not be modified because the condition had already been complied with by the Applicant, meaning the condition required no future action and had "no further work to do".

15. Also relevant is Preston CJ's consideration of sections 4.55 and 4.56 of the EPA Act. At [51] of the decision in *Ku-ring-gai Council v Buyozo*, Preston CJ stated "*… in relevant respects the power and the constraints on the exercise of the power in s 4.56(1) are similar to the power and the constraints on the exercise of the power in s 4.55(1A) or (2)*".

16. In considering the power to modify a consent under sections 4.55 or 4.56, Preston CJ also stated (with *emphasis* added):

The constraints on the exercise of the four powers vary between the powers and define the type of modification that can be effected by exercise of the powers. The constraints on three of the powers, s 4.55(1A), s 4.55(2) and s 4.56(1), indicate that the modification of the development consent sought needs to effect some change to the development the subject of the development consent, while the constraints on one of the powers, s 4.55(1), indicate to the contrary that no change to the development the subject of the development consent needs to be effected.

The most obvious indicator is that three of the powers are subject to the constraint that the repository of the power, the consent authority, is satisfied that the development to which the consent as modified relates is substantially the same as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all) (in s 4.55(1A)(b), s 4.55(2)(a) and s 4.56(2)(a)), while one of them has no such constraint (s 4.55(1)). This is an indicator that the modification of the development consent that is able to be made by exercising the three powers under s 4.55(1A), s 4.55(2) and s 4.56(1) must change in some way the development the subject of the development consent, while the modification of the development consent that is able to be made exercising the power under s 4.55(1) need not change the development the subject of the development consent.

These same three powers are subject to other constraints that also indicate that modification of the development consent under these powers must change in some way the development the subject of the development consent.

Before the power in s 4.55(1A) can be exercised, the consent authority must be satisfied that the proposed modification is of minimal environmental impact (s 4.55(1A)(a)). Only the carrying out of a development can have an environmental impact. Neither the grant of a development consent subject to conditions nor the modification of a development consent in themselves can have any environmental impact; it is only the carrying out of the development authorised by the development consent or the development consent as modified that can have any environmental impact. The precondition that the consent authority is satisfied that a proposed modification is of minimal environmental impact necessitates a comparison of the environmental impact of the development for which the consent was originally granted with the environmental impact of the development to which the consent as modified relates, and then an evaluation of whether any change in environmental impact can be described as "minimal". That comparison and evaluation can only be undertaken if the modification sought does effect some change to the development the subject of the development consent.

Before the powers in s 4.55(1A), s 4.55(2) or s 4.56(1) can be exercised, the consent authority must publicly notify the proposed modification and consider any submissions made concerning the proposed modification (s 4.56(1A)(c) and (d), s 4.55(2)(c) and (d), and s 4.56(1)(b) and (d)). These requirements for enabling public participation indicate that a modification that can be made by the exercise of these powers need to effect some change to the development the subject of the development consent. The public are interested in changes to the development that might result from the modification of the development consent, not mere changes in the terms of the development consent that do not effect any change in the development. For this reason, the power in s 4.55(1), which is limited to correcting a minor error, misdescription or miscalculation in the development consent, is not subject to the constraints to which the other powers in s 4.55(1A), s 4.55(2) and s 4.56(1) are subject, including the requirements to publicly notify the proposed modification and to consider any submissions made concerning the proposed modification.

17. The Court ultimately held that the power to modify a development under those provisions could only arise where there is some change proposed to the development the subject of the development consent (at [10]-[11], [52]-[65]).

18. The current position in law is that the power to modify a development only arises where there is some change proposed to the development itself. That is to say, a change must be affected to the

"development" with the scope of "development" defined pursuant to section 1.5 of the EPA Act to include matters such as:

(a) the use of land,

(b) the subdivision of land,

(c) the erection of a building,

(d) the carrying out of a work,

(e) the demolition of a building or work,

(f) any other act, matter or thing that may be controlled by an environmental planning instrument.

19. We note that "use" under s 1.5(1)(a) is not defined in the EPA Act. However, the Courts have consistently held that the inclusion of "use" in the definition of development brings all manner of activity or even inactivity into the statutory concept of development: *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1 at 21 to 22 per Gibbs J; *North Sydney Council v Ligon 302 Pty Limited* (1996) 185 CLR 470 at 477 per Brennan CJ, Dawson, Toohey McHugh and Gummow JJ. It is settled law that a person making a passive use of land does not "carry out" development for the purposes of the EPA Act: *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (No 2) (*1997) 42 NSWLR 641 at 643-644 per Hadley JA.

20. A change to the way the land is "used", or alternatively a change to an element of the development that is controlled in the planning instruments, is a change to the development that is capable of modification within a development consent. In this regard, the change to the lifespan of the solar farm is appropriately considered to be a change to the "development", as it extends beyond merely a change in the terms of the development consent. It constitutes a change to the active "use" of the land.

21. In addition to this, the situation in *Ku-ring-gai Council v Buyozo* is distinguishable from the present situation with the Modification Application. Specifically, we note the following points:

    a. our client is not trying to modify a condition imposed under section 7.11 of the EPA Act, in which case there may be an argument that the power to modify the application is not enlivened. Rather, the development itself being modified.

    b. the proposal seeks to effect a change to the development, that is, to extend the maximum period of the lifespan of the approved solar farm from 25 years to 35 years. Accordingly the development itself is being modified.

    c. the extension of the lifespan is a change to the development which is prospective in nature and is a modification in respect of which the public could make submissions.

22. Given the matters set out above, the Panel has the power to approve the Modification Application and to do so would be consistent with the judgment of *Ku-ring-gai Council v Buyozo* and the requirements pursuant to the EPA Act.

Substantially the same

23. To further assist the Council, we have undertaken a consideration of the extent of the changes - which are constrained by s 4.55(2)(a) "to require the development to which the consent as modified relates being substantially the same as the development for which consent was originally granted and before that consent as originally granted was modified".

24. As to the question of whether the modification is "substantially the same" as the consent approved under the Original Application, we consider that these issues are satisfactorily addressed in our client's letter dated 9 June 2021 accompanying the section 4.55(2) application (**ITP Letter**). In summary, the ITP Letter provides the following in relation to the proposed operational changes under Modification Application:

    a. there will be no change to the nature, scale or intensity of the use, which remains a 5MW solar energy facility. The longevity of the solar farm does not alter the physical form, character or use of the development;

    b. there will be no change to:

        i. the relationship between the development and the site and surrounds; or

        ii. the level of impact of the development; and

    c. based on the current strategic planning framework in relation to the site, surrounds and region, there is a low likelihood that the area will be released for urban development within the next 25-35 years.

25. In our opinion, the proposal is considered to be substantially the same development as the Original Consent in light of the requirements of s 4.55(2) of the EPA Act and the legal principles set out by Pepper J in *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3)* [2015] NSWLEC 75. We can provide further submissions in this regard if so required.

26. The test under s 4.55(2) of the EPA Act and requirement as per *Ku-ring-gai Council v Buyozo* that a modification application effect some change to the development are two distinctly different enquiries. As stated by Stein J in *Vacik Pty Limited v Penrith City Council* [1992] NSWLEC 8 and endorsed by the NSW Court of Appeal in *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468, the test under s 4.55(2) of the EPA Act focuses upon whether a proposed modification to a development is "*essentially or materially or having the same essence*". This exercise involves comparing the original and modified application and ensuring the modification application is substantially the same in light of the proposed change. In contrast, the decision in *Ku-ring-gai Council v Buyozo* highlights the requirement for a modification application to effect some change to the development in the sense that a consent authority may not grant consent to a modification application that proposes no change to a development.

27. The Modification Application both meets the requirements under s 4.55(2) of the EPA Act and is consistent with *Ku-ring-gai Council v Buyozo* in the sense that the proposed change is substantially the same development as the Original Consent while also effecting a change to the Original Consent through the modification to the operational lifespan of the solar farm.

Next steps

28. Now having the benefit of our advice, our client has instructed us to write to you with respect to the matters above for your consideration.

29. We respectfully request that any assessment by Council considers and responds to the matters set out in this letter.

30. Please contact the writer if you have any questions about this letter or require further information.

Yours faithfully,

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ANNEXURE A – LETTER FROM ITP TO COUNCIL

[#Insert letter#]