Allens Arthur Robinson

18 August 2010

ABN 47 702 595 758
Level 28
Deutsche Bank Place
Corner Hunter and Phillip Streets
Sydney NSW 2000
Australia
T +61 2 9230 4000
F +61 2 9230 5333
Correspondence
GPO Box 50
Sydney NSW 2001
Australia
DX 105 Sydney
www.aar.com.au

Andrew Driver
Hanson Construction Materials
Pty Ltd
Locked Bag 5260
Parramatta NSW 2124

Dear Mr Driver

Advice regarding conforming use rights
Premises: Central Coast Sands Quarry, Lot 33, DP 755246, Reservoir Road, Somersby

1. Introduction

We refer to our conferences on 16 June 2010 and 20 July 2010 and the brief provided to us by Insite Planning dated 2 July 2010.

We are instructed that Hanson Construction Materials Pty Ltd (***Hanson***) are currently seeking a lateral expansion of the sandstone quarry located on the Premises onto an adjoining parcel of land, and that this is currently the subject of a Part 3A application under the *Environmental Planning and Assessment Act* 1979 (***EP&A Act***). We understand that following lodgment of the Environmental Assessment for the Project, the Department of Planning raised concerns regarding the status of existing approvals for the Premises.

You have requested our advice on:

(a) whether the existing quarry operations at the Premises are the subject of conforming use rights; and

(b) whether there is a maximum specified depth for these rights.

For the purposes of this advice, we have relied on:

(a) the information set out in the report titled "Brief of Information (Information Pertaining to Request for Legal Advice)" (***Report***) dated 2 July 2010 and provided by Insite Planning to us on 5 July 2010, including the Annexures containing relevant documentation and correspondence.

(b) the information provided to us at the conferences with Hanson and Insite Planning on 16 June 2010 and 20 July 2010.

(c) the statements provided by Neil Catt (dated 27 July 2010) and James Davies (dated 6 August 2010).

2. Executive Summary

In our opinion:

(a) The Premises enjoys the benefit of conforming use rights for a clay and sandstone quarry. Notwithstanding the inability of Gosford City Council (***Council***) to locate the development consent for quarrying sandstone at the Premises, we consider that there is sufficient documentary evidence to establish the grant of consent.

(b) In addition, the repeated assertions by Council that development consents exist for quarrying sandstone at the Premises and Council approval to its extension enliven the operation of the presumption of regularity that the relevant consent exists.

(c) Conforming use rights for quarrying at the Premises are not subject to a maximum specified depth (applying the decision of the New South Wales Court of Appeal in *Vaughan-Taylor v David Mitchell-Melcann Pty Ltd* (1991) 25 NSWLR 580).

3. Background

(a) Zoning of the Premises

We understand from the letter from Council to Insite Planning dated 22 July 2010 that the land was subject to *Ordinance No 105 – Town and Country Planning – General Interim Development* (***Ordinance 105***). While we have been unable to review a copy of Ordinance 105 as Council is unable to locate it, we understand from information provided by Hanson and the statement of James Davies that the land was zoned Rural 1(b) and that extractive industry was a permissible use with consent in this zone. As such, our advice proceeds on this assumption.

Currently, the land is zoned 1(a) Rural (Agriculture) under the *Gosford Interim Development Order No. 122*. Extractive industry is a permissible use with consent in this zone.

"Extractive industry" is defined to mean:

> (a) the winning of extractive material; or
>
> (b) an undertaking, not being a mine, which depends for its operations on the winning of extractive materials from the land on which it is carried on, and includes any washing, crushing, grinding, milling, or separating into different sizes of that extractive materials.

"Extractive material" means "sand, gravel, clay, turf, soil, rock, stone or any similar substance".

We consider that the use of the Premises for quarrying sand and clay would fall under the above definition of "extractive industry" and as such is a permissible use in zone 1(a).

(b) Development consents for the Premises

On 2 May 1963, Council resolved to grant consent to the quarrying of clay on the Premises, subject to certain conditions.

The evidence also strongly suggests that consent was granted on 15 June 1962 for the quarrying of sandstone on the Premises.

We understand that Hanson and Insite Planning have made repeated requests to Council to search its records for development consent for the Premises as a sandstone quarry, and that the Council is unable to locate this document.

However, there is a substantial amount of documentation and correspondence dating from 1963 referring to development consents in existence for the Premises for a sandstone quarry. A chronology of relevant documentation and correspondence is set out at Annexure A to this letter.

In particular, the correspondence set out in Annexure A demonstrates that Council has repeatedly confirmed the existence of development consents for use of the Premises as a clay and sandstone quarry. This includes the letters from Council at items 3, 5 and 13 of Annexure A.

In response to a request for approval to expand the quarry, Council on 11 April 1995 again confirmed that approval was granted by Council for a quarry on the subject land in or prior to 1963" and that "the existing quarry is a conforming use for which previous approval has been granted by Council". Importantly, it determined that "Council has no objection to the extension of the quarry on Lot 33" subject to specified conditions.

(c) Use of the Premises

Aerial photographs dating from 1954, 1964, 1966, 1975, 1980, 1984, 1992 and 1995 provided in the Report furnish evidence of continuous quarrying operations on the Premises from the late 1950s. The aerial photograph dated May 1975 provides evidence of extensive works and cleared amenities on the Premises, indicating that quarrying activities were well established by this time.

Further, we are instructed that the Premises has been used continuously as a quarry since the 1960's. Council documents confirm that the operator of the quarry in the 1960's was Mr R W Wallent, followed by Mr Ron Mundy in 1971, Glendale Washed Sands in 1973 and Montoro Resources from 1983 (operating under the name Central Coast Sands Pty Ltd). Hanson (under the name Pioneer Concrete (NSW) Pty Ltd became the operator of the Premises from 1989. Production records dating from 1995 provided by Hanson provide additional evidence of the continuous use of the site as a sandstone quarry since that time.

4. Conforming Use Rights

In order to establish conforming use rights for the use of the Premises as a quarry, Hanson needs to show that:

1. The use of the Premises was lawful;[1]
2. The Premises has been continuously used as a quarry since the date that the conforming use rights are said to have arisen;[2]
3. There has been no expansion or intensification of the conforming use without consent since 3 February 1986.[3]

(a) Legislative provisions

Section 109 of the EP&A Act provides that:

109 Continuance of and limitations on other lawful uses

[1] EP&A Act, s 106(1); *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404

[2] EP&A Act, s 109(2)(e); s 109(3).

[3] EP&A Act, s109(2)(c).

(1) Nothing in an environmental planning instrument operates so as to require consent to be obtained under this Act for the continuance of a use of a building, work or land for a lawful purpose for which it was being used immediately before the coming into force of the instrument or so as to prevent the continuance of that use except with consent under this Act being obtained.

(2) Nothing in subsection (1) authorises:

(a) any alteration or extension to or rebuilding of a building or work, or

(b) any increase in the area of the use made of a building, work or land from the area actually physically and lawfully used immediately before the coming into operation of the instrument therein mentioned, or

(c) without affecting paragraph (a) or (b), any enlargement or expansion or intensification of the use therein mentioned, or

(d) the continuance of the use therein mentioned in breach of any consent in force under this Act in relation to that use or any condition imposed or applicable to that consent or in breach of any condition referred to in section 80A (1) (b), or

(e) the continuance of the use therein mentioned where that use is abandoned.

(3) Without limiting the generality of subsection (2) (e), a use is presumed, unless the contrary is established, to be abandoned if it ceases to be actually so used for a continuous period of 12 months.

Further, clause 42 of the *Environmental Planning and Assessment Regulations* (2000) requires that development consent be obtained for any enlargement, expansion or intensification of an existing use and that the enlargement, expansion or intensification:

(a) must be for the existing use and for no other use; and

(b) must be carried out only on the land on which the existing use was carried out immediately before the relevant date.

We note that the limitations in s 109(2) on enlargement, expansion or intensification of an existing use came into effect on 3 February 1986.[4] As such, Hanson only needs to establish that there was no enlargement, expansion or intensification of the existing use after this date.

(b) Presumption of regularity

The presumption of regularity is a principle of administrative law to the effect that when:

> "... an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act".[5]

Courts have recognised there is scope for the operation of the presumption of regularity to establish the grant of a requisite development consent even in a case where no direct evidence is available – for example, for reasons such as incomplete council records. In particular, the presumption of regularity has been applied in circumstances where existing use rights were asserted but there was no evidence, or only scant evidence, regarding the existence of a development consent relating to the land.

[4] *Environmental Planning and Assessment Amendment Act* 1985.

[5] *Knox County v Ninth National Bank* (1893) 147 US 91, cited by Griffith CJ in *McLean Bros & Rigg Ltd v Grice* (1906) 4 CLR 835 at 850.

For example, in *Manicaland Pty Ltd v Strathfield Council* [1997] NSWLEC 196, the central issue was whether consent had been granted to the Housing Commission of NSW to construct certain buildings as public housing. The applicant could not produce evidence of a development consent being granted, however it could point to actions which were taken by the Housing Commission in exercise of its statutory power, namely, the construction and use of the buildings as public housing, which depended for their regularity upon consent having been granted.

Bignold J cited the following formulation of the presumption of regularity in *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154:

> Where a public official or authority purports to exercise a power or to do an act in the course of his duties, a presumption arises that all conditions necessary to the exercise of that power of the doing of that act have been fulfilled (at 163 per McHugh J).

His Honour recognised that the applicant bore the onus of proving that development consent had been granted, but was assisted in discharging this onus by the presumption of regularity, which was ultimately determinative as there was no evidence to show whether consent was granted or not. In the circumstances of the case, Bignold J held that the presumption of regularity operated to presume that, in carrying out this development, the Commission had 'obeyed' the law and 'fulfilled the necessary conditions' by obtaining the requisite development consent from Council.

The presumption of regularity was also applied in a similar manner *Australian Posters v Leichhardt Council* (2000) 109 LGERA 343. In this case, there was strong circumstantial evidence that consent had been granted to a building on the land, as the relevant council had granted three consents in respect of the subject site on the "acknowledged basis" that the land enjoyed the benefit of existing use rights. In these circumstances, Bignold J inferred, in the absence of direct evidence that development consent had been granted, that the building had been constructed with development consent. Applying the presumption of regularity, his Honour stated that:

> In the present case, there is nothing in the evidence that could operate to displace or rebut that presumption and there is a ready explanation for the absence of direct evidence, namely that the council has not obtained, or searched the relevant file pertaining to the appeal site held by the council when it was the relevant consent authority for determining any development application made in respect of the appeal site.

Lloyd J also recognised the operation of the presumption of regularity in *Dosan Pty Ltd v Rockdale City Council* (2001) 117 LGERA 363, however considered that the scope of the operation of the principle is as follows:

> I would not, therefore, be willing to find that a presumption that a consent has been granted arises merely because occupants have used the land in a manner which required consent. Something more is required to give rise to the presumption. I would limit the application of the presumption of regularity as found in Australian Posters and its predecessor cases to closely analogous situations. That is, to cases where there is no direct evidence of a consent having been granted and a public official of public authority has subsequently done an act or exercised a power which depended for its validity upon a prior consent having been granted.

(c) Depth of conforming use rights

In the case of *Vaughan-Taylor v David Mitchell-Melcann Pty Ltd* (1991) 25 NSWLR 580, the New South Wales Court of Appeal considered the interpretation of the words "actually physically and lawfully used" in s 107 of the EP&A Act, the Court stated that:

> Certain things may be said about the operation of the paragraph. First, it refers to the "area" of use. In my opinion, it does not prevent the company in the present case digging a mine or quarry which is deeper than existed before the relevant date. The paragraph is directed to the lateral area of the land used: it does not, in such a case as the present restrict the cubic content of what is done (per Mahoney JA at 584).

As such, judicial authority suggest that there is no restriction on the depth of such rights in relation to the quarry,

(d) Application to facts

We consider that there is substantial evidence to support the existence of conforming use rights in relation to the Premises for use as a clay and sandstone quarry.

It is a well-recognised principle of law that an essential element of an existing use right is that the use be for a "lawful purpose".[6] Development consent for use of the Premises as a quarry was originally required under Ordinance 105 at the time the conforming use rights are said to have commenced. As such, Hanson must establish the grant of the requisite development consent to establish the lawfulness of use of the Premises.

First, notwithstanding the Council's inability to locate the development consent for sandstone quarrying at the Premises, we consider that it may be inferred from the relevant facts that the requisite development consent was granted. The Council Minutes and subsequent correspondence from Council outlined in Annexure A provide strong evidence of the existence of this consent. In particular, the statement by Council in its letter dated 11 April 1985 that it has "no objection to the extension of the existing quarry" furnishes strong evidence. In addition, the fact that the Department of Mineral Resources wrote to Hanson regarding *State Environmental Planning Policy 37 – Mines and Extractive Industries* (***SEPP 37***) requesting evidence of development consent, and no objection was subsequently raised under SEPP 37, also furnishes strong evidence the requisite consents were granted.

Further, we consider that the presumption of regularity would also apply in these circumstances to establish the grant of the requisite consent for the Premises. Indeed, the evidence in this case to support the inference that development consent was granted is much stronger than in the cases of *Manicaland* and *Australian Posters* cited above, where there was almost a complete absence of evidence of the requisite consents having been granted. Further, there is nothing in the evidence that would displace or rebut the presumption.

In addition, there is clear evidence to support the continuation of use of the Premises as a clay and sandstone quarry since the use was lawfully commenced in the 1960's, including the aerial photographs described above, production rates supplied by Hanson and the information set out in statement provided by Neil Catt. Further, these documents also suggest that there was no enlargement, intensification or expansion of the conforming use without consent after the applicable date of 3 February 1986.

Finally. in relation to the depth of conforming use rights, the case of *Vaughan Taylor* cited above confirms that the ambit of identical conforming use rights is not confined to the depth of existing operations, and there is no maximum specified depth in respect of the conforming use rights.

---

[6] EP&A Act, s 106(a); *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404.

5. Conclusion

Based on our assessment above, we conclude that on the facts provided to us, the Premises enjoys the benefit of conforming use rights for use as a clay and sandstone quarry. Further, we consider that these rights are not subject to a maximum specified depth.

Yours sincerely

Allens Arthur Robinson

Noel Hemmings QC
Noel.A.Hemmings@aar.com.au
T +61 2 9230 4848

Madeleine Ellicott
Lawyer
Madeleine.Ellicott@aar.com.au
T +61 2 9230 5869