

Our ref RF:2210182:klh

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Bruce Zhang
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c/o Jackson Environment and Planning

Dear Mr Zhang

**State Significant Development Application (SSD8660) - Kariong Sand & Soil Supplies
Response to proposed conditions of consent providing for positive covenant
Premises: 90 Gindurra Road, Somersby (Lot 4 of DP 227279)**

We act for Davis Earthmoving & Quarrying Pty Ltd, owner of the proposed Kariong Sand & Soil Supplies Facility.

We refer to Central Coast Council's letter of 9 February 2021 to the Department of Planning & Environment (**DPIE**) providing draft conditions of development consent.

1. Overview

The purpose of this letter is to request that DPIE decline Council's request to include the condition requiring registration of a restriction on title regarding undisturbed areas of threatened species habitat (**Disputed Condition**).

The Disputed Condition would be invalid as it does not reasonably and fairly relate to our client's development and would be unreasonable in the circumstances. In summary:

- 1.1 The Disputed Condition is expressly proposed to further a public policy of the Council (the future protection of an undisturbed area) and is not to mitigate any impact of the development. As a legal matter, it does not fairly and reasonably relate to the proposed development.
- 1.2 There are no circumstances justifying a departure from the accepted position of the courts that restrictions and covenants on the title to land are not generally appropriate or desirable. The Somersby Industrial Plan of Management and the existing planning scheme is sufficient for Council to regulate any existing or future use of the lands.

For these reasons, the Dispute Condition would not be appropriate and at law would be beyond power to impose. We request that the Department use its discretion to not include this condition in its recommended draft conditions to the Independent Planning Commission.

We have proposed an alternative way forward below.

2. Background

The relevant facts are as follows:

- 2.1 Davis Earthmoving & Quarrying Pty Ltd is the Applicant of State Significant Development application SSD-8660 which proposes to construct and operate a resource recovery facility at Kariong Sand and Soil Supplies at 90 Gindurra Road, Somersby.
- 2.2 The proposed development involves the expansion and upgrade of an existing resource recovery facility to enable the receipt, processing and storage of up to 200,000 tonnes per year of non-putrescible construction and demolition waste.

Plan of Management Somersby Industrial Park

- 2.3 The proposed development is situated within the footprint of the Plan of Management for Somersby Industrial Park (**SIP PoM**).
- 2.4 The PoM provides strategies for long term protection and management of threatened species and diversity.
- 2.5 The PoM identifies management zones at the rear of the Lot as containing *Prostanthera junonis* and *Hibbertia procumbens* habitat. Importantly, the proposed development does not disturb the management zones for the *Prostanthera junonis* and *Hibbertia procumbens* habitat.
- 2.6 Under the PoM, land that contains significant *Prostanthera junonis* and *Hibbertia procumbens* habitat is deemed a Level 1 Constraint. A Level 1 Constraint means the land cannot be developed for industrial use or adversely impacted by adjacent development (Table 3.1 of the PoM).

Council's recommendation

- 2.7 Council recommends the following condition be imposed (the Disputed Condition):

"An 88B restriction [under the *Conveyancing Act* 1919] that provides for biodiversity protection; and

An 88E positive covenant [under the *Conveyancing Act* 1919] to ensure implementation of the comprehensive Bushland Management Plan with a minimum 10 year timeframe that addresses the requirements of the Somersby Industrial Park Plan of Management."
- 2.8 The terms of the positive covenant proposed by Council are as follows:

"This area will be placed under a 'Public Positive Covenant' 88E of the Conveyancing Act 1919. This instrument must require the land to be managed under an approved Bushland Management plan for the conservation of all identified threatened species. The public positive covenant must be created to require the implementation of the Bushland Management Plan.

The public positive covenant must permit Council or its nominee to enter and inspect the site and carry out any works required under the Bushland Management Plan, at the owner's cost, if the owner fails to implement and maintain the site in accordance with the Bushland Management Plan as amended and approved by Council.

The public positive covenant must be prepared by Council's Solicitor at the cost of the registered proprietor.

The authority empowered to release, vary or modify the instrument is Central Coast Council."

- 2.9 The Council's stated purpose for the restriction on use and positive covenant is to provide for "the ongoing protection and management of retained high biodiversity land in the southern part of the property".
- 2.10 The PoM itself contains no requirements for a Bushland Management Plan in the relevant habitat management areas. It contains no matters to address in such a Plan.

3. Law on restrictions and/or covenants as conditions of consent

The legal test for a valid condition of consent (the **Newbury test**) is well accepted and is as follows:

- 3.1 the condition must be imposed for a planning purpose;
- 3.2 the condition must fairly and reasonably relate to the development proposed in the application; and
- 3.3 the condition must be reasonable.

(Newbury District Council v Secretary of State for Environment [1981] AC 578)

The Land and Environment Court has held that a condition imposed to further Council policy in relation to future public benefit, despite being a proper planning purpose, may not meet the requirement that the condition must "*fairly and reasonably relate to the development proposed in the application*".

By way of example, in *Dogild Pty Ltd v Warringah Council* [2008] NSWLEC 53 (the **Dogild case**) the Council imposed a condition on the development consent for the construction of a four-storey mixed residential and commercial development requiring the creation of a right of way to provide rear access to the development site and seven other adjoining and adjacent properties. The condition was in accordance with the public interest and a long-standing policy of the Council to create rear lane access to the properties to provide improved access for garbage and delivery vehicles.

The Court held that, while the condition had a clearly identifiable planning purpose, it *did not fairly and reasonably relate* to the development for which consent had been sought but was imposed to further the Council's policy of providing rear access to properties in the vicinity of the development site. It was for a purpose not particular to the development.

Further, the Land and Environment Court has consistently held:

- 3.4 The imposition of restrictive covenants is generally not necessary or appropriate (*MacDonald v Mosman Municipal Council* (1999) 105 LGERA 49) [7]-14].
- 3.5 The Court will not as a matter of public policy impose restrictive covenants where the law already adequately provides enforcement of the provisions of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*: *PDP (Darlinghurst Apartments) Pty Ltd v Sydney City Council* [2005] NSWLEC 41 (the **PDP case**)).
- 3.6 The principles above in respect of restrictive covenants has been applied in respect of positive covenants (*Antoine Street Holdings Pty Ltd v Parramatta City Council* [2019] NSWLEC 1060).

Accordingly, the imposition of restriction or covenants should only be imposed in rare or exceptional circumstances: *Lenland Property Developments Pty Limited v Council of the City of Sydney* [2013] NSWLEC 1060 [17]. For example, in line with the PDP case, a rare or exceptional circumstance may arise where there are no protections afforded by public policy for the protection of an area.

Turning to the SIP PoM itself:

- 3.7 Biodiversity is protected in part through the use of identified "management zones" for habitat which forewarn developers of specific development constraints for each zone (SIP Pom, p. 8).
- 3.8 The subject land contains zones for *Prostanthera junonis* and *Hibbertia procumbens* habitat. The "Management considerations" for land containing each of these zones state, in respect of management plans, only that a plan must be prepared prior to development proceeding on a lot (SIP PoM, pp. 45 & 46). There is not reference to, or requirement for, restrictions or covenants on title.
- 3.9 The reference to public positive covenants only arises in respect of voluntary measures proposed by a proponent and in the use of areas to offset impacts of development (cl. 5.4.3).
- 3.10 There is no requirement for any developer to prepare a Bushland Management Plan for *Prostanthera junonis* and *Hibbertia procumbens* habitat zones.

4. Application to the development

In the present case, the Disputed Condition is arguably imposed for a planning purpose, being "the ongoing protection and management of the retained high biodiversity land in the southern part of the property". That is, the ongoing protection and management of the area that is not disturbed by the proposed development.

However, as in the Dogild case, the Disputed Condition does not meet the second part of the Newbury test above. That is the Disputed Condition does not *fairly and reasonably relate* to the proposed development for which consent is sought. Instead, the condition is imposed to provide greater protection in future against the development of the protected area. It is imposed for a public purpose and is of no private benefit to the industrial development.

However, even if it were, it would not be reasonable in light of the Court's clear position in relation to restrictions on use and positive covenants. In particular:

- 4.1 The SIP PoM itself does not require the consent authority to impose the restriction on use and positive covenant in granting consent to the proposed development. It is sufficient for a management plan to be prepared prior to development proceeding. In fact, the issue of restrictions and covenants only arises in respect of voluntary offsets of impacts of development (see 5.4.3 of the SIP PoM).
- 4.2 The footprint of the proposed development does not contain *Prostanthera junonis* and *Hibbertia procumbens* habitat – our client is not relying on it as an offset area. Further, the proposed development of the waste facility does not benefit from the amenity provided by the biodiversity.
- 4.3 Any future use of the habitat would be constrained by the significant protections in the SIP PoM and the requirement to apply for and obtain development consent for future development. There is comprehensive protection at law to ensure any future development would require assessment of the impacts, and approval, before being carried out. The condition is contrary to good public policy. In contrast the proposed restrictions on title would be detrimental to the value of the land and deter future purchasers.
- 4.4 Further, Council has available its full range of enforcement powers under the EP&A Act to enforce compliance with the consent for land within the development. This includes a wide power of entry to industrial premises.

5. Way forward

As an alternative way forward our client would agree to a modified condition of consent (without any registration on title) requiring it to prepare a Bushland Management Plan.

Our client proposes the following condition as an alternative:

The proponent must engage a suitably qualified expert to prepare a Bushland Management Plan (BMP) for the facility. The BMP must have regard to the aims and objectives of the Somersby Industrial Plan of Management.

Please let me know if there is any further clarification that we can provide.

Yours faithfully,

FISHBURN WATSON O'BRIEN



ROSS FOX
Principal
Accredited Specialist Planning and Environment