

Please find following a submission to the public exhibition of
Modification requests for
Concept Plan (MP06_0318 MOD 4) and
Stage 1 Project Approval (MP08_0194 MOD 2)
Residential Development Kings Forest, Kingscliff

Henry James

12 March 2014

Introduction

Leda's proposed development of the site will clearly have a significant effect on the natural environment, including threatened species and their habitat. Without an offer of substantial mitigation / compensation, Leda faced a real and justifiable prospect of refusal. Leda made offers which amounted to compensation / mitigation. The most significant element of the proposed compensation / mitigation was dedication of land to OEH and Council for nature conservation purposes in perpetuity.

It is my contention that:

- The extent of land offered has been clearly and fairly defined in the approvals which are the subject of the applications for amendment.
- The approvals give Council the option of not accepting dedication if Council was not satisfied that the lands had been rehabilitated to an extent that ongoing management would not be burdensome.
- The approvals do not give the proponent the option of summarily withdrawing the offer of dedication (to Council or OEH).
- The approvals include provisions that prohibit the proponent from refusing to take reasonable steps to rehabilitate land proposed to be dedicated to Council.
- If long term management of the land proposed to be dedicated to Council is instead undertaken by the proponent (or some other unspecified person) it is highly likely the conservation outcomes will be significantly reduced.

Council will presumably accept dedication if state planning authorities ensure that environmental management plans required under the approvals are adequate to the task.

It is also my contention that any reduction in the area actually dedicated to public authorities should not occur without a full reassessment of overall environmental impact – i.e. impact without the mitigation / compensation originally offered. There is no such assessment in the applications for amendment (see section 6.0 of the application).

In the absence of a full reassessment of environmental impacts, the applications to amend conditions in a way that gives the proponent the option of reducing the dedication area should be refused.

It is unfortunate that consent authorities did not ensure that prior to issue of approvals:

- Instruments were in place to ensure that the proposed dedication of conservation land to Council occurred in a timely fashion.
- The proponent had submitted effective management plans governing the scope, quality and cost of rehabilitation of areas to be dedicated.

The PAC project plan approval and concept plan approval (mod2) have a number of conditions which seek to address these remaining tasks. A number of these are the direct and indirect subject of applications for amendment. These parts of the applications should also be refused.

Concept plan approval mod 4 application

Land Proposed to be Dedicated to the Office of Environment and Heritage – definition of Offset area.

I object to this amendment.

The areas proposed to be dedicated to OEH are offset areas. Leda's arguments to the contrary are rubbish.

Their arguments are that the term is a "misnomer" because:

(a) "At no stage has Project 28 indicated that the 'Future OEH Land' was to be dedicated as some form of offset or compensation for areas to be developed"

and

(b) "The 'Future OEH Land' was always offered by Project 28 on a voluntary basis".

As to part (a) of their argument, Leda's attempts to deny this characterization are incredible. (See opening paragraph in introduction to this submission).

As to part (b) of the argument, the claim that the offer was made voluntarily is (a) not relevant to the characterization of proposed dedications of land as offset areas and (b) does not give the proponent the power to now withdraw the offer and still have the benefit of the approval.

Land Proposed to be Dedicated to Tweed Shire Council – definition and consequent amendments to conditions B5 and C27

I object to this bundle of proposed amendments, including:

- the change to the definitions of "Land to be dedicated to Council in Future" and "Council dedicated land plan"
- the substitution of figure titled "Plan of proposed areas to be dedicated to Council with work areas" prepared by Landsurv Pty Ltd and dated 2 October 2012, Revision D with a new figure titled "Potential Council Land Plan With Work Areas prepared by Landsurv" dated 06.12.13, Revision E.
- Amendment to condition B5

They in effect amount to an attempt to amend the approvals to give the proponent the power to withdraw the part of the offer of mitigation in the applications that was the proposed dedication of land to Council.

Claims by the proponent that the offer to of land to Council was not a firm offer are rubbish.

Evidence that it is rubbish includes the application to be allowed to substitute figures that were part of the application and are now referenced in conditions of approval. These figures included the terms:

1. “Proposed areas to be dedicated to Council”
2. “Indicative areas and staging of land to be dedicated to Council”
3. “Environmental protection areas to be dedicated to Council or NPWS”.

The terms in paragraphs 1 and 2 above are in the figure referred to in the definition of “Land to be dedicated to Council in the future” (see dot point 2 above). The term in paragraph 3 above is in a number of other figures part of the applications and referenced in condition A2 of the concept plan approval (see more on this matter below).

Further evidence that the offer of dedication of land to OEH and Council was central to the weighing of environmental impact would likely be uncovered in an examination of the environmental assessments accompanying the applications for concept plan and project plan approvals and prior application for amendment to concept plan approvals approval. I do not have time to make this examination before the closing date of this exhibition, but will make further submissions on the matter as soon as possible.

Condition A2 Project in Accordance with Plans

I object to the amendment to condition A2 which seeks to substitute figures that were part of the application and are now referenced in the condition. The figures include the term “environmental protection areas to be dedicated to Council or NPWS”.

The amendment is part of a bundle that is an attempt to give the proponent the power to withdraw the part of the offer of mitigation in the applications that was the proposed dedication of land to Council and perhaps the OEH.

Conditions B5, and C29 – Dedication of land to Tweed Shire Council

I object to these proposed amendment³.

The aim of the conditions is presumably to clarify the timing of dedication of the various parts of the land proposed to be dedicated to Council, and to give Council the opportunity to make submissions to the DG on the documentation prepared by the proponent in response to the condition.

The proposed amendments remove any requirement for documentation referred to above.

The amendment to B5 proposes to give the proponent the power to summarily withdraw the offer of dedication. If the words of the amendment itself to not make this clear, the reasons given for the amendment certainly do (see the words “the main

purpose of this amended condition is to clarify that Project 28 Pty Ltd is under no obligation to dedicate the Potential Council Land to Council).

Condition B8 – Director General as moderator

I object to the amendment of this condition.

In my view it sensible for the DG to be given the proposed role, especially in view of the long history of unreasonable behaviour on the part of the proponent. If the proponent thinks that the condition is ultra vires, he can take the question of jurisdiction the court, where hopefully it will be dealt with at the same time as the questions of the dedications and the adequacy of the management plans.

Conditions B7 and C3

I object to the amendment of terms in these conditions (see reasons above).

Project Plan Approval Mod 2

5.1 Definitions – Land Proposed to be Dedicated to Tweed Shire Council

I object to the amendments proposed to the definition of “Land to be dedicated to Council in the future” and “Council Dedicated Land Plan”. I object also to the proposal to substitute a new version of the plan referred to in the definition of “Council Dedicated Land Plan”.

My reasons are set out in the part of my submission above on proposed identical amendments to the concept approval.

5.3 Definitions - Maintenance period.

I object to this amendment.

Contrary to the impression conveyed in the modification application there are numerous references to “maintenance” of environmental lands (as distinct from works undertaken in the “establishment period”). See for instance conditions A13, 39, 49 and 50 of the project approval. The term “maintenance phase” appears in condition 39 of the project approval. Maintenance of the environmental protection lands and buffers thereto is important, not least because there will be some time between the end of the establishment period and dedication to public authorities as a result of delays (reasonable or not) on the part of the proponent. Indeed, if no dedication occurs, under the provisions of B7 of the concept plan (mod 2) and A13 of the project approval the proponent will be liable for maintenance specified in the management plans in perpetuity.

The definition should not be deleted. Perhaps the references in conditions 39 and 49 to “maintenance phase” should be changed to “maintenance period”, or conversely, the definition title should be changed to “maintenance phase”.

5.4 Definitions - Land to be dedicated to the Office of Environment and Heritage

I object to the amendments proposed to the definition of the term “Offset area” for the reasons set out above in the part of my submission above on proposed identical amendments to the concept approval.

5.6 Condition A13 - Management and maintenance of environmental lands

I object to the proposed amendment.

It might be assumed that one aim of condition A13 was to quickly stop current land management practices that are inconsistent with the proposed future practices. Unfortunately, this can probably not be done by reference to management plans which have not been submitted and approved.

In the alternative, I suggest that a condition of consent should be attached (to either the concept plan or the project plan or both) that (a) requires the surrender of any existing uses for agriculture or forestry on land within the site zoned for environmental protection and buffers thereto, and (b) reminds the proponent that any works in these areas would require approval. Once the management plans are settled, the required approvals for works in these areas are in place.

In any event, part of the proposed amendment of this condition is objectionable. Uncertainty is created about the responsibility for the cost of initial weed control and other rehabilitation in a section of draft condition A13(1). The problem arises with the words “This obligation (to complete the relevant parts of the program of works set out in the management plans) does not apply in relation to any Potential Council Land if a Dedication Agreement is entered into between Council and the Proponent in respect of that land.” Unlike the provisions in relation to the dedication of land to OEH, there is no condition that requires proponent funding of rehabilitation works that have not been completed prior to dedication of the land. In relation to the dedication of land to OEH, these provisions are in condition C3 of the concept plan approval and are called up by draft amended condition A13(2) of the project approval. It needs to be made clear that the costs of works in the management plans for lands dedicated to council are the responsibility of the proponent, and that the costs of any uncompleted works cannot become a point of argument in negotiations regarding dedication.

5.7 Condition A15 – Director General as Moderator

I object to the proposed amendment for the reasons set out above in the part of my submission above on proposed identical amendments to the concept approval.

5.9 Condition 3 – Environmental Offset Areas

I object to the proposed amendments.

The proposed alternative scheme creates a number of unacceptable uncertainties, especially with regard to provisions for the land to be dedicated to council.

What is to be depicted in a plan for a “relevant contiguous area”? For instance, in the case of the wetland that has precinct 4 to the east and precincts 7 and 8 to the west, before earthworks in precinct 4 are to commence, will the whole of that section of wetland be surveyed for the required plan? Or just the eastern half (approximately)? Or just a thin sliver of the wetland along the western edge of precinct 4?

Uncertainties are also created because some of the proposed roads (or sections of) are not in numbered precincts. Significant earthworks are proposed for these areas and they are located in part on land zoned for environmental protection. This is particularly the case for parts of Kings Forest Parkway, but potentially also parts of Road 06, Road 23 and Road 26

In the material on display, paragraph 3(f) appears to not have been amended in a manner consistent with proposed definition changes to the terms “land to be dedicated to Council in future” and “Offset Area”.

5.14 Condition 49 – Environmental Audit Reports

I object to the changes to definitions of the lands, for reasons set out above.

I object to the changes proposed to the penalty for failure to comply with standards set out in the management plans. It is not unusual for development to be “held up” where there is a failure meet standards, e.g. the withholding of occupancy certificates. The alternative scheme proposed for ensuring compliance is a mess (see below) and likely to lead to long delays in achieving compliance, not least because it leaves consent authorities no option but to commence court proceedings to try and gain compliance. The condition requiring bonds for environmental restoration works may provide the solution, but only if it remains as an effective alternative (see below).

The proposed changes in part (3) of the amendment is inconsistent with part (2) as proposed for amendment. Part (2) requires submission of audits within 3 months of specified anniversaries. Part (3) proposes a timeframe for submitting audits (plus responses from the proponent to the audits) which is based on the time of the audits’ completion. What a mess!

In relation to paragraph (4), what happens if the rectification works that are identified in the audit take more than 3 months to bring to specified standards, even if rectification starts promptly?

5.15 Condition 50 – Bond for Environmental Restoration Works

I object to the proposed deletion of this condition.

Contrary to claims in the application, there is provision for a refund of the bond.

There may be need to amend the condition to better define the works and lands the bond applies to.

5.18 Condition 149 – Dedication of Land to OEH

I object to the proposed amendment to description of the land for reasons set out above.