Our reference Aaron Gadiel 32611146
Direct line +61 2 9931 4929
Email aaron.gadiel@gadens.com
Partner responsible Aaron Gadiel

gadens

Gadens Lawyers
Sydney Pty Limited
ABN 69 100 963 308

77 Castlereagh Street
Sydney NSW 2000
Australia

DX 364 Sydney

T +61 2 9931 4999
F +61 2 9931 4888

gadens.com

30 March 2015

Privileged and confidential

Leda Developments Pty Ltd
Suite 14, Level 1, 46 Cavill Avenue
Surfers Paradise QLD 4217

By email: mgeale@ledaholdings.com.au

Attention: Michael Geale

Dear Michael

Your requests to modify the Kings Forest Part 3A approvals, MP06_0318 MOD 5 and MP08_0194 MOD 3

Overview

Issue

1 On 13 March 2015 the NSW Department of Planning and Environment (**the Department**) wrote to you with regard to one of the above requests (MP08_0194 MOD 3). It said:

> In relation to the Project Approval, the Department is not satisfied that the proposed modification is within the scope of section 75W of the *Environmental Planning and Assessment Act 1979*. A separate development application to Tweed Shire Council will need to be made and you are encouraged to consult with Council in relation to this matter.

2 You have asked for us to provide legal advice in answer to three questions:

(a) **Question 1:** If the concept plan approval is appropriately modified, will the Tweed Shire Council (**the Council**) have the power to grant development consent authorising the construction and use of the service station?

(b) **Question 2:** Is the requested modification of the project approval within the scope of section 75W of the *Environmental Planning and Assessment Act 197*9 (**the Act**)?

(c) **Question 3:** Is the Minister for Planning (**the Minister**) entitled to refuse to deal with the section 75W request on its merits?

Summary

3 In our opinion:

(a) The proposal for a service station/food and drink premises on the subject site was:

(i) part of the declared Kings Forest project; and

(ii) within the Part 3A stream,

when Part 3A was repealed on 1 October 2011.

(b) This particular Part 3A development **is** captured by the transitional regime set out in Schedule 6A of the Act.

(c) As a result, the development cannot be carried out unless the Minister for Planning (or delegate) has approved it

(d) The Council cannot lawfully:

(i) consider a development application; or

(ii) grant a development consent,

for a service stations and/or fast food outlet on the subject land.

(e) In the present circumstances, the only means of securing a merit assessment (and an approval) for the carrying out of this development is via a project approval.

(f) The requested modification of the project approval is plainly within the scope of section 75W of the Act.

(g) The Minister has a public duty to consider the section 75W request and either modify the approval or disapprove of the modifications. In making this decision, the Minister must consider the merits of the particular request.

Detailed advice

Facts

4 We understand and assume the relevant facts to be as follows:

(a) The Kings Forest land (**the overall site**) is located off the Tweed Coast Road, near Kingscliff, 15 minutes from the Gold Coast Airport.

(b) The overall site is owned by Project 28 Pty Ltd - a member of the Leda group of companies (which also includes Leda Developments Pty Ltd). For the sake of simplicity, any reference in this advice to 'you' includes Project 28 Pty Ltd.

(c) On 9 January 2007 the Minister formed an opinion under clause 6(1) of the *State Environmental Planning Policy (Major Projects) 2005* (**the SEPP**) that certain development on the overall site was development described in Schedule 2 of the SEPP. This document describes itself as the 'Record of Minister's Opinion'.

(d) The Minister has never changed or revoked this opinion.

(e) The letter dated 8 December 2006 from Planning Workshop (referred to in the Record of Minister's Opinion) is not relevant.

(f) An environmental assessment for the approval of a concept plan was duly submitted to the Department before August 2010.

(g) A concept plan approval was given on 19 August 2010 (**the concept plan approval**). The Department identifies the concept plan approval by the reference code '06_0318'.

(h) The concept plan approval has been modified on four occasions. The current consolidated approval is as per the document compiled by DAC Pty Ltd in December 2014 (provided by you to us).

(i) In general terms, the concept plan approval provides for approximately 4,500 residential dwellings, a town and neighbourhood centres, community facilities and the protection/rehabilitation of environmental land.

(j) When the concept plan approval was given, the then Minister also made a determination under section 75P(1)(b) of the Act that the particular stages of the project are to be the subject of Part 4 of the Act (**the further approvals determination**).

(k) Under the further approvals determination, all of the project is to be the subject of Part 4 of the Act, **except for** 'Stage 1' and precinct subdivision applications for precincts 17-24. This determination has not been modified or revoked. No new determination of this kind has been made.

(l) The overall site includes Lot 7 DP 875447 (**Lot 7**).

(m) When the concept plan approval was given, a precinct plan was adopted (MPS 2142 SK-105f August 2009) which divided the overall site up into 24 precincts.

(n) Part of Lot 7 was identified as precinct 1.

(o) The precinct plan that now applies to the site - under the modified concept plan approval (RPS Dwg Ref 113691-PSP-4b Plan No 04 Rev B 5 December 2013) - still identifies that same part of Lot 7 as precinct 1.

(p) A portion of precinct 1 is designated as 'employment land' by the concept plan that is identified in the modified concept plan approval (RPS Dwg Ref 113691-PSP-4b Plan No 01 Rev B 5 December 2013). This employment land is described as the **subject site** in this advice.

(q) On or soon after 28 August 2008 you applied for a project approval. The Department identifies this project approval application by the reference code '08_0194'. The application was accompanied by the letter from your town planning consultants, JBA (Vivienne Goldschmidt), dated 28 August 2008. This letter included 'attachment 7' which depicted a proposed service station and fast food outlet on the subject site.

(r) The Department issued revised environmental assessment requirements in relation to the project approval application on 23 December 2010.

(s) A project approval was given on 11 August 2013 (**the project approval**). The Department also identifies this project approval by the reference code '08_0194'.

(t) The project approval has been modified on two occasions. The current consolidated approval is as per the document compiled by DAC Pty Ltd in December 2014 (provided by you to us).

(u) In broad terms, the project approval is for:

(i) the subdivision of the Kings Forest site into ten 'development lots';

(ii) bulk earthworks and civil works;

(iii) the construction of a rural supplies building on the subject site; and

(iv) the subdivision of precinct 5 into 376 residential lots (including associated subdivision works).

(v) You have made requests to the Minister - under section 75W(2) of the Act - for the modification of the concept plan approval and the project approval. The Department identifies these two requests as 'MOD 5' and MOD 3' respectively.

(w) The purpose of these requests is to approve the carrying out of works for a 'service station' (including 'food and drink premises') on the subject site, in lieu of the rural supplies building.

(x) The substance of the request (and supporting information) is accurately set out in the report titled 'S75W Modification to MP06_0318 & MP08_0194' dated December 2014 prepared by Planit Consulting Pty Ltd.

(y) The subject site is zoned '2(c) urban expansion' and is within the local government area of the Council.

(z) No part of the intended Kings Forest development is or has been declared to be state significant development or state significant infrastructure by an order of the Minister under the post-Part 3A regime.

(aa) A service station/fast food outlet are not exempt or complying development under the *Kings Forest Development Code* in force under the concept plan approval.

5 Please tell us if any of the above facts or assumptions are not correct, as it may change our advice.

Question 1 **If the concept plan approval is appropriately modified, will the Council have the power to grant development consent authorising the construction and use of the service station?**

6 There are two aspects to this question:

(a) Firstly, whether the development of the service station and

any associated food and drink premises is part of a 'transitional Part 3A project'.

(b) Secondly, if it is a transitional Part 3A project, whether the Council would have the power to deal with a development application for that development under Part 4.

Whether the development is part of a 'transitional Part 3A project'

7 Part 3A has been generally repealed, however, its provisions continue in force (with some modification) for 'transitional Part 3A projects' (clause 3(1) of Schedule 6A of the Act).

8 The Kings Forest development became a Part 3A project on 9 January 2007 when the Minister formed the required 'opinion' under clause 6(1) of the SEPP. The Record of Opinion defined the development as follows:

> Creation of a **residential community** (including subdivision) providing a range of residential dwelling types, an aged care facility, educational facilities, a village centre, a church, **a service station**, a golf course and club house, a neighbourhood centre and a regional community facility, **generally** as described in letters dated **17 November 2006** … from Planning Workshop Australia to the Department of Planning (bold added).

9 The cited 17 November 2006 letter said that:

> It is intended that the draft Concept Plan for the site **will provide a "broad brush" indication** of the neighbourhood structure … and **possible uses** for the site. …. The range of uses to be considered during the drafting of the draft Concept Plan **include**: … **A Service Station** (bold added)…

10 In our opinion, the 'residential community' in the Record of Opinion plainly includes a service station. Given that:

(a) the 'residential community' is only 'generally described' and is defined in 'broad brush' terms;

(b) the list of specific land uses is plainly not exhaustive (noting, for example, that the word 'include' is used); and

(c) food and drink premises (which include take away food outlets, cafes and milk bars) are a standard feature of residential communities,

we consider that the reference to 'residential community' within the Record of Opinion includes a reference to food and drink premises.

11 Accordingly, in our view, the development that you envisage for the subject site is part of the 'project' that was brought under the Part 3A scheme on 9 January 2007.

12 However, not every project that was the subject of Part 3A became (or still is) a **transitional** Part 3A project.

13 In this regard, the Minister's further approvals determination (of 19 August 2010) had the effect that parts of the project ceased to be 'a project to which Part 3A applied' (under section 75P(1)(b)).

14 As a consequence, those parts of the project are **not** now part of a transitional Part 3A project (clause 6 of Schedule 6A of the Act).

However, the development of the subject site **was not included in the further approvals determination**. We say this because the further approvals determination explicitly carved out (and did not apply to) 'Stage 1'. This was defined (in the concept plan approval given at the same time, in the same instrument) to be:

> development described in major project application number MP_08194.

15 The JBA letter that accompanied that project application (dated 28 August 2008) said that:

> The Project Application involves:
>
> - a service station and associated workshop and shop; and
> - premises for a fast food outlet
>
> The location, size and associated access and parking for the facilities are detailed on the plan at Attachment 7.

This makes it clear that the project application (and therefore 'Stage 1') included a proposal for the service station and food and drink premises on the subject site.

16 In short, while some parts of the project ceased to be covered by the general provisions of Part 3A on 19 August 2010, we believe that the proposal for a service station/food and drink premises was still firmly within the Part 3A stream when Part 3A was repealed on 1 October 2011.

17 Additionally, we consider this particular Part 3A development to be captured by the transitional regime set out in Schedule 6A of the Act. We say this for the following reasons:

(a) the Kings Forest is the subject of a concept plan approval (clause 2(1)(b) of Schedule 6A);

(b) environmental assessment requirements for approval to carry out the project were notified on 23 December 2010 - within two years of the relevant repeal date (clause 2(1)(c) of Schedule 6A); and

(c) environmental assessments (for both an approval to carry out the project and for approval of a concept plan) were submitted before the relevant Part 3A repeal date (clause 2(1)(d) of Schedule 6A).

18 In reaching this conclusion we have considered the exclusions from clause 2(1) of Schedule 6A, and formed the view that these exclusions do not apply. In particular, while some parts of the project ceased to be a Part 3A project before the repeal date (clause 2(6)), the balance of the project was still under Part 3A, and has become a transitional Part 3A project (clause 2(4)).

19 While we consider the legal status of the service station/food and drink premises to be clear, our view is only reinforced by clause 2(5) of Schedule 6A, which says:

> A transitional Part 3A project **extends** to the project as varied by changes to the Part 3A project or concept plan application, to the concept plan approval or to the project approval, whether made before or after the repeal of Part 3A (bold added).

20 This text identified that, in **addition** to the scope defined when the project is first brought under Part 3A (as per the Record of Opinion), there are at least four different ways in which the scope of the project may be **extended**:

(a) changes to the project application;

(b) changes to the concept plan application;

(c) changes to the concept plan approval; and

(d) changes to the project approval.

21 Additionally, we believe that the use of the word 'extends' makes it clear that subsequent changes to the scope of a project may broaden what is to be regarded as the Part 3A project, but do not narrow it. So the fact that the project approval does not now include the service station or fast food outlet on the subject site does not mean that that part of the 'project' that was originally brought under Part 3A is no longer captured by that scheme.

Whether the Council would have the power to deal with a development application

22 Since we consider that the development of a service station and fast food outlet on the subject site **is** a transitional Part 3A project, it follows that we consider that Part 3A continues to apply in relation to that development (under clause 3(1) of Schedule 6A of the Act).

23 This means that section 75D of the former Part 3A provisions of the Act applies:

> **75D Minister's approval required for projects**
>
> (1) A person is not to carry out development that is a project to which this Part applies unless the Minister has approved of the carrying out of the project under this Part.

24 This meaning of this provision is clear. Once a project is declared under Part 3A, the development cannot be carried out unless **the Minister** has approved it (*Waters Lane v Sweeney* [2007] NSWCA 200 [140]; *H & J Standen Pty Ltd v Minister for Planning and Infrastructure* [2014] NSWLEC 113 [6]).

25 This provision applies even after part of the project has been approved. It even applies in relation to components of the development that are captured by a declaration of the project as a Part 3A project, **but not sanctioned by a project approval**. This is, in our view, made very clear by section 75R(1):

> Part 4 and Part 5 do not, except as provided by this Part, apply to or in respect of an approved project (**including the declaration of the project as a project to which this Part applies and any approval or other requirement under this Part for the project**) (bold added).

26 The operation of section 75R(1) was explained by Justice Preston, the Chief Judge of the Land and Environment Court, in *Rivers SOS Inc v Minister for Planning* [2009] NSWLEC 213:

> The words in brackets cause the term "approved project" to include not only the project as approved, but also things that are not the project itself but relate to the process of approval of the project, **such as the**

> **declaration that the project is a project to which Pt 3A applies** and **the approval of the project by the Minister**. The extension of the meaning of "approved project" … must be taken to be deliberate and intended to extend the exclusory operation of subs (1) in respect of Pt 4 … of the Act (bold added).

27 The legislative purpose is clear. When:

(a) the Minister had taken the necessary action to bring a proposed project under Part 3A; and

(b) the Minister subsequently approves only part of the declared project,

local councils are not free (in the absence of some other step by the Minister) to approve the parts of the project that the Minister did not approve.

Such an action by a local council would be an intolerable infringement on the prerogatives of the Minister under Part 3A. (A potential example of where a Minister and a consent authority were in such a conflict is described in *GPT RE Limited v Belmorgan Property Development* [2008] NSWCA 256, see [12]-[13] in particular.)

28 As a direct result of the operation of section 75D(1) and section 75R(1), we do not believe that the Council could lawfully:

(a) consider a development application; or

(b) grant a development consent,

for a service station and/or fast food outlet on the subject land.

Summary of answer to question 1

29 In our view:

(a) You are unable to take the action suggested by the Department. That is, you are unable to make a development application to the Council to secure approval to carry out the service station/food and drink premises development on the subject site.

(b) In the present circumstances, the only means of securing a merit assessment and an approval for the carrying out of this development is via a project approval.

Question 2 **Is the requested modification of the project approval within the scope of section 75W of the Act?**

30 Section 75W is the provision in the former Part 3A scheme that allows for the modification of project and concept plan approvals.

Application of section 75W after the repeal of Part 3A

31 Section 75W continues to apply in relation to transitional Part 3A projects:

(a) under clause 3(1) of Schedule 6A for project approvals; and

(b) under clause 3C(1) of Schedule 6A for concept plan

approvals.

32 We see no basis to infer that the scope of section 75W is any different than would have been the case if the former Part 3A provisions were still generally in force.

33 Any doubt on this point is eliminated by clause 2(5) of Schedule 6A. This provision expressly contemplates changes to a project approval being made after the repeal date of Part 3A. It says:

> A transitional Part 3A project extends to the project as varied by changes to the Part 3A … project approval, **whether made before or after the repeal of Part 3A** (bold added).

Conventional section 96 requirements do not apply

34 Unlike section 96 (the provision that applies to development consents under Part 4), there is no requirement in section 75W that any modifications sought or approved in relation to a development be 'substantially the same'.

35 Furthermore, the implication in section 96 that a modification to a development must not be a 'radical transformation' does not arise in section 75W.

36 This is because the bar on alterations that make radical transformations arises from the use of the word 'modify' in section 96: *Transport Action Group Against Motorways Inc v Roads and Traffic Authorit*y [1999] NSWCA 196.

37 While section 75W uses the word 'modify', the provision actually gives 'modification of approval' a special meaning that is different from its dictionary meaning. That is, it means:

> **changing** the terms of a Minister's approval (bold added).

38 In *Barrick Australia Ltd v Williams* [2009] NSWCA 275 the Court of Appeal majority confirmed that the previous law, in relation to section 96, preventing 'radical transformation' does not arise under section 75W.

Boundaries to the use of section 75W

39 However, there are boundaries to the application of section 75W.

40 In *Barrick* (at [38]–[42] and [53]), the Court of Appeal made it clear that section 75W implicitly obliges the Minister to be satisfied that a request **is** for a 'modification' (that is, is a change to the terms of a Minister's approval as per section 75W(1)).

41 This power was one for the Minister (or delegate) to exercise, not the courts. One reason for this arises from the difficulties (and potential controversies) inherent in deciding precisely what a 'project' is. The majority said (at [52]):

> [T]he very concept of a **project** is amorphous in a sense which is not true of an object, such as a car. Although there will be circumstances in which it is not clear which descriptor applies, it is usually possible to distinguish between a modified vehicle and a replacement vehicle. **By contrast**, a **project** is, at least in part, a **process** and may be characterised or described **from a variety of different perspectives** (bold added).

42 For this reason, the Court majority said (at [50]) that it was of 'little assistance' to attempt to ask whether a project was a new **or** changed project.

43 In *Meriton Property Services v Minister for Planning and Infrastructure* [2013] NSWLEC 1260 two commissioners of the Land and Environment Court considered this statement and observed that:

> We accept that some **changes** to a proposal … might be so **extreme** as to fall outside the concept of modification [under section 75W]. For example, to give an instance that is quite clearly fanciful … if there were to be an application for an Olympic swimming pool in the upper Hunter Valley granted consent pursuant to Pt 3A, it would be quite clearly absurd to deal with an approval modification application to turn it into an open cut coal mine (bold added).

44 When a decision is made by the Minister (or delegate) that a given request falls within the scope of section 75W, there are only limited opportunities for judicial review. The courts will only intervene if they are convinced that the Minister's view 'was not reasonably open on the facts'. That is, the decision was manifestly unreasonable, or so unreasonable that no authority having the power could properly consider the decision to be a reasonable exercise of the power (*Hill Top Residents Action Group Inc v Minister for Planning* [2009] NSWLEC 185 [101]; *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50 [39]). There must be a plausible justification for the decision (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 290)

45 This gives the Minister a wide degree of latitude in deciding whether section 75W applies, safe in the knowledge that the mere fact that others may have a different opinion is not, in itself, a ground for legal challenge.

46 Furthermore, the majority in *Barrick* said (at [53]):

> … [T]he defined phrase [in section 75W(1)] means "changing the terms of an approval to carry out a project under this Part". Although that is defined to include changing a condition of the approval, **there is no clear dividing line between that which may constitute a condition and that which may constitute an element of the underlying project** (bold added).

47 In our view, this makes it clear that a request to modify will still be within the scope of section 75W **even if it seeks to change an element of the underlying project**. However, the Court majority offered some guidance ('in the abstract') as to the context for the Minister's decision about the application of section 75W.

48 The Court majority observed when an application for a project approval is made, it is required to undergo environmental assessment and public consultation. This same process does not apply for a modification. It is clear that the modification of an approval was something intended to have limited environmental consequences beyond those which had been the subject of assessment. However, the Court majority also observed that it **cannot** be said that only modifications which properly required no further environmental assessment were envisaged.

***An example of the application of* Barrick**

49 *Meriton Property Services* provides a useful case study. In this case,

the Land and Environment Court considered a section 75W modification request in relation to a project approval for a large-scale mixed use development. The requested change included:

(a) an increase in apartment numbers from 233 to 286;

(b) an increase in serviced apartment numbers from 302 to 337;

(c) an increase in the height of the two buildings that comprise the development from:

(i) 29 storeys to 38 storeys; and

(ii) 29 storeys to 33 storeys;

(d) a 13.9 per cent increase in gross floor area (from 45,148 square metres to 51,426 square metres);

(e) an increase in car parking from 508 spaces to 573;

(f) a reconfiguration of car parking so that it is no longer fully contained in five basement levels, but also would be located in three above ground podium levels.

50 This matter was a merit appeal initiated by the proponent (not judicial review). This meant that the Court was standing in the shoes of the Minister, and exercising the discretion that the Minister would have had when initially dealing with the matter.

51 The Court determined that these changes were not so extreme as to fall outside the concept of modification under section 75W. The Court considered (at [71]) that the impacts arising from these alterations were, at worst, very minor and may have been potentially positive. The Court concluded that the requested changes fell within the scope of section 75W (and then, as part of its merit consideration, determined that they were acceptable and approved them).

Application of* Barrick *to the present case

52 In our view, the proposed change to the project approval plainly falls within the scope of section 75W. We say this based on our consideration of the environmental consequences that might arise if the request is approved. Our view is as follows:

(a) The floor space of the service station/food and drink premises would be 2,026 square metres, a reduction from the 2,036 square metres of the approved rural supplies building. The development is sited and designed so that no adverse impacts are likely in relation to the amenity of adjoining properties or the physical environment. A coastal themed architectural design and landscaping solution has been proposed for the subject site. There are no alterations prospered to any of the already approved measures regarding vegetation removal, revegetation/rehabilitation or environmental/buffer management. These factors suggest that the impact of the changes to the planned building on the site are likely to be neutral or improved.

(b) The number of car parking spaces will be reduced to 71 spaces from the approved 135 spaces for the rural supplies building. According to the May 2013 Director-General's

assessment report, the 135 spaces reflected 'the worst case scenario for any type of shop or retail development'. The reduced number is consistent with a modified development with reduced traffic demands. There is no impact on the function of the Tweed Coast Road. The proposal remains consistent with the requirements regarding the Tweed Coast Road and associated upgrades already in place under the project approval. This indicates the impacts of the modification in relation to parking and traffic are likely to be neutral or improved.

(c) The extent of earthworks in precinct 1 will not change (that is, they will be as per the existing project approval).

(d) The rural supplies building only formed a relatively minor component of the project approval. Among other things, the approval was for:

(i) Bulk earthworks across the overall site for the purposes of flood protection and stormwater management.

This generally involved the lowering of levels in precincts in the east of the site in order to provide fill for the western precincts. It was anticipated that up to 360,000 cubic metres of imported fill material might be required within the western balance site to achieve the designated flood levels for residential development.

(ii) The subdivision of precinct 5 and the creation of 376 residential lots with associated subdivision works.

The environmental consequences of development that was the subject of assessment in the grant of the original approval was, in our view, significant. In the original approval, the development on the subject site formed only a very minor component of impacts of the overall development. It is plain to us that any other variations in impacts on the subject site are minor and will be dwarfed by the impacts in the original project approval.

53 There may be other environmental consequences from the change of use from 'rural supplies building' to service station/food and drink premises. However, we do not see how that change can be 'so extreme' that it places the modification outside the scope of the section 75W request.

54 Our view is only reinforced by the circumstances in which the project approval was given. The May 2013 assessment report makes it clear that at the time that the project approval was given, the actual use of the building was unknown. The report says (on pages 42-44):

> As the actual tenancy of the building is unknown, the department and council were concerned that there was insufficient information regarding the final use of the rural supplies development to enable a thorough assessment of carparking (customer, staff, delivery vehicles), servicing (no. and size of truck movements), access (conflict between service vehicles & customers) and environmental controls (eg. storage of hazardous materials). Council objects to the department recommending approval to the development without knowing the true nature of the development and whether car parking is adequate on site. …

> The department is satisfied that, subject to the design modifications above, the proposed building and landscaping may be approved, subject to conditions. However, as the final tenancy of the building is unknown, separate development consent must be obtained for the first use of the building and the hours of operation, service delivery vehicle arrangements and any external displays and signage.

This open-endedness is embodied in the project approval as condition 100. Clearly the project approval was granted in the knowledge that there was, at that time, a lack of certainty as to the precise impacts of the development of the subject site. The project approval was given in any event.

55 There can be no parallels with the hypothetical example offered by the commissioners in *Meriton Property Services* (see paragraph 43 above) where a proposed change involved the replacement of one land use (an Olympic swimming pool) with another land use that bore no relationship to the first (an open cut coal mine). In the present case, there is a clear relationship between the approved development the subject site, and the proposed modified development.

56 In short, in our opinion, the environmental consequences of the proposed changes are not so great that they can be regarded as being outside the scope of section 75W.

Question 3 **Is the Minister entitled to refuse to deal with the section 75W request on its merits?**

57 The Minister has the discretion to deal with a modification request by either:

(a) modifying the approval (with or without conditions); or

(b) disapproving the modification,

(under section 75W(4) of the Act).

58 In our view, so long as the request falls within the scope of section 75W, there is no option for the Minister (or delegate) to refuse outright to deal with the request.

59 Furthermore, it is not open to the Minister (or delegate) to disapprove the modification without first considering the merits of the modification. The Minister (or delegate) must not shut his/her ears to an applicant who wishes to make representations about the particular circumstances of their request, nor refuse to listen to anyone with something new to say (*Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634).

60 Accordingly, in our view:

(a) the Minister has a public duty to consider the section 75W request and either modify the approval or disapprove of the modifications; and

(b) in making this decision, the Minister must consider the merits of the particular request.

We trust that this advice is of assistance.

Please do not hesitate to contact me on (02) 9931 4929 if you wish to discuss this advice.

Yours sincerely

Aaron Gadiel
Partner
Accredited Specialist Local Government and Planning Law