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**Attention:** Darryl Anderson

Dear Darryl

**Advice re status of the Concept Plan approval at Kings Forest and the *Kings Forest Development Code***

You have asked us to provide advice regarding the concept plan approval at Kings Forest and the *Kings Forest Development Code (KFDC)*. Specifically, you have asked us whether that concept plan approval and the KFDC are the **principal planning controls** regulating land use at Kings Forest.

**Summary advice**

In our opinion:

- Any development application for the Kings Forest land cannot be the subject of development consent unless it meets any standards or requirements (including non-numerical requirements) set out in the concept plan approval.
- Condition C2 of schedule 2 of the concept plan approval imposes a requirement that any development application for:
  - residential subdivision; or
  - for the construction of dwellings or commercial premises,must demonstrate consistency with Part B of the KFDC.
- Condition A3 of schedule 2 of the concept plan approval require that the project must be undertaken in accordance with the KFDC (not just Part B of the KFDC).
- These standards and/or requirements cannot be varied under clause 4.6 of the *Tweed Local Environmental Plan 2014*.
- The KFDC itself imposes a series of comprehensive controls that are, in themselves, standards and/or requirements that must be met. These standards and/or requirements have legal effect and also override any inconsistent provisions in both local environmental plans and state environmental planning policies.
- It is plain that the concept plan and the KFDC are the principal planning controls regulating land use at Kings Forest.

## Background

This advice concerns the Kings Forest concept plan approval '06\_0318'.

The background of this matter is known to you. We have relied on the factual information that you have supplied us at various times in preparing this advice.

In particular, we understand and assume the relevant facts to be as follows:

- On 19 August 2010, the Minister for Planning gave approval for a concept plan for Kings Forest (**the concept plan approval**). The reference number for this approval is '06\_0318'.
- Since this date, the concept approval has been modified six times. These modifications are known as:
  - 'MOD1', approved 22 December 2010;
  - 'MOD2', approved 11 August 2013;
  - 'MOD3', approved 16 May 2014;
  - 'MOD4', approved 20 November 2014;
  - 'MOD5', approved 10 November 2015; and
  - 'MOD8', approved 24 May 2018.
- The FDC was originally approved on 12 December 2010. However, since then the approved document has been replaced on three occasions:
  - version 1.1 – as amended by condition B6 in 'MOD2';
  - version 1.2 – as amended by condition A3 in 'MOD4'; and
  - version 1.3 – as amended by condition A3 in 'MOD5'.
- The current KFDC is version 1.3 (as per condition A3 of schedule 2 of the concept plan approval).
- The only development you intend to seek approval for (by development applications) is for the urban development of Kings Forest.

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

## Detailed advice

### 1. The status of the concept plan approval

#### *The transitional provisions*

- 1.1 The concept plan approval was given under the former Part 3A provisions of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**).
- 1.2 A concept plan approval does not, in itself, actually authorise the carrying out of any works or subdivision. Under the original Part 3A scheme, such authorisation required either a project approval or a development consent (the latter being given under 'Part 4' of the EP&A Act).
- 1.3 In this case, the complete development of the subject site will require one or more development consents.
- 1.4 While Part 3A of the EP&A Act has been repealed, some of its operative provisions still apply: clause 3(1) of schedule 2 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (**the EP&A Transitional Regulation**).

1.5 Clause 3B(1)-(2) of schedule 2 of the EP&A Transitional Regulation relevantly says:

- (1) This clause applies to development (other than an approved project) **for which a concept plan has been approved under Part 3A**, before or after the repeal of Part 3A, and so applies whether or not the project or any stage of the project is or was a transitional Part 3A project.
- (2) This clause applies to development (other than an approved project) for which a concept plan has been approved under Part 3A, before or after the repeal of Part 3A, and so applies whether or not the project or any stage of the project is or was a transitional Part 3A project. After the repeal of Part 3A, the following provisions apply to any such development ...—
  - (a) if Part 4 applies to the carrying out of the development, the development is taken to be development that may be carried out with development consent under Part 4 (**despite anything to the contrary in any environmental planning instrument**), ...
  - (c) any **development standard** that is within the terms of the approval of the concept plan **has effect**,
  - (d) a consent authority must not grant consent under Part 4 for the development (unless it is satisfied that the development is **generally consistent with the terms of the approval of the concept plan** ...
  - (g) this clause applies instead of section 75P(1), but any direction, order or determination made under section 75P(2) in connection with the concept plan continues to have effect (bold added).

1.6 In our view, the consequence of both clause 3B(2)(d) and 3B(2)(g) is **that any development consent granted must only approve a development that is generally consistent with the terms of the approval of the concept plan** (cf *Elite Construction NSW Pty Limited v Coffs Harbour City Council* [2018] NSWLEC 201 at [42]-[43]; *Johnson Property Group Pty Ltd v Lake Macquarie City Council* [2019] NSWLEC 1645 at [4]).

1.7 To be clear, a development application that is not generally consistent with the terms of the approval of the concept plan is legally incapable of development consent: *Steven Holdings Pty Ltd trading as Stevens Group v Newcastle City Council (No 2)* [2020] NSWLEC 1287 at [251]-[252].

1.8 Additionally, **any 'development standard' set out in the concept plan approval has legal effect** (under clause 3B(2)(c)).

### **Development standards**

1.9 The expression 'development standard' is relevantly defined (in section 1.4(1) of the EP&A Act) to mean:

Provisions of an environmental planning instrument or **the regulations** in relation to the carrying out of development, being provisions by or under which requirements are specified **or** standards are fixed in respect of any of that development, **including, but without limiting the generality of the** foregoing, requirements or standards in respect of — ...

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
- (b) the proportion or percentage of the area of a site which a building or work may occupy,
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
- (d) the cubic content or floor space of a building,
- (e) the intensity or density of the use of any land, building or work,

- (f) the provision of public access, open space, landscape space, tree planting or other tretamine for the conservation, protection or enhancement of the environment,
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,
- (h) the volume, nature and type of traffic generated by the development,
- (i) road patterns,
- (j) drainage,
- (k) the carrying out of earthworks,
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,
- (m) the provision of services, facilities and amenities demanded by development (bold added) ...

- 1.10 As per the above definition, a 'development standard' may be a standard **or** a requirement. We consider this includes non-numerical requirements.
- 1.11 In saying this, we observe there is no rule that says that only numerical requirements are development standards. The word 'requirement' is relevantly defined to mean (by the *Macquarie Dictionary* online):
- that which is required; a **thing** demanded or obligatory: a knowledge of Spanish is among the requirements (bold added)
- 1.12 A 'thing' clearly can be measured in either quantitative or qualitative terms. Indeed, the example offered by the *Macquarie Dictionary* (above) is a non-numerical (qualitative) requirement. In our view, there is nothing about the word 'requirement' (in the EP&A Act's definition of 'development standards') that suggests that only numerical requirements are included as development standards.
- 1.13 The Court of Appeal has expressly identified non-numerical requirements as development standards on at least two occasions:
- (a) In *Lowy v The Land and Environment Court* [2002] NSWCA 353 a majority of the Court said that a provision requiring a building to be placed on the foreshore side of the foreshore building line was a requirement in respect of a permitted development (and thus capable of being contravened under the former *State Environmental Planning Policy No 1 – Development Standards* (at [124] per Giles J and [2] per Mason P).
  - (b) In *Residents Against Improper Development Inc v Chase Property Investments Pty Ltd* [2006] NSWCA 323 the Court found that a requirement that every proposed lot in a subdivision must have either effluent disposal or be serviced by a reticulated sewerage system was a development standard (at [1], [86], [92] and [211]).
- 1.14 While the view of the Department of Planning and Environment has no special weight in a court (on a question of law), we note (for completeness) that our view is consistent with the Department's published material. Specifically, planning circular PS 20-002, 'Contraventions to development standards', dated 5 May 2020. This circular expressly acknowledges that there may be non-numerical development standards.
- 1.15 A development standard imposed by a term of the concept plan applies, despite anything to the contrary in **any** environmental planning instrument. That is, such provisions override both local environmental plans and state environmental planning policies.

#### ***Variation of development standards under clause 4.6?***

- 1.16 We have considered whether a development standard imposed by a term of the concept plan approval can be varied under any version of 'clause 4.6'.

- 1.17 According to the *State Environmental Planning Policy (State Significant Precincts) 2005 (the State Significant Precincts SEPP)* the only provision of the *Tweed Local Environmental Plan 2014 (the LEP)* that applies to the Kings Forest site is clause 4.6 (as per clause 10(a) of appendix 5 of the State Significant Precincts SEPP).
- 1.18 Clause 4.6 of the LEP only applies to allow a contravention of a development standard **imposed by an environmental planning instrument** (clause 4.6(2)). A development standard in a concept plan term is not imposed by an environmental planning instrument, but by the EP&A Transitional Regulation. We consider that this means that a development standard imposed by a term of the concept plan approval cannot be varied under clause 4.6.
- 1.19 In short, in our opinion:
- (a) Any development application for the Kings Forest land cannot be the subject of development consent unless it meets any standards or requirements (including non-numerical requirements) set out in the concept plan approval.
  - (b) These standards and/or requirements override both local environmental plans and state environmental planning policies.
  - (c) The standards or requirements imposed by the terms of the concept plan approval cannot be varied under clause 4.6 of the LEP.
  - (d) Any development application for the Kings Forest land also cannot be the subject of development consent unless the proposed development is generally consistent with the terms of the concept plan approval.

## 2. The status of the KFDC

- 2.1 Condition C26 of schedule 2 of the concept plan approval is titled 'Implementation of Part B of the Kings Forest Development Code'. It says:
- All future project/development applications for residential subdivision or for the construction of dwellings or commercial premises must demonstrate consistency with Part B of the Kings Forest Development Code.
- 2.2 Additionally, condition A3 of schedule 2 of the concept plan approval relevantly says:
- The project **will** be undertaken **in accordance with** the following documents: ...
- (9) Kings Forest Development Code Version 1.3 submitted with MP06\_0318 MOD5 (bold added).
- 2.3 In our opinion:
- (a) Condition C26 imposes a requirement.
  - (b) The requirement is that any development application for:
    - (i) residential subdivision; or
    - (ii) for the construction of dwellings or commercial premises,
 must demonstrate consistency with Part B of the KFDC.
  - (c) This requirement is a 'development standard' within the meaning of clause 3B(2)(c) of schedule 2 of the EP&A Transitional Regulation.
  - (d) The 'development standard' has legal effect.
  - (e) The development standard must be satisfied for a development consent to be granted.

- (f) A failure to comply with that requirement will necessitate refusal of the development application (in the absence of a modification of the concept plan approval).

2.4 Additionally, in our view:

- (a) The instruction in condition A3 is a specification of a requirement in respect of a series of aspects of the development.
- (b) Relevantly, one of those instructions is, that the project 'will' (must) be undertaken in accordance with KFDC (not just Part B of the KFDC).
- (c) This instruction is a requirement. That is, it is also 'development standard' within the meaning of clause 3B(2)(c) of schedule 2 of the EP&A Transitional Regulation.
- (d) The 'development standard' has legal effect.
- (e) The 'development standard' must be met for a development consent to be granted.

2.5 We consider that the net effect of all of this is that any relevant requirement (for development) set out in the KFDC must be complied with in order for development consent to be granted.

2.6 This is consistent with the terms of the KFDC itself. The KFDC provides at paragraph 1.1 on page 7, in describing the name and application of the plan:

This *Code* is known as the Kings Forest Development Code. The *Code* forms part of the Kings Forest *concept plan* approval and is to accompany and provide design detail for development to be undertaken in accordance with the *concept plan*.

### 3. The requirements of the KFDC

3.1 Section 1.2 of the KFDC (on page 8) sets out two controls as follows:

- (1) All development is to be undertaken generally in accordance with the Kings Forest *concept plan* at **Figure 1.2.1 subject to compliance** with the objectives and **development controls** set out in this *Code*.
- (2) Land uses are to be as specified on the Precinct Development Matrix at **Figure 1.2.2** (some bold added).

3.2 Additionally, section 1.6 of the code includes 'step 4'. The relevant text says:

Is your proposal permissible and consistent with the Precinct Development Matrix...?

3.3 The 'Precinct Development Matrix' is set on pages 10-11 of the KFDC. It resembles (in apparent function) a land use table in a local environmental plan. It identifies each 'Precinct' and lists a series of 'Development Uses' for each such precinct.

3.4 In our opinion, any development application for Kings Forest cannot be the subject of consent if the proposed land use is not one of the nominated 'Development Uses' for the given precinct (subject to other provisions of the KFDC not being presently relevant).

3.5 Part B of the KFDC contains a set of comprehensive 'development controls' for the site. This consists of:

- (a) residential development controls;
- (b) town centre neighbourhood centres and employment land;
- (c) subdivision controls; and
- (d) application (in the absence of a modification of the concept plan approval).

3.6 Significantly, we consider that:

- (a) it is a requirement of conditions C26 and A3 of schedule 2 of the concept plan approval that the KFDC be complied with (as explained in section 2 above);
- (b) the KFDC imposes a series of controls that are, in themselves, standards and/or requirements that must be met;
- (c) these standards and/or requirements are 'development standards'; and
- (d) these standards and/or requirements have legal effect and override any inconsistent provisions in any local environmental plans and state environmental planning policies.

3.7 This means that, these standards and/or requirements apply **without any flexibility** (under clause 3B(2)(c) of schedule 2 of the EP&A Transitional Regulation).

3.8 We note that clause 3B(2)(d) of schedule 2 of the EP&A Transitional Regulation only requires that development be 'generally consistent' with the terms of a concept plan approval.

#### 4. The requirement that a development be 'generally consistent'

4.1 It is true that the phrase 'generally consistent' does not mean the same thing as 'consistent'. In our view, it merely requires that the development the subject of the development application is not 'antipathetic' to the development that is the subject of the concept plan approval (cf *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185, 193).

4.2 However, in our view, this apparent flexibility is a mirage (for the application of the KFDC). This is because:

- (a) conditions C26 and A3 of schedule 2 of the concept plan approval impose development standards;
- (b) the terms of conditions C26 and A3 do not permit any flexibility; and
- (c) there is no provision akin to 'clause 4.6' in the KFDC itself.

#### 5. Conclusion

For the reasons we explained above, we consider it plain that that concept plan and the KFDC are the principal planning controls regulating land use at Kings Forest.

Please do not hesitate to contact Kalinda Doyle on 8035 7918 or Aaron Gadiel on 8035 7858 if you have any queries regarding this advice.

Yours sincerely



  
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