IN THE LAND AND ENVIRONMENT COURT
OF NEW SOUTH WALES

10834 of 2013

AUSBAO (NSW) MANAGEMENT PTY LIMITED
Applicant

v

PLANNING AND ASSESSMENT COMMISSION
First Respondent

KU-RING-GAI COUNCIL
Second Respondent

THE CAPACITY TO AMEND MAJOR PROJECT APPLICATION MP10-0219

MEMORANDUM OF ADVICE

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Attention: Mr Robert Wilcher

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Introduction

My instructing solicitors act for the applicant (Ausbao) in class 1 proceedings in the Land and Environment Court (10834 of 2013). The Planning and Assessment Commission (PAC) is the first respondent and Ku-ring-gai Council (Council) is the second respondent. The applicant seeks approval of Major Project Application MP10-0219 but seeks to amend the application which is the subject of the current appeal to include additional land and buildings which, together with the current subject matter of the Project Application, was the subject of a Concept Approval granted by the PAC on 19 December 2014 in accordance with an earlier decision of the Land and Environment Court on 5 December 2014 to uphold appeal proceedings 10648 of 2013.

Request for advice

I have been requested to confirm the capacity to amend the Major Project Application (MPA) such that, in its amended form, the MPA will constitute the subject matter of the current Land and Environment Court proceedings (10834 of 2013) which are undetermined at this time.

The context and extent of the proposed amendments

The proposed development is a transitional Part 3A project for the purposes of Schedule 6A of the EP&A Act. It was declared to be a Part 3A project pursuant to s75B, which has now been repealed. Pursuant to clause 2(5) of Schedule 6A:

A transitional Part 3A project extends to the project as varied by changes to the Part 3A project ... whether made before or after the repeal of Part 3A.

Clause 3(1) confirms the applicability of the repealed Part 3A:

3 Continuation of Part 3A - Transitional Part 3A Projects

(1) Part 3A of this Act (as in force immediately before the repeal of that Part and as modified under this Schedule after that repeal) continues to apply to and in respect of a transitional Part 3A project.

The original MPA was made pursuant to s75E of the Act and it proposed a multi unit residential building located at 5 Avon Road, Pymble. The proposed amendment now addresses the site encompassed by the Concept Approval, which comprises 1, 1a, 3 and 5 Avon Road and 4 and 8 Beechworth Road, Pymble. The amended proposal would comprise three multi unit residential buildings, together with the subdivision and development of four detached dwellings on the western portion of the site.

The current amended proposal is described in plans which are noted as revision S and P5. Those plans have been the subject of consideration by the parties to the proceedings. I am instructed that revision T is in preparation and that it is intended that the revision T plans (which make minor changes to the revision S plans) will be the subject of a motion to amend the MPA so as to become, upon the motion being granted, the plans the subject of the appeal. It is noteworthy that the Concept Approval contemplates that the original MPA might be the subject of amendment. Sub-clause (c) of the determination of the PAC on 19 December 2014 was as follows:

(c) Pursuant to s75P(1)(b) of the Environmental Planning & Assessment Act 1979, that all future stages (apart from project application MP10-0219) which is (at any time) the subject matter of Land and Environment Court proceedings number 10834 of 2013) of the Concept Plan approval are subject to Part 4 of that Act (emphasis added).

The original MPA was noted as "stage 1 project application".

Advice

The extent of the power to amend a Part 3A application

As noted in a joint Memorandum of Advice dated 25 September 2014, which considered a capacity to amend the Concept Application, the appeal in respect of this Project Application was made pursuant to s75K. Section 39(2) of the Land and Environment Court Act invests the Court with all the functions and discretions on an appeal as were available to the Minister. With respect to applications for amendment of applications under Part 4 of the EP&A Act, clause 55 of the Environmental Planning & Assessment Regulation 2000 applies, but there is no equivalent provision with respect to amendments to applications made under Part 3A. The Court's power to grant leave to amend the Part 3 application arises under the general power to grant leave to amend documents in the proceedings pursuant to s64(1)(a) of the Civil Procedure Act. That power contains no words of express limitation.

The scope of the power to amend the Part 3A Project Application has not been the subject of judicial consideration. However, decisions by the Land and Environment Court and the Court of Appeal with respect to the width of the power to amend Part 4 applications pursuant to clause 55 and to modify an application made pursuant to Part 4 or Part 3A, provide a measure of guidance and may be considered as the starting point of an analysis of the power but are not the end point because it may be generally accepted that the power to amend a Part 3A application is wider than the power in clause 55 which the legislation has chosen specifically not to apply to Part 3A.

Further, the power to amend is wider than the power to modify and the power of amendment generally has been consistently considered having regard to the beneficial and facultative nature of the power, with the result that it is to be construed so as to give the widest interpretation which its language will permit: *Radray Constructions Pty Limited v Hornsby Shire Council* (2006) 145 LGERA 292; *Barrick Australia Ltd v Williams & Ors* (Court of Appeal) (2009) 168 LGERA 43.

In *Barrick* the Court of Appeal observed that in the context of Part 3A, which was introduced to deal with State significant developments and provide a streamlined and less restrictive approach to the assessment of such projects, it was not appropriate to confine the meaning of the verb "modify" to only those changes which *alter without radical transformation* as might be appropriate when dealing with s96 modifications to Part 4 approvals. The Court of Appeal also refused to endorse a limitation that the limit of change must result in a project which is the *same project and not a project which can properly be characterised as new and different: Barrick* at [50-51].

In simple terms, it may be deduced that the scope of the capacity to amend a Project Application is not so limited. The preference for a liberal interpretation of the capacity to amend is supported by the context and language of Part 3A. Importantly, s75H(7) contemplates that there will be circumstances of change to a project prior to its determination where such changes constitute *significant changes.* In such circumstances the Director General may require a proponent to re-notify the changed application. That process has been observed by the PAC with respect to the current revision S plans.

Further, pursuant to s75J(4) a project (which may have been significantly changed from its original form) may be approved by the Minister *with such modifications of the project or on such conditions as the Minister may determine.* Once again, the legislation clearly contemplates that the approved project, whether by way of amendment or modification by the Minister, or both, may be quite different in its ultimate content to that originally proposed.

Taking into consideration the propositions set out above, I return to the facts of the subject proposal to amend the original MPA, so as to align it with the Concept Approval and which will involve the incorporation of a greater area of land and additional residential flat buildings and single dwellings. The amendment will also incorporate a change to the layout of the multi unit residential building originally proposed for number 5 Avon Road. There is no doubt that an amendment of this magnitude will constitute a

'significant change' but this is not a disqualifying factor because it is contemplated by the scheme of Part 3A (see 75H(7)). It is not necessary for the applicant to demonstrate that the amendment will not 'alter without radical transformation' the subject matter of the unamended MPA (see the reasoning of the Court of Appeal in *Barrick*).

Further, it is not necessary for the applicant to satisfy the Court that the amended project is relevantly 'the same project' rather than one which may be described as 'new and different' (*Barrick* at [50-51]). In circumstances where those limitations do not apply, I am of the opinion that the proposed amendments do fall within what must be regarded as the extremely wide power to amend an MPA and accordingly, there exists the capacity to amend the MPA in the manner proposed so as to reflect the changes in the revision S plans or the contemplated revision T plans, which are to a similar effect to revision S.

It is obvious that amendment of the original MPA (MP10-0219) will amend the subject matter of proceedings 10834 of 2013. This outcome does not dictate the final merit determination which will be carried out as a separate and subsequent exercise of discretion.

I so advise.

C. W. McEwen SC

Chambers

31 July 2015