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24 November 2017

Presiding Member
Mid-West Wheatbelt (Central) JDAP
c/o Shire of York
1 Joaquina Street
YORK WA 6302
Email: records@york.wa.gov.au

Delivery Method: Email

Dear Sir / Madam

Application for amendment – Development Approval DP/14/00039

We are instructed by Mr Robert Henry Chester (**Owner**), the registered proprietor of Lots 4869, 5931, 9926 and 26932 Great Southern Highway, Saint Ronans (**Land**), being the Land the subject of the above development approval for a landfill, or 'Waste Disposal Facility' (**Development Approval**).

We are also instructed by (together, the **Applicants**) –

- (a) AMI Enterprises Pty Ltd (**AMI**), which holds an option to purchase the Land from the Owner through an executed legal agreement (**Option Agreement**); and
- (b) Alkina Holdings Pty Ltd, which is the wholly owned subsidiary of AMI that will operate the development the subject of the Development Approval.

In particular, our instructions are to apply under regulation 17(1) of the *Planning and Development (Development Assessment Panels) Regulations 2011* (**DAP Regulations**), for amendment to Condition 9 of the Development Approval (**Application**).

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Please find enclosed –

- (a) a completed DAP Form 2 – ‘Application for amendment or cancellation of a Development Assessment Panel determination’; and
- (b) the application fee.

Regulation 17 of the DAP Regulations

- 1. Regulation 17(1)(a) of the DAP Regulations provides that “*An owner of land in respect of which a development approval has been granted by a DAP pursuant to a DAP application may apply for the DAP ... to amend the approval so as to extend the period within which any development approved must be substantially commenced*”.
- 2. Regulation 17(2)(a) goes on to expressly provide that an application under subregulation (1) “*may be made during or after the period within which the development approved must be substantially commenced*”.

Condition 9

- 3. The Development Approval was granted by the State Administrative Tribunal (**Tribunal**) on 8 March 2016, subject to 15 Conditions.¹
- 4. Condition 9 of the Development Approval states:

The development approved is to be substantially commenced within two years after the date of the approval, and the approval will lapse if the development is not substantially commenced before the expiration of that period.

- 5. Condition 9 reflects the provisions of clause 8.8.1(a) of the Shire of York Town Planning Scheme No.2 (**Scheme**) which provides that “*Where the local government grants planning consent for the development of land ... the development approved is to be substantially commenced within 2 years, or such other period as specified in the approval, after the date of the determination*”.
- 6. Importantly, it does not appear from the decision of the Tribunal granting the Development Approval that there was any consideration by the Tribunal of providing a longer period for substantial commencement than the 2 years referred to in Condition 9. That is, it appears that a period of 2 years was given as the “default” position set out in clause 8.8.1(a) of the Scheme.
- 7. This Application seeks to amend Condition 9, by –
 - (a) deleting: ‘*within two years after the date of the approval*’; and
 - (b) extend the period for substantial commencement by inserting ‘*by 8 March 2020*’.

¹<http://decisions.justice.wa.gov.au/SAT/SATdcsn.nsf/%24%24OpenDominoDocument.xsp?documentId=F2D9987E557166FE48257F70002C1B77&action=openDocument>

Substantial commencement

8. The term “substantially commenced” is defined in Schedule 1 of the Scheme as follows:

substantially commenced: means that work of development the subject of planning consent has been begun by the performance of some substantial part of that work or development.

9. Strictly speaking, that definition has been replaced by the definition that now appears in clause 2 of the Second Schedule of the *Planning and Development (Local Planning Schemes) Regulations 2015* and is deemed to form part of the Scheme, which is as follows:

Substantially commenced means that some substantial part of work in respect of a development approved under a planning scheme ... has been performed.

10. Both definitions are consistent with the interpretation of the term by the Courts, including decisions of the High Court of Australia in **Drummoyne Municipal Council v Lebnan** (1974) 131 CLR 350 and **Day v Pinglen** (1981) 148 CLR 289, which have been applied in all Australian jurisdictions, including by the State Administrative Tribunal in Western Australia.
11. The purpose of ‘substantial commencement’ is to require a development to be commenced within a prescribed time because ‘it is undesirable that a developer should have available for an indefinite time an approval in respect of a development which changing patterns of use or changing community attitudes might, over time render inappropriate. It is in the interests of orderly planning that an approval for building or for use, once obtained, should be acted upon or should expire, within a reasonable time.’: **Fazio v City of Fremantle & Ors** (unreported) CIV 2314 at 14.²

Relevant considerations for extending time for substantial commencement

12. The Tribunal’s recent decision in the matter of **Georgiou Property 2 Pty Ltd and Presiding Member of the Metro West Joint Development Assessment Panel** [2017] WASAT 138 (**Georgiou**) set out the determinative issues for extending the time for a developer to substantially commence a development.
13. The Georgiou decision was also in respect of an application under regulation 17(1) of the DAP Regulations.
14. The determinative issues that the Georgiou decision set out for the extension of a development approval’s time for substantial commencement are –
- (a) *whether the planning framework has changed substantially since the development approval was granted;*
 - (b) *whether the development would likely receive approval now; and*

²<http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=531A22AF257D533248256461002FDE63&action=openDocument>

- (c) *whether the holder of the development approval has actively and relatively conscientiously pursued the implementation of the development approval.'*

JDAP and extensions for substantial commencement

15. A number of Joint Development Assessment Panels (**JDAP**) decisions have determined applications under regulation 17(1)(a) of the DAP Regulations to extend the time for substantial commencement, in accordance with the determinative issues from **Georgiou**.
16. This development assessment panel – being the Wheatbelt JDAP as it was then – approved an application under regulation 17(1)(a) of the DAP Regulations, at its meeting on 3 September 2014, for an extension of the time for substantially commencing a development. In that decision the Wheatbelt JDAP approved the extension of a further 3 years, even after the approval had already expired, to provide the applicant flexibility in implementing their development.³
17. The Metro West JDAP (**MWJDAP**) at its meeting on 5 August 2016, approved an extension of time for substantial commencement from 2 years to 4 years.⁴ The reasons that were given in the minutes of that decision were:
- 'There has not been a substantial change to the planning framework and sufficient work has been undertaken in the circumstances to effect the approval to a point of substantial commencement.'*
18. The Metro West JDAP (**MWJDAP**) at its meeting on 20 June 2016, approved an extension of time – contrary to the recommendation in the responsible authority report – for substantial commencement from 2 to 3 years.⁵ The reasons that were given in the minutes of that decision were:
- 'The alternate resolution was moved on the basis that this Form 2 application is for an extension of time of one year only and contains no new or modified design elements. Due regard was given to the policy framework and that the original application was unanimously approved by the JDAP which determined, at that time, that it had appropriately addressed amenity issues.'*
19. The Metro South-West JDAP (**MSWJDAP**) at its meeting on 3 May 2016, approved an extension of time for substantial commencement from 2 to 4 years.⁶ In the agenda for that MSWJDAP meeting, the responsible authority report stated that extending the time from 2 to 4 years for substantial commencement should be supported on the basis of the following:

³<http://www.planning.wa.gov.au/DAPS/ArchivedDaps/Regional%20DAPs/Wheatbelt%20JDAP/Meeting%20minutes/20140903%20-%20Wheatbelt%20JDAP%20-%20Minutes%20-%20No%204%20-%20Shire%20of%20Dandaragan.pdf>

⁴<http://www.planning.wa.gov.au/DAPS/DAPS/Metro%20West%20JDAP/Meeting%20minutes/20160805%20-%20Minutes%20-%20No%20139%20-%20City%20of%20Vincent%20-%20City%20of%20Subiaco%20-%20Town%20of%20Cottesloe.pdf>

⁵<http://www.planning.wa.gov.au/DAPS/DAPS/Metro%20West%20JDAP/Meeting%20minutes/20160620%20-%20Minutes%20-%20No%20133%20-%20Town%20of%20Cambridge.pdf>

⁶<http://www.planning.wa.gov.au/DAPS/DAPS/Metro%20South-West%20JDAP/Meeting%20minutes/20160503%20-%20Minutes%20-%20No%20103%20-%20City%20of%20Cockburn.pdf>

*'There have not been any significant changes to the applicable planning framework that are relevant to this proposal since the issuing of the original approval.'*⁷

20. The Metro East JDAP (**MEJDAP**) at its meeting on 19 June 2014, approved an extension of time for substantial commencement from 2 to 4 years.⁸ In the agenda for that MEJDAP meeting, the responsible authority report stated that extending the time from 2 to 4 years for substantial commencement was regarded as 'minor'.
21. In a number of other decisions, DAPS (or the Tribunal) have also allowed periods for substantial commencement longer than 2 years as part of the grant of planning approval, recognising that there may be many circumstances that result in a longer period being required for substantial commencement. Examples include where the development requires significant detailed engineering work, or requires a long lead-time for the purposes of pre-sales, or where the development requires further environmental or other approvals that may take time to obtain.

Whether the planning framework has changed substantially since the development approval was granted?

22. As noted above, the Development Approval was granted by a decision of the Tribunal, delivered on 8 March 2016 (**Approval Date**).
23. The relevant overarching planning framework as referenced in the SAT Decision was the:
 - (a) *Planning and Development Act 2005*; and
 - (b) *Planning and Development (Local Planning Schemes) Regulations 2015*.
24. Neither of these documents has been subject to any change since the Approval Date, and on that basis there is nothing to suggest that the decision making process that resulted in the Development Approval would result in any different outcome today.
25. The local planning framework as at the Approval Date was made up of the following relevant documents:
 - (a) Shire of York Local Planning Strategy; and
 - (b) Shire of York Town Planning Scheme No 2 (**Scheme**).
26. There has been no gazetted change to either of these documents since the Approval Date.
27. We note that the Shire of York (**Shire**) had initiated an amendment to the Scheme (**A50**) on 19 November 2012, but that this still has not been gazetted.

⁷<http://www.planning.wa.gov.au/daps/data/metropolitan%20daps/metro%20south-west%20jdap/Meeting%20agendas%20and%20papers/20160503%20-%20Agenda%20-%20No%20103%20-%20City%20of%20Cockburn.pdf> (p5)

⁸<http://www.planning.wa.gov.au/DAPS/DATA/Metropolitan%20DAPs/Metro%20East%20JDAP/Meeting%20minutes/20140619%20-%20Metro%20East%20JDAP%20-%20Minutes%20No%2040%20-%20City%20of%20Swan%20-%20Shire%20of%20Serpentine%20Jarrahdale.pdf>

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28. Further, A50 was referred to and considered by the Tribunal in reaching its decision to grant the Development Approval.
 29. The Shire sought to change A50 after it was initiated in order to restrict waste facility developments such as that which is the subject of the Development Approval. On 14 April 2014, the Shire's Council resolved to request the Minister for Planning (**Minister**) change A50 so that the 'Waste Disposal Facility' land use classification was prohibited under the Scheme. The Minister deferred any decision on this request until after the Tribunal's determination granting the Development Approval.
 30. Following the Tribunal's decision, the Minister refused the Shire's request to the extent it would apply to the Land and the Development Approval. On 5 April 2016, the Minister acted under section 87(2)(b) of the *Planning and Development Act 2005* to require the Shire to modify A50 to include a special use zone in relation to the Land to specifically allow the development and use of the Land for a 'Waste Disposal Facility' in accordance with the Development Approval (**SU8**).
 31. As noted above, A50 has not yet been gazetted in any form, but by virtue of the Minister's decision under section 87(2)(b) of the Act, the provisions of A50, which is the only relevant proposed change to the planning framework since the Approval Date, specifically supports the carrying out of the Development Approval.

Whether the development would likely receive approval now?

32. In the absence of any material change to the planning framework since the Approval Date, the proposal that is subject of the Development Approval remains as appropriate now, as it was when considered by the Tribunal and when the Development Approval was granted.

Whether the holder of the development approval has actively and relatively conscientiously pursued the implementation of the development approval?

33. The proposed landfill facility is a substantial development, as set out in the documentation compiled for the Agenda of the:
 - (a) Wheatbelt Joint Development Assessment Panel, Meeting Number: WJDAP/3 (**Original JDAP Documents**)⁹; and
 - (b) Mid-West/Wheatbelt Joint Development Assessment Panel, Meeting Number: MWWJDAP/2 (**Amended JDAP Documents**),
 and requires a commitment of resources that take time to arrange and deploy.
34. The proposal includes 6 cells that will be constructed in stages.¹⁰
35. The proposal involves major excavation works, which are limited to certain times of the year due to the compaction of clay to a required moisture content level as part of the ongoing construction quality assurance regime of a typical liner

⁹<http://www.planning.wa.gov.au/daps/ArchivedDaps/regional%20daps/wheatbelt%20jdap/Meeting%20agendas%20and%20papers/20140414%20-%20Wheatbelt%20JDAP%20-%20Agenda%20-%20No%203%20-%20Shire%20of%20York.pdf>

¹⁰<http://www.planning.wa.gov.au/daps/data/regional%20daps/mid-west%20wheatbelt%20jdap/Meeting%20agendas%20and%20papers/20150831%20-%20Agenda%20-%20No%202%20-%20Shire%20of%20York.pdf> (p60)

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- installation. It can only be practically undertaken at certain times of the year that follow consecutive dry months. This further limits the time within which the development can be commenced.
36. Further circumstances relevant to the proposal and the timeframe within which it could be commenced are the necessary preconditions of –
- (a) preparing and executing the Option Agreement; and
 - (b) obtaining a works approval (**Works Approval**) under the *Environmental Protection Act 1986 (EP Act)*.
37. SITA Australia Pty Ltd (**SITA**), the original applicant for the Development Approval (who also had a legal arrangement with the Owner), walked away from the proposal after the grant of the Development Approval, but retained the tenure option under its legal arrangement with the Owner until the expiry of that arrangement, approximately 6 months after the Approval Date.
38. By the time the Applicants entered the Option Agreement, it was February 2017 and 11 months had elapsed since the Approval Date. To this point no physical works had as yet been undertaken to substantially commence the proposal.
39. Since the Option Agreement was signed, the Applicants have done all they could to *'actively and relatively conscientiously pursue[d] the implementation of the development approval'*.
40. The proposal was previously the subject of a Works Approval granted by the Department of Environment Regulation (**Previous Works Approval**). This Previous Works Approval was subsequently surrendered by SITA, the holder of that Works Approval.
41. Had the Previous Works Approval not been surrendered, the Applicants would have been entitled to apply to simply have the Previous Works Approval transferred to them in accordance with sections 61 and 64 of the EP Act.
42. As a result of the surrender of the Previous Works Approval, the Applicants were required to undertake a full-scale review and update of the documentation upon which the Previous Works Approval had been granted, in order to make a fresh application for a Works Approval. This was done, and the fresh application was lodged in July 2017 (**Works Approval Application**).
43. The Works Approval Application reflects the proposal as approved by the Development Approval and the Previous Works Approval and, in effect, seeks to "reinstate" the Previous Works Approval.
44. As it would be unlawful to undertake any physical works prior to the grant of a Works Approval, there is little more that the Applicants can do for the purposes of implementing the Development Approval until such time as the Works Approval Application is determined and a Works Approval is granted.
45. The Applicants are experienced operators of licensed landfill sites and are part of the Instant Waste Management group, the largest private waste and recycling company in Western Australia.
46. The Applicants reasonably expect that the Works Approval Application will be granted, and have prepared themselves to expediently commence implementing the development following the grant of the Works Approval.
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47. The Proponent's implementation program (subject to being granted the Works Approval) is as follows –
- (a) tendering for a construction contractor;
 - (b) mobilisation and site preparation;
 - (c) pre-excavation geotechnical and hydrogeological testing;
 - (d) excavation of the Proposal's cells; and
 - (e) construction of supporting infrastructure and access works.
48. If the Works Approval is granted prior to the end of 2017, it is likely that the above implementation programme will be able to be completed by mid-2018. However if the grant of the Works Approval is delayed beyond the end of 2017 the practical and climactic issues referred to above will limit the ability to commence the implementation programme until later in 2018, resulting in the programme not being able to be completed until at mid-2019.

Conclusion

49. Amending Condition 9 so that substantial commencement of the proposal is required by 8 March 2020, maintains a definite timeframe and would not derogate from the purpose of that provision (as described in **Fazio** above).
50. The scale of the proposal and the support of the planning framework means it is the correct decision to approve the Application and amend Condition 9 of the Development Approval to extend the requirement for substantial commencement.
51. The circumstances of the proposal and the large scope of the works required to commence the development means that it would be reasonable to extend the time for substantial commencement by 2 years.
52. By undertaking the above list of works within the relevant timeframes, the Proponent will substantially commence the development in a practical and reasonable time frame for a development of its scale. It is also conservatively anticipated that this would be in advance of the proposed amended deadline for substantial commencement of 8 March 2020.

If you have any queries regarding the above please contact Julius Skinner or Moshe Phillips of LSV Borrello Lawyers.

Yours faithfully



Julius Skinner
Principal
LSV Borrello Lawyers