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29 January 2020

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Presiding Member
Mid-West Wheatbelt JDAP
c/o Shire of York
1 Joaquina Street
YORK WA 6302

Electronic

Dear Sir/Madam

Application for amendment - Development Approval DP/14/00039

- 1 We are instructed by Mr Robert Henry Chester (**Owner**), the registered proprietor of Lots 4869, 5931, 9926 and 26934 Great Southern Highway, Saint Ronans (**Land**). The Land is the subject of the above development approval (**Development Approval**) for the construction and use of Class II Landfill, or 'Waste Disposal Facility' (**Proposed Development**).
- 2 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.
- 3 In particular, our instructions are to apply for amendment under regulation 17(1) of the *Planning and Development (Development Assessment Panels) Regulations 2011* (**DAP Regulations**), to Condition 9 of the Development Approval (**Application**).
- 4 Please find enclosed –
 - (a) the DAP Form 2 – 'Application for amendment or cancellation of a Development Assessment Panel determination'; and
 - (b) the Shire of York's application form to amend an existing planning consent; and
 - (c) the certificate of title for the Land.
- 5 We are instructed that our client has already forwarded a completed Shire of York credit card form for the payment of the following application fees –
 - (a) \$241 for the JDAP application fee; and
 - (b) \$295 for the Shire's application fee.

This Application

- 6 The State Administrative Tribunal (**Tribunal**) originally made a decision to grant the Development Approval on 8 March 2016 (**Approval Decision**). Condition 9 of the Development Approval required the proposed development to be substantially commenced by 8 March 2018.
- 7 On 30 November 2018, the Tribunal made a decision to grant an application by the Applicants to extend the date for substantial commencement to 8 March 2020 (**Extension Decision**). Order 2 of that decision was that:
- 'Condition 9 of the development approval granted by the State Administrative Tribunal on 8 March 2016 is amended by deleting the words 'within two years after the date of the approval' and substituting 'by 8 March 2020'.'*
- 8 Therefore, Condition 9 of the Development Approval now states:
- 'The development approved is to be substantially commenced by 8 March 2020 ~~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.'*
- 9 The Application in this instance, is to now again amend Condition 9 from referring to 2020 to 2022.

Status of the Proposed Development

- 10 We refer to the Extension Decision and the Tribunal's observations of the peculiar and 'curious' circumstances surrounding the Proposed Development.
- 11 On 21 July 2017, the Applicant's had lodged an application for a works approval (**Works Approval Application**) with the Department of Water and Environmental Regulation (**DWER**) under the *Environmental Protection Act 1986* (**EP Act**).
- 12 As noted in the Extension Decision (para 13), the Works Approval Application should ordinarily have been determined within 60 days. If this had been the case, this would have left the Applicants almost 6 months to substantially commence the Proposed Development and not then having to amend the time for substantial commencement under the Development Approval (para 174).
- 13 As was also noted (para 168), works required to lawfully undertake the substantial commencement of the Proposed Development, first required the grant of the Works Approval Application, and could not be carried out without the grant of the Works Approval Application.
- 14 As at the date of the Extension Decision and after 16 months, the Works Approval Application still had not been determined, in circumstances which the Tribunal noted as being 'curious' (para 156).
- 15 At that point, the reason DWER had given for not determining the Works Approval Application was that it was awaiting the Extension Decision (para 53).
- 16 Notwithstanding the delivery of the Extension Decision on 30 November 2018 and the best efforts of the Applicants, DWER continued to resist determining the Works Approval Application for another 4 months.
- 17 On 7 January 2019, DWER responded to the Applicants' enquiries with a letter acknowledging concerns with the assessment timeframes for the Works Approval Application and failing to meet desired timeframes.
- 18 On 14 January 2019, the Applicants met with the responsible DWER officers where it was indicated that the Works Approval Application's assessment was culminating soon, and that draft documentation would be issued within 6 weeks.

- 19 The DWER failed to meet these commitments, but in response to further enquiries by the Applicants, continued to indicate that a draft determination of the Works Approval Application would be issued by the end of March 2019.
- 20 On 1 April 2019, without any forewarning or prior discussion, the Minister for Environment (**Minister**) issued a notice to the Applicants that he had directed the Environmental Protection Authority (**EPA**), under section 43 of the EP Act, to assess the Proposed Development, in accordance with the process under Part IV of the EP Act.
- 21 On 24 April 2019, under section 39(1) of the EP Act, the EPA published a notice that the Proposed Development was to be assessed, as per the process under Part IV of the EP Act. Upon the EPA publishing that notice and the assessment process commencing, the Works Approval Application could not be determined, and nothing could be done to progress nor substantially commence the Proposed Development, until the assessment process under Part IV is completed.
- 22 Section 41A of the EP Act prohibits anyone from doing anything to implement a proposal while it is under assessment under Part IV.
- 23 Further, section 54(4) of the EP Act prohibits the DWER from determining the Works Approval Application while the Proposed Development is under assessment.
- 24 Therefore, the Applicants cannot pursue a grant of the Works Approval Application and nor can they then implement works to substantially commence the Proposed Development, until the EPA has completed its assessment and a statement is published pursuant to section 45 of the EP Act that the Proposed Development may be implemented.

This Application cannot be determined

- 25 The Applicants acknowledge that the the MWWJDAP is barred from determining this Application while the EPA's assessment process is ongoing.
- 26 We trust that the MWWJDAP has formally received notice from the EPA under section 39A(3) of the EP Act that the Proposed Development is being assessed . In any event, section 41 of the EP Act prohibits the MWWJDAP making any decision on this Application while the EPA's assessment process is ongoing.
- 27 Therefore, the Applicants also acknowledge that while this Application can be processed, its determination then must wait until the EPA has completed its assessment and a statement published pursuant to section 45 of the EP Act that the Proposed Development may be implemented.

Further justification for this Application pending the EPA process

- 28 Given it is incumbent on proponents seeking to extend the time for substantial commencement to 'actively and relatively conscientiously pursue implementation', the Applicants consider it appropriate to submit this Application prior to 8 March 2020.
- 29 While the MWWJDAP could carry out its assessment of this Application pending the completion of the Part IV assessment process by the EPA, the Applicants accept that this would not be expedient. If the result of EPA assessment process is that the Minister makes a decision that the Proposed Development:
- (a) should not be implemented, then any assessment process undertaken by the MWWJDAP would be wasted; or alternatively
 - (b) may be implemented, this may still be many months away and in this time there could new or different considerations that become relevant to the MWWJDAP's assessment.

- 30 Likewise, it also not expedient for the Applicants to include their full submissions in support of this Application until the EPA process is complete.
- 31 The Applicants foreshadow providing further submissions in support of this Application, after a statement is published pursuant to section 45 of the EP Act that the Proposed Development may be implemented.
- 32 We can foreshadow that these submissions will largely replicate those that were considered by the MWWJDAP on 10 April 2018 and then accepted by the Tribunal in the Extension Decision (all publicly accessible). It is clear that the only obstacle to substantial commencement of the Proposed Development has been outside of the Applicants' control and confined to the time taken to administer the EP Act.
- 33 As the Tribunal noted in the Extension Decision (para 73), the 5 considerations relevant to determining an application to extend the 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;
 - (c) whether the holders of the development approval have actively and relatively conscientiously pursued the implementation of the development approval;
 - (d) whether the landowner has sought to 'warehouse' the development approval; and
 - (e) whether the time period for substantial commencement originally imposed was adequate.
- 34 The findings set out in the Extension Decision demonstrates a compelling basis that the reasoning in that instance will again be applicable to the Application in this instance and would support favourable treatment against the 5 considerations above.

Please contact Moshe Phillips on 9404 9111 or at mphillips@tglaw.com.au if you have any questions or require any further information.

Yours faithfully

THOMSON GEER



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