

10 June 2021

Mills Oakley
ABN: 51 493 069 734

Your ref: 103/2016
Our ref: SZWS/AXGS/3509116

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215

Tommaso Briscese
General Manager
Burwood Council
PO Box 240
BURWOOD NSW 1805

Contact
Stella Zhao +61 2 8035 7905
Email: szhao@millsokley.com.au

Partner
Aaron Gadiel +61 2 8035 7858
Email: agadiel@millsokley.com.au

Dear Mr Briscese

Modification application under section 4.55(2) in relation to development consent 103/2016

This letter is submitted to Burwood Council (**the Council**) as part of an application to modify the above development consent (**the development consent**) under section 4.55(2) of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**).

The purpose of this letter is to set out:

- the proposed modification;
- an explanation as to why the proposed modification is warranted; and
- various mandatory matters that must be addressed in any modification application under clause 115 of the *Environmental Planning and Assessment Regulation 2000* (**the Regulation**).

Summary

- This modification application seeks to change conditions that relate to easements burdening that are to:
 - burden the subject site; and
 - benefit a neighbouring privately-owned site (188-192 Burwood Rd Burwood).
- When the development consent was granted:
 - There was an intention that the owners of the two properties would agree on an access way (an easement) for vehicles — via the basement area of the subject development — for the benefit of 188-192 Burwood Road.
 - It was expected that there would be a payment by the owner of 188-192 Burwood Road for the 'development value of the basement vehicular access way'. This amount was expected to be agreed upon on the basis of a valuation.
- Despite the best efforts of the applicant, the applicant and the owner of 188-192 Burwood Road have not yet reached any agreement as to:
 - the terms of the easements; or
 - the envisaged payment to the applicant for the easements.
- The applicant obtained a formal valuation of the proposed easements. The market value and compensation for loss for the easements was assessed at \$6 million. The owner of 188-192 Burwood Road has not agreed to pay that sum. It has not supplied its own valuation report to the applicant.
- The development is presently under construction. It is expected that it will be ready to receive its occupation certificate in July 2022. If the relevant conditions are not modified it will not be possible for

the occupation certificate to be issued. Given that there has been no agreement between the applicant and the owner of 188-192 Burwood Road, it is necessary for a modification application to be lodged now to manage the situation.

- No condition of development consent can force the owner of 188-192 Burwood Road to purchase the easement(s). It would also be unreasonable for a development consent to force the applicant to confer a property right on a private party (of some great value) for less than its market value.
- Accordingly, the proposed new condition 12 introduces a 'good faith' negotiating regime. This regime will compel the applicant (including any successors) to negotiate in good faith to seek to agree on a payment for, and the terms of, the easements. This obligation would be triggered — at any point during the life of the development — on receipt of a proposal from the owner of 188-192 Burwood Road.
- The current language of special conditions 4 and 5 assumes that the delivery of the access way is a certainty. Amendments to these conditions are proposed to make it clear that the knock-through wall and associated infrastructure must still be constructed, but are merely to facilitate a future access arrangement (rather than being a guarantee that such an arrangement will be in place).
- The 'good faith' negotiating regime (together with a requirement that all necessary physical works must still be constructed to make the future accessway practicable) is a sufficient and proportionate measure to ensure that the future development of 188-192 Burwood Road would not needlessly be burdened by a suboptimal access arrangement (to the disbenefit of the community). Anything more than this would be unlawful.
- The consent authority does not need to be concerned that the applicant (or any successors-in-title) could 'sit on their hands' to avoid providing the easement(s) for 188-192 Burwood Road.
- This is because, if the 'good faith' negotiations break-down, the owner of 188-192 Burwood Road will have a remedy that sits outside of the development consent.
- Section 88K of the *Conveyancing Act 1919* allows the Supreme Court to make an order for the grant of an easement. In certain circumstances the Land and Environment Court also has this power.
- The consent authority can be satisfied that the owner of 188-192 Burwood Road would very likely be able to obtain a Court-ordered easement, if needed, on the payment of adequate compensation to the applicant (or its successors in title).
- If the modification application is refused, there is a real likelihood that the completed buildings will sit idle, for an extended period of time, and not be occupied.
- It is contrary to the public interest that significant buildings remain empty and unused at such a significant location any longer than is necessary.

Detail

1. The name and address of the applicant

Giant Project Group Pty Ltd
Level 10/11-15 Deane Street
Burwood NSW 2134

The applicant is the owner of Lot 1 DP1240935 (180-186 Burwood Road Burwood) and Lot 2 DP 240935 (7-9 Burleigh Street Burwood) which comprises the land to which the development consent relates.

2. A description of the development to be carried out under the consent (as previously modified)

The development consent is for the:

Demolish existing structures and erect 1 x 16 storey commercial tower and 1 x 23 storey tower above a multi level podium containing 55 residential apartments, commercial and retail floor space over 5 levels of basement parking for 120 car spaces.

3. The address, and formal particulars of title, of the land on which the development is to be carried out

The address, and formal particulars of title are:

180-186 Burwood Road Burwood, Lot 1 DP1240935)
7-9 Burleigh Street Burwood (Lot 2 DP 240935)

4. A description of the proposed modification to the development consent

- 4.1 The modification sought is intended to delete any **requirement** (under the development consent) for an easement to provide vehicular access to 188-192 Burwood Road (Lot 30 DP 939716) to be registered on the title of the land.

Special condition 4

- 4.2 Condition 4 of the special conditions is **presently** as follows:

The proposed development shall include a knock-through wall to Basement Level 1, as identified on plan DA-2000, Issue J, dated 19/04/2017, provided at six (6) metres wide, and at least 2.7 metres high.

Reason: To ensure future vehicular access to Burleigh Street and redevelopment opportunity of 188-192 Burwood Road.

- 4.3 **Omit** the whole condition of special condition 4 and **instead** insert:

The proposed development shall include a knock-through wall to Basement Level 1, as identified on plan A-105 Rev M, dated 8 December 2020 (being a plan approved by Construction Certificate CA0855A2).

Reason: To provide for an opportunity for vehicular access to Burleigh Street and redevelopment opportunity of 188-192 Burwood Road (Lot 30 DP939716) should either:

- an access arrangement be agreed between the relevant landowners in the future; or
- an appropriate easement for vehicular access is ordered by a court under section 88K of the *Conveyancing Act 1919*.

Special condition 5

- 4.4 Condition 5 of the special conditions is **presently** as follows:

The Applicant must ensure that the infill walls between Basement Level 1 support columns along the southern boundary of the land adjacent to the site of the proposed easement for basement access referred to in Condition 4 is of materials and construction that are capable of being readily removed when access to the land immediately to the south of the site, and adjacent to the easement referred to in Condition 4, is required in order that vehicular access can be obtained.

Reason: To enable the delivery of vehicular access via the removable wall when required.

- 4.5 **Omit** the whole condition of special condition 5 and **instead** insert:

The infill walls between Basement Level 1 support columns along the southern boundary of the land adjacent to the site of the knock-through wall (referred to in Condition 4) are to be of materials and construction that are capable of being readily removed if vehicular access to and from Lot 30 DP939716 is agreed between the relevant landowners in the future.

Reason: To enable the vehicular access via the removable wall should either:

- an access arrangement be agreed between the relevant landowners in the future; or
- an appropriate easement for vehicular access is ordered by a court under section 88K of the *Conveyancing Act 1919*.

Special condition 124.6 Condition 12 of the special conditions is **presently** as follows:

The draft memorandum of understanding submitted is to be amended to include a right of access and easement for servicing (including garbage collection) 188– 192 Burwood Road from the proposed truck turntable on the ground floor via double doors with an opening of at least 1840mm on both sides of the proposed through site link. A copy is to [be] supplied to and agreed in writing with Council prior to signing and the issue of a Construction Certificate.

Reason: To ensure adequate servicing arrangements for the adjacent site.

4.7 **Omit** the whole condition of special condition 12 and **instead** insert:

The landowner(s) of the relevant part(s) of Lot 1 DP1240935 (180-186 Burwood Road Burwood) and Lot 2 DP 240935 must — in response to a proposal from the owner of Lot 30 DP 939716 (188-192 Burwood Road) made at any time during the life of the development — negotiate in good faith to seek to agree on a payment for, and the terms of, easements (burdening the relevant part(s) of Lot 1 DP1240935 and Lot 2 DP 240935 and benefiting Lot 30 DP 939716) as follows:

- a. A right of access to pass across each lot burdened, but only within the site of the easement, to get to or from the lot benefited for the purposes of the loading or unloading of goods or garbage. The site of such an easement would be a path of travel — limited in stratum — sufficient for access:
 - (i) by vehicle between Burleigh Street and the truck turntable; and
 - (ii) on foot between the turntable and the double doors identified for the purpose of this condition as identified on plan A-106 Rev N, dated 8 December 2020 (being a plan approved by Construction Certificate CA0855A2).
- b. A right of vehicular access to pass across each lot burdened, but only within the site of the easement, to get to or from the lot benefited. The site of such an easement would be a path of travel — limited in stratum— sufficient for access from Burleigh Street through to the knock-through wall referred to in condition 4.

Negotiations in good faith under this condition may also include proposals by the owner(s) of the relevant part(s) of Lot 1 DP1240935 (180-186 Burwood Road Burwood) and Lot 2 DP 240935 for the imposition of positive covenants for maintenance and repair in relation to the easement areas (burdening Lot 30 DP 939716 and benefiting the relevant part(s) of Lot 1 DP1240935 and Lot 2 DP 240935).

Reason: To facilitate an opportunity for landowners to reach a commercial agreement on an enduring access arrangement.

Special condition 134.8 Condition 13 of the special conditions is **presently** as follows:

The draft memorandum of understanding (once amended and agreed with Council to include servicing access to 188 – 192 Burwood Road) is to be entered into and a signed copy supplied to Council prior to the issue of a Construction Certificate.

Reason: To ensure the adjacent site is capable of being adequately developed and serviced.

4.9 **Omit** the whole condition of special condition 13.**Special condition 19**4.10 Condition 19 of the special conditions is **presently** as follows:

The easement detailed in the submitted draft memorandum of understanding providing vehicular access to 188-192 Burwood Road is to be registered on the title of the land prior to the issue or (sic) an Occupation certificate...

4.11 **Omit** the whole condition of special condition 19 and instead insert:

For avoidance of doubt, there is no requirement for the easements referred to in condition 12 to

be registered for an occupation certificate to be issued.

5. Reasons in support of the proposed modification — the draft MOU

- 5.1 The above conditions (proposed to be modified) arose as a consequence of a draft 'Memorandum of Understanding' (**the draft MoU**) that was supplied to the consent authority on 14 November 2017, prior to the grant of development consent.
- 5.2 The draft MoU was prepared as part of a package of material designed to address concerns regarding the practicable and equitable site development of the neighbouring southern commercial property at 188-192 Burwood Rd Burwood (Lot 30 DP939716).
- 5.3 The submission set out why the applicant did not consider that the grant of development consent would cause 188-192 Burwood Road to become isolated. The submission set out evidence as to why 188-192 Burwood Road could still be developed, in accordance with the planning controls, if the development consent was to be granted to the pending development application.
- 5.4 Key provisions of the draft MoU were as follows (noting that the reference to 'Happy' is a reference to Double Happy Pty Ltd, the owner of 188-192 Burwood Road and the reference to 'Urban' is a reference to an associate of the applicant):

(a) 'Objectives and scope':

The objectives of the parties association are for Urban to assist to develop & upgrade the property owned by Happy with the Urban neighbouring property ... with a new application prepared and designed in part by Urban and Happy with Architects retained by Happy to be submitted on behalf of Happy and include the form of a draft Strata Plan & Easement as per Schedule One hereto **for vehicular access via basement area** and compatible building designs on both properties (bold added).

(b) 'Organisation and Management of the Agreement':

Urban will have the sole responsibility to undertake the preparation and submission to Happy of the **Right of Carriageway** ... Happy consents to supply Urban with all its current proposed architectural plans and reports via its architects and town planners so that the Urban and its consultants are able to assist Happy consultants with a development design & proposal to Burwood Council that is compatible with design of the development on the Urban property **including vehicular basement access way & pedestrian access way with all survey and Strata plan costs associated with this easement on the Urban property** to be paid by Urban (bold added).

(c) 'Terms of the Agreement':

This agreement is subject the parties signing a formal heads of Agreement reciting these terms as prepared by the legal advisers for Urban and submitted to lawyers representing Happy. This MoU will inform the terms of the formal agreement which will regulate the parties development relationship, responsibilities **and payment required to be made to Urban by Happy** for co ordinating the development of the parties properties in Burwood **including access to Burleigh Street via Urban property basement for the Happy property proposed basement area** as per draft in Schedule One hereto (bold added).

(d) 'Financial arrangements':

Payments will be made by Happy to Urban as follows:

- A An amount to represent the time taken to assist with the Happy proposal in the sum of ### hundred dollars (\$###00.00).
- B **An amount to Urban for compensation for the access way to be valued & agreed by Happy as payment for the development value of the basement vehicular access way.**
- C Payments for works by Urban to build a purpose built removable basement wall to be removed by & cost to Happy when required for vehicular access to the Happy property (bold added)...

(e) 'Effective dates and signatures':

This agreement will operate as at the date the agreement is signed by the authorised representatives of Urban & Happy.

(f) 'Payments schedule':

Payments will be made by Happy to Urban as follows:

- A An amount to represent the time taken to assist with the Happy proposal in the sum of ### hundred dollars \$###00.00).
- B **An amount to Urban for compensation to be valued & agreed by Happy as payment for the development value of the basement vehicular access way.**
- C Payments for works by Urban to build a purpose built removable basement wall to be removed by & cost to Happy when required for vehicular access to the Happy property (bold added).

5.5 The key take-home points from the above are as follows:

- (a) There was an intention that the parties would agree on an access way (an easement) for vehicles — via the basement area of the subject development — for the benefit of 188-192 Burwood Road.
- (b) The draft MOU, if finalised as an MoU, would be followed by a formal 'heads of agreement', which would be a legal document.
- (c) There would be a payment by Happy to 'Urban' (an associate of the applicant) for the 'development value of the basement vehicular access way'. The amount would be agreed upon on the basis of a valuation.

5.6 The draft MoU has not been finalised between the parties (either prior to the grant of development consent or since). (Special conditions 12 and 13 were satisfied by the provision of an MoU signed by Urban Apartments Pty Ltd alone, an associate of the applicant, to Council on 31 March 2021 — and Council's acknowledgement of the same.)

5.7 It is not appropriate that the applicant disclose the substance of any 'without prejudice' discussions with the owner of 188-192 Burwood Road, Double Happy Pty Ltd (**Double Happy**). However, it is sufficient to say the efforts of the applicant to bring about agreement on the easements, including their purchase price have been substantial. They include:

- (a) email from the applicant to Double Happy, 11 November 2019;
- (b) email from Double Happy to the applicant, 11 November 2019;
- (c) email from the applicant to Double Happy, 4 March 2021;
- (d) email from Double Happy to the applicant, 4 March 2021;
- (e) further email from the applicant to Double Happy, 4 March 2021;
- (f) further email from Double Happy to the applicant, 4 March 2021;
- (g) email from the applicant to Double Happy, 11 March 2021;
- (h) email from the applicant to Double Happy, 22 March 2021;
- (i) email from Double Happy to the applicant, 23 March 2021;
- (j) email from the applicant to Double Happy, 23 March 2021;
- (k) email from Double Happy to the applicant, 24 March 2021;

- (l) email from the applicant to Double Happy, 25 March 2021;
 - (m) email from Double Happy to the applicant, 26 March 2021;
 - (n) email from the applicant to Double Happy, 14 April 2021; and
 - (o) email from Double Happy to the applicant, 14 April 2021.
- 5.8 Additionally, as anticipated by the draft MoU, the applicant obtained a formal valuation of the proposed easements on 27 February 2021. A copy of the valuation report was given to Double Happy. The report is **enclosed** with this application. The market value and compensation for loss for the easements was assessed at \$6 million. Double Happy has not agreed to pay the sum set out in the valuation. It has not supplied its own valuation report to the applicant.
- 5.9 Despite the best efforts of the applicant, the applicant and Double Happy have not yet reached any agreement as to:
- (a) the terms of the easements; or
 - (b) the envisaged payment to the applicant for the easements.
- 5.10 The development is presently under construction. It is expected that it will be ready to receive its occupation certificate on July 2022. Given that there has been no agreement between the applicant and Double Happy, it is necessary for a modification application to be lodged now to manage the situation.
- 5.11 If the relevant conditions are not modified (as per section 4 above) it will not be possible for an occupation certificate to be issued. This is because special condition 19 (as set out in paragraph 4.10 above) requires that the easements be registered on title.
- 5.12 Special condition 19 was imposed on the assumption that the two landowners concerned would quickly reach an agreement on price and terms for the easements. Every indication in 2017 was that this was likely. However, despite the best efforts of the applicant, this has turned out not to be the case.
- 5.13 Ultimately, a development consent cannot compel Double Happy to pay a market value for the easements. Additionally, it would be unreasonable and contrary to the public interest — in these present circumstances — to require the (otherwise) completed development to remain vacant indefinitely, until Double Happy is willing to pay the market value for the easements.
- 5.14 We explain why in the following sections.

6. Reasons in support of the proposed modification — updating the drawing reference

- 6.1 Special condition 4 presently refers to a 'knock-through wall', as per plan DA-2000, Issue J, dated 19 April 2017 (see paragraph 4.2 above). This drawing was prepared as part of the original development application package. An extract of the drawing appears below:

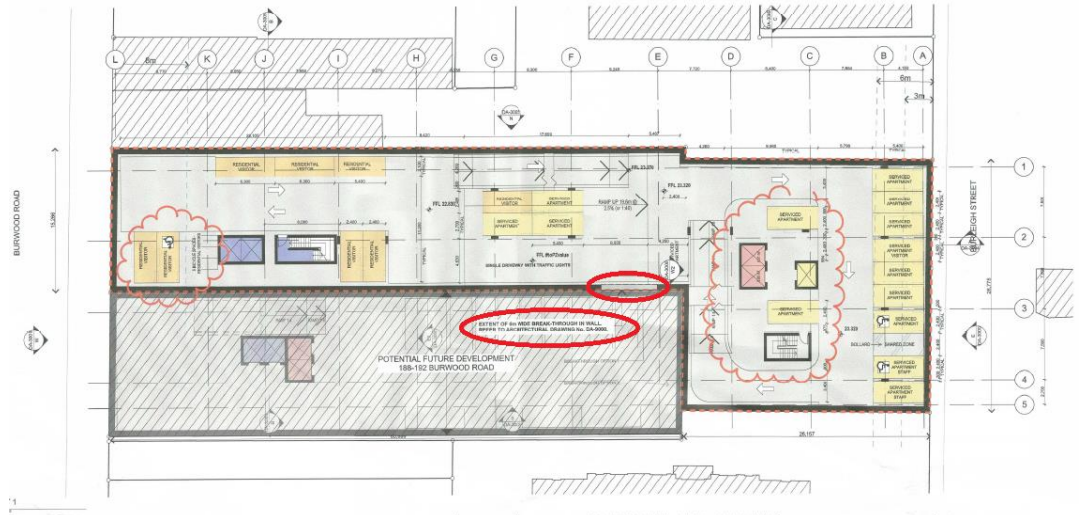


Figure 1: An extract from plan DA-2000, Issue J, dated 19 April 2017, showing basement 1. The annotations in red have been added by us — to show the location and associated note for the knock-through wall referenced in condition 4.

- 6.2 However, this drawing was (in substance) superseded by the modification that was approved on 2 November 2020. As a consequence of that modification, basement 1 was reconfigured as shown below:

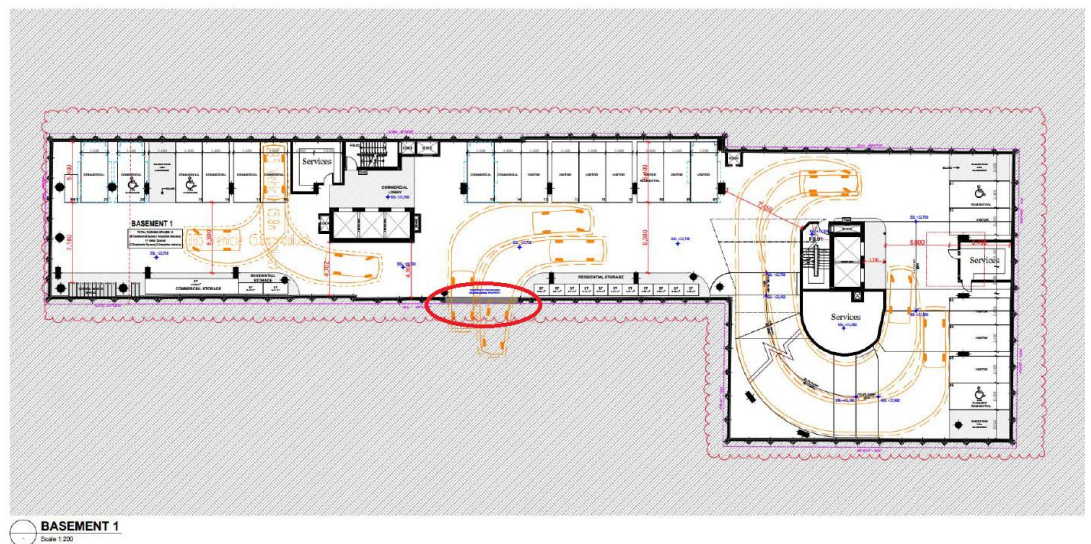


Figure 2: An extract from drawing A103, Revision E, dated 16 October 2020, showing basement 1. The annotation in red has been added by us — to show the revised location of the knock-through wall.

- 6.3 The knock-through wall was relocated several metres to the west.
- 6.4 In any event, the drawings approved under the development consent (plan DA-2000 and drawing A-105) were not the development consent's final drawings.

- 6.5 The current drawing regulating the location of the knock-through wall is plan A-105 Rev M, dated 8 December 2020. This drawing supersedes the earlier drawings because it is the plan approved by construction certificate CA0855A2. An extract from that drawing appears below:

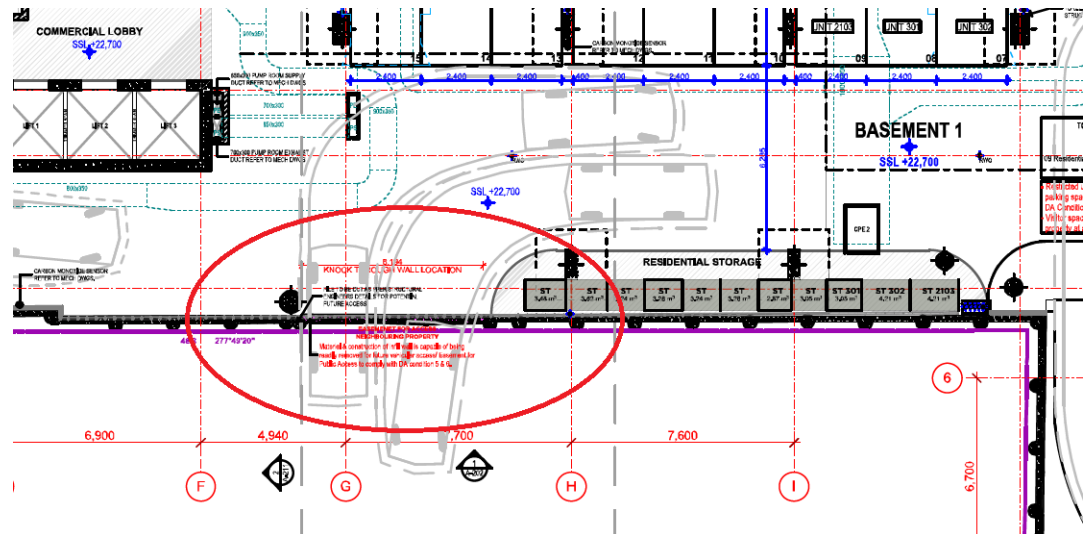


Figure 3: An extract from drawing A103, Revision E, dated 16 October 2020, showing basement 1. The annotation in red has been added by us — to show the current approved location of the knock-through wall.

- 6.6 We say that the construction certificate drawing is the legally relevant drawing because of section 4.16(12) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*. This provision says:

Effect of issuing construction certificate If a consent authority or a registered certifier issues a construction certificate, **the construction certificate and any approved plans and specifications issued with respect to that construction certificate**, together with any variations to the construction certificate or plans and specifications that are effected in accordance with this Act or the regulations, are taken to **form part of the relevant development consent** (other than for the purposes of section 4.55) (some bold added).

- 6.7 The plain words of this provision mean that the plans and specifications issued by the registered certifier with respect to the construction certificate are part of the development consent (other than when applying the ‘substantially the same’ test under section 4.55).
- 6.8 To the extent that there is an inconsistency between:
- (a) the construction certificate plans and specifications; and
 - (b) the plans and specifications approved in the development consent,

the construction certificate plans and specifications must prevail: *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404 at [202] and [206]; *Bunderra Holdings Pty Ltd v Pasmenco Cockle Creek Smelter Pty Ltd* [2017] NSWCA 263 at [43]-[52], [75]-[78].

- 6.9 The terms of a construction certificate also override inconsistent **conditions** of a development consent by force of section 4.16(12) of the EP&A Act: *Bunderra Holdings* at [51] and [214].
- 6.10 This is the case — even if the changes made by a construction certificate are more than minor: *Bunderra Holdings* at [50] and [77].
- 6.11 The upshot of all this is that — despite the current text of condition 4 — the actual approved location of the knock-through wall is the location shown in the construction certificate approved drawing, A103, Revision E, dated 16 October 2020.

- 6.12 Accordingly, this modification application, if only for the purposes of clarity, proposes that special condition 4 be updated to reference the current drawing.

7. Reasons in support of the proposed modification — providing an opportunity for access

- 7.1 The current language of special conditions 4 and 5 (including their ‘reasons’) assumes that the delivery of the access way is a certainty (see paragraphs 4.2 and 4.5 above).
- 7.2 However, for reasons already discussed — despite the best efforts of the applicant — the applicant and Double Happy have not reached any agreement as to:
- (a) the terms of the easement; or
 - (b) the envisaged payment to the applicant for the easement,
- (see paragraphs 5.5-5.9 above).
- 7.3 Accordingly, amendments to special conditions 4 and 5 are proposed to make it clear that the knock-through wall and associated infrastructure must still be constructed, but are merely to facilitate a future access arrangement rather than guarantee to such an arrangement will be in place.

8. Reasons in support of the proposed modification — obligation on the applicant to negotiate in good faith

- 8.1 The development consent was not granted on the assumption that the easement(s) would be created and registered for free, or for less than market value. A failure to reach agreement was not anticipated when the consent was granted.
- 8.2 It is well-established in planning law that conditions of a development consent are only binding on a person **who is carrying out development**. This was explained by the Chief Judge of the Land and Environment Court (Preston CJ) in *North Sydney Council v Moline; North Sydney Council v Tomkinson (No 2)* [2008] NSWLEC 169. The Court said (at [21]) that:
- A person who does not “carry the development out” cannot be in breach of s 76A(1) and hence cannot commit an offence against s 125(1) of the Act. In the same way, civil enforcement orders can only be made against a person who is actually carrying out development on land in breach of the Act ...
- 8.3 This means that no condition can be inserted into the development consent requiring Double Happy (or its successors-in-title as the owner of 188-192 Burwood Road) to take any particular action. Double Happy would not be carrying out any development under the subject development consent.
- 8.4 Only the conduct of the applicant (and its successors-in-title) can be regulated by the subject development consent.
- 8.5 As a result, no condition of development consent can force Double Happy to purchase the easement(s).
- 8.6 Accordingly, the proposed new condition 12 replaces a reference to the draft MoU with a good faith negotiating regime (see paragraph 4.7). This regime will compel the applicant (and any successors) to negotiate in good faith to seek to agree on a payment for, and the terms of, the easements. This obligation would be triggered at any point during the life of the development on receipt of a proposal from the owner of 188-192 Burwood Road.
- 8.7 This is a sufficient and proportionate measure to protect the public interest. That is, it is sufficient to ensure that the future development of 188-192 Burwood Road would not needlessly be burdened by a suboptimal access arrangement (to the disbenefit of the community).

- 8.8 It would also be unreasonable for a development consent to force the applicant to confer a property right on a private party (of some great value) for less than its market value. We say this for two reasons.
- 8.9 Firstly, a consent condition imposed to secure a financial advantage to the owner of 188-192 Burwood would be imposed for an improper purpose: (*Botany Bay City Council v Saab Corp Pty Ltd* [2011] NSWCA 308 at [13]).
- 8.10 However, even if the purpose is pure, a consent condition that **operated** to redistribute property rights from the applicant to the private owner of 188-192 Burwood Road would impose a severe burden placed on the applicant that is disproportionate to the consequences attributable to the proposed development (*Botany Bay City Council* at [15]; *Dogild Pty Ltd v Warringah Council* [2008] NSWLEC 53 at [60]-[61] and [65]; *Community Association DP 270253 v Woollahra Municipal Council* [2013] NSWLEC 184 at [92], [96] and [102]-[106]).

9. Reasons in support of the proposed modification — if good faith negotiations break-down

- 9.1 The consent authority need not be concerned that the applicant (or its successors in title) need only 'sit on their hands' to avoid providing the easement(s) for 188-192 Burwood Road.
- 9.2 This is because, if good faith negotiations break-down, the owner of 188-192 Burwood Road will have a remedy that sits outside of the development consent.
- 9.3 Section 88K of the *Conveyancing Act 1919* allows the Supreme Court to make an order for the grant of an easement. In certain circumstances the Land and Environment Court also has this power. The power can only be exercised (by either court) if the following conditions are satisfied:
- (a) the easement is reasonably necessary for the effective use or development of the land benefitting from the easement (**the reasonable necessity requirement**);
 - (b) the use of the land benefitting from the easement will not be inconsistent with the public interest (**the public interest requirement**);
 - (c) the owner (and each other person having an estate or interest in that land that is evidenced by a registered instrument) of the land to be burdened by the easement can be adequately compensated (**the adequate compensation requirement**); and
 - (d) all reasonable attempts have been made to obtain an easement (**the reasonable attempts requirement**),

(*Ross Bilton v Georgia Ligdas* [2016] NSWSC 1262 at [111]).

We will deal with each of the above requirements in turn.

The reasonable necessity requirement

- 9.4 Reasonable necessity requires that the use or development of the land be more than just desirable or preferable (*Rainbowforce Pty Ltd v Skyton Holdings Ltd* [2010] NSWLEC 2 at [76]; *Gordon v Lever* [2018] NSWSC 1888 at [64]).
- 9.5 On the other hand, the test is **not** whether an easement is **absolutely** necessary for any development or use of the land. That is, it is **not** necessary to show that an easement must be granted for the land to be used for any reasonably possible purpose (*117 York Street v Proprietors of SP No 16123* (1998) 43 NSWLR 504, 508-509).
- 9.6 There is a distinction between easements that are 'nice to have' and those that are reasonably necessary (*O'Shea v Athanasakis* [2009] NSWSC 1150 at [124]).

- 9.7 In a matter such as the present one, there is a need to demonstrate that the proposed development is one which is:
- ... appropriate to the area in which the land is situated and is at least an economically rational use of the land ...
- (as per *Moorebank Recyclers v Tanlane* [2012] NSWCA 445 at [154]).
- 9.8 Additionally, the proposed 'use or development of the land with the easement must (at least) be 'substantially preferable' to the use or development of the land without the easement' (*117 York Street* at 508-509).
- 9.9 The Court must also take into account all relevant matters, including any impacts of the easement on the land burdened by the easement (*ING Bank (Australia) v O'Shea* [2010] NSWCA 71 at [48] – [49] and [141]-[161]).
- 9.10 This means that if an easement would have severe adverse impacts on the use of the burdened land, then there must be a correspondingly higher need for the easement for the effective use and development of the land in order to justify its imposition. For example, if the easement would effectively sterilise the burdened land, then a very strong case for reasonable necessity would be required (*Moorebank Recyclers* at [156]-[159]).
- 9.11 In the present case, the development consent already ensures that the new buildings on 180-186 Burwood Road Burwood would be physically configured to accommodate the access arrangement. Swept paths, etc have already been assessed to confirm workability. No change is proposed in this respect.
- 9.12 Accordingly, in future 'section 88K' proceedings, there could be no credible claim by the applicant (or any successor-in-title) that the easements would have severe adverse impacts on the use of the burdened land. This reduces the threshold that must be met to pass the reasonable necessity requirement (to the advantage of the owner of owner of 188-192 Burwood Road).
- 9.13 In *Grattan v Simpson* (1998) 9 BPR 16,649 Young J said (at 16,651):
- The cases show that the mere fact that there is some other means of access to the property does not of itself preclude an order being made under this particular section. However, where there are alternate means of access the evidence must show that in order to appropriate someone else's property **there must be a considerable advantage in obtaining the easement rather than developing an alternative access** (bold added).
- 9.14 The Council has already assessed that there is a considerable advantage in obtaining the easements rather than developing an alternative access for 180-186 Burwood Road.
- 9.15 Based on the body of evidence already in existence, this criterion would be met.

The public interest requirement

- 9.16 Where development consent has been granted envisaging the proposed development, a strong presumption arises that the grant of the easements would not be inconsistent with the public interest: *ABI-K Pty Ltd v Frank Shi* [2014] NSWSC 551 at [25]; *Louisiana Properties Pty Ltd v Hakea Holdings Pty Ltd*; *Hakea Holdings Pty Ltd v Louisiana Properties Pty Ltd* [2017] NSWLEC 37 at [56].
- 9.17 Given the terms of the development consent (as proposed to be modified) it is very likely that this requirement would be satisfied.

The adequate compensation requirement

- 9.18 The compensation that is payable by the owner of 180-186 Burwood Road to the applicant (or its successors) would be determined having regard to the expert valuation evidence that is placed before it.
- 9.19 The courts have tended to prefer the piecemeal approach in situations such as this (*Rainbowforce* at [145]; cf *Louisiana Properties* at [122]).

- 9.20 The piecemeal approach to valuation involves assessing compensation for:
- (a) the loss of proprietary rights by imposition of the easement;
 - (b) disturbance caused by the initial construction works and subsequent maintenance and repair; and
 - (c) injurious affection, being the loss in value to the residue area as a result of imposition of the easement less any benefit or increment in value as a result of imposition of the easement.

(*Rainbowforce* at [138]).

- 9.21 There are two things to note in this regard.

- 9.22 **Firstly**, there is no compensation for the loss of bargaining position of the owner of the land to be burdened. The owner (ie the applicant in this case) is 'to receive a just sum and for value for what he or she has to give over, rather than being able to demand the earth' (*Rainbowforce* at [108]).

- 9.23 **Secondly**, a court's task is to be satisfied that the persons affected by the easement are 'adequately compensated'. In assessing adequate compensation the court 'is not to err on the side of generosity or miserliness' (*Rainbowforce* at [110]). Ordinarily, compensation will have three elements:

- (a) the diminished market value of the affected land;
- (b) associated costs that would be caused to the owner of the affected land; and
- (c) an assessment of compensation for insecurity and loss of amenities, such as loss of peace and quiet.

Against these losses and disadvantages should be allowed, as an offset, any compensating advantages (*Rainbowforce* at [111]).

The reasonable attempts requirement

- 9.24 In order to satisfy this requirement, the owner of 180-186 Burwood Road must be able to demonstrate to the Court that it has made all reasonable attempts to acquire an easement from the respective landowners.
- 9.25 If the modification is approved, this would involve making full use of the 'good faith' negotiating regime required under the proposed new special condition 12 (see paragraph 4.7 above).

In short

- 9.26 The consent authority can be satisfied that the owner of 188-192 Burwood Road would be very likely to be able to obtain a Court-ordered easement, if needed, on payment of adequate compensation to the applicant, or its successors in title.
- 9.27 It would be inappropriate for the consent authority to attempt to arbitrate on the appropriate level of compensation. Fortunately, the section 88K regime means that the consent authority does not need to do so.

10. Reasons in support of the proposed modification — beneficial and facultative

- 10.1 The power given by section 4.55(2) of the EP&A Act to modify a development consent, is one to be regarded as beneficial and facultative (see *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 at 475 per Mason P).
- 10.2 This means that there is an implied shift in the persuasive burden to the consent authority to demonstrate why the proposed modification should not be regarded as appropriate (*TL & TL Tradings Pty Ltd v Parramatta City Council* [2016] NSWLEC 150 at [85]).

- 10.3 In the present circumstances there are no persuasive reasons why the easements must be registered before the new buildings are occupied. The:
- (a) 'good faith' negotiating requirement; and
 - (b) the right of the neighbouring landowner to pursue Court-ordered easements under section 88K (which necessitates the payment of adequate compensation to the applicant, or its successors),
- are sufficient protection for the public interest.
- 10.4 Furthermore, if the modification application is refused, there is a real likelihood that the completed buildings will sit idle, for an extended period of time, and not be occupied.
- 10.5 It is contrary to the public interest that significant buildings remain empty and unused at such a significant location any longer than is necessary, given the following:
- (a) The buildings are in a location where they are expected to support the integration of suitable business, office, residential, retail and other development in a highly-accessible location.
 - (b) While laying idle the buildings would be unable to serve as a centre of employment and housing in a location highly accessible by public transport. This means that they would not encourage the use of alternatives to private motor vehicles, such as public transport, walking or cycling.
 - (c) The buildings would be unable to serve the local workforce and the wider community while they remain idle.
 - (d) The buildings would not, whilst idle, promote land uses with active street frontages.
- 10.6 Accordingly, it is important to the public that the buildings not lay idle any longer than is strictly necessary.

11. The 'substantially the same' test

- 11.1 The applicant gives an undertaking that the proposed development, as modified, will be substantially the same development as the development that was the subject of the original development consent.
- 11.2 Inasmuch as the proposed modification relates to the timing of the registration of the easements, this procedural change does not, in itself, alter any aspect of the **development**. Accordingly, this change cannot raise any issues under the 'substantially the same' test.
- 11.3 Accordingly, the development as proposed to be modified is substantially the same development.

12. Statement re certain applications

- 12.1 The application is not being made to:
- (a) the Land and Environment Court under section 4.55 of the EP&A Act; or
 - (b) to the consent authority under section 4.56 of the EP&A Act.
- 12.2 This statement does not preclude our client commencing a merit appeal to the Land and Environment Court at the first opportunity.

Statements of fact set out in this letter are based on instructions given to us by our client.

Yours sincerely



Aaron Gadiel

Partner

Accredited Specialist — Planning and Environment Law