

19 October 2021

**Mills Oakley**  
ABN: 51 493 069 734

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

All correspondence to:  
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Tommaso Briscese  
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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 the manner of the development's construction. The change will allow the construction program to be carried out continuously (and not cease merely because commercial negotiations have not been completed with the owner of a neighbouring privately-owned site, being 188-192 Burwood Road 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 yet agreed to pay that sum. It has not supplied its own valuation report to the applicant.
- The development is presently under construction. Further construction certificate(s) must be issued for construction to continue.

- It is contrary to the public interest that the current construction program cease merely because of an unresolved commercial issue between two private landowners.
- It is sufficient that the easement issue is resolved prior to the issue of an occupation certificate.

## 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 modify the proposed development, so that it may be carried out without a memorandum of understanding up to the point of the issue of an occupation certificate.

#### ***Special condition 12***

- 4.2 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.

- 4.3 **Omit** the whole condition of special condition 12.

#### ***Special condition 13***

- 4.4 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.

- 4.5 **Omit** the whole condition of special condition 13.

**Special condition 19**

4.6 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.

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

The easement detailed in the draft memorandum of understanding submitted to the Council on 31 March 2021 providing for:

- a. vehicular access to 188-192 Burwood Road; and
- b. a right of access and easement for servicing (including garbage collection) 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,

is to be registered on the title of the land prior to the issue of an Occupation Certificate.

**5. Reasons in support of the proposed modification — general**

- 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 Road 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.

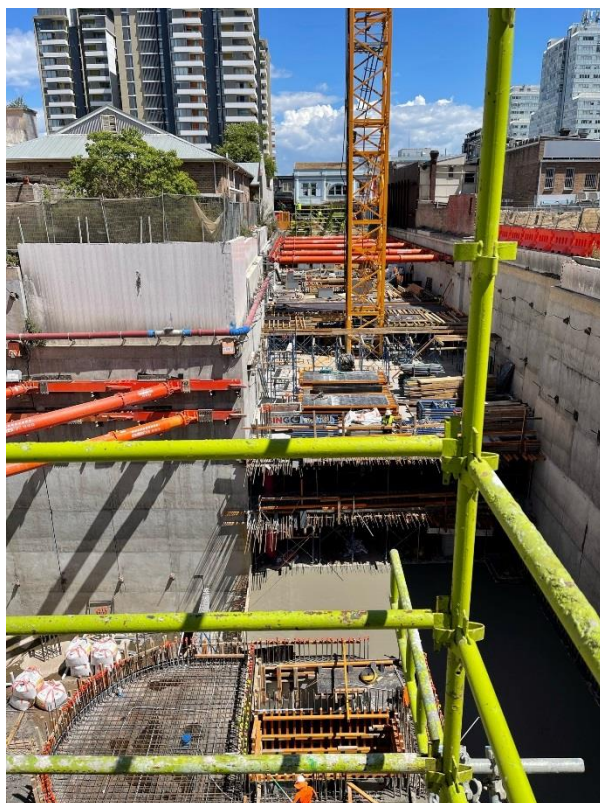
5.6 The draft MoU has not been finalised between the parties (either prior to the grant of development consent or since). (Special conditions 12 and 13 were satisfied on the issue of the first construction certificate by the provision of an MoU signed by Urban Apartments Pty Ltd alone, an associate of 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 an agreement on the easements, including their purchase price have been substantial. They include:

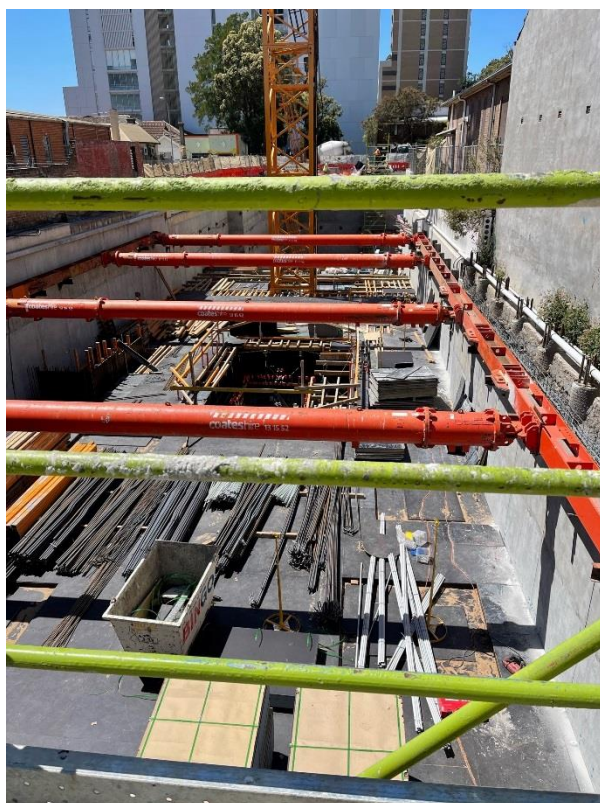
- (a) email from the applicant to Double Happy, 11 November 2019;

- (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;
  - (o) email from Double Happy to the applicant, 14 April 2021; and
  - (p) email from the applicant to Double Happy, 20 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 yet agreed to pay the sum set out in the valuation.
- 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 A construction certificate (for 'works approved within the development consent relating to the modification of the approval under C9A085A1 for the basement drainage, concrete structural elements up to and including ground floor slab and excludes all other associated building and development works') was issued on 7 December 2020. The development is presently under construction. It is expected that it will be ready to receive its occupation certificate in 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 ensure that construction is able to continue while negotiations continue. The applicant wishes to avoid any uncertainty as to whether further construction certificates may be issued.

5.11 The following image illustrates the present state of the site:



The above image is the view from the hoarding on Burleigh Street taken on 19 October 2021.



The above image is the view from the hoarding on Burwood Road taken on 19 October 2021.

- 5.12 The Applicant will require further construction certificates to be issued as follows, in order for the construction program to continue uninterrupted:
- (a) structural construction certificates (anticipated to be issued by 1 November 2021; and
  - (b) other construction certificates for the approved development (anticipated to be issued by 23 December 2021).
- 5.13 At present there are 50 workers regularly attending the site.
- 5.14 As construction ramps up the site will, at its peak employment level have around 250 workers regularly attending the site.
- 5.15 Any delay in the issue of construction certificates will adversely impact:
- (a) those workers;
  - (b) third party contractors; and
  - (c) suppliers from whom the applicant procures its materials from.
- 5.16 Maintaining the status quo and potentially delaying the issue of construction certificates until commercial negotiations are completed between the applicant and the neighbour next door will have the following consequences:
- (a) adverse amenity impacts to the neighbouring properties and the wider community as a result of the site remaining as an incomplete, but unoccupied, construction site for a prolonged period; and
  - (b) delaying the economic and social stimulus of the project.
- 5.17 In regard to economic stimulus, there is presently a declared human biodiversity emergency in all parts of Australia (as per the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020*).
- 5.18 The NSW Government has said (via Planning Minister Rob Stokes on 15 September 2020) that:
- the planning system had been a key economic lever in the NSW Government's immediate response to the pandemic, driving the state and the rest of the country to a strong economic recovery by accelerating a pipeline of projects.
- 5.19 Annexed and marked 'A' is a media release by the Minister for Planning and Public Spaces, the Honourable Robert Stokes MP, issued on 15 September 2020, making the above statement.

## **6. Reasons in support of the proposed modification — beneficial and facultative**

- 6.1 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).
- 6.2 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]).
- 6.3 In the present circumstances there are no persuasive reasons why commercial arrangements for the easements must be resolved before the issue of further construction certificates. The requirement that the easements be registered before the occupation certificate is issued is a sufficient protection for the public interest.

- 6.4 It is contrary to the public interest that the land spend any time as an unworked construction site given the following:
- (a) Workers and small businesses dependent on the construction work proceeding will lose income and work, with consequent knock-on effects through the community.
  - (b) 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.
  - (c) While laying idle an incomplete construction site, the site 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.
  - (d) The buildings would be unable to serve the local workforce and the wider community while they remain incomplete.
  - (e) The buildings would not, whilst incomplete and idle, promote land uses with active street frontages. In fact, the idle construction site would be a visual and social blight on the streetscape. It would create a stretch of inactivated street frontage which is likely to attract anti-social behaviour.
- 6.5 Accordingly, it is important to the public that the site not lay idle and that the construction program progress.

## **7. The 'substantially the same' test**

- 7.1 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.
- 7.2 This modification application seeks to change the manner of the development's construction. The change will allow the construction program to be carried out continuously (and not cease merely because commercial negotiations have not been completed with the owner of a neighbouring privately-owned site, being 188-192 Burwood Road Burwood).
- 7.3 The proposed development will be modified, but the modification is very minor.
- 7.4 Accordingly, the development as proposed to be modified is substantially the same development.

## **8. Statement re certain applications**

- 8.1 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.
- 8.2 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

A handwritten signature in blue ink, appearing to read "Aaron Gadiel".

**Aaron Gadiel**

**Partner**

Accredited Specialist — Planning and Environment Law

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