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The General Manager
Liverpool City Council
DX 5030
LIVERPOOL

22 December 2015

Dear General Manager,

Re: Advice - Development Application for retail and shop top housing development at 90 Cartwright Avenue, Miller (DA 62/2015)

We refer to recent communications with Council's Director Planning and Growth in relation to development application No. DA 62/2015 lodged with Council seeking consent for a retail and shop top housing development on the land known as Lot 4 in Deposited Plan 219028 (No. 90) Cartwright Avenue, Miller ("Lot 4").

Our advice is sought on the question of whether the retail tenancies and structural columns that are proposed on the ground floor of the development would be contrary to the provisions of the easement that burdens Lot 4.

ADVICE

In the judgment published on 27 March 2015 in the case of *Registrar-General of New South Wales v Jea Holdings (Aust) Pty Ltd* [2015] NSWCA 74 ("Jea Holdings case") the NSW Court of Appeal confirmed that Lot 4 is burdened by an easement in the terms set out in Memorandum of Transfer J493622 dated 20 October 1963 and registered on 23 April 1964 between Green Valley Shopping Centre Pty Limited as Transferor and Tooth & Co as Transferee.

The terms of the easement are set out in paragraph 22 of the judgment of the Court of Appeal. In essence the terms of the easement require the owner of Lot 4 not to do, commit, or suffer any act, matter or thing which might obstruct or prevent the exclusive use of Lot 4 for the parking of motor vehicles by the owners of Lot 5 in Deposited Plan 219028 (as well as their tenants, lessees, servants, invitees, customers and patrons).

However, the terms of the easement specifically permit the owner of Lot 4 to erect over or under Lot 4 "*such building or buildings at a height of not less than 12 feet*

which shall not obstruct or prevent the use of Lot 4 for the parking of motor vehicles or the ingress or egress of motor vehicles from the parking area."

At paragraphs 152 to 153 of the Jea Holdings case Justice Basten said:

> *"152. The limitation on use of lot 4 by the owner of that lot, while capable of extending from time to time to much or even all of the surface area of the parking lot, was a shared right, with the registered owner, to the use of the lot for car parking. Further, it expressly subsisted with the rights of the owner to use any part of the stratum at a height greater than 12 feet above the surface of the land and to use the underground area to such depth as might be valuable to it. So much is apparent from the terms of par (a) of the covenant set out at [22] above.*
>
> *153. Disregarding the car parking rights, the rights reserved to the owner of lot 4 (the transferor) would by necessary implication include such use of the surface of lot 4 as would be necessary to erect a building above it, and to obtain egress to the land below it.* ***It is not uncommon for buildings to be erected above ground level, so as to permit parking beneath them. It is also to be expected that not insignificant inroads would be made on the number of parking spaces available if such a building were erected over (or under) lot 4. That would not be inconsistent with the terms of the covenant, which must accommodate reasonable user by the owner of the servient tenement in accordance with its reserved rights.*** *Further, the fact that the use of land by the transferee and its customers and patrons was to be exercised "together with" the transferor and the respective tenants and lessees, invitees and customers of the owners of lots 1-4, was entirely inconsistent with the kind of exclusivity which would prevent the interest being classified as an easement." (emphasis in bold is added)*

The development subject of DA 62/2015 proposes the following on the ground floor or surface of Lot 4:

- 162 car parking spaces.
- 2 retail tenancies.
- A foyer, outdoor deck and garden area.
- Fire stairs and exit points.
- 3 lifts.
- Various columns and structural elements supporting the building that is proposed to be constructed above the ground level.

Having regard to the judgment of the NSW Court of Appeal in the Jea Holdings case it would seem that the structural columns, fire stairs and lifts are unlikely to be considered to be contrary to the terms of the easement that burdens Lot 4 because those elements would be necessary in order to accommodate the right of the owner of Lot 4 to erect a building that is 12 feet above the surface of the land.

However, the retail tenancies, garden and foyer area as proposed on the surface of Lot 4 near to the northern boundary are unlikely to be considered to be consistent with the terms of the easement because the provision of those elements are not necessary to facilitate the provision of a building over the surface of Lot 4.

In our view, the fact that part of the development may be contrary to or inconsistent with the easement that burdens Lot 4 does not of itself prohibit the granting of consent to the development application. In that regard, the following matters should be noted:

1. That granting of consent to a development application does not affect the proprietary rights of a third party such as the owners of Lot 5 (see Rothwell Boys Pty Ltd v Coffs Harbour City Council (2012) 186 LGERA 366). If the carrying out of development in accordance with the terms of a development consent involves an interference with any such proprietary rights then, at the point at which an unlawful interference with those rights is either threatened, imminent or occurring, the affected party can approach the Supreme Court.

2. An easement can be extinguished either by agreement of the parties benefited by the easement or pursuant to the statutory regime provided for by Section 89 of the Conveyancing Act 1919. Accordingly, if a development consent cannot be implemented without an amendment to or extinguishment of an easement an application could be made by the owner of land burdened by the easement to the Supreme Court of NSW under Section 89 of the Conveyancing Act 1919 for the easement to be modified or extinguished.

The fact that the development as proposed may be currently incapable of being lawfully carried out due to the existence of the easement for car parking that burdens Lot 4 does not prohibit the granting of consent to the application. Further, it would not be necessary to include a condition on the grant of development consent to prohibit the consent from operating unless or until the easement was extinguished. The matter of extinguishment or modification of the easement is a private proprietary matter that would need to be dealt with by the owners of the land burdened (Lot 4) and the land benefited (Lot 5).

In the case of *Botany Bay City Council v Minister for Planning and Infrastructure and others* (2015) NSWLEC 12 Justice Beech Jones rejected claims that an approval given under Part 3A of the Environmental Planning and Assessment Act 1979 (‘EP&A Act”) was invalid on the basis that it was

incapable of being carried out without certain easements being extinguished. At paragraph 82 of the judgment Justice Beech Jones said:

> *"The contention that the Project "is incapable of being carried out or carried out in compliance with the conditions" of the Approval has simply not been made out. To the contrary, the material before the PAC and this Court only demonstrates that extinguishment may or may not occur. In any event, this Court would not grant a declaration of that kind. It does not reflect the application of the EPAA or any other relevant environmental legislation to findings of fact made by the Court concerning events that have happened. Instead it purports to record a prospective assessment of the likelihood that the carrying out of the Project would unlawfully interfere with the Council's proprietary rights. It is necessarily preliminary and as such is clearly not a suitable matter for declaratory relief …*
>
> *…Further, as the incapacity referred to in the proposed declaration is said to flow from an interference with proprietary rights, and not a contravention of the EPAA or other environmental legislation, it is doubtful that this Court has power to grant such relief although it is not necessary to consider that further."*

CONCLUSION

In our view, the existence of the easement that burdens Lot 4 does not prohibit the granting of development consent under the EP&A Act to development application No. DA 62/2015 (even if the development is inconsistent with the terms of easement). Further, it would not be necessary for a condition to be imposed on the grant of development consent to defer the operation of the consent unless or until the easement that burdens Lot 4 is modified or extinguished as it is a private proprietary matter that would need to be dealt with by the owners of the land burdened (Lot 4) and the land benefited (Lot 5).

We trust the above advice is of assistance. If you have any questions about the advice or require further advice, please do not hesitate to contact Adam Seton at our Campbelltown Office.

Yours faithfully
MARSDENS LAW GROUP

A.J. SETON
Partner
Accredited Specialist Local Govt. & Planning