

## Asher Richardson

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**From:** Mark Bonanno  
**Sent:** Friday, 24 May 2019 2:03 PM  
**To:** Asher Richardson  
**Cc:** Erin Watt; Simon Turner; Harjeet Atwal; Ruba Osman; Luke Murtas  
**Subject:** 728 Princes Highway: Commencement of DA201200528

Dear Asher,

### Advice sought

You have asked me to advise whether I agree that physical commencement of works in relation to DA201200528 has commenced, and therefore, that the consent has not lapsed.

Information to hand

- Your emails; and
- An advice from Allens Linklaters dated 18 April 2019 (**Advice**) in support of the proposition that the works have physically commenced (attaching a report from JK Geotechnics of 20 August 2018 (**Report**)); and
- A copy of the conditions in 201200528; and
- A copy of the Coffey Geotechnical Report (**Coffey Report**) referenced in the conditions.

### Executive summary

I do not agree that physical commencement has taken place for the reasons set out below. I believe therefore the approval has lapsed.

### The Facts

DA201200528 (**DA**) was issued by the Panel on 21 August 2013, for the property 728 to 750 Princes Highway, Tempe (**Site**) and in the normal course would lapse on 20 August 2018.

The DA was for a series of bulky goods tenancies.

The relevant section is section 53 of the *Environmental Planning & Assessment Act 1979* (**Act**). None of the variations or exceptions in the section apply, and the approval would last for 5 years.

The DA was issued to Urbis Pty Limited.

The Site was then sold to Bunnings in January 2015.

Bunnings have submitted a new development application for the same Site and this is the subject of the Panel's current consideration.

The only work allegedly done to fulfil the requirement for physical commencement is a series of 8 boreholes and installation of groundwater monitoring wells commenced on 14 August 2018 (see Report, page 1), or 6 days before lapse. There is no other work alleged to allow physical commencement.

The conditions refer to a number of requirements before undertaking works in conditions 28 to 47. None of these were fulfilled. In fact, fulfilment of some of these conditions would be quite onerous.

### Consideration

To claim physical commencement, Bunnings are reliant on condition 55 which states:

*Before the issue of any Construction Certificate, amended plans are required to be submitted to the satisfaction of the Certifying Authority detailing all recommendations contained within the Geotechnical Deck Study report, prepared by Coffey Geotechnics Pty Ltd, dated 13 August 2012 and submitted to Council on 27 November 2012.*

The Coffey Report itself seems complete save for one part at page 5 under the heading "Further Investigation". It states:

*Based on the results of this initial geotechnical assessment and our experience on similar projects, the proposed development is considered geotechnically feasible, but further geotechnical investigation specific to the proposed development is recommended to provide suitable recommendations for design, and to manage the geotechnical risks associated with the site and development proposal.*

*Further investigation such as boreholes will be required to assess excavation conditions where excavations and new footings are located. Cored boreholes are also recommended to assess the depth and quality of bedrock. This would also allow higher design bearing capacities and a better understanding of any likely groundwater seepage during construction.*

The Report appears to be an answer to the Coffey Report. However, I am troubled by a few matters.

Firstly, the Report at page 1 states:

*The main purpose of the geotechnical work was to confirm and supplement the information and recommendations presented in our Geotechnical Report Ref. 27926Vrpt-Tempe, dated 2 December 2014. The latter report was preliminary and prepared simply for the purposes of Due Diligence to assist with the purchase of the property; hence, the need to complete the additional, supplementary work to assist with the Development Application for the proposed development.*

In other words, no reference to Coffey. In fact, it tells us that it is a supplementary report which was required for Due Diligence in the purchase of the Site. It is nothing to do with reports necessary to satisfy the condition in the DA.

It goes on to speak of the need to “assist with the Development Application for the proposed development”.

Which “proposed development”? The DA has already been approved. The Report is far from clear that it is in response to the DA conditions. It is far more likely that it is for the current proposal you are assessing, and not for the DA which lapsed on the very day it was produced.

### **Consideration of the law within the Advice**

I have no dispute with the law as quoted. The bar for physical commencement is low. Preparatory work qualifies, provided it is “related to” the DA in question.

My concern here is that the documents you have been given are ambivalent. If the Report made reference to the Coffey Report, and expressed itself to be in answer to Item 7 page 5, the path would be clearer.

From what I have in front of me now, I do not have a Geotechnical report which is necessary to the DA.

Doubtless when the applicant sees this advice, there will be all sorts of qualifying letters, but the circumstances trouble me.

Less than a week before lapse, the applicant appears to have taken steps to action the approval. Unable to do the things in the sections “Before Commencing Demolition...” they have found something to do of a preparatory nature. My concern is that the work done is not “related to” this proposal: see *Hunter Development Brokerage Pty Ltd v Cessnock City Council* [2005] NSWCA 169 at paragraph 104.

The Report, which is essentially all they have to prove commencement, expresses itself to be undertaken as part of an old due diligence report; and then references another 2014 report undertaken by themselves. Again, no reference to the DA. JK Geotechnics, as far as I can see, had nothing to do with the DA. They may be involved in this proposal for Bunnings, but they had no part in the DA which is alleged to have commenced.

We are meant to assume that the Report is done to complete the Coffey recommendations. Nothing in their advice, or in the Report itself, leads me to that conclusion. We are invited to assume the link.

I decline the invitation.

### **Conclusion**

While the barrier to proving physical commencement is low, for the above reasons I do not think they have succeeded on this occasion.

Mark

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*Council acknowledges the Traditional Custodians of these lands, the Gadigal-Wangal people of the Eora Nation.*