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18 April 2019

Philip Drew
Development Approvals Manager
Bunnings Properties Pty Ltd
Level 8
5 Rider Boulevard
Rhodes NSW

Dear Phil

**Physical commencement of works pursuant to Development Consent No. 201200528
Site: 728-750 Princes Highway, Tempe NSW**

1 Instructions

- 1.1 Bunnings Properties Pty Ltd (**Bunnings**) has requested our advice as to whether Development Consent No. 201200528 issued by Marrickville Council to Urbis Pty Ltd on 21 August 2013 (**Development Consent**) has lapsed.

2 Summary of advice

- 2.1 In our view, the Development Consent has not lapsed because engineering work, in the form of intrusive geotechnical investigations, relating to the building work was physically commenced on the Site pursuant to s4.53(4) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).
- 2.2 The intrusive geotechnical investigations were undertaken between 14 and 17 August 2018, prior to the date on which the Development Consent would have otherwise lapsed being 20 August 2018.¹

3 Statutory framework

- 3.1 Under the EP&A Act, a development consent lapses 5 years after the date from which it operates, although this period may be reduced by the consent authority when granting a development consent in certain circumstances.² No such reduction was made by the consent authority when granting the Development Consent.
- 3.2 However, development consent for the erection of a building, the subdivision of land or the carrying out of a work does not lapse:

¹ EP&A Act s4.53(1).

² EP&A Act, s4.53(2)-(3A).

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"...if building, engineering or construction work relating to the building, subdivision or work is physically commenced on the land to which the consent applies before the date on which the consent would otherwise lapse under this section."³

- 3.3 Case law confirms that in applying s4.53(4) of the EP&A Act to determine whether a development consent has lapsed, the only relevant questions are:⁴
- (a) **Question 1:** was the consent for the erection of a building, subdivision of land or the carrying out of a work;
 - (b) **Question 2:** was the work relied on "*building, engineering or construction work*";
 - (c) **Question 3:** did it relate to the approved development; and
 - (d) **Question 4:** was it lawfully physically commenced on the land to which the consent applied prior to the relevant lapsing date.
- 3.4 Each of these questions are addressed below.

4 Physical commencement

Question 1: Consent for the erection of a building and subdivision of land

- 4.1 The Development Consent authorises the following development at the Site:
- (a) partial demolition of the rear of the existing building;
 - (b) construction of a new building form and adaptive reuse of the remainder of the existing building for two levels of bulky goods tenancies;
 - (c) provision of undercroft car parking and at grade parking for up to 301 cars;
 - (d) erection of signage; and
 - (e) subdivision of the land to provide a slip lane from the Princes Highway into Smith Street and widening of Smith Street on the northern side;

together, the **Development**.

- 4.2 The Development Consent clearly authorises the erection of a new building form on the Site, together with subdivision of land for the purposes of s4.53(4) of the EP&A Act.

Question 2: Engineering Work

- 4.3 We are instructed that intrusive geotechnical investigations were undertaken on the Site by JK Geotechnics between 14 and 17 August 2018, comprising drilling and testing of 8 deep geotechnical boreholes and installation of groundwater monitoring wells at various locations on the Site.
- 4.4 The nature and purpose of the geotechnical investigations is described in the **enclosed** letter from JK Geotechnics to Bunnings Group Limited dated 20 August 2018. Relevantly, that letter confirms that the results of the geotechnical testing will enable JK Geotechnics to provide information and recommendations on subsurface profile including bedrock depth and quality; AS2870 site classification; main geotechnical issues of the Site for the Development; earthworks including excavation issues; retention; groundwater issues; lateral parameters for retention design; suitable

³ EP&A Act, s4.53(4).

⁴ *Hunter Development Brokerage Pty Ltd v Cessnock City Council; Tovedale Pty Ltd v Shoalhaven City Council* [2005] NSWCA 169 at [111]; *Norlex Holdings Pty Ltd v Wingecarribee Shire Council* [2010] NSWLEC 149 at [22].

footings systems and options; foundation strata and depth; allowable bearing pressures; allowable shaft adhesions; and external pavements.

4.5 It is well established in decisions of the Court of Appeal and Land and Environment Court that geotechnical work can be 'engineering works' precluding a consent from lapsing, and such works do not fail to prevent the lapse of the consent because the works are merely preparatory or because the soil is analysed off site.⁵

4.6 In *Hunter Development Brokerage Pty Ltd v Cessnock City Council; Tovedale Pty Ltd v Shoalhaven City Council* [2005]⁶ (Hunter), Tobias JA made the following observations:

"In my opinion, the expression "engineering work" in its context of forming part of the composite phrase "building, engineering or construction work", should be given a broad meaning to include all those activities associated with, and forming a necessary part of, the discipline of engineering applicable to the subdivision of land. There can be no doubt that engineering as such can involve many different elements..."

4.7 Whilst *Hunter* involved subdivision works, these principles have also been applied to "works" generally.⁷

4.8 Relevantly, the works described in those cases involved the excavation of test pits and the collection of soil samples that were subjected to laboratory tests, whose results enabled:

- (a) the preparation of engineering plans and specifications for proposed subdivision road pavements in one instance; and
- (b) recommendations regarding earthworks, excavation, footings and retaining walls, and a basement construction sequence for the proposed development to be made in another instance.

4.9 Accordingly, and consistent with case law authority, we consider that the intrusive geotechnical investigations carried out by JK Geotechnics on the Site are 'engineering works' pursuant to s4.53(4) of the EP&A Act.

Question 3: Nexus with the approved development

4.10 The phrase "relating to" in the context of s4.53(4) of the EP&A Act has been the subject of much judicial discourse. The seminal discussion is to be found in the judgment of Tobias JA in *Hunter* where his Honour relevantly states at [104]:

"I accept that the ambit of the expression "relating to" depends upon the context in which it appears...It involves, at the very least some real relationship or connection between the work and the subdivision in respect of which the consent has been granted. In my opinion, the required connection or relationship is satisfied if the relevant work is a necessary step in, or part of, the process required for, or involved in, the erection of the building, the subdivision of the land or the carrying out of the work (as the case may be) which is authorised by the consent."

4.11 Importantly, in *Hunter* Tobias JA also found at [109] that even though work undertaken may not form part of the actual works consented to, "the carrying out of engineering work associated therewith

⁵ *Hunter Development Brokerage Pty Ltd v Cessnock City Council; Tovedale Pty Ltd v Shoalhaven City Council* [2005] NSWCA 169; *Rowlane Investments Pty Ltd v Leichhardt Council* [2013] NSWLEC 60; *Zaymill Pty Limited and Maksim Holdings Pty Limited v Ryde City Council* [2009] NSWLEC 86; *Benedict Industries Pty Ltd v Minister for Planning; Liverpool City Council v Moorebank Recyclers Pty Ltd* [2016] NSWLEC 122.

⁶ [2005] NSWCA 169 at [83].

⁷ *Benedict Industries Pty Ltd v Minister for Planning; Liverpool City Council v Moorebank Recyclers Pty Ltd* [2016] NSWLEC 122 at [61] and [67].

and/or which was necessary to enable those works to be undertaken" constitutes works that relate to the development works.

- 4.12 We are instructed that the geotechnical investigations were undertaken for the following reasons as relating to the Development authorised by the Development Consent:
- (a) to provide technical engineering information on subsurface conditions of the Site to inform the detailed engineering and structural design of the Development, and in particular:
 - (i) the undercroft car park, which involves excavation of the Site; and
 - (ii) the footings for the above-ground structures by reference to bearing conditions;
 - (b) to enable detailed design plans to be prepared and lodged as part of the application for a construction certificate;
 - (c) to comply with Condition 47 of the Development Consent, which requires Bunnings to submit design drawings and documents relating to the excavation of the Site and support structures to RMS for assessment, in accordance with Technical Direction GTD2012/001 (given that excavation is proposed close to the Princes Highway). Condition 47 requires Bunnings to submit all documentation at least 6 weeks before the commencement of works; and
 - (d) to comply with Condition 55 of the Development Consent which requires amended plans to be submitted to the satisfaction of the Certifying Authority detailing all recommendations contained within the Geotechnical Desk Study Report prepared by Coffey Geotechnics Pty Ltd dated 13 August 2012. That Geotechnical Desk Study Report relevantly recommended:

"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 the 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."
- 4.13 The works clearly relate to the Development as approved by the Development Consent as can be seen through their linkage with Conditions 47 and 55, and to enable an application for a construction certificate to be made.
- 4.14 In *Benedict Industries Pty Ltd v Minister for Planning; Liverpool City Council v Moorebank Recyclers Pty Ltd* [2016]⁸, Robson J held that:
- "I do not accept the submission that works conducted to either obtain a construction certificate or comply with some other precondition to the development cannot "relate to" the development works...The Consent works are only able to be pursued to the extent that their preconditions, whether a construction certificate or otherwise, are met by the proponent. Meeting these conditions is a necessary step if the Consent works are to be undertaken, and so compliance with the preconditions represents an "initiatory step" as outlined by Tobias JA in Hunter. As such, works undertaken in relation to these preconditions may still represent works "relating to" the Consent works."*
- 4.15 It is clear that the geotechnical investigations are properly referable to the Development authorised by the Development Consent, as those works are a necessary step in the process of carrying out the Development in order to comply with conditions and to prepare detailed plans to accompany the application for a construction certificate.

⁸ *Benedict Industries Pty Ltd v Minister for Planning; Liverpool City Council v Moorebank Recyclers Pty Ltd* [2016] NSWLEC 122 at [72].

Question 4: Lawful physical commencement on the land prior to lapsing date

- 4.16 In *Hunter*, the notion that the work had to result in a material alteration to the physical nature of the land was rejected. All that was necessary was that the work was physically commenced on the property and was not commenced off-site. Thus, in *Hunter* and in *Zaymill Pty Limited and Maksim Holdings Pty Limited v Ryde City Council* [2009]⁹, the excavation and testing of the soil samples was engineering work that had been physically commenced on the land notwithstanding that the soil was analysed elsewhere.
- 4.17 The geotechnical investigations in the present case included the drilling and testing of 8 deep geotechnical boreholes and installation of groundwater monitoring wells across the Site, thereby clearly evidencing work on the land. The fact that analysis of samples occurred off-site does not erode this position or satisfaction with this requirement of s4.53(4).
- 4.18 The works were undertaken between 14 and 17 August 2018, prior to the date on which the Development Consent would have otherwise lapsed being 20 August 2018.
- 4.19 The geotechnical investigations were also lawfully carried out in accordance with the Development Consent. Although Condition 28 – 47 of the Development Consent are pre-conditions to undertaking certain works, we do not consider that those conditions were required to be satisfied prior to undertaking the geotechnical investigations. We have formed this view because:
- (a) the heading to Conditions 28 – 47 is "*before commencing demolition, excavation and/or **building** works*" (our emphasis), and the geotechnical investigations are not demolition, excavation or building works; and
- (b) the geotechnical investigations were required to be undertaken in order to obtain the information necessary to comply with Condition 47. A similar set of facts was considered by the Court in *Reysson Pty Ltd v Roads and Maritime Services* [2012]¹⁰ in which Biscoe J relevantly held that:
- "...if "engineering works" in condition 9 include surveying, then it is impossible to comply with condition 9 because the complete set of engineering drawings it requires cannot be produced until surveying is done, yet condition 9 prohibits surveying until the complete set of engineering drawings is produced. Catch 22.*
- The respondent has no answer except to say that (a) the Court is not free to depart from the literal meaning of the words...*
- I do not accept the respondent's submission. One shrinks from the extraordinary construction which it involves: that the Council is taken to have intended to grant consent for work that was impossible without amending a condition of the consent. This would be a serious derogation from the grant. It is not sensible. Conditions of development consent should be construed if possible as intended to achieve something practical and substantive..."*
- 4.20 Accordingly, the engineering works were physically commenced on the Site before the date on which the Development Consent would otherwise lapse.

5 Conclusion

- 5.1 In our view, and for the reasons set out above, the Development Consent has not lapsed.

⁹ [2009] NSWLEC 86.

¹⁰ [2012] NSWLEC 17 at [40] – [42].

Please let us know if you have any questions or would like to discuss any aspect of the above.

Yours sincerely



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Encl.

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Monday, 20 August 2018
Ref No 27926V1let1

Bunnings Group Ltd
11 Shirley St
ROSEHILL NSW 2142

SENT BY EMAIL: mmahrous@bunnings.com.au

ATTENTION: Michael Mahrous, Project Manager NSW/ACT

Dear Sirs

PRELIMINARY GEOTECHNICAL INFORMATION
PROPOSED BULKY GOODS WAREHOUSE DEVELOPMENT (DA201200528)
750 PRINCES HIGHWAY (CORNER SMITTH ST)
TEMPE NSW

At your request, we have commenced additional geotechnical work at the above mentioned proposed development site. 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.

The additional work was started on 14 August 2018 and essentially comprised drilling and testing of 8 deep geotechnical boreholes and installation of groundwater monitoring wells at the locations shown very approximately on the attached plan, Figure 1, which is based on the survey plan of the site. The figure also shows the locations of the 2014 test boreholes, referenced 1 to 13. The additional test locations were nominated by HWN and agreed on site. Location of the boreholes was partly dictated by access constraints imposed by existing development, which was still in use.

The additional boreholes and groundwater monitoring wells were completed on 17 August 2018. The work has now progressed to drafting of the borehole logs and laboratory testing, including strength testing of recovered rock core.

The boreholes exposed a subsurface profile of fill covering residual clay that grades into shale bedrock. The depths to shale are marked on attached Figure 1 next to each current and previous borehole. Depths to rock range from 0.3m in BH4 to 2.3m in BH8. The rock is at shallower depths in the northern corner of the site at 0.3m to 0.8m in BHs 2, 3, and 4. The strength of the rock will be confirmed by laboratory strength testing of recovered rock cores, but at this early stage, the rock strength was assessed during the drilling to be generally in the range of low to medium strength (i.e. unconfined compressive strengths in the range of 2MPa to 20MPa); however, the rock profile did seem to contain bands and layer of weaker and stronger rock than the latter stated general strength range. In regards to the strata above the rock this comprised surface layer of fill down to depths of between 0.3m and 2.7m, with the deepest fill present under the existing warehouse slab. And below the fill layer there was residual silty clay that was assessed to be of medium plasticity and very stiff to hard in strength.



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The groundwater levels as measured last week in all new and existing wells was different from those reported in the previous Due Diligence report. The current measured groundwater depths were at the range of 4.6m to 7.3m are shown on attached Figure 1. The 2014 groundwater levels were in the range of 1.7m to 4.6m.

At this very early stage, the main conclusion from the additional boreholes is that the geotechnical and subsurface strata as described in the previous Due Diligence report are confirmed to be generally comparable. The main deviation from the information provided in the previous report is in regards to the depths to groundwater levels, which were found to be remarkably different at much greater depths.

As mentioned above, the geotechnical work has now progressed to drafting of the borehole logs and laboratory testing, including strength testing of recovered rock core. After receiving the latter results, analyses and report preparation will be completed. The report will provide final information and recommendations on; we do not expect these to deviate significantly from those provide in the previous Due Diligence report:

- Detailed logs of the all boreholes, including current and previously completed, with penetration test results and groundwater observations;
- Interpretation of Subsurface Profile including bedrock depth and quality;
- AS2870 site classification;
- Main Geotechnical Issues of this site for the development;
- Earthworks including excavation issues;
- Retention;
- Groundwater Issues;
- Lateral Parameters for Retention Design;
- Suitable Footings Systems and Options;
- Foundation strata and depth;
- Allowable Bearing Pressures;
- Allowable Shaft Adhesions;
- External Pavements including CBR value.

Should you require any further information regarding the above, please do not hesitate to contact the undersigned.

Yours faithfully
For and on behalf of
JK GEOTECHNICS

A handwritten signature in black ink, appearing to read 'Fernando Vega'.

Fernando Vega
Senior Associate
Encl.: Figure 1.

