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18 June 2019

Philip Drew  
Development Approvals Manager  
Bunnings Properties Pty Ltd  
Level 8  
5 Rider Boulevard  
Rhodes NSW 2138

Dear Phil

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

We refer to our letter of advice dated 18 April 2019 (*Previous Advice*).

## **1 Background**

- 1.1 In our Previous Advice, we confirmed our view that Development Consent No. 201200528 issued by Marrickville Council to Urbis Pty Ltd on 21 August 2013 (**Development Consent**) has not lapsed because engineering work, in the form of intrusive geotechnical investigations, relating to the building was physically commenced on the Site pursuant to s4.53(4) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) prior to the date on which the Development Consent would have otherwise lapsed.
- 1.2 Inner West Council (**Council**) subsequently provided to Bunnings Properties Pty Ltd (**Bunnings**) comments from its in-house Senior Lawyer (Mr Mark Bonanno) in relation to our Previous Advice, and provided the opportunity for Bunnings to prepare a response for the benefit of the Sydney Eastern City Planning Panel.
- 1.3 We now respond to the comments of Mr Bonanno.

## **2 Relationship of the work to the Development Consent**

- 2.1 Whilst Mr Bonanno agreed with our summary of the law and relevant legal principles within our Previous Advice, he considered that the information provided did not clearly demonstrate that the intrusive geotechnical investigations were sufficiently related to the Development Consent in order to satisfy the test for physical commencement (which he accepts is a low bar).

**Our Ref** 120844854:120844854  
RFPS 505232517v3 120844854 18.6.2019

- 2.2 However, in forming this view Mr Bonanno only focused on whether the relevant works were undertaken in order to satisfy Condition 55 of the Development Consent. His response fails to address three other bases for the conclusion we reached, notwithstanding that in our Previous Advice, satisfaction of Condition 55 was identified as only one of four different ways in which we demonstrated that the intrusive geotechnical investigation works were related to the Development Consent.
- 2.3 The other examples of this nexus were provided in paragraph 4.12 of our Previous Advice and included:
- (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; and
  - (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.
- 2.4 Mr Bonanno does not address the above reasons in his comments.

### 3 'Purpose' of the works

- 3.1 In considering the 'purpose' of the intrusive geotechnical investigations, Mr Bonanno made the following comments having regard to the letter from JK Geotechnics to Bunnings Group Limited dated 20 August 2018 (**JK Geotechnics Letter**) (which was enclosed with our Previous Advice):

*"[The JK Geotechnics Letter]..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 [JK Geotechnics Letter] 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.*

*The [JK Geotechnics Letter], 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."*

- 3.2 Contrary to Mr Bonanno's comments, the JK Geotechnics Letter does in fact refer to the Development Consent in the subject line of that document. In our view, this indicates that the intrusive geotechnical investigations were undertaken in respect of the development approved by the Development Consent.
- 3.3 Additionally, Mr Bonanno's comment that the geotechnical investigations were carried out only a week before the date on which the Development Consent would have otherwise lapsed is irrelevant to the legal question as to whether physical commencement has occurred. Case law is clear that, provided that relevant work was carried out prior to the lapse date, it does not matter how close to the lapse date it occurred, nor whether the work was carried out for the purposes of engaging the physical commencement provisions of the EP&A Act.
- 3.4 In any event, we are instructed that the reason for this timing was that the warehouses on the Site were tenanted and Bunnings did not wish to undertake works on Site until those warehouses were vacated.

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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