

# MinterEllison

25 May 2017

**BY EMAIL AND EXPRESS POST:** [tom.hu@ansongroup.com.au](mailto:tom.hu@ansongroup.com.au)

Tom Hu  
Anson City Developments 1 Pty Ltd  
Level 6  
285-287 George Street  
SYDNEY  
NSW 2000

Dear Tom

**Burwood Grand Project 37-49 Belmore Street, Burwood  
Section 4.55 Application**

**1. Instructions**

- 1.1 We refer to our recent correspondence regarding the Burwood Grand Project, located at 37-49 Belmore Street, Burwood (Lot 100 in DP1185255) (**Site**).
- 1.2 Development consent was granted to Kapau Holdings by Burwood Council for a mixed use development on the Site in 2016 (**2016 Consent**). The development approved by the 2016 Consent includes a commercial podium with 16 tenancies and three high rise residential towers, basement car parking and associated works. The development consent has been commenced and some approved excavation works have been carried out.
- 1.3 Anson has the benefit of the consent and is interested in increasing the height of one of the approved residential towers. Two additional levels are proposed on tower B.
- 1.4 In order to achieve the additional yield, Anson have proposed a modification application which increases the footprint of the Site and incorporates adjacent land owned by the Council (Lot 11 DP 790324) (**Council Lot**).
- 1.5 You have asked for our advice with respect to two issues:
  - (a) can Anson lawfully lodge a section 4.55(2) modification application that adds the Council Lot to the development footprint; and
  - (b) is the landowners consent of the Council required for the lodgment and determination of the modification application? Is the letter provided by the Council sufficient?

**2. Summary**

- 2.1 An approved development footprint can lawfully be extended by way of a section 4.55 modification application. Landowner's consent is required for such a modification if the applicant does not own the land (clause 155 of the *Environmental Planning and Assessment Regulation 2000*). In our view, Anson can lawfully lodge a section 4.55(2) modification application that adds the Council Lot to the development footprint.
- 2.2 In our view, the letter from the General Manager dated 15 May 2018 and provided at Annexure A is sufficient to constitute landowner's consent for the modification application. For abundant

caution however, we recommend that you ask the General Manager to indicate in writing that the Council consents to the proposed 4.55 modification application.

### 3. Addition of Council lot to development footprint

#### Provisions of section 4.55

- 3.1 We refer above to the proposed modification and the addition of the Council Lot.
- 3.2 Section 4.55 provides that a consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

***"(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and***

***(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and***

***(c) it has notified the application in accordance with:***

***(i) the regulations, if the regulations so require, or***

***(ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and***

***(d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be."***

(emphasis added)

- 3.3 The first issue to determine is whether the extension of the footprint is capable of being characterised as "*substantially the same development*".

#### Extension of footprint

- 3.4 In *Scrap Realty Pty Ltd v Botany Bay City Council* [2008] NSWLEC 333 (*Scrap Realty*), Preston CJ in the NSWLEC heard a merit appeal in relation to an application to modify a development consent under s 96(2) to expand the development for which consent was originally granted to adjoining land not subject to the original consent. Preston CJ held at paragraphs [12]–[21] as follows:

*"12. I will start with the council's issue concerning whether a consent can be modified to add land not the subject of the consent originally granted.*

*13. The power under s 96, whether in (1), (1A) or (2), is simply one to 'modify the consent'. Originally, the power to modify consents was restricted to modifying 'details' of a consent. That restriction was removed in 1985 and the power was enlarged to be, simply, to modify the consent: see *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 at 475. The concept of modification involves 'alteration without radical transformation': see *Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414 at 421; *North Sydney Council v Michael Standley Pty Ltd* (1998) 43 NSWLR 468 at 474. The object of the modification is the consent.*

*14. Hence, the power of a consent authority to 'modify' a consent is a power to alter without radical transformation the consent.*

*15. Exercise of the power to modify a consent is made conditional, in the case of modifications under s 96(2), on the consent authority forming an opinion of satisfaction*

*that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all).*

*16. This condition precedent to the exercise of the power to modify consents focuses on 'the development', making a comparison between the development as modified and the development as originally granted.*

*17. In terms, neither the concept of 'modify' applied to a consent or the concept of 'development' in the condition precedent exclude amendment of a consent to permit the carrying out of development on land that was not the subject of the original development consent.*

*18. It is true that a consent authorises the carrying out of development on only the land the subject of the development consent. Development cannot be approved in abstract, isolated from the land to which it relates. The development and the land on which the development is carried out are indivisible. However, this does not preclude the consent being modified to extend the development approved by the consent to other land. This still entails a modification of the consent — it alters the description of the land to which the consent applies so as to permit the carrying out of development on that land as well.*

*19. As far as the condition precedent is concerned, the alteration is of 'the development' — it expands the area on which development is carried out. There obviously will be questions of fact and degree in ascertaining whether the development before and after modification can be said to be substantially the same. Nevertheless, an expansion of the area on which development is carried out by adding land not the subject of the original consent is not inherently outside the concept of modification of the development under s 96.*

*20. The parties were not able to find any judicial authority which has held that the power to modify development consents does not include the power to alter the land to which a consent applies so as to permit the carrying out of development approved by the consent on land additional to the land to which the consent as originally granted applied. The power to modify consents has been in force since 1979 when the Environmental Planning and Assessment Act was enacted. As I have earlier noted, the power was enlarged in 1985. The fact that no judicial authority exists establishing that modification of a consent cannot include the addition of land to the land to which the consent as originally granted applied is, perhaps, corroborative that such a narrow construction of the power in s 96 is not to be preferred.*

*21. Accordingly, I find that there is power under s 96(2) to modify the 1976 consent to add Lot 1 to the land to which the consent applies and on which the approved storage use can be carried out."*

- 3.5 It follows that a modification of a development consent under s 4.55(2) may be made to expand the area in which development is carried out by adding land to which the consent applies, provided that the consent authority is satisfied that the development as modified is substantially the same development for which consent was originally granted.

#### Landowners consent

- 3.6 Under clause 115 of the *Environmental Planning and Assessment Regulation 2000*, an application for modification of a development consent under section 4.55 (2) of the Act must contain the following information:

- "(a) the name and address of the applicant,*
- (b) a description of the development to be carried out under the consent (as previously modified),*
- (c) the address, and formal particulars of title, of the land on which the development is to be carried out,*
- (d) a description of the proposed modification to the development consent,*

- (e) a statement that indicates either:
  - (i) that the modification is merely intended to correct a minor error, misdescription or miscalculation, or
  - (ii) that the modification is intended to have some other effect, as specified in the statement,
- (f) a description of the expected impacts of the modification,
- (g) an undertaking to the effect that the development (as to be modified) will remain substantially the same as the development that was originally approved,
- (g1) in the case of an application that is accompanied by a biodiversity development assessment report, the reasonable steps taken to obtain the like-for-like biodiversity credits required to be retired under the report to offset the residual impacts on biodiversity values if different biodiversity credits are proposed to be used as offsets in accordance with the variation rules under the [Biodiversity Conservation Act 2016](#),
- (h) **if the applicant is not the owner of the land, a statement signed by the owner of the land to the effect that the owner consents to the making of the application** (except where the application for the consent the subject of the modification was made, or could have been made, without the consent of the owner),
- (i) a statement as to whether the application is being made to the Court (under section 4.55) or to the consent authority (under section 4.56),

and, if the consent authority so requires, must be in the form approved by that authority."

(emphasis added)

3.7 Clause 115(h) of the EP&A Regulation expressly contemplates circumstances where an applicant intends to lodge a modification application, but does not own all of the land. It requires landowner's consent in these circumstances.

3.8 Considering that:

- (a) an approved development footprint can lawfully be extended by way of a section 4.55 modification application; and
- (b) landowner's consent is required for such a modification if the applicant does not own the land (clause 155 of the *Environmental Planning and Assessment Regulation 2000*).

Anson can lawfully lodge a section 4.55(2) modification application that adds the Council Lot to the development footprint.

#### 4. Landowner's consent provided by the Council

4.1 As referred to above, clause 115(h) of the EP&A Regulation provides that application for modification of a development consent under section 4.55(2) of the Act must contain a statement signed by the owner of the land to the effect that the owner consents to the making of the application.

4.2 We have provided the Council's letter dated 15 May 2018 which purports to provide this consent at Annexure A. It is written by the General Manager of the Council and refers to the Burwood Grand project, the Council Lot and provides relevantly "*Council is able to grant landowners consent to facilitate the Section 96 Application requirement*".

#### Authority

4.3 We note firstly that the General Manager has the authority to grant landowner's consent by reference to the following list of delegations.  
[http://www.burwood.nsw.gov.au/verve/resources/General\\_Manager\\_s\\_Delegations\\_by\\_Exception\\_-\\_Adopted\\_by\\_Council\\_22\\_November\\_2016.pdf](http://www.burwood.nsw.gov.au/verve/resources/General_Manager_s_Delegations_by_Exception_-_Adopted_by_Council_22_November_2016.pdf)

- 4.4 The list provides "*This document outlines what functions are not delegated to the General Manager and thereby the General Manager has delegation to undertake all other functions*".
- 4.5 Accordingly the General Manager has the requisite authority to grant consent.

*Is the consent sufficient?*

- 4.6 It is of some concern that the letter refers to the former section 96 and is less than unequivocal in its language stating that "*Council is able to grant landowners consent*" rather than that the Council actually "*grants consent*".
- 4.7 The case law establishes that the question of whether owner's consent has or has not been given is a question of construction of the material submitted with the DA. There is no provision for a qualified or conditional owner's consent; it is either owner's consent or not.
- 4.8 In *Crowley v Hastings Municipal Council* (1982) 4 APAD 115 (*Crowley*), Bignold SA in the NSWLEC considered an applicant appeal against the determination of the Council to use a part of a creek at Port Macquarie for the purposes of operating a business of hiring and using aqua bikes. As the creek was Crown Land, the owner was the Land Board Office. No consent had been obtained from the Land Board Office when the hearing opened. The hearing was adjourned and correspondence was produced from the Land Board Office indicating it had no objections to the applicant's operation.
- 4.9 Bignold SA held that, an expression of the owner's absence of objection to an activity may constitute owner's consent to a DA for that activity.
- 4.10 In our view, the letter from the General Manager dated 15 May 2018 goes further than indicating an absence of objection, and positively indicates that consent is able to be granted. In our view, this is likely to be sufficient to constitute landowner's consent for the modification application. For abundant caution however, we recommend that you ask the General Manager to indicate in writing that the Council "*consents to the proposed 4.55 modification application*."

If you have any questions please contact us on the details below.

Yours faithfully  
**MinterEllison**



John Whitehouse  
Partner



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## ANNEXURE A

Mr Tom Hu  
Project Director  
Anson City Developments 2 Pty Ltd  
PO Box 20517  
WORLD SQUARE NSW 2002

Our Ref.: 18/17921  
15 May 2018

Dear Mr Hu

**EXPRESSION OF INTEREST AND REQUEST FOR COUNCIL CONSENT  
PURCHASE OF COUNCIL LAND AND SECTION 96 APPLICATION  
LOT 11 ON DP 790324 - BURWOOD GRAND PROJECT**

I refer to your letter of 9 May 2018 expressing an interest in the purchase of Council land known as Lot 11 on DP 790324 and requesting Council's consent for a Section 96 Application, in the interests of integrating the subject land into the Burwood Grand project.

Council has no objection to the sale of the land and supports the Expression of Interest in principle.

However, any acquisition or disposal of a Council asset requires a resolution of Council under Section 377 of the *Local Government Act*. Council would also need to obtain an independent valuation in response to your valuation. The sale or disposal of this land would be conditional upon the acceptance of the sale price and subject to Council's resolution.

Notwithstanding the above, Council is able to grant consent as the land owner to facilitate the Section 96 Application requirement.

Should you require any further information please contact Council's Manager Property & Building Services, Mr Robert Teo, on 9911 9883.

Yours sincerely



Tommaso Briscese  
**ACTING GENERAL MANAGER**