

Our Ref: JEH:SAH:1079448

15 September 2021

Attention: Naomi Ryan
URBIS
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SYDNEY NSW 2000

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Dear Naomi

**Advice regarding physical commencement of redevelopment of Newcastle Art Gallery
Development Consent No. DA2010/1278
Land: 1 Lama Street, Cooks Hill**

1. Request for advice

1.1 You have sought our advice on whether Development Consent DA2010/1278 which authorised development for the purposes of the redevelopment of Newcastle Art Gallery (**the Consent**), was physically commenced prior to 18 April 2017, being the date upon which it would lapse.

1.2 Specifically, we have been asked to consider whether the following works may be relied upon to demonstrate the physical commencement of the Consent:

(a) Demolition works including the removal of a masonry block wall adjacent to the existing loading dock on 12 December 2012 and the removal of the art pavilion within the existing pavilion courtyard on 6 August 2021 (**Demolition Works**); and

(b) The removal of a tree located within the pavilion courtyard (**Tree Removal**).

We will refer to these works collectively as **the Works**.

1.3 Aerial views showing the location of the Works are at **Annexure A** to this advice.

Adelaide
Brisbane
Canberra
Darwin
Hobart
Melbourne
Norwest
Perth
Sydney

2. Executive Summary

- 2.1 The Works constitute "building work", which relates to the Consent and was carried out prior to the date on which the Consent would lapse, being 18 April 2018.
- 2.2 The information available indicates that the Works were carried out lawfully (and note in particular that no construction certificate was required for the demolition works).
- 2.3 In light of this, in our view, the Consent has not lapsed, and a modification application can be lawfully determined.
- 2.4 We would recommend that the Council confirms whether there is any evidence which indicates whether the conditions identified in Annexure C have been complied with.

3. Relevant Background

- 3.1 On 18 April 2012, the City of Newcastle granted the Consent. The approved development for the purposes of "redevelopment of art gallery" on land known as 1 Laman Street, Cooks Hill (**the Land**) subject to conditions.
- 3.2 Council has lodged a modification application MA2021/00192, which seeks to modify the Consent to '*change floor plans, elevations and landscaping including deletion of Darby Street retail spaces*' which is yet to be determined. The details of this modification application are not relevant to the question of whether the Consent has been lawfully commenced.
- 3.3 The Statement of Environmental Effects prepared by BCC Consulting Planners and dated November 2011 (**the SEE**), which is an approved document identified in Condition 2 of the Consent, describes the development as follows:¹

The proposed works consist of two storey additions to the existing NAG as follows:-

- Construction of a new wing of the NAG over two levels along Darby Street;
- Extension of the existing building back towards Queen Street; and
- Refurbishment of the existing structure as an integral part of the overall redevelopment.

The details of the proposed works are set out below:-

Demolition - Demolition of the existing structure on Darby Street, the cooling tower and some internal partitions.

Refurbishment - Refurbishment of the existing gallery and associated facilities to link with the new gallery and exhibition space, new office reception, offices and various storage areas.

New Back of House – Construction of a new back of house consisting of a loading dock, plant room and lift hoist at ground floor and a back of house area, exhibition store, plant room and lift store at the first floor.

New Eastern Wing – Construction of a new eastern wing consisting of a cafe, amenities, gallery reception, education area gallery, courtyard and theatre at ground floor and a boardroom, gallery spaces and amenities at the first floor. Additionally, there are two retail spaces proposed along Darby and Queen Streets.

¹ SEE, Section 3.5 "Proposed Works", Page 7.

- 3.4 The "existing structure on Darby Street" to which the SEE refers is the art pavilion within the existing pavilion courtyard, as is clear from the demolition plans in Appendix C to the SEE. Specifically, Demolition Plan DA02 dated 30 December 2011 (which forms part of the approved documentation in Condition 2 of the SEE) show this structure on the Darby Street frontage with an arrow which is labelled "Demolish existing structure". A copy of this plan is **Annexure B** to this advice.
- 3.5 The plan also shows a structure on the corner of Laman Street and Darby Street, on the north of the Land with is marked with broken lines indicated that it is also to be demolished. We note the structure is external to the existing art gallery building.
- 3.6 The Land contained a number of trees to be removed as part of the proposal.² Demolition Plan DA02 dated 30 December 2011 shows a number of trees to be removed, including a tree in the centre of the art pavilion.
- 3.7 The Site Plan DA03A dated 30 December 2011 (which also forms part of the approved documentation in Condition 2 of the SEE) shows that an entirely new building, which is the new wing along Darby Street is to be constructed as identified in paragraph 3.2 above.
- 3.8 There are a number of conditions of consent which require certain actions to be completed prior to or during the commencement of construction work under the consent. We note the report prepared by Urbis dated 14 September 2021 has considered these conditions of consent in some detail at Section 4. Relevant conditions are summarised in **Annexure C** to this advice.
- 3.9 A modification application was subsequently lodged and approved by the Council on 3 September 2012, which added a number of development consent conditions including some amended plans and conditions. These conditions, where relevant, are noted in **Annexure C**. Although the modifications approved do not otherwise alter the Consent in such a way as to affect this advice.
- 3.10 No construction certificate has been issued in relation to the Consent.
- 3.11 We are instructed the following works have been carried out:
- (a) Demolition works including the removal of a masonry block wall adjacent to the existing loading dock on 12 December 2012 and the removal of the art pavilion within the existing pavilion courtyard on 6 August 2012 (**Demolition Works**); and
 - (b) The removal of a tree located within the pavilion courtyard (**Tree Removal**).
- 3.12 Council has lodged a modification application DA2010/1278/02, which seeks to modify the Consent to add a street awing to Darby and Laman Street frontages which is yet to be determined. The details of this modification application are not relevant to the question of whether the Consent has been lawfully commenced.

² SEE, "Preservation of Trees or Vegetation", Section 4.2.2, Page 18.

4. Legislative Framework

- 4.1 At the time the Consent was granted,³ section 95 of the *Environmental Planning and Assessment Act 1979 (EPA Act)* provided that a development consent would lapse five years after the date from which it operates,⁴ or a shorter period if the conditions of consent provided otherwise in certain circumstances.⁵
- 4.2 In this case, the Consent expressly provided that the consent would lapse five years after the date on which it operates, being 18 April 2017, and this is therefore the relevant date before which works must have been carried out to prevent the Consent from lapsing.

Effect of physical commencement:

- 4.3 Section 95(4) provided that the lapsing of a development consent may be prevented by the physical commencement of certain types of work:

(4) *Development consent for:*

- (a) *the erection of a building, or*
- (b) *the subdivision of land, or*
- (c) *the carrying out of a work,*

does not lapse 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.

- 4.4 We note the relevant legislative framework related to this requirement has not undergone material change between the date that the Consent was granted and the date on which the Consent would have lapsed had works not commenced.⁶
- 4.5 Having regard to the relevant case law, physical commencement will occur if:
- (a) the work relied upon is *building, engineering or construction work*; and
 - (b) the work *relates to* the approved development; and
 - (c) the work was *lawfully carried out* on the Premises.⁷
- 4.6 The work must be lawful and must be carried out in accordance with the conditions of development consent.⁸

³ This is the version of the EPA Act in force between 13 March 2012 to 5 July 2012.

⁴ Section 95(1), EPA Act.

⁵ Section 95(2)-(3A), EPA Act.

⁶ And note there has been no further change to date other than a renumbering of the section, see Section 4.53(4), EPA Act.

⁷ See *Benedict Industries Pty Ltd v Minister for Planning; Liverpool City Council v Moorebank Recyclers Pty Ltd* [2016] NSWLEC 122

⁸ See Section 76A(1) / Section 4.2(1)(b) of the EPA Act

Commencement of the erection of a building:

- 4.7 At the time the consent was granted, Section 81A(2) of the EPA Act provided that "erection of a building in accordance with a development consent" must not be commenced until, among other things, a construction certificate was issued for the building work.
- 4.8 The phrase "erection of a building" was defined in section 4(2)(b) of the EPA Act and includes reference to a range of types of work, including "making alterations to, or the enlargement or extension of, a building", among other things. It does not refer to the demolition of a building or structure.
- 4.9 Whether demolition works under a development consent requires a construction certificate is the subject of judicial consideration, which will be considered further in the "advice" section below. In summary, it depends upon the development for which consent has been granted and the conditions of consent.

Tree removal

- 4.10 The Consent authorises the removal of several trees. The removal of a tree is "development" within the meaning of section 4 of the EPA Act, being an "act matter or thing" referred to in section 36 of the EPA Act and controlled by an environmental planning instrument.⁹ The removal of trees is would be characterised as being part of the general development for which consent is sought, which was permitted with development consent on the Land.¹⁰

5. Advice

- 5.1 The test of whether there has been physical commencement work is principally an objective one, depending upon what has in fact been done.¹¹
- 5.2 The Works will have the effect of preventing the Consent from lapsing if they involve:
- (a) work which is *building, engineering or construction work*; and
 - (b) that work *relates to* the approved development; and
 - (c) that work is *lawfully carried out* on the Premises.¹²
- 5.3 We will consider each of the above requirements in turn.

⁹ See specifically section 26(1)(e), EPA Act and clause 45 of the *Newcastle City Centre Local Environmental Plan 2008*.

¹⁰ Being an innominate use and therefore being permitted with consent as "any development not specified in Item 2 or 4" of the items to Zone B4 Mixed Use in Land Use Table of the *Newcastle City Centre Local Environmental Plan 2008*.

¹¹ *United Dominions Corporation Ltd v Woollahra Municipal Council* [1973] 1 NSWLR 616, approved by the High Court in *Drummoynne Municipal Council v Lebrnan* (1974) 131 CLR 350 at 360; see also *JMS Capital Pty Limited v Tweed Shire Council* [2006] NSWLEC 535 (Lloyd J at [16]).

¹² See *Benedict Industries Pty Ltd v Minister for Planning*; *Liverpool City Council v Moorebank Recyclers Pty Ltd* [2016] NSWLEC 122.

Is the work building, engineering or construction work?

- 5.4 The composite phrase "building, engineering or construction work" is given broad meaning in case law.
- 5.5 "Building work" is defined as "any physical activity involved in the erection of a building".¹³ Relevantly, this includes preparatory works, such as demolition works, provided that the development consent refers to demolition.¹⁴ Even partial demolition work has been found sufficient to establish physical commencement. For example, in *Sharp v Hunters Hill Council*,¹⁵ where partial demolition of an existing dwelling house was carried out a few days prior to the lapse of the consent, as part of a "necessary prelude or preliminary activity" to the subsequent erection of a dwelling house and was found to be physical commencement.¹⁶
- 5.6 The clearing of vegetation, even where it is merely preparatory to the carrying out of other works to facilitate the erection of a building, has been found to constitute work capable of constituting the physical commencement of the works.¹⁷ The characterisation of that work (for example, as building work or as construction work, depends upon the type of work it is preparatory to or facilitates. For example, in *Benedict Industries*, clearing works were "associated with, and formed a necessary part of" engineering works, which it would not be reasonably possible to undertake absence the clearing works.¹⁸ (We note for completeness that the tree removal in that case was on a much larger scale than that in the current case, however see our comments on whether the commencement is 'substantial' below.)
- 5.7 By way of clarification, at the time the Consent was granted and during the period during which the consent was required to be commenced there was no distinction at law between work which constitutes physical commencement and "mere preparatory work".¹⁹
- 5.8 The Works are admittedly not extensive. However, they are in our view nevertheless sufficient to meet this requirement, as there is no requirement that the works be "substantial", or more than "preparatory".²⁰ The requirement for "substantial" commencement previously appeared in an earlier version of the lapsing section in the EPA Act. As identified by the Court in *Besmaw Pty Ltd v Sutherland Shire Council*,²¹ once Parliament had decided to delete the requirement of substantiality, there was little room for an argument that the works must not be de minimus, and that it was therefore reasonable to exclude any test of the degree and extent of the work under the present statutory regime, nonetheless the requirement that the relevant work *relate* to the approved subdivision requires a real nexus between them. In this case, the physical activity is real, and not a mere sham, such as

¹³ See section 1.4 and 6.1, EPA Act (and section 4 of the former EPA Act).

¹⁴ *Sharp v Hunters Hill Council* [2002] NSWLEC 27 at [35].

¹⁵ [2002] NSWLEC 27.

¹⁶ *Ibid* at [40].

¹⁷ See *Hunter Development Brokerage Pty Ltd v Cessnock City Council* (2005) 63 NSWLR 124; [2005] NSWLEC 169 (Tobias J at [83]); *Benedict Industries Pty Ltd v Minister for Planning*; *Liverpool City Council v Moorebank Recyclers Pty Ltd* [2016] NSWLEC 122 (Robson J at [106]-[107], [110])

¹⁸ See *Benedict Industries* (Robson J at [106])

¹⁹ *Hunter* (Tobias JA at [16]).

²⁰ As the Court of Appeal discussed in *Cando Management and Maintenance Pty Ltd v Cumberland Council* [2019] NSWCA 26 at [116].

²¹ (2003) 127 LGERA 413 (Talbot J).

"entering land in respect of which a subdivision has been approved and knocking in one or two pegs".²²

- 5.9 To the contrary, preparation of a site for the purposes of a building or structure can constitute construction work for the building or structure.²³ However, there must be a physical activity which involves an appearance of reality and is not merely a sham.
- 5.10 As a consequence, this requirement will be satisfied.
- 5.11 We note for completeness that clause 124AA(1) of the EPA Regulation now identified a number of activities which are deemed to no longer constitute physical commencement of a development consent including, among other things "the removal of vegetation as an ancillary activity". This clause has clarified that some works, such as carrying out survey work, acoustic testing, or "removing vegetation as an ancillary activity" no longer can be used to establish that work was physically commenced. However, this amendment to the EPA Regulation post-dates the date on which the Works were carried out and the date by which the Consent was required to be physically commenced and therefore clause 124AA(2) is of no effect.

Does the work relate to the approved development?

- 5.12 If the work is a necessary part of the process of carrying out the approved development under the Consent then it "relates to" the development. The formulation adopted by the Court in the leading case of *Hunter Development Brokerage Pty Ltd v Cessnock City Council* (**Hunter**) is as follows: "the required connection or relationship is satisfied if the relevant work is *a necessary step* in the erection of the building".²⁴
- 5.13 A relatively broad view of this requirement has been taken. For example, in *Norlex Holdings Pty Limited v Wingecarribee Shire Council* (**Norlex**), acoustic testing was relied upon for physical commencement. That testing was *not* expressly required by the conditions of consent. However, the conditions did require compliance with certain sound levels and this testing had been carried out to ensure compliance could be achieved. The Court found that the acoustic testing carried out was sufficient.
- 5.14 In light of the above, the Works plainly relate to the Consent. The physical works required, including the Demolition Works and Tree Removal are necessary to bring into effect the Consent (and not something else). They are specifically identified on the approved demolition plans and discussed in the SEE which forms part of the approved documentation. There is therefore little or no ambiguity which would challenge the position that the works "relate to" the Consent.

²² *Hunter Development & Brokerage Pty Ltd v Cessnock City Council* (2005) 63 NSWLR 124 (**Hunter**)(Tobias JA (Santow JA and Stein A-JA concurring) at [86]).

²³ *Benshaw Pty Limited v Sutherland Shire Council* (2003) 127 LGERA 413.

²⁴ Emphasis added, *Hunter* (Tobias JA at [104], [106], [116]), applied by *Norlex* (Pepper J at [91],[92]).

Are the works lawfully carried out?

- 5.15 Unlawful works cannot be relied upon for physical commencement.²⁵ Certain conditions may need to be satisfied prior to the carrying out of works, as well as a construction certificate obtained.²⁶
- 5.16 Conditions which are expressed to be satisfied prior to demolition or the commencement of works are listed in **Annexure C**.
- 5.17 These conditions need to be followed. If works do not comply with the conditions, they may be unlawful, meaning they cannot be relied upon for the purposes of physical commencement.
- 5.18 In our view, a review of the conditions of consent to confirm compliance (or lack thereof) is a matter more appropriately carried out by the Council or a town planner and we have not undertaken a thorough review of the Council's historical files (or other places where relevant records may be located).
- 5.19 However, the information we have been provided with refers to the satisfaction of a number of the conditions we have identified in Annexure C. For example:
- (a) An internal memorandum from Council's Director Liveable City, Frank Cordingley, dated 19 July 2012 refers to the removal and the art pavilion. It notes:
- An archival recording of the entire Art Gallery, including the Pavilion, has been prepared as required by the Conditions of Development Consent.*
- This archival recording is required by Condition 17 to be made prior to work commencing. Although we have not seen the record itself, this memorandum provides evidence that it was carried out.
- (b) A letter dated 26 June 2012 from the Project Manager, Matthew Bennett, dated 26 June 2012 states that it encloses a copy of the "Hazardous Substances Management Plan completed in response to Condition of Development Consent No.25". Condition 25 requires this plan to be provided marked the Attention of Compliance Services (which, we note, this letter is) prior to the commencement of the works.
- 5.20 Our instructions are that a number of conditions have been complied with where required, though we cannot confirm compliance with all conditions based on the information before us.
- 5.21 We note a number of the conditions are potentially relevant but not necessarily matters to be satisfied prior to works. Condition 30, for example, is required if there will be the obstruction of a public place only (which does not appear to have occurred, but is beyond the scope of our expertise to comment on).

²⁵ *Green v Kogarah Municipal Council* [2001] NSWCA 123 (Giles JA at 55).

²⁶ *Hunter* (Tobias JA, [118]-[121]).

- 5.22 Further, a development consent is to be construed not as a document drafted with legal expertise, but to achieve practical results.²⁷ Adopting this approach to the conditions in Annexure C, and considering more detailed information about the facts and circumstances, may also demonstrate that no action would be required to satisfy the condition. For example, Condition 27 requires all services to be disconnected in accordance with the relevant authority's requirements "prior to demolition". Although "all services" are captured by the condition, it is simply "prior to demolition" and not "prior to any demolition works occurring" or similar. A practical reading of the text indicates that if the art pavilion was not connected to any services, the disconnection of services in the existing gallery building would not need to take place.

Was a construction certificate required for demolition?

- 5.23 Demolition requires a construction certificate in some circumstances. At the time the consent was granted, Section 81A(2) of the EPA Act provided that "erection of a building in accordance with a development consent" must not be commenced until, among other things, a construction certificate was issued for the building work.
- 5.24 The two leading decisions on whether demolition requires a construction certificate are *Over Our Dead Body Society Inc v Byron Bay Community Association Inc* (***Over Our Dead Body***), where a construction certificate was required, and *Sharp v Hunters Hill Council* (***Sharp***), where a construction certificate was not.²⁸ The differences between the cases turn on their different factual and legal matrices.²⁹
- 5.25 We consider the factual and legal matrix in this case are more closely aligned with *Sharp*, it is our view that the demolition carried out did not require a construction certificate. The Demolition Works were carried out to enable the erection of the new wing along Darby Street. They were not carried out on parts of the building to which alterations and additions were being made, such that the demolition works were intermingled with the retention, addition and restorations of the building (as was the case in *Over Our Dead Body*), but rather a "necessary prelude or preliminary activity" to enable the development to be carried out (as per *Sharp*).³⁰
- 5.26 Further, the interpretation of "development" upon which the finding in *Over Our Dead Body* was based, arises from a historical version of the EPA Act which predated *Sharp* and the Consent.³¹
- 5.27 As a consequence, at law, the Demolition Work did not first require the issue of a construction certificate.
- 5.28 For completeness, we have considered the conditions of the Consent, which confirm the general position at law applies to the Consent. The Consent could expressly require a construction certificate, but, to the contrary the conditions make a clear distinction between "construction work" (which does require a construction certificate) and "demolition work" (which does not). It does so by referring expressly to these different categories within a number of conditions condition (for example in Conditions 30, 46 and 47, which mention both terms separately) but only imposing

²⁷ *Westfield Management Limited v Perpetual Trustee Company Limited* [2006] NSWCA 245 (Hodgson JA at [36]); *Baulkham Hills Shire Council v Ko-veda Holiday Park Estate Ltd* [2009] NSWCA 160 (Tobias JA at [96]-[99] and [105]).

²⁸ (2001) 116 LGERA 158 and (2002)120 LGERA 155 respectively

²⁹ As discussed in *Sharp* (Bignold J at 161-162).

³⁰ See *Sharp* (Bignold J at [40]).

³¹ This is outlined in *Over Our Dead Body* (Bignold J at [22]-[25]) and distinguished in *Sharp* (Bignold J at [29]).

the requirement to obtain a construction certificate "prior to construction works" in Condition 89.

- 5.29 There is no clear intention expressed in the Consent to go beyond what is prescribed by the EPA Act, and to the contrary, the conditions support this position.
- 5.30 Accordingly, demolition works may be commenced in accordance with the Consent without a construction certificate and carried out in accordance with the relevant conditions of consent.
- 5.31 For completeness, we also note the removal of the tree does not require a construction certificate.
- 5.32 Accordingly, we confirm that it is our view that the Consent has been physically commenced and therefore will be preserved indefinitely from lapsing under section 4.53(4) of the EPA Act.

6. Recommendation

- 6.1 We also recommend you provide evidence of the satisfaction of the requirements of Conditions 32 to 34 of the Consent should you wish to rely on the works identified at 5.17.
- 6.2 Regardless, we confirm that in our view the Consent has been physically commenced and therefore will be preserved indefinitely from lapsing under section 95(4) of the EPA Act.

Yours faithfully



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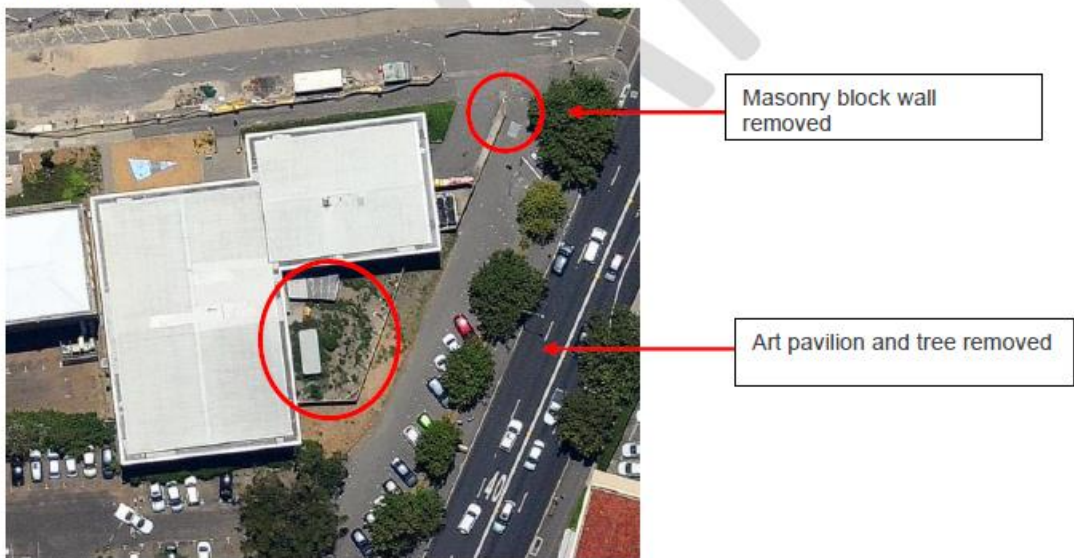
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Annexure A: Aerial views showing location of the works



Picture 1 – Monday 6 August 2012



Picture 2 – Friday 4 January 2013

Source: Nearmap

The site plan illustrates the layout of the Cultural Centre. The existing structure is shown with solid lines, while the proposed structure is indicated by dashed lines. The plan includes a detailed landscaping scheme with various tree types and sizes, as well as a parking area. The streets shown are Queen St, Laman St, and Darby St. A legend in the bottom right corner identifies the symbols used for existing trees to be removed and the proposed structure.

LEGEND:

- EXISTING TREES TO BE REMOVED
- PROPOSED EXISTING STRUCTURE

LEGEND:



**EXISTING TREES
TO BE REMOVED**

SCALE:
1200 @ B.
1500 @ A.

CLARE DESIGN



Public Works
Government Architect's Office



NEWCASTLE ART GALLERY

DEVELOPMENT APPLICATION

DATE PRINTED: 3/12/2011

30TH DECEMBER 2011

DA02

2003

PLAN

DEMOLITION

0
4
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0
10

Annexure C

We have identified the following conditions of potential relevance as matters "prior to demolition" or "prior to work". These matters may be shown to be irrelevant as a consequence of further factual, site-specific and historical consideration.

1. Condition 17 - Archival Record
2. Condition 19 - Register's Surveyor's Certificate
3. Condition 22 - Construction Traffic Management Plan
4. Condition 24 - Toilet Facilities
5. Condition 25 - Hazardous Substance Management Plan
6. Condition 26 - Demolition Requirements
7. Condition 27 - Disconnection of Services
8. Condition 28 - Location of Demolition Waste
9. Condition 30 - Hoarding (if necessary)
10. Condition 31 - Illumination (if necessary)
11. Condition 32 - Signage
12. Condition 37 - Environmental Management Plan
13. Condition 45 - Vehicular Signage
14. Condition 46 - Hours of Work
15. Condition 49 - All Weather Access
16. Condition 50 - Temporary Protective Crossing
17. Condition 51 - Controlling Dust