

Email

3 August 2022

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Dear John

235-237 Marsden Road, Carlingford - DA/873/2021 – deferred commencement conditions

You have asked us to provide advice in relation to conditions 1-3.

You have asked us to advise:

- whether draft conditions 1-3 of the proposed development consent DA/873/2021 (**Consent**) which relates to a proposed development (**Proposed Development**) on Opal's property at 235-237 Marsden Road, Carlingford (**Development Site**), are lawful;
- whether draft conditions 1-3 are appropriate and reasonable; and
- what, if any, amendments could be made to conditions 1-3 to address these issues.

Our advice is set out below.

1. Background

- 1.1 Draft conditions 1-3 are expressed to be “deferred commencement” conditions which impose requirements for the drainage solution which is part of the Proposed Development.
- 1.2 It appears that the trigger for these requirements is Opal's proposal to:
- (a) relocate part of the existing drainage pipeline and easement within its property so that it is outside the building footprint for the Proposed Development; and
 - (b) connect the drainage pipeline for the Proposed Development directly to the relocated drainage easement within the subject site, which ultimately runs through some neighbouring properties out to the Parramatta City Council drainage system on Mulyan Avenue.
- 1.3 Currently, almost all of the overland flows on Opal's property are disposed of in one of two ways:
- (a) most of the flows from the subject site discharge overland across the eastern boundary, where they are captured in a strip drain running along the rear of the properties immediately east of Opals' property and directed to a drainage pit, which leads to a drainage pipe flowing east to Council's stormwater system on Mulyan Avenue (**Existing Downstream Pipeline**); and
 - (b) some of the flows from Opal's property discharge to Marsden Road, which ultimately discharges to the TfNSW drainage easement within Opals' property, which then connects into the Existing Downstream Pipeline.

- 1.4 Opal's drainage solution, as part of the Proposed Development, is essentially to:
- (a) replicate the existing drainage line on its property (although in a slightly different location) and connect that line directly into the Existing Downstream Pipeline; and
 - (b) provide an on-site stormwater detention (**OSD**) system which captures most of the overland flows on Opals' property, and then direct that water via a new pipe on Opals' property into the Existing Downstream Pipeline.
- 1.5 The effect of Opal's drainage solution is that:
- (a) almost all of the overland flows from Opal's property will be directed into the Existing Downstream Pipeline without relying on the strip drain on the neighbouring properties east of Opal's property;
 - (b) there will be no increase in the volume of water flowing from Opal's property into the Existing Downstream Pipeline; and
 - (c) the new OSD system will reduce the flow rate of water entering the Existing Downstream Pipeline.
- 1.6 The documents prepared by Opal's drainage engineers, Henry & Hymas, which Opal has provided to Council, confirm the improved drainage outcomes generally as described above.
- 2. Conditions 1-3 are unreasonable and potentially unlawful**
- 2.1 The meaning of draft conditions 1-3 is not entirely clear. However, it is possible to read the draft conditions so that they would require Opal to:
- (a) demonstrate the feasibility of Opal's drainage solution again (although it is not clear why) (condition 1(a) and (e));
 - (b) create a new easement for the relocated drainage pipe on Opal's property in favour of TfNSW or Council (and the conditions do not make it clear who) (condition 1(d) and (f));
 - (c) create new easements over the downstream properties which benefit Opal's property, until the drainage line meets Council's stormwater infrastructure in Mulyan Avenue (condition 2); and
 - (d) ensure that the existing pipeline downstream from Opal's property:
 - (i) has capacity to carry water flows not only from Opal's property but also from some neighbouring properties; and
 - (ii) is in good condition (and, presumably, if it is not, repair that pipeline so that it is).(condition 3).
- 2.2 If the draft conditions can be read in that way, then, in our view, they would be both impractical and potentially unlawful, for the following reasons.

- (a) Opal has already demonstrated, with expert plans and correspondence, that its drainage solution is effective to support the Proposed Development, and otherwise is consistent with the provisions of clause 36 of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (the version of this planning control that applies to the Proposed Development). A requirement to do so again after development consent is granted is unnecessary and unreasonable.
- (b) The easement currently held by TfNSW is an easement in gross, but condition 2 requires Opal, in effect, to obtain easements which benefit its property and burden the downstream properties. This is either:
- (i) redundant if there is already an easement burdening the downstream properties; or
 - (ii) unreasonable if there is not, because it seeks to have Opal address an issue which is not of its making.

In either case, if the existing property interests support the current drainage system, and the Proposed Development will improve the current drainage position, there is no reasonable justification to require Opal to obtain easements to support the ongoing drainage position.

- (c) It is notable that the NSW Land and Environment Court declined to impose a requirement for an easement of this type in ***David v. Hornsby Shire Council*** [2017] NSWLEC 1025. The Court in that case recognised that requiring a downstream easement to establish an acceptable point of discharge was not appropriate.
- This is particularly relevant for the Proposed Development because the connection to the Existing Downstream Pipeline will be within the development site, and will not have any effect on the existing downstream drainage arrangements.
- (d) Council cannot lawfully require Opal to carry out improvement works on the pipeline on downstream properties, or to deliver new or varied drainage easements over those properties, where Opal is not proposing any works on those properties. Any condition which requires this would be not fairly and reasonably relate to the proposed development for which consent is being granted, and may therefore be invalid.
- (e) Council's desire to upgrade or improve the downstream drainage system does not justify the imposition of conditions on Opal's development consent to require this. There is nothing to indicate that Opal's development would create a need for any upgrade or improvement. On the contrary, Opal's drainage engineers have indicated that there will be reduced demand on the downstream pipeline as a result of the additional OSD.
- (f) Those requirements in conditions 1-3 which may legitimately be imposed (ie. the parts which do not require further assessment and do not require assessment or easements relating to the Existing Downstream Pipeline) should not be deferred commencement conditions, because:
- (i) they require things which are typical for operational development consents which involve drainage solutions, and there is no justification

- for requiring them to be done before the development consent in this case becomes operational;
- (ii) some of those requirements involve doing works, which can only sensibly be done under an operational development consent, and not as deferred commencement requirements;
 - (iii) the requirement to create a new easement on Opal's property can only be done once the new building has been constructed and the new drainage infrastructure has been installed on site, so that the precise location of the easement can be determined, and therefore requirement cannot be a deferred commencement requirement (requirements such as this are usually pre-occupation requirements, and that is what should happen in this case); and
 - (iv) the points in (i) and (ii) above are supported by decisions such **David v. Hornsby Shire Council** (as cited above).

3. Suggested amendments

- 3.1 Accordingly, in our view, draft conditions 1 to 3 should not be deferred commencement conditions and should be substantially amended. Those amendments include the following:
- (a) since Opal has already resolved, through the DA process, the issues which draft conditions 1(a) and (e) address, those conditions should be removed;
 - (b) draft conditions 1(c), (d), (g) and (h) are standard requirements which typically are satisfied during construction and should not be deferred commencement conditions (moreover, they cannot sensibly operate as deferred commencement conditions);
 - (c) draft condition 1(b) should not be a deferred commencement condition, because (as noted above) the precise location of an easement can only be determined once the surrounding building has been constructed and the pipe has been relocated;
 - (d) draft condition 2 is inappropriate and potentially unlawful (for the reasons outlined above), and it is also unnecessary, so it should be removed; and
 - (e) draft condition 3 is inappropriate and potentially unlawful (for the reasons outlined above), and it is also unnecessary, so it should be removed.

Please let us know if you have any queries or would like to discuss.

Yours sincerely



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