

22 August 2023

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Dear Fay

Coveston Developments Pty Ltd advice on Stormwater Easement re DA 2022/395 at 411 – 417 Crown Street, Wollongong

You have asked us to provide advice relating to easements for drainage with respect to your development application DA 2022/395 for 411-417 Crown Street, Wollongong. In particular, you have asked us to advise on examples of where consents have been granted with conditions requiring easements for stormwater drainage across land, where the owners of that land have not agreed to the easement at the time of the granting of the development consent.

In circumstances where a stormwater easement is required by a deferred commencement condition of a development consent, or prior to the issue of a construction certificate, and the required easement is unable to be obtained by agreement, there are two primary ways by which a stormwater easement can be imposed by court order. Those primary avenues are as follows:

1. A court order pursuant to section 88K of the *Conveyancing Act 1919* (NSW) (the '**Conveyancing Act**'); and
2. A court order pursuant to section 40 of the *Land and Environment Court Act 1979* (NSW) (the '**LEC Act**').

It can reasonably be inferred that if an order is made by a court pursuant to either section above, then the burdened owner has not agreed to the easement.

Section 88K of the *Conveyancing Act*

Section 88K of the *Conveyancing Act* provides:

- (1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.

In *Menassa v Shi* [2023] NSWSC 54 ('**Menassa**'), the Plaintiff had the benefit of a development consent subject to a deferred commencement condition which relevantly required the obtaining of an easement for drainage over an adjoining property. As detailed in the *Menassa* decision at paragraphs [22] – [38] and [44], prior to the granting of the development consent, Council had raised the issue of obtaining an easement for drainage however, attempts by the Plaintiff to obtain an easement for drainage across the adjoining land by negotiation were unsuccessful. Accordingly and following the grant of the development consent, the Plaintiff commenced proceedings against the owners of the adjoining land pursuant to section 88K of the *Conveyancing Act* seeking an order granting an easement for drainage across the adjoining land. Notwithstanding the Defendant's argument that there were options for the easement for drainage across other adjoining properties, the Court imposed the easement for drainage across the Defendant's land.

Gordan v Shaheen [2005] NSWSC 1328 ('**Gordan**') is another example of where the Plaintiff had the benefit of a development consent subject to a deferred commencement condition requiring an easement for drainage over adjoining land. As detailed in the *Gordon* decision at paragraph [9], various attempts were made over a period of years to obtain the easement by consent however, the only response received from the Defendant was that it refused to give consent. Accordingly and following the grant of the development consent, the Plaintiff commenced proceedings against the owners of the adjoining land pursuant to section 88K of the *Conveyancing Act* seeking an order granting an easement for drainage across the adjoining land. Notwithstanding that the Defendants did not appear in the proceedings, and that there was evidence before the Court of a potential option for an easement across another adjoining property (a less preferable easement), the Court imposed the easement for drainage across the Defendant's land.

Section 40 of the *LEC Act*

Section 40 of the *LEC Act* provides the Land and Environment Court with the power to make orders to impose an easement. It provides, inter alia, as follows:

40 Additional powers of Court—provision of easements

...

(2) The appellant may make an application to the Court for an order imposing an easement over land.

...

(4) In dealing with an application under this section, the Court may exercise the jurisdiction of the Supreme Court under section 88K of the *Conveyancing Act 1919* and, in that event, section 88K of the *Conveyancing Act 1919* applies to the Court's exercise of that jurisdiction in the same way as it applies to the exercise of that jurisdiction by the Supreme Court.

In *Clarebridge Holdings Pty Ltd v W Barry Holdings Pty Ltd* [2011] NSWLEC 56 ('**Claridge Holdings**'), the Applicant had the benefit of a development consent subject to a deferred commencement condition requiring a stormwater easement burdening the neighbouring land. As detailed in the *Claridge Holdings* decision at paragraphs [31] – [37], the Applicant had attempted to negotiate an easement over many years however the offers to acquire the easement had been declined. Notwithstanding that the Defendants did not appear in the proceedings, and that there was evidence before the Court of a number of potential alternative options for an easements across other adjoining properties, the Court imposed the easement for drainage across the Defendant's land.

Conclusion

We trust that the above caselaw examples of where consents have been granted with conditions requiring easements for stormwater drainage across land where the owners have not agreed to the easement at the time of the granting of the development consent will be of assistance for your DA 2022/395 for 411-417 Crown Street, Wollongong.

If you have any questions or require further information, please do not hesitate to contact Anthony Whealy on +61 2 8035 7848 or at awhealy@millsoakley.com.au or Ben Salon on +61 2 8035 7867 or at bsalon@millsoakley.com.au

Yours sincerely



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