

30 May 2022

Our Ref: AKL:CAT004/4006

Ethos Urban  
Sussex Street  
SYDNEY NSW 2000  
ATTN: Kate Tudehope

**By Email:**  
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Dear Kate

## **Modification Application for Westmead Catholic Community Campus – SSD10383**

### **1. Introduction**

1.1 You have asked us to provide a legal submission addressing specific conditions in the development consent for the Westmead Catholic Community Campus (**WCC**) SSD10383 (the **Consent**) which are proposed to be modified. We set out the legal basis for our submission in support of a modification application below.

### **2. Condition B1**

2.1 Condition B1 of the Consent currently reads as follows:

- (a) *a schematic diagram of a through site direct and paved pedestrian connection from Farmhouse Road to the western boundary of the site (Lot 1 DP 1095407 and Lot 1 DP 1211982) to facilitate active access solutions supporting the GTP and to allow for alternate student access to the site, in addition to the existing Darcy Road entry points, consistent with Figure 6.6 of Transport & Accessibility Impact Assessment prepared by Transport Planning Partnership dated 25 August 2021; and*
- (b) *ensure the diagram prepared under (a) provides for a possible future pedestrian connection linking the east-west pedestrian link to Bridge Road (to the west) including possible access through the adjoining properties to the west and the riparian zone.*

2.2 In our view, there are two key concerns with sub-clause (b) of this condition:

- (a) it is not drafted with sufficient certainty, as required by *The Owners – Strata Plan No 4983 v Canny [2018] NSWCA 275; (2018) 233 LGERA 432 at [71]*, which provides that “development consents should be framed in clear terms and any conditions specified with certainty”; and
- (b) it may not fairly and reasonably relate to the development, which is one of three requirements for a valid condition of consent, as established in *Newbury District Council v Secretary of State for the Environment [1981] AC 578 (Newbury)*.

2.3 In relation to the first concern, in our view, sub-clause (b) of Condition B1 is not drafted with sufficient certainty as it refers to a “possible future pedestrian connection” and “possible

access through the adjoining properties”. It is not clear what this “possible future pedestrian connection” would look like as it not referenced in any plan which is incorporated into the development consent.

- 2.4 Furthermore, it is not clear from the language of this condition what the purpose of the “possible future pedestrian link” is intended to be. A condition of consent must be interpreted objectively and the subjective intentions of the consent authority are not relevant when determining the meaning of a condition: *Auburn Municipal Council v Szabo* (1971) 67 LGRA 427 at 433-434.
- 2.5 We are instructed that the Consent relates to the first stage of the redevelopment of the WCC. Whilst there may be pedestrian access or connectivity required in the future, any plans for such future access will be subject to separate development applications at an undetermined time in the future.
- 2.6 In order for a condition of consent to satisfy the “Newbury test”, a condition must be:
- (a) for a proper planning purpose;
  - (b) fairly and reasonably relating to the development; and
  - (c) not so unreasonable that no authority would have imposed it.
- 2.7 Accordingly, in relation to our second concern with sub-clause (b) of Condition B1, we consider the condition may not fairly and reasonably relate to the development. The connection of the development the subject of the Consent through adjacent properties for future pedestrian access is not relevant to the current Consent. We are instructed that the development approved by the Consent does not generate a need for pedestrian access to Bridge Road to be provided and accordingly, it is not appropriate that any future access be identified at this time.

### 3. Conditions E4 and F1

- 3.1 Condition E4 of the Consent currently reads as follows:

*“At least 2 months prior to the issue of the first occupation certificate for the school, the Applicant must:*

- (a) *provide evidence that the internal site link from the multi-storey car park to the school and CELC has been completed so that the users can access the site safely from the multi-storey car park area;*
- (b) *provide evidence that the paved pedestrian link through the site connecting Farmhouse Road to the western boundary of the site, as required by condition B1(a) is operational and in a satisfactory condition for use by the school/CELC and parish church users;*
- (c) *provide satisfactory evidence to the Certifier that all required easements (if any) under section 88B and/or positive covenants, have been created within the site (where necessary) to establish this pedestrian link and allow the use of this link by the students of the proposed school, CELC or the users of the parish church at all times; and*
- (d) *provide satisfactory evidence to the Certifier that a positive covenant has been created under section 88B to allow for the east-west pedestrian link (required by condition B1(a)) or any similar east-west pedestrian link within the site (Lot 1 DP 1095407 and Lot 1 DP 1211982) to be used as public pedestrian access between 7am and 5pm (school days), when the connection is extended from the site to Bridge Road in the future.”*

3.2 Condition F1 currently reads as follows:

*“Within 12 months of commencement of operation of the school, the Applicant must provide the following to the satisfaction of the Planning Secretary:*

(a) *evidence that:*

- (i) *(i) an east-west link from the site to Bridge Road (to the west) including possible access through the adjoining properties to the west and the riparian zone (in accordance with the schematic plans in condition B1, or otherwise agreed with the Planning Secretary) has been constructed; and*
- (ii) *(ii) all required easements (for the internal site link, if needed and the extended pedestrian link to Bridge Road) under section 88B and/or restriction or public positive covenant under section 88E of the Conveyancing Act 1919 naming Council/Planning Secretary (or the relevant public authority) as the prescribed authority, which can only be revoked, varied or modified with the consent of the Council / Planning Secretary (or the relevant public authority), have been registered, to establish this pedestrian link and allow the use of this link by the students of the proposed school, CELC or the users of the parish church at all times;*

OR

- (b) *where an east-west link from the site to Bridge Road (to the west) including possible access through the adjoining properties to the west is not built/completed, but an agreement(s) is/are in place for the link providing a realistic timeline for delivery of the link is provided to the Planning Secretary and the timeframe of the delivery of the link is agreed with.*

OR

(c) *evidence that:*

- (i) *(i) the Applicant has undertaken extensive consultation and engagement with the adjoining property owners and the relevant public authorities to establish the above link in condition F1(b);*
- (ii) *(ii) evidence of this consultation is provided; and*
- (iii) *(iii) the reasons for which the pedestrian link cannot be established through the adjoining properties and/or riparian zone adjoining the site.”*

3.3 In short, Conditions E4 and F1 require that easements and positive covenants be registered on title to facilitate future pedestrian access through the WCC and adjacent properties to connect to Bridge Road.

3.4 In our view, these conditions arguably do not satisfy the Newbury test.

3.5 We consider that Conditions E4 and F1 may not satisfy the second limb of the Newbury test as they do not fairly and reasonably relate to the development. We understand that the local Council is eager to obtain public access through the WCC to improve connectivity to other developments (existing and future) in the general vicinity of the WCC.

3.6 The Land and Environment Court on several occasions has found conditions similar to Conditions E4 and F1 to fail the Newbury test as not fairly and reasonably relating to the development.

- 3.7 In *Dogild Pty Ltd v Warringah Council* [2008] NSWLEC 53, the Applicant challenged a condition of consent which required it to establish a right of carriage way over its property for the benefit of neighbouring commercial premises. Biscoe J held at [60] to [61]:

*“60 In my opinion, the condition requiring the grant of a right of carriageway over the Land to the other Strand Properties does not fairly and reasonably relate to the permitted development. It is not fair and reasonable in the circumstances of this case. There are estimated to be between 50 and 70 strata owners in the Strand Properties. They, as well as their invitees and licensees, including customers of shops in the Strand Properties, would be entitled to use the carriageway under the requirements of the condition. In addition, as acknowledged in the reason attached to the condition and in the evidence of the planners, the general public will use this carriageway stretching between Oaks Avenue and Howard Avenue. The council in submissions fairly conceded that it would be wrong to suggest otherwise. The development does not generate the need for such a right of carriageway and public access, and will not benefit from it. The fact that, under the condition, vehicles and pedestrians visiting the Land would have the alternative of entering or exiting from Howard Avenue rather than Oaks Avenue (as at present) does not bring the requirement into any significantly closer relationship with the permitted development. I do not accept that there is any traffic management issue generated by the proposed development which requires vehicles to have that option. The council seeks a carriageway stretching between Oaks and Howard Avenues in order to fulfil its longstanding intentions and, if it can become a one way system, to meet traffic problems in the segregated lane serving the rear of the Strand properties to the north of the Land. However, those traffic problems are not affected by the proposed development nor vice versa.*

*61 That is sufficient, in my view, to uphold this challenge to the validity of the condition...”*  
(our emphasis)

- 3.8 *Dogild* relied upon an earlier case with similar facts at [53]:

*“53 An illustration of the application of the second and third Newbury tests is provided by *St George Building Society v Manly Municipal Council* (1981) 3 APA 370, on which the applicant placed some emphasis. *St George* proposed to rebuild its existing office building which had a frontage to the Corso, the main retail street in the Manly business centre. The existing building incorporated a pedestrian arcade leading from the Corso to Market Lane and a parking station. The rebuilding would eliminate the arcade. *St George* offered to provide free pedestrian access through its office during business hours Monday to Friday. It appealed against a condition of approval requiring the building to be redesigned “to provide unrestricted pedestrian access at all times between the Corso and Market Lane”. Senior Assessor Bignold (as he then was) held that the condition did not satisfy the second and third Newbury tests: at 381, 384. He said at 384 that “the disputed condition does not fairly and reasonably relate to the permitted development. In reaching this conclusion the court places particular reliance on the undisputed fact that the proposed development does not itself create any need for the provision of the arcade access and that the question of that access is wholly extraneous to the proposed development”. It was said at 387 that “the disputed condition clearly is directed to secure permanent public access in respect of the redevelopment site and would have the effect of requiring the equivalent of a public right of way at least for the life of the new development”. The respondent argued that *St George* was distinguishable on the basis of the finding (at 376) that the condition would involve considerable private detriment to *St George* by virtue of denying it the opportunity to redevelop its existing premises in the manner it considered would best serve its business interests....”* (out emphasis).

- 3.9 The above cases clearly indicate that it is not reasonable for a consent authority to attempt to achieve its own objectives via imposing a condition of consent on a development that does not in and of itself generate the need for the works or access being required by the condition.

3.10 Furthermore, we are instructed that it was not the intention of the Department to require actual public access be provided for at this stage of redevelopment for the WCC. However, as stated above, conditions of consent must be drafted with certainty and must be interpreted objectively.

3.11 In our view, conditions E4 and F1 as drafted put an unreasonable burden on our client to effectively secure public access over its land by way of registered instruments on title, when such public access is not currently needed or required by the development the subject of the Consent.

#### 4. Conditions E5 and E43

4.1 Condition E5 currently reads as follows:

*“To allow for appropriate access to “uncovered and open to air” play spaces (all open spaces outside the footprint and roof overhang of the school building), the Applicant must provide an Open Space Management Plan to the satisfaction of the Planning Secretary, prior to the issue of any occupation certificate. The plan must demonstrate that all students of the primary school would have sufficient and regular access to ground level ovals within the site (Lot 1 DP 1095407 and Lot 1 DP 1211982), without requiring the displacement of other students (such as the high school students) from these ovals.”*

4.2 Condition E43 currently reads as follows:

*“Prior to the issue of the occupation certificate for the school (unless alternate timeframe is agreed within the Planning Secretary), the Applicant must provide evidence that:*

*(a) a management plan has been developed in conjunction with the other existing schools within the site to allow access to the sports ovals to other local schools and/or local community groups outside the school hours, and a copy of the management plan has been approved by the Certifier and provided to Council for information;*

*OR*

*satisfactory consultation has been undertaken with the other owners of the site in developing a management plan referred to in condition E43(a) and that this plan can be delivered within 12 months of commencement of operation of the school.”*

4.3 In our view, Conditions E5 and E43 arguably do not satisfy the Newbury test for similar reasons as stated above in relation to conditions E4 and F1. We repeat the authorities as set out in paragraphs 3.7 and 3.8 above. It is not reasonable for a consent authority to try to achieve its objectives of providing additional open space to the community on privately held land.

**5. Conclusion**

5.1 For all the legal reasons set out above, and the merit reasons as set out in the Ethos Urban submission, we submit that the Department should grant the modification application requiring deletion of the abovementioned conditions.

Yours faithfully



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