Our Ref: TAN:ABL:2102739

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27 October 2021

The Minister
NSW Department of Planning, Industry and Environment
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Parramatta NSW 2124

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Dear Minister Stokes

Submissions in support of State Significant Development 8812 Modification 3

1. On 13 September 2019, approval was granted to State Significant Development 8812 (**Consent**) for various improvements and additions at Cranbrook School.

2. This letter is provided in support of Cranbrook School's requested modification of the Consent to:

   (a) affect changes to the Council reserve as requested by Woollahra Municipal Council (**Council**) and approved in Section 138 application under the *Roads Act 1993* which comprises an adjustment to the boundary fence, road layback and pram ramp on Rose Bay Avenue;

   (b) remove the requirement for indemnities in favour of Council; and

   (c) provide clarity, certainty, and finality to the form and content of covenants and easements required by conditions of the Consent.

Background

3. The Consent was determined by the Minister for Planning and Public Spaces (**Minister**). The Minister is the consent authority for state significant development.

4. The Consent is for various alterations and additions to Cranbrook School. Schedule 1 of the Consent describes the approved development as:

   - *"demolition of the existing War Memorial Hall and Mansfield buildings to facilitate the construction of the New Centenary Building;*
   - *Excavation of Hordern Oval to facilitate the construction of a subsurface car park and new aquatic and fitness centre (including public domain works to New South Head Road;*
   - *new access driveway to the proposed car park, accessed off Rose Bay Avenue;*
   - *use of the internal driveway between Victoria Road and Rose Bay Avenue to accommodate on campus 'kiss and ride' facility;*

- *construction of a new Hordern Oval Groundsman's facility;*
- *reinstatement of the Hordern Oval as a playing field;*
- *landscaping and general site improvements."*

5. Conditions E37 and E40 within SSD 8812 require Cranbrook School to grant certain indemnities in favour of Council.

6. The requirement for covenants, easements and indemnities imposed in the Consent are susceptible to being held invalid at law where they do not legitimately relate to a planning purpose but also where their imposition add an extraneous *private law* enforcement mechanism to Council's existing *public law* enforcement powers.

7. Despite this, our client takes no issue in registering the covenants and easements required, but does take issue with the requirement for an indemnity as part of these encumbrances on its title.

8. Our client is advised by its insurers that our client will be unable to obtain insurance to cover the ambit of risk imposed through such indemnities. Notwithstanding this risk that would be imposed on our client, a number of cases make it quite clear that the requirement for an indemnity in a condition of consent is beyond power.

9. Additionally, the physical requirements of the site and requests from Council through a Section 138 application, necessitated minor modifications of the Consent, specifically an adjustment to the boundary fence, road layback and pram ramp on Rose Bay Avenue.

10. Our detailed reasoning giving rise to the view expressed above and in support of the modifications sought by Cranbrook Schools is set out further below.

11. Accordingly, Cranbrook Schools applies for modification of conditions of Consent (E36 to E40) in the manner described in **Annexure A** and minor amendments to the proposed works including an adjustment to the boundary fence, road layback and pram ramp on Rose Bay Avenue.

Indemnity provisions in the conditions of the Consent

Conditions E36 and E37

12. Conditions E36 and E37 provide:

Covenant for Works on Council Property

E36. Prior to the issue of the final Occupation Certificate and to ensure that all private structures on Council public road reserve are in accordance with Council's "Policy for Managing Encroachments on Council Road Reserves", the person with the benefit of this consent, being the owner of Cranbrook School, must enter into a legal agreement with Council for the associated landscaping and placement of private structures on Council's property.

E37. The owner must enter into a legal agreement as follows:

(a) the registration on the title to the subject property to which this Public Positive Covenant pursuant to S88E of the *Conveyancing Act 1919* burdening the subject property and benefitting the Council providing for the indemnification of Council from any claims or actions, and the ongoing maintenance of any private structures encroaching on the public road reserve for which consent has been given, such as steps, retaining walls, sitting furniture, access ways, overhang balconies, awnings, signs and the like. This process has an estimated timeframe of 2 months.

(b) the wording of the Public Positive Covenant must be in accordance with Council's standard format and the Instrument must be registered at the Land Property Information office prior to the issue of the relevant Occupation Certificate.

(c) the property owner must pay Council monetary compensation for the Public Positive Covenant, as determined by the Council, and must also pay all of Council's associated costs.

Note: The required wording of the Instrument can be downloaded from Council's website www.woollahra.nsw.gov.au. The Principal Certifying Authority must supply a copy of the works as executed plans to Council together with the final Occupation Certificate.

13. Council's "Policy for Managing Encroachments on Council Road Reserves" (**Policy**) is dated 14 July 2008. The Policy (at Clause 3) outlines two options for encroaching structures:

(a) Removal.

(b) Retention subject to the adjoining owner entering into an appropriate agreement with the Council to ensure public liability and public amenity issues are identified and managed, and that a community benefit results.

14. The Policy specifies that measures to allow encroachments to remain will be suited to the circumstances. Clause 4.2 sets out available options being:

> "1. A *Positive Covenant* registered on the adjoining property's Title, or
>
> 2. An *Easement to Permit Encroaching Structures to Remain* granted by the Council, under Section 181A of the Conveyancing Act 1919, and registered on the adjoining property's Title.
>
> 3. A *Lease*, with conditions, under Section 153 of the *Roads Act 1992*, to the adjoining property.
>
> 4. Subdivision of the road to excise the area encroached upon, *closure of the road* parcel and *sale* of the parcel to the adjoining owner."

15. Regardless of which option is used to allow the encroachment to remain, the Policy states:

> "*The adjoining owner responsible for an encroachment will be required in all cases **to indemnify Council** in regard to any claim arising from the encroaching item, and to maintain all improvements in good condition".*
>
> [Emphasis added].

Condition E37

16. Condition E37(a) of the Consent requires that Cranbrook School create a Public Positive Covenant over its land for associated landscaping, placement of private structures on Council land and the indemnification of Council in relation to those private structures and encroachments on Council land. It states:

> *"The owner must enter into a legal agreement as follows:*
>
> (a) *the registration on the title to the subject property to which this **Public Positive Covenant** pursuant to S88E of the Conveyancing Act 1919 burdening the subject property and benefitting the Council **providing for the indemnification of Council from any claims or actions, and the ongoing maintenance** of **any private structures encroaching on the public road reserve for which consent has been given**, such as steps, retaining walls, sitting furniture, access ways, overhang balconies, awnings, signs and the like."*
>
> [Emphasis added]
>
> (**Road Reserve Indemnity Covenant Condition**).

Condition E40

17. Condition E40(f) of the Consent requires that Cranbrook School create a Public Positive Covenant over its land in relation to on-site stormwater detention systems and the indemnification of Council in relation to any claims or actions arising in relation to the on-site stormwater detention and absorption trenches. The condition states:

> *"[On completion of construction work, stormwater drainage works must be certified by a professional engineer with Works-As-Executed drawings submitted to the Principal Certifying Authority detailing]:*
>
> *…*
>
> *(f) "prior to the issue of a final Occupation Certificate, a **positive Covenant** pursuant to Section 88E of the Conveyancing Act 1919 must be created on the title of the subject property, **providing for the indemnification of Council from any claims or actions and for the on-going maintenance of the on-site detention system and/or absorption trenches**, including any pumps and sumps incorporated in the development. The wording of the Instrument must be in accordance with Council's standard format and the Instrument must be registered at the Lands Title Office."*
>
> [Emphasis added]
>
> (**Drainage Indemnity Covenant Condition**).

Ambit of legal instruments required under the Consent

18. In our view, the correct interpretation of Conditions E36 to E40 (inclusive) is that these conditions impose a requirement to enter into the following legal instruments:

Condition of Consent	Instrument
E36 & E37	Public Positive Covenant for Works on Council Property
E38 & E39	Easement for Access for Public Footpath (over Cranbrook School)
E40	Public Positive Covenant for Stormwater

19. Condition E36 does not operate independently of Condition E37 or impose an additional requirement on Cranbrook School to enter into *both* an easement and a public positive covenant for any private structures encroaching on the public road reserve.

20. This, in our view, is the preferred interpretation of the Consent for the following reasons based on principles of interpretation and case law.

21. Condition E36 creates an obligation for a "legal instrument" in accordance with the Policy. The Policy (above) describes the categories of legal instrument that may be a suitable "measure" to allow an encroachment remain. Among those options are a Positive Covenant *or* an Easement to Permit Encroaching Structures to Remain. Condition E37 describes the "legal instrument" selected from the options in the Policy, being a Public Positive Covenant, not both a Public Positive Covenant and an Easement to Permit Encroaching Structures to Remain.

22. Condition E36 describes the rationale for the requirement of the Public Positive Covenant in Condition E37 and the timeframe for its implementation. Condition E37 clarifies the "legal instrument" referred to in Condition E36 (a Public Positive Covenant) and its conditions.

23. The two provisions sit under the one subheading and are necessarily interdependent. They would suffer ambiguity (rendering them inoperable) if read separately in isolation. For example, if separated, which of the "legal instruments" in the Policy is the owner of Cranbrook School compelled to enter into and on what terms. The condition cannot leave the door open to additional steps to perfect it: *Mison v Randwick Municipal Council (1991) 23 NSWLR 734.* Equally, if read in isolation, Condition E37 has no timeframe for compliance or rationale supporting its existence.

24. Conditions E36 and E37 are, appropriately, grouped together under the one heading "Covenant for Works on Council Property". That heading indicates a covenant, not an easement, as the legal instrument chosen by Council.

25. Conditions E38 and E39 follow the same format as E36 and E37 and are grouped together under the heading "Creation of Easement for Access for the Public Footpath". Condition E38 describes a time frame for compliance and rationale while Condition E39 provides further detail and clarification of the easement for access required. Headings are not determinative but where ambiguity arises, this context may assist in interpretation. A development consent must be read as a whole and the ordinary rules of construction and principles of interpretation apply as with any other statutory instrument: *Baulkham Hills Shire Council v Ko-veda Holiday Park Estate Ltd* [2009] NSWCA 160 at [97]-[99].

26. The effect of reading a consent as a whole may be to depart from the material and ordinary meaning of the words of one provision, where it is necessary to do so to avoid absurdity or inconsistency with the rest of the instrument: *Tempe Recreation (D.500215 and D.1000502) Reserve Trust v Sydney Water Corporation* [2014] NSWCA 437 at [53]-[54].

27. Finally, a development consent is to be construed to achieve practical results and not as a document drafted by lawyers: *Gill v Donald Humberstone & Co* Ltd [1963] 1 WLR 929 at 933–4.

28. In our view, Conditions E36 and E37 must therefore be read together and where ambiguity arises or exists within a condition of consent, any such lack of clarity or certainty in a development consent is the responsibility of the consent authority and it must take the consequences: *Ryde Municipal Council v Royal Ryde Homes* [1970] 1 NSWR 277 19 LGRA 321 at [324]; *Lake Macquarie City Council v Australian Native Landscapes Pty Ltd* (No 2) [2015] NSWLEC 114; *The Owners – Strata Plan No 4983 v Canny [2018] NSWCA 275; (2018) 233 LGERA 432 at [71] - [73])*.

Validity of conditions

29. The power to impose conditions upon the grant of development consent is not at large. The primary statutory control upon the power to impose conditions when granting consent is found in section 4.17 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**). Section 4.17 provides:

> *"A condition of development consent may be imposed if—*
>
> > *(a) it relates to any matter referred to in section 4.15(1) of relevance to the development the subject of the consent, or…"*

30. As is well understood, section 4.15(1) identifies those matters which a determining authority must take into consideration when determining a development application. Leaving aside what might collectively be referred to as planning instruments and documents in section 4.15(1)(a) (of which there are no EPI's that require the covenants that have been imposed),[1] section 4.15(1) identifies the following requiring consideration:

> *"(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
> *(c) the suitability of the site for the development,*
> *(d) any submissions made in accordance with this Act or the regulations,*
> *(e) the public interest."*

31. The combined effect of these two statutory provisions is that any condition imposed in reliance upon section 4.17(1)(a) will need to relate to those matters identified in paragraphs (b), (c), (d) and (e) of section 4.15(1).

32. It is in the context of the need for such a relationship that utilising encumbrances on title needs to be considered. Broadly speaking, that relationship is likely only to exist in a limited number of circumstances. In saying this, we acknowledge the ambit of those circumstances is not precisely defined.

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[1] The applicable environmental planning instruments specified in the Assessment Report for SSD 8812 are: *State Environmental Planning Policy (State & Regional Development) 2011*; *State Environmental Planning Policy (Infrastructure) 2007*; *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017*; *State Environmental Planning Policy No. 55 - Remediation of Land*; *State Environmental Planning Policy No. 64 - Advertising Structures and Signage; Sydney Regional Environment Plan (Sydney Harbour Catchment) 2005 and Woollahra Local Environmental Plan 2014*.

There are no provisions in the above environmental planning instruments empowering an indemnity in relation to any private structures within the public road reserve, on-site detention systems and/or absorption trenches. As noted in the Assessment Report for SSD 8812, development control plans do not apply to State Significant Development (clause 11, *State Environmental Planning Policy (State & Regional Development) 2011*) so it is not necessary to consider this further.

33. In addition to the above statutory regime, general principles governing the imposition of conditions have also been articulated in numerous cases. In *Bathurst City Council v PWC Properties Pty Limited* (1998) 195 CLR 566 the High Court endorsed the statement of Walsh J in *Allen Commercial Constructions Pty Limited v North Sydney Municipal Council* (1970) 123 CLR 490 at 499-500 where his Honour opined that the power to attach conditions to development consents was to be understood:

> *".. not as giving an unlimited discretion as to the conditions which may be imposed, but as conferring a power to impose conditions which are reasonably capable of being regarded as related to the purpose for which the function of the authority has been exercised, as ascertained from a consideration of the scheme and of the Act under which it is made."*

34. Australian Courts, including the High Court have also endorsed the test for the imposition of a valid condition articulated by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578. The Newbury test requires:

    (a) the condition must be for a planning purpose, and not any ulterior one;

    (b) the condition must fairly and reasonably relate to the development (the subject of the application); and

    (c) the condition must not be so unreasonable that no reasonable planning authority could have imposed it.

35. The above context needs to be remembered as a development consent and the conditions required by it, imposes both burdens and benefits or, expressed differently, rights and obligations on the beneficiary of the development consent. These rights and obligations are subject to enforcement under the EP&A Act itself as the Act authorises the bringing of proceedings to restrain or enforce a breach of the Act and a breach of the Act includes a reference to a breach of conditions of development consent.

36. This is important to bear in mind in considering any condition which seeks to utilise encumbrances on title (such as a covenant or easement) as a means of enforcement of conditions where the primary obligations imposed by the conditions are, themselves, able to be enforced pursuant to the provisions of the EP&A Act itself: see *PDP (Darlinghurst Apartments) Pty Limited v Sydney City Council* [2005] NSWLEC 41. As a development consent sits *in rem*, they are capable of being enforced against subsequent owners.

Are the conditions in accordance with section 4.17?

37. Whilst our client is prepared to accept the imposition of the proposed covenants and easements required by Conditions E36 to E40 in the conditions of consent, it is important to firstly explain that, based on various statements of principle and decided cases, the Courts have expressed a reticence to impose conditions that utilise encumbrances on an applicant's title to enforce planning law outcomes.

38. Lloyd J in *Macdonald v Mosman Municipal Council* 105 LGERA 49 made the following observations regarding conditions of consent relying on encumbrances on an applicant's title:

> *"The Court has not, in the past, been favourably disposed towards conditions requiring registered restrictions as to user. In particular, Cripps J in Carr v Goulburn City Council held that it was not appropriate to impose such a condition. The abovementioned cases show that such a condition is neither necessary nor generally appropriate. I agree."*

39. Lloyd J adopted the same approach in *Our Firm Facility Pty Limited v Wyong Shire Council* [2001] NSWLEC 243. His Honour observed as follows (at [29]):

> *"Firstly, the council seeks a covenant pursuant to s 88E of the Conveyancing Act 1919, such covenant required to be registered on the property title prohibiting the use of the land for anything but housing for older people or people with disability. In my opinion, a covenant of this kind is quite inappropriate. In McDonald v Mosman Municipal Council ... I examined a line of authority in this Court in which it has been consistently held that it is inappropriate for conditions of development consent to acquire the imposition of covenants on the title to land.* ***It would be a rare and exceptional case where that would be an appropriate measure****."*
>
> *(Our emphasis)*

40. The reason for the above is that in many circumstances, planning law (public law) already provides an adequate enforcement mechanism for these matters - through the conditions embodied in the consent - there are enforcement rights against the consent holder (see for example, *PDP (Darlinghurst Apartments) Pty Limited v Sydney City Council* [2005] NSWLEC 41). Conditions of consent bind new owners of the land and can be enforced against them, thus there is no need for a private law enforcement mechanism (i.e. covenant).

41. We acknowledge there are other cases in which the NSW Land and Environment Court have upheld the validity of imposition of covenants through conditions of consent, including in *Fortunate Investments Pty Limited v North Sydney Council* (2001) 114 LGERA l where then Chief Judge Pearlman accepted there was a power to impose conditions requiring covenants. In that case, it was held that a condition requiring the registration of a restrictive covenant burdening every lot in the strata plan, which would require each of the owners of the strata lots to comply with a plan of management, was appropriate. Paragraph [15] of Pearlman CJ's judgment is reproduced below:

> *"I think there is a good deal of enforcement capacity in the conditions of consent incorporating the plan of management and I would not regard it as necessary to impose a condition requiring a restrictive covenant for that purpose. However, I also think Ms Townsend's submission that* ***it is important that notice be given to purchasers is critical in this case****. For that purpose, it is appropriate to impose a condition requiring a restrictive covenant."*
>
> *(Our emphasis)*

42. Also, Cripps J in *Northshore Gas Company* (embraced by Bignold J in *NTL Australia Limited v Willoughby Council* [2000] NSWLEC 244) agreed that an onsite detention rain water system was within power due to the purpose of the covenant.

43. We accept that in limited circumstances covenants which have a role in ensuring successors in title are aware of obligations for maintenance may be imposed by consent authorities and the Court without objection. Against this background, we consider that the imposition of a condition imposing the requirement to enter into a covenant under the *Conveyancing Act 1919* may, as a matter of power, be imposed provided it conforms with section 4.17 of the EP&A Act and meets the Newbury test.

44. However, the circumstances in which such a condition is to be imposed should be exceptional, and such a requirement should not simply provide an extraneous and additional mechanism to enforce a condition of consent which is capable of enforcement on its own terms and in accordance with the EP&A Act. We also accept that such a requirement is more likely to be sustained if it is directed to the notification of successors in title and imposing an obligation to maintain a particular piece of infrastructure which is necessary for implementation of the development in contemplation.

45. For those reasons our client is willing to accept the imposition of the covenants and easements required by conditions E36 to E40 of the conditions of consent, with the exception of the requirement for an indemnity, which we address below.

Imposition of an indemnity as a condition of consent

46. Conditions of consent requiring positive covenants that impose indemnities are much more problematic. This is the case despite any adopted policy position by a public consent authority.

47. Part of the Road Reserve Indemnity Covenant Condition relates to indemnifying Council against "*claims or actions* [in relation to]….*any private structures encroaching on the public road reserve for which consent has been given, such as steps, retaining walls, sitting furniture, access ways, overhang balconies, awnings, signs and the like*".

48. Part of the Drainage Indemnity Covenant Condition relates to indemnifying Council against "*any claims or actions* [in relation to*]…. the on-site detention system and/or absorption trenches, including any pumps and sumps incorporated in the development*."

49. The NSW Land and Environment Court has held on two occasions that these types of conditions (imposing indemnities) are beyond power.

50. The decisions are *Galandon Pty Ltd v Narrabri Shire Council* (1983) 51 LGR 5 (**Galandon**) and *Hutchinson 3G Australia Pty Ltd v Waverley Council* [2002] NSWLEC 151 (**Hutchinson 3G**). We set out some observations regarding these cases below.

51. *Galandon* involved the development of a motel on flood-prone land in Narrabri. A condition of consent included that "*the floor level be constructed half a metre above the one in one hundred years flood level*". The condition provided that alternatively, the building was to be constructed on "*piers between two and two and a half metres above natural ground level*".

52. The Council in *Galandon* indicated that it was willing to replace these provisions with a charge in registrable form providing an indemnity to the Council in respect of claims against it arising out of personal or property damage caused by flooding as a result of the Council having granted development consent. There are similarities in the facts in *Galandon* to what is being required of Cranbrook School in the Road Reserve Indemnity Covenant Condition and the Drainage Indemnity Covenant Condition.

53. The Court held in *Galandon*:

    (a) An indemnity in favour of the consent authority in these circumstances would constitute a breach of the EP&A Act.

    (b) The original condition was unreasonable in all of the circumstances.

54. The other case, *Hutchinson 3G,* involved the expansion of telecommunication facilities on an existing tower in the nearby local government area of Waverley.

55. One of the conditions in the relevant consent related to an indemnity provision releasing "Council from all legal liabilities from risks incurred including any possible future adverse health impacts of electric radiation associated with the erection, maintenance and operation of this infrastructure".

56. The Court held in *Hutchinson 3G*:

    (a) In examining the validity of an indemnity condition, the Court reaffirmed that a condition of consent must observe the requirements in *Newbury* and have a planning purpose, fairly and reasonably relate to a development, and not be so unreasonable that no reasonable planning authority could have imposed it.

(b) The indemnity condition was "ultra vires and invalid". It did not relate to a planning purpose and did not satisfy the test of validity.

57. Paragraph [28] of the judgment is important:

> *"The indemnity condition is not directed to the interests of the public safety or preservation or well-being of the public. Instead it is directed solely to the issue of protecting the council from any liability in the event that a claim is made against it for damages relating to the effects of EMR. The sole beneficiary of the indemnity condition is the council, not the residents. Such condition could not be classified as one made in "the public interest" as referred to in s 79C(1)(e) of the EP&A Act since no protection whatsoever is provided to the public. It follows that the indemnity condition does not satisfy the test of validity, namely, that it relates to a "planning purpose"."*

58. The Court then concluded that the condition was severable from the consent.

Other cases?

59. We are not aware of any case law that changes the position set out in *Galandon* and *Hutchinson 3G*.

60. We have identified that the *Galandon* and *Hutchinson 3G* decisions have been applied by the Land and Environment Court in 4 subsequent cases. Relevant parts of these decisions are set out below.

(a) Firstly, in *Terrigal Grosvenor Lodge v Wingecarribee Shire Council* [2008] NSWLEC 1162, the ratio of *Galandon* and *Hutchinson 3G* was cited by Brown C at [51]-[52]:

> ***"[51]*** *The following conditions are in dispute:*
>
> > ***Condition 42*** *– this condition provides that the property owner/management will be required to enter into an agreement indemnifying the council from any liability for damages incurred as a result of the proximity of the site to the golf course. The applicant opposes the condition.*
>
> ***[52]*** *I agree with the submission of the applicant that the condition can be deleted on the basis that an indemnity to secure an authority under the EPA Act against liability in an action for negligence which might be brought as a result of a development consent granted by the consent authority would constitute a breach of the EPA Act (Galandon Pty Ltd v Narrabri Shire Council 1983 51 LGRA)."*

(b) Secondly, in *Fitzhenry v Hornsby Shire Council* [2010] NSWLEC 1083, although the appeal was dismissed, Pearson C cited *Galandon* and *Hutchinson 3G* regarding the proposed indemnities:

> ***"[32]*** *The applicant accepts that a positive covenant is appropriate to notify a subsequent owner of the land as to its obligations to comply with the flood management plan and conditions of consent and keep the shed insured, however it is inappropriate for a subsequent purchaser to be required to give an indemnity to Council against liability.*
>
> ***[33]*** *After both parties had provided brief written submissions on the conditions in dispute, Mr Pickup for the Council very properly contacted the court to draw my attention to the decision of Cowdroy J in Hutchison 3*

> *G Australia Pty Ltd v Waverley Council [2002] NSWLEC 151, which is inconsistent with his submissions on condition 8. This decision, and the earlier decision of McClelland J in Galandon Pty Ltd v Narrabri Shire Council (1983) 51 LGRA 5, support the conclusion that condition 8(a) requiring an indemnity would not have a basis in any of the matters set out in s 79C of the Act and therefore could not be imposed."*

(c) Thirdly, in *Pickles v Jackson* [2011] NSWLEC 1001 again, the ratio of *Galandon* and *Hutchinson 3G* was cited by Morris C at [40]:

> *"I am not satisfied that the liability for consequential damage that may arise from the construction of the fence on public land can be transferred to the owners of the site. The decision of Cowdroy J in Hutchison 3G Australia Pty Ltd v Waverley Council [2002] NSWLEC 151, supports this view. This decision, and the earlier decision of McClelland J in Galandon Pty Ltd Narrabri Shire Council (1983) 51 LGRA 5, support the conclusion that a condition requiring an indemnity would not have a basis in any of the matters set out in s 79C of the Act and therefore could not be imposed."*

(d) Finally, in *Valoth v Parramatta City Council (No 2)* [2012] NSWLEC 161 the ratio of *Galandon* and *Hutchinson 3G* was cited by Sheahan J at [84]:

> *"Had Council sought legal advice, its attention may have been drawn to decisions of this court, such as Galandon Pty Ltd v Narrabri Shire Council (1983) 51 LGRA 5, or Hutchison 3G Australia Pty Ltd v Waverley Council [2002] NSWLEC 151, which would indicate that a Council's insistence on such a waiver of liability is ultra vires, not being a relevant planning consideration for a Council in deciding to grant or refuse a consent."*

Conclusion regarding validity

61. Based on the above case law, the Road Reserve Indemnity Covenant Condition and the Drainage Indemnity Covenant Condition seeking to impose indemnities on the beneficiary of the consent are likely to be held invalid if challenged because they are beyond power and do not have a planning purpose.

62. The sole beneficiary of the indemnity condition is Council, not the residents of Woollahra and such conditions could not be classified as being made in "the public interest". In our view, they do not satisfy the first limb of the *Newbury* test.

63. Putting the first limb of the *Newbury* test aside, we also consider that the subject conditions are also likely to fail the third Newbury test - in that they are so unreasonable that no reasonable consent authority would impose them.

64. In this regard, an indemnity is a powerful non-fault risk allocation mechanism and imposing one is not a proportionate risk control for the object of those conditions - approved encroaching structures and approved drainage infrastructure. At common law, the right to damages is implied by law and does not need to be stated in a contract. Specifically, in this instance, Council has common law rights it may enforce against Cranbrook School in the event of a breach of its obligations to maintain encroachments and stormwater systems. Under the common law once a party establishes that a primary obligation has been breached the law implies a secondary obligation to pay damages. One follows the other.

65. In commercial contracts, indemnities are frequently used as a mechanism to expand the range of losses that a principal could otherwise recover at common law or assign fault where none would ordinarily arise at law. But a development consent is very different to a

commercial contract in which one would typically expect both parties have an opportunity to negotiate and the bargaining position of both parties is relatively even. Under a commercial scenario an indemnity might be appropriate given a commercial party has an opportunity to negotiate both the inclusion of an indemnity and its scope and terms. This is not the case with a development consent.

66. Ultimately, accepting the indemnity could have a number of significant repercussions for Cranbrook School, if claims were to arise, as an indemnity can change the test for causation, remoteness of damage and foreseeability, and modify the common law duty of the indemnified party to mitigate its loss (thus increasing the losses to be paid for by Cranbrook School). These will likely raise issues for Cranbrook School's insurers given one of the indemnities relates to land outside the School.

67. These matters all go to the manifest unreasonableness of the condition.

Modification of conditions of the Consent sought

68. In light of the above, Cranbrook School applies for modification of conditions of Consent (E37 to E40) in the manner described in **Annexure A**.

69. The purpose of the modifications are to:

(a) effect minor changes to the Consent necessitated by changing physical requirements at the subject site; and

(b) remove the imposition of indemnities on Cranbrook School.

70. A consent authority may modify a consent if it satisfies the requirements listed in sections 4.55(1A) or 4.55(2) of the EP&A Act:

> *(1A) 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 proposed modification is of minimal environmental impact, and*
>
> *(b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), 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 any period prescribed by the regulations or provided by the development control plan, as the case may be.*
>
> *Subsections (1), (2) and (5) do not apply to such a modification.*
>
> *(2) 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)…*
>
> *[Emphasis added]*

The modification sought effects a change to the proposed development

71. The recent judgment of the NSW Court of Appeal (**Court**) in the case of *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177 (***Buyozo***) contained two important conclusions relating to the power of consent authorities to modify development consents.

72. Firstly, a modification shares with the grant of a development consent the essential characteristic of only operating prospectively, so as to authorise the doing of something in the future: *Willoughby City Council v Dasco Design and Construction Pty Ltd & Anor* (2000) 111 LGERA 422; [2000] NSWLEC 275.

73. Both modifications to the Consent in this instance operate prospectively, that is the physical works are yet to occur and the encumbrances have not been registered on title. With respect to the removal of the imposition of indemnities in Conditions [37]-[40], those indemnities are not yet imposed through a registered instrument and as such have not crystallised. Accordingly the conditions of Consent have not yet been satisfied and still have work to do.

74. Secondly, where a modification to a development consent is applied for under section 4.55(1A), section 4.55(2), or section 4.56(1) of the EP&A Act, the Court's judgment in Buyozo requires that at least one of the results of the modification application to be a change to the proposed development. In that regard, the Court stated:

> *"[55] The constraints on three of the powers, s 4.55(1A), s 4.55(2) and s 4.56(1), indicate that the **modification** of the development consent sought **needs to effect some change to the development** the subject of the development consent, while the constraints on one of the powers, s 4.55(1), indicate to the contrary that no change to the development the subject of the development consent needs to be effected."* (emphasis added).
>
> *"[63] The upshot of this analysis is that the power in s 4.56(1), as with **the powers in s 4.55(1A) and s 4.55(2), can only be exercised to modify** a development consent **if the modification will effect some change** to the development the subject of the development consent. **This need not be the only effect** of the modification but it **must be at least one of the results** of the modification of the development consent."*
>
> *[Emphasis added].*

75. The modifications sought including an adjustment to the boundary fence, road layback and pram ramp on Rose Bay Avenue, effect a change to the development the subject of the Consent, that is improvements and additions at Cranbrook School, such that the powers in sections 4.55(1A) and 4.55(2) to modify the Consent are enlivened.

76. Also of note, Buyozo makes clear that it is not necessary that every element of the modification application effect some change in the development, for example removal of the imposition of indemnities in Conditions [37]-[40], provided that that discrete element forms part of a modification application which does satisfy that test: above per Buyozo at [63].

The modified proposed development is substantially the same as the development originally approved

77. There are numerous cases in which the NSW Land and Environment Court has considered whether a modified proposed development is substantially the same as the development originally approved.

78. The judgment of Bignold J in *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280 has often been cited with regard to the test under section 4.55(2)(a) of the EP&A Act, particularly at paragraphs 55 and 56 in which the Court described the process for consideration of a proposed modification of development as follows:

> *"55. The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the approved development.*
>
> *56. The comparative task does not merely involve a comparison of the physical features or components of the development as approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts."*

79. More recently, however, Preston CJ, clarified in *Arrage v Inner West Council* [2019] NSWLEC 85 (**Arrage**) [at 19] that, despite *Moto Projects,* the proper test is to be found in the words of section 4.55(2)(a) of the EP&A Act, that is, whether the modified development "is substantially the same development" as the originally approved development.

80. His Honour held at [24]:

> *"First, the essential elements to be identified are not of the development consent itself, but of the development that is the subject of that development consent. The comparison required by s 4.55(2) is between two developments: the development as modified and the development as originally approved: see Scrap Realty Pty Ltd v Botany Bay City Council (2008) 166 LGERA 342; [2008] NSWLEC 333 at [16].*
>
> *Second, the essential elements are not to be identified "from the circumstances of the grant of the development consent"; they are to be derived from the originally approved and the modified developments. It is the features or components of the originally approved and modified developments that are to be compared in order to assess whether the modified development is substantially the same as the originally approved development."*

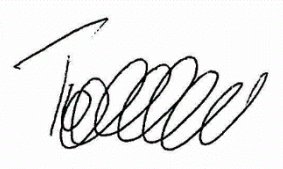
81. His Honour held [at 27] that one way (but not the only way) that the test under section 4.55(2) of the EP&A Act may be satisfied is through a comparative exercise of identifying and comparing the "material and essential elements", both quantitative and qualitative, of the modified development and the originally approved development. His Honour stated that another way of satisfying the test might involve a comparison "*of the consequences, such as the environmental impacts, of carrying out the modified development compared to the originally approved development: see Moto Projects at [62] and Tipalea Watson Pty Ltd v Ku-ring-gai Council (2003) 129 LGERA 351; [2003] NSWLEC 253 at [17]*".

82. In our view, and having regard to the decision of Arrage, the modifications to the conditions of Consent (E37 to E40) sought by Cranbrook School in the manner described in **Annexure A** represent minor alterations to the conditions of the development Consent, not the development.

83. With respect to the boundary fence, road layback and pram ramp on Rose Bay Avenue, the material and essential elements (both qualitative and quantitative) remain the same. There is no material change to the "*development that is the subject of that development consent"* which is the essential element to be identified in the comparison exercise. The changes do not result in a qualitative or quantitative change to the material elements of the development as originally approved in the Consent.

84. Accordingly, the test in section 4.55(2)(a) is satisfied as the consent authority can be satisfied that the development to which the Consent as modified relates will remain substantially the same development as the development for which consent was originally granted.

Yours faithfully



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Annexure A - Proposed Amended Conditions

Covenant for Works on Council Property

E36. Prior to the issue of the final Occupation Certificate and to ensure that all private structures on Council public road reserve are in accordance with Council's "Policy for Managing Encroachments on Council Road Reserves" (except to the extent it requires an indemnity), the person with the benefit of this consent, being the owner of Cranbrook School, must enter into a legal agreement with Council for the associated landscaping and placement of private structures on Council's property.

E37. The legal agreement the owner must enter into and other requirements (referred to in Condition E36) are as follows:

(a) a Public Positive Covenant pursuant to S88E of the *Conveyancing Act 1919* (NSW) burdening the subject property and benefitting the Council and providing for the ongoing maintenance of any private structures encroaching on the public road reserve for which consent has been given, such as steps, retaining walls, sitting furniture, access ways, overhang balconies, awnings, signs and the like.

(b) the Public Positive Covenant must be submitted to Council for approval prior to registration;

(c) the Public Positive Covenant must be registered under the *Real Property Act 1900* (NSW) in the relevant folios of the Land prior to the issue of the relevant Occupation Certificate; and

(d) the property owner must reimburse Council's reasonable expenses incurred in the drafting, negotiation and registration of the Public Positive Covenant.

Creation of Easement for Access for the Public Footpath Located within Private Property

E38. Prior to the issue of the final Occupation Certificate for the Aquatic and Fitness Centre, an easement for access must be created on the Cranbrook School Certificate of Title for any portion of the proposed public footpath adjacent to New South Head Road and located within the School's property boundary.

E39. The legal agreement the owner must enter into and other requirements (referred to in Condition E38) are as follows:

(a) the procuring of an easement for access in favour of Woollahra Council from Cranbrook School under the *Conveyancing Act 1919* (NSW) permitting the public footpath structures to remain on Cranbrook School Property;

(b) the easement for access must be submitted to Council for approval prior to registration;

(c) the easement for access must be registered under the *Real Property Act 1900* (NSW) in the relevant folios of the Land prior to the issue of the relevant Occupation Certificate; and

(d) Cranbrook School must pay Council's reasonable associated costs with the drafting, negotiation and registration of the legal agreement.

Positive Covenant and Work-As-Executed Certification of Stormwater Systems

E40. On completion of construction work, stormwater drainage works must be certified by a professional engineer with Works-As-Executed drawings submitted to the Principal Certifying Authority detailing:

(a) compliance with conditions of development consent relating to stormwater;

(b) the structural adequacy of the on-site detention system (OSD);

(c) that the works have been constructed in accordance with the approved design and will provide the detention storage volume and attenuation in accordance with the submitted calculations;

(d) pipe invert levels and surface levels to Australian Height Datum;

(e) contours indicating the direction in which water will flow over land should the capacity of the pit be exceeded in a storm event exceeding design limits.

Prior to the issue of a final Occupation Certificate, a Positive Covenant must be submitted to Council for approval prior to registration providing for the on-going maintenance of the on-site detention system and/or absorption trenches, including any pumps and sumps incorporated in the development. The Positive Covenant pursuant to Section 88E of the *Conveyancing Act 1919* (NSW) must then be registered under the *Real Property Act 1900* (NSW) in the relevant folios of the Land prior to the issue of the relevant Occupation Certificate.