

Confidential

28 May 2015

Our ref: LAN15008
Your ref:

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The Chief Executive
UrbanGrowth NSW
PO Box 237
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Attention: Amanda Alassad-Bruun

Email

Dear Sir,

Modification of Consent - Relocation of Jemena Gas Main

Introduction

- 1 I refer to my instructions from Amanda Alassad-Bruun and Mark Girgis in their emails to me of 20, 21 and 26 May 2015.
- 2 The consent granted to development application SSD_5093 for the redevelopment of the M2 site at North Ryde (**Consent**) approved the relocation of part of an existing gas main owned by Jemena (**Gas Main**) within the land to which the Consent related.
- 3 I am instructed that it is now proposed to relocate part of the Gas Main onto the adjoining road reserve for the M2 (**Road Reserve**). The Consent does not relate to the Road Reserve.

Advice requested & issues

- 4 I have been asked whether the Consent can be modified under s 96 of the *Environment Planning and Assessment Act 1979* (**EPA Act**) to facilitate the relocation of part of the Gas Main into the Road Reserve.
- 5 NSW Planning & Environment has raised the question of whether the Consent can be modified under s96 of the EPA Act in these circumstances, as it would involve development on land to which the Consent does not currently relate.
- 6 I have been instructed that I do not otherwise need to consider whether the development as proposed to be modified would be substantially the same as the development the subject of the Consent.

Advice & discussion

- 7 The issue of whether an application under s 96 of the EPA Act can relate to land to which the original consent did not relate was considered by Preston CJ in *Scrap Realty Pty Limited v Botany Bay City Council* [2008] NSWLEC 333.
- 8 Preston CJ stated that before a consent can be modified under s96, there is a condition precedent that the consent authority must '*form an opinion of satisfaction that the development to which the consent as modified relates is substantially the same development for which consent was originally granted*' (at [15]).
- 9 His Honour goes on to find that neither the concept of *modify* applied to a consent or the concept of *development* in the condition precedent to the modification, excludes modification of a consent to permit the carrying out of development on land that was not the subject of the original development (at [16]).
- 10 Preston CJ's held:

[18] ... The development and the land on which the development is carried out are indivisible. However, this does not preclude the consent being modified to extend the development approved by the consent to other land. This still entails a modification of the consent — it alters the description of the land to which the consent applies so as to permit the carrying out of development on that land as well.

[19] As far as the condition precedent is concerned, the alteration is of "the development" — it expands the area on which development is carried out... an expansion of the area on which development is carried out by adding land not the subject of the original consent is not inherently outside the concept of modification of the development under s 96.' (my emphasis).
- 11 There have been no subsequent cases which have overturned the decision in *Scrap Realty*.
- 12 Therefore, the fact that the proposed modification to the Consent will involve the carrying out of development on the Road Reserve, does not preclude the modification being approved under s96 of the EPA Act.

Implications & risks

- 13 The Minister for Planning will need to be satisfied that the development as proposed to be modified is substantially the same as the development the subject of the Consent, and will also need to be satisfied as to the merits of the relocation of the part of the Gas Main onto the Road Reserve.
- 14 However, there is in my view, no risk that if approval was granted to the modification of the Consent under s96 of the EPA Act, that approval could be challenged on the basis that it related to land other than that to which the Consent originally related.

Recommendations

- 15 I therefore recommend that provided that UrbanGrowth NSW is otherwise comfortable that the development as proposed to be modified is substantially the same as the development to which the Consent relates, UrbanGrowth NSW should proceed to seek to modify the Consent to facilitate the relocation of part of the Gas Main under s96 of the EPA Act.

16 I trust this advice is of assistance.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'MH'.

Megan Hawley

Partner

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