



Sensitive



5 August 2026

Private and confidential

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Dear David

Easement conditions - 64 and 68 Selhurst Street, Coopers Plains

1. You have sought our advice with respect to whether Conditions 15 and 41 of the development approval given by the Brisbane City Council (**Council**) dated 6 September 2019 (A005203936) and as changed on 24 August 2023 (A006291133) for:
 - (a) a development permit for Material change of use (warehouse);
 - (b) a development permit for Reconfiguring a lot (boundary realignment 2 into 2); and
 - (c) a preliminary approval for Building work (warehouse)in respect of land located at 64-68 Selhurst Street, Coopers Plains (Lots 2 & 3 on SP303903) (**Land**) (**Development Approval**) are lawful.
2. Conditions 15 and 41 are in substantially the same terms.
3. Condition 15 relates to the part of the Development Approval comprising a development permit for Material change of use and Condition 41 relates to the part of the Development Approval comprising a development permit for Reconfiguring a lot. Both require easements to be granted in favour of Council for underground drainage, overland flow and access purposes "as may be required" "and/or" for that part of the site affected by the 1% AEP for Creek/waterway flooding or 2% AEP for overland flow flooding.
4. For the reasons that follow, we are of the view that Conditions 15 and 41 are not permitted development conditions for the purposes of s65(1) of the *Planning Act 2016* (**Planning Act**).
 - 4.1 Conditions 15 and 41 are not reasonably required in relation to the development or use of the premises as a consequence of the Development Approval.

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- 4.2 The development or use of the Land the subject of the conditions is a warehouse use (a receiving shed and drop off area with a total GFA of 432sqm located in the north-east corner of the Land) and realignment of the southern internal boundary between Lot 2 and Lot 3.
- 4.3 The Land has an area of 4.08ha and is improved by existing lawful industrial development within an established industrial precinct. The Land is in the Industry investigation zone and the Acacia Ridge-Archerfield neighbourhood plan.
- 4.4 At the time the conditions were imposed and currently, there are existing easements (Easements D, E & F on SP303903) registered in favour of the Council for drainage (underground and overland flow) in respect of the Land. The Council already has rights as set out in the relevant easement terms in relation to underground and overland flow in respect of those easement areas on the Land.
- 4.5 The entire extent of the Overland flow flood planning area identified for the Land on the Council's Flood overlay map is within the existing easement areas. By reference to Council's own mapping, further easements for overland flow would not appear to be reasonably required as there are no additional areas of overland flow flood mapped on the Land.
- 4.6 Conditions 15 and 41 refer to granting easements "as may be required". It is unclear on the face of the condition who determines whether and what easements are required. If Conditions 15 and 41 remain part of the Development Approval, Conditions 15 and 41 have arguably been satisfied as easements for underground drainage, overland flow and access "as may be required" have been granted.
- 4.7 Conditions 15ii) and 41ii) contain an unclear expression of "and/or" and set out an alternative (or potentially additional) criteria relating to 1% AEP for Creek/waterway flooding or 2% AEP for overland flow flooding. Your town planning consultant, Urban Strategies, has informed us that Council's FloodWise Property Reports indicate that:
- (a) the 1% AEP creek flooding extent reaches RL15.5m on 68 Selhurst Street (with the highest ground level on the property being RL15.2m); and
 - (b) the 1% AEP creek flooding extent reaches RL17.1m on 64 Selhurst Street (with the highest ground level on the property being RL17.1m).
- Urban Strategies are of the view that easements required additionally, or alternatively, for 1% AEP for Creek/waterway flooding would relate to the whole of the Land.
- 4.8 We understand that nature of the development the subject of the Development Approval and the changes that result from its completion do not impact on underground drainage or overland flow. The additional GFA area for the warehouse is 1.06% of the total area of the Land. Conditions 15 and 41 are therefore not a reasonable response to the change in the existing state of things.
5. Conditions 15 and 41 are also not relevant in a planning sense and are an unreasonable imposition on the development.
- 5.1 While it is acknowledged that conditions requiring easements for drainage purposes can be reasonable and relevant in some circumstances, that is not the case here.
- 5.2 There is a level of tension between the zoning of the Land (Industry investigation) and the Flood overlay code. In determining the appropriateness of conditions, it is relevant to consider how the planning scheme addresses that tension. Here, the development the subject of the Development Approval was impact assessable and required the applicant to



consider the Flood overlay code (amongst other things). An assessment against that Flood overlay code was submitted as part of the development application material.

- 5.3 Part of Conditions 15ii) and 41ii) reflect AO18.3 of the Flood overlay code. While that might suggest some relevance in the sense required by s65(1)(b), it is important to note that it is expressed as an acceptable outcome and there does not appear to be any higher-level provisions in the Flood overlay code or strategic framework to support a policy of requiring easements. An applicant can demonstrate compliance with corresponding PO18 and the Purpose/overall outcomes of the Flood overlay code as alternatives to needing to comply with AO18.3. It is noted that there are no other references to easements in the Flood overlay code, including in PO18. Further, PO18 only relates to development involving reconfiguring a lot. The latter casts further doubt on the relevance of such a condition in the context of development involving material change of use.
- 5.4 It is also relevant to consider the Land's context and surrounds. Your town planning consultants have indicated that there are few sites within the direct or wider locality of the Land with easements for the purposes identified. Where conditions like Conditions 15 and 41 are not being imposed in all circumstances of development in this part of the City, that suggests there is not a broader strategy or clear planning policy underpinning the conditions.¹
- 5.5 Based on the alternative drafting, Conditions 15 and 41 could require easements across the whole of the Land that this will complicate the operation of existing lawful uses on the Land and could constrain future activities on the Land. The easements would likely operate in perpetuity and could effectively preclude any further development on the Land. The Planning and Environment Court has confirmed that such kind of conditions require the "closest scrutiny".²
- 5.6 It is our view that there is no relevant nexus between the development and the requirements to grant the easements required by Conditions 15 and 41. Conditions 15 and 41 do not seem a response to the development the subject of the Development Approval or directed to a legitimate planning purpose. The outcomes sought by the conditions can be adequately implemented through the operation of the City Plan, namely, any future development on the part of the Land affected by the Flood overlay code will, under City Plan 2014, be assessable development requiring consideration against the Flood overlay code. To the extent that any future development on the Land may impact on overland flow, underground drainage or flooding then future applications will come before the Council for consideration and any protections warranted by the form of development proposed at that time can be implemented through the operation of the Flood overlay code and the planning scheme more broadly at that time. There is no apparent planning purpose to pre-empt an outcome that any further development on the Land should not occur without considering the nature of the development and the facts and circumstances at that time.
6. Even if Conditions 15 and 41 can legitimately be imposed having regard to the constraints in s65 of the Planning Act (a position we do not agree with for the reasons set out in this letter), there is no obligation to do so. The assessment manager retains a residual discretion to determine what lawful conditions should be imposed and this discretion is not to be exercised capriciously.³ Regard must be had to all relevant considerations, including the existing lawful uses occurring on the land as well as relevant provisions of the planning

¹ *Bridgeman Enterprises Pty Ltd v Sunshine Coast Regional Council* (2021) QPEC 25

² *Transpant No 4 Pty Ltd v Moreton Bay Regional Council* [2021] QPEC 6

³ *Trask and Transpant No 4 Pty Ltd v Moreton Bay Regional Council (No 2)* [2021] QCA 334

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documents. It is our view that Conditions 15 and 41 do not fairly or reasonably relate to the development the subject of the Development Approval.

7. Finally, we confirm that notwithstanding that there was no challenge to conditions 15 and 41 at the time they were imposed, it is open to seek to have the conditions removed by way of a subsequent change application.⁴

Yours faithfully

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⁴ *Palmer v Gold Coast City Council* [2014] QPEC 73