

Camden Residents' Action Group  
PO Box 188  
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9 October 2022

Dear Camden Residents' Action Group

St John's Anglican Church Precinct at Camden | Camden Council Development Consent Dated 14 August 2012

Camden Residents' Action Group has instructed me to give it advice in relation to the Development Consent issued by Camden Council on 14 August 2012 in relation to 6 Menangle Road, Camden which comprises part of the St John's Anglican Church Precinct at Camden. I have read through the 2012 Development Consent and the correspondence and the advice which CRAG has already received about this which you sent to me. I have also read through the legal advice given to St John's Anglican Church, Camden dated 2 December 2021.

#### MY ADVICE

My advice is that this Development Consent expired on 17 August 2014.

**2012 DEVELOPMENT CONSENT | EXPIRATION** On 14 August 2012 Camden Council issued a Development Consent which was requested by the Anglican Church and which was, as expected, subject to detailed conditions. That Development Consent was stated to be for: "Alterations and extensions to the existing church hall, its use as a place of public worship and associated site works." The Development Consent stated it would expire on 17 August 2014 "unless work commenced" before that date. The only work that was carried out at the site before 17 August 2014 was survey work and pegging out of the development site in 2013 (survey (peg out)). No other work was carried out at the site. The survey (peg out) work is the only work which can be pointed to as work carried out at the site before 17 August 2014. For that survey (peg out) work to meet the requirement for work under the Development Consent to prevent it from expiring, the law is very clear that the work needs to have been carried out lawfully.

Clause 8 on page 12 of the Development Consent sets out a very relevant condition which had to be satisfied before any work, including survey (peg out) work, could be carried out lawfully at the site. That condition imposed the following requirement: "This development consent does not allow site works, building or demolition works to commence, nor does it imply that the plans approved as part of the development consent comply with the specific requirements of Building Code of Australia. Works must only take place after a Construction Certificate has been issued, and a Principal Certifying Authority (PCA) has been appointed". Clause 8 is necessary for the Development Consent and the development to comply with the requirements of s.6.6 (formally s.81A) of the Environmental Planning and Assessment Act in relation to building works. It is clear from the 2012 Development Consent that survey (peg out) work is included in the work prohibited before a Construction Certificate has been issued and a Principal Certifying Authority has been appointed. Clause 4.0(2) of the 2012 Development Consent contains a condition which states: "SURVEY REPORT (PEG OUT) The building must be set out by a registered Land Surveyor. A Survey Report detailing the siting of the building in relation to the allotment boundaries shall be submitted to the Principal Certifying Authority (PCA) prior to the placement of any concrete".

On 8 September 2022, the Governance Team Camden in response to a GIPA lodged by Camden Residents' Action Group formally confirmed that there are "no records held" of: 1. the existence of a Construction Certificate; 2. the appointment of a Principal Certifying Authority.

The existence of both of these is stated in the 2012 Development Consent to be essential prerequisites to the carrying out of any work at the site, including survey (peg out) work.

The result is that the survey (peg out) work was not carried out lawfully and therefore is not work that can be relied on to prevent the 2012 Development Consent from expiring.

Therefore, the 2012 Development Consent expired on 17 August 2014 in accordance with its terms.

Therefore, that 2012 Development Consent cannot now be relied on or used.

#### LEGAL ADVICE GIVEN TO ST JOHN'S ANGLICAN CHURCH CAMDEN

As you and others have correctly stated, this legal advice does not give a conclusive answer whether the Development Consent has expired or is still available.

At paragraph 2.2 of that advice letter, this legal advice states:

"Carrying out surveying work, including pegging out the site, and preparation of a plan to enable works under the Consent, would be within the established meaning of "engineering work". Such works, if they relate to the consent and are lawfully carried out would be work sufficient to prevent a consent from lapsing".

I agree with that statement, but, to fit within that advice description the work must be carried out "lawfully".

That legal advice does not state that the survey (peg out) work at this site was carried out "lawfully".

The closest that legal advice gets to stating that the survey (peg out) work at this site was "lawful" is paragraph 5.21:

"Surveying work can generally be lawfully carried out without need for previous compliance with conditions of consent".

That can be a correct statement but its application in each case depends on the wording of the relevant development consent.

Paragraph 5.21 of that legal advice is not a statement that the survey (peg out) work was carried out lawfully and that the 2012 Development Consent is still alive and available and has not expired.

That legal advice does not address and answer the question whether the 2012 Development Consent is still alive and available or whether the 2012 Development Consent expired on 17 August 2014.

#### POSITION OF CAMDEN COUNCIL

In its letter to Rector Tony Galea dated 10 April 2013 Camden Council states:

"It is Council's view that survey work and pegging out of the development site, as approved under Development Consent 195/2012, and submission of documented survey work to Council before the lapse of the consent, would be considered as physical commencement, within the meaning of the Environmental Planning and Assessment 1979".

I agree with that statement, particularly the words that refer to the survey work and pegging out of the site needing to be carried out "as approved under Development Consent 195/2012".

But that is only a statement of what could occur.

The survey (peg out) work at the site was not carried out "as approved under Development Consent 195/2012".

It is not a statement that the 2012 Development Consent has not expired or is prevented from expiring by the survey (peg out) work.

#### LEGAL OBLIGATIONS ON CAMDEN COUNCIL ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

Camden Council has clear legal obligations as the approving authority for the 2012 Development Consent to ensure that the approved development is only carried out in accordance with the law, including the Environmental Planning and Assessment Act 1979 (the Act).

This is a legal obligation on Camden Council and on the relevant Local Planning Panel.

The Act imposes a large number of legal obligations in relation to development which Camden Council and the Local Planning Panel each is legally obliged to enforce as the consent authority for this development.

For example, section 4.2(1) of the Act states:

"If an environmental planning instrument provides that specified development may not be carried out except with development consent a person must not carry the development out on the land to which the provision applies unless:

- (a) such consent has been obtained and is in force, and
- (b) the development is carried out in accordance with the consent and the instrument

Maximum Penalty, Tier 1 Monetary Penalty".

My advice is that the 2012 Development Consent is not in force. Therefore, the first test is failed.

My further advice is that the survey (peg out) work was not carried out in accordance with the 2012 Development Consent. Therefore, the second test is failed.

Therefore, the 2012 Development Consent has not had lawful work carried out before the nominated expiry date of 17 August 2014 and therefore the 2012 Development Consent expired on that date of 17 August 2014.

It is noted from the above that a Tier 1 Monetary Penalty can be imposed if development is carried out illegally.

In this case, it is unlikely that any Tier 1 Monetary Penalty will be applied against the Church for the wrongly carried out survey (peg out) work because section 9.52(2) of the Act states that a Tier 1 Monetary Penalty will only be imposed: "if the prosecution establishes to the criminal standard of proof:

- (a) that the offence was committed intentionally, and
- (b) that the offence
  - (1) caused or is likely to cause significant harm to the environment, or
  - (2) caused the death of or serious injury or illness to a person".

It appears that the survey (peg out) work did not cause either of these outcomes.

Section 6.6(1) of the Act would also be very relevant for Camden Council and for the Local Planning Panel if the 2012 Development Consent was still effective, which it is not, having expired on 17 August 2014.

Section 6.6(1) of the Act states:

"A development consent does not authorise building works until a certifier has been appointed as the principal certifier for the works by (or with the approval of) the person having the benefit of the development consent or other person authorised by the regulations".

As can be seen, the Act imposes strict duties and legal obligations on a consenting authority, which would be Camden Council or the Local Planning Panel in this case.

#### 2021/2022 APPLICATION TO MODIFY THE 2012 APPROVED DEVELOPMENT

In 2021 the Anglican Church, as the applicant, applied to Camden Council to modify the approved 2012 development and revised that modification in 2022.

Because the 2012 Development Consent expired on 17 August 2014, that Development Consent is not available for any application to modify the development which it approved. That 2012 Development Consent no longer exists.

Further, the proposed 2021/2022 amendment is not in fact a modification of the approved 2012 development but contemplates a totally different development.

These are examples of but not the only major differences between the approved 2012 development and what is proposed:

- changed hours of operation;
- extensions of building;
- changes of building material and colour palettes;
- reconfiguration of levels and drainage;
- changes to landscape plans.

Taken overall a reasonable person would not and could not see the 2012 approved development and the 2021/2022 modification as substantially the same development.

The site of the Development Consent is now a state listed heritage Precinct. Its visual appearance and landscape setting are essential elements referred to in its statement of significance and Conservation Management Plan. The 2012 design was by a renowned architect. That design has been abandoned and no architect is attributed to the 2021/2022 modification. Visually, the 2021/2022 modified building is completely different from the approved 2012 building. The proposed 2021/2022 building is imposingly masculine and starkly visible within the setting of the Precinct and the Heritage Conservation Area of the town.

The requested 2021/2022 modification must be made the subject of a new and separate development application both because of its differences from the approved 2012 development and because the 2012 Development Consent expired on 17 August 2014.

## HERITAGE COUNCIL

On 2 August 2018, the Hon. Gabrielle Upton MP as Minister for Heritage ordered that the carrying out of the approved 2012 development works was exempt from Section 57(1) of the Heritage Act 1977.

Leaving aside the grievous abandonment of the historic and heritage elements of this site, which make it one of the most important heritage sites in Australia, the exemption was meaningless and ineffective because the 2012 Development Consent had expired on 17 August 2014 which was well before the date that exemption was granted.

Therefore in 2018 when the Minister made her order, there was no existing Development Consent authorising those works for that exemption to apply to.

## THE HISTORY

This Church site and the adjacent Rectory site and the adjacent open Glebe area were granted by the Macarthur Family to the Anglican Church by a Deed of Feoffment in 1841 and by Declarations of Trust in 1911.

On each occasion the Anglican Church, including through the Archbishop in 1841, undertook in writing that the Anglican Church would hold these gifted lands "for ever" and that they would be used by the Anglican Church at all times.

Therefore, these lands have a very historic significance and have been the subject of firm commitments and undertakings by the Anglican Church.

Despite that, the Anglican Church, in breach of the commitments it made when the land was gifted to it, has been looking to sell part of the land and Rectory to third parties. A Sales Ordinance permitting this came into force after the 2012 consent and that Sales Ordinance remains in force today. This is viewed by many residents of Camden as a serious breach of its binding commitments by the Anglican Church.

Any such sale action by the Anglican Church of Australia may expose the Anglican Church of Australia to legal action for breach of its binding commitments given when it accepted the land as a gift from the John Macarthur Family. I have not explored this issue fully.

These lands and the buildings on them are widely acknowledged to be of exceptional heritage significance and they are listed as such. It would seem to be a callous disregard for the history and significance of this site and for the written promises and commitments of the Anglican Church of Australia when the land was given to it to forgo use of the original Church by building a worship centre next to it and potentially to sell Precinct property to fund it.

The 2012 Development Consent included a condition that required adherence to the Precinct's Conservation Management Plan (2004) and its Addendum (2010). That Conservation Management Plan also specifies maintenance requirements but, despite that, there is a noticeable deterioration of the cemetery and current evidence of rising damp, brick spalling, sandstone decay, water penetration, and deteriorating roof structure across all buildings at the site.

It is also arguable that the 2012 consent for a 400-seat worship centre next to the original Church in itself breached Conservation Management Plan Policy 3 which is to continue the unbroken line of use since the 1840s of St John's as the prime place of Anglican Worship in Camden.

## CONCLUSION

It is clear that the development approved by Camden Council on 14 August 2012 cannot proceed under that 2012 Development Consent, as that Development Consent expired on 17 August 2014.

Given the Precinct's exceptional significance, its State Heritage listing and Conservation Management Plan, any application to develop the site must be considered holistically taking into account all legal, historical and social circumstances. The only way forward to develop the site, if that is to occur, is through a new Development Application that properly and fully addresses all these circumstances.

I confirm that my legal advice is that this Development Consent expired on 17 August 2014 and that the 2012 Development Consent cannot now be relied on or used at all.