

**Undertaking given under Section 9.5 of the
Environmental Planning and Assessment Act
1979 (NSW) by:**

Decode Sydney Pty Limited (ACN 604 521 173)

Undertaking given under Section 9.5 of the *Environmental Planning and Assessment Act 1979 (NSW)* by Decode Sydney Pty Limited (ACN 604 521 173)

1. Persons giving the Undertaking

- 1.1 This undertaking is given to the Secretary of the Department of Planning and Environment (**Secretary**) by Decode Sydney Pty Limited (ACN 604 521 173) (**Builder**) for the purposes of section 9.5 of the *Environmental Planning and Assessment Act 1979 (NSW)* (EP&A Act).

2. Background

Background to the Development

- 2.1 The Builder is a construction company headquartered at Level 8, 52 Alfred Street, Milsons Point NSW 2061.
- 2.2 On 4 September 2018, the Land and Environment Court determined proceedings 2017/225161 by the grant of consent to Development Application DA No. DA/140/2016 lodged by Al-Faisal College Limited (ACN 082 621 092) for development at 65-69 Croydon Street, Lakemba NSW 2195 (the **Premises**) for the following:
- (1) Alterations and additions to the existing building at 69 Croydon Street, demolition of two existing dwellings and associated structures at 65 and 67 Croydon Street, change of use to an Educational Establishment (Primary School) and associated site works and fencing.
- (collectively, the **Approved Development**).
- 2.3 Canterbury-Bankstown Council (**Council**) alleges that certain works as constructed at the Premises are not consistent with the Approved Development and do not otherwise have development consent. Namely, Council alleges that a basement floor level has been excavated and constructed (the **Unauthorised Works**). Condition 15 of the Approved Development provided that the development was to be carried out in accordance with architectural plans dated 14 May 2018 prepared by Millenium Design Consultants. These plans included a Ground Floor Plan (DA-02E) however there was no basement plan. Neither the architectural plans or any other provision of the Approved Development authorised the excavation and construction of a basement. The Unauthorised Works were not authorised pursuant to the Construction Certificates issued by Bernie Cohen & Associates Pty Ltd Trading as Essential Certifiers on 12 September 2019, 28 October 2019 or 11 September 2020 in relation to the Approved Development. The Unauthorised Works were not authorised pursuant to another environmental planning instrument.

The Alleged Contraventions

- 2.4 Council alleged that between September 2020 and April 2021:
- (1) The Builder caused the excavation of the basement floor level / aided, abetted, counselled, or procured ADN Investments Pty Limited (ACN 107 361 160) to excavate a basement floor level;
- (2) The Builder carried out the construction of the basement floor level amounting to the Unauthorised Works at the Premises; and

- (3) The Consent did not authorise excavation or construction of a basement floor level and required the development to be carried out in accordance with approved plans that did not show a basement floor level.

(Conduct).

- 2.5 The Conduct on the part of the Builder may have contravened the EP&A Act as:
 - (1) Section 4.2(1)(a) provides that a person must not carry out development unless such a consent has been obtained under the EP&A Act and is in force.
 - (2) The Unauthorised Works were carried out without development consent contrary to the provisions of section 4.2(1)(a) of the EP&A Act.
 - (3) The aiding, abetting, counselling, or procuring of the Unauthorised Works gives rise to an offence pursuant to section 9.50(3A)(a) of the EP&A Act.
- 2.6 The Conduct may have amounted to offences under the EP&A Act as described above, and is referred to as the **Alleged Contraventions**.
- 2.7 The Builder acknowledges that undertaking development without first obtaining consent may amount to a contravention of section 4.2 or section 9.50 of the EP&A Act or both.
- 2.8 The Builder offered this Undertaking to Council.

Response to Alleged Contraventions

- 2.9 The Builder acknowledges the community impacts which arise from breaches of the EP&A Act, including harm to the regulatory scheme which establishes an orderly method for the obtaining of planning approvals prior to carrying out development. Development carried out without consent does not undergo prior impacts assessment which would allow for avoidance or mitigation of those impacts. Unauthorised excavation creates potential for additional impacts relating to vibration, groundwater, traffic, and waste, which never underwent prior impacts assessment.
- 2.10 The Builder, including its senior managers, are concerned by the Alleged Contraventions and are committed to ensuring compliance with both the Approved Development and the EP&A Act. Since Council brought the Alleged Contraventions to the Builder's attention, the Conduct has received the full attention of the management of the Builder.
- 2.11 Council has no knowledge of any prior breaches of the planning laws by the Builder in relation to activities undertaken by the Builder within the Canterbury-Bankstown Local Government area.

3. Commencement of this Undertaking

- 3.1 This Undertaking comes into effect when both:
 - (1) This Undertaking is executed by the Builder; and
 - (2) This Undertaking so executed by the Builder is executed by the Secretary or his delegate

(the Commencement Date).

4. Undertaking

4.1 The Builder undertakes for the purposes of section 9.5 of the EP&A Act that it will carry out the steps specified below:

- (1) Provide assistance to the Prosecutor in the Land and Environment Court Proceedings No. 2023/234871 – 2023/234874, including by nominating and making relevant personnel of the Builder available to provide witness statements setting out full and frank disclosure of the relevant person's knowledge in connection with the Conduct.
- (2) Deliver a 12 month training program from the Commencement Date, comprising regular refresher talks to staff and contractors involved in all current and future development. These refresher talks will:
 - (a) be delivered:
 - i. at each of the monthly employees' meetings; and
 - ii. at each of the monthly contractors' meetings.
 - (b) include the following content:
 - i. the terms of the development consent and construction certificates, including the approved plans;
 - ii. ensuring that as part of any tendering process these approvals are reviewed and considered;
 - iii. the importance of complying with all of the conditions of the approved development consent and the approved plans;
 - iv. the serious penalties which can imposed upon persons for breaches of the EP&A Act;
 - v. how to identify the approved plans;
 - vi. the processes for reporting any compliance issues to the Builder management and others involved in the development process such as the appointed Certifier;
 - vii. the role and responsibilities of the appointed Certifier for the development; and
 - viii. the process for seeking to modify approvals and the importance of modifying any such approvals prior to undertaking works which do not comply with the approved development consent and approved plans.
- (3) The Builder will make a financial contribution to Council in the amount of \$200,000.00 to be used by Council for the Assets Growth Fund Strategic Priorities (**Financial Contribution**). The Financial Contribution will be deposited into the following nominated account:

Bank: Commonwealth Bank Limited
Account Name: Canterbury Bankstown Council

BSB: 062-111
Account Number: 00000010

- (4) Half of the Financial Contribution will be paid to Council within 30 days of the Commencement Date.
- (5) The remainder of the Financial Contribution will be paid to Council within 12 months of the Commencement Date or other later time as agreed to in writing by Council, unless the Builder can demonstrate to the reasonable satisfaction of Council that it has expended that amount rectifying or assisting in the rectification of the Unauthorised Works.
- (6) Within 30 days after the Commencement Date, the Builder will pay Council:
 - (a) a sum of \$4,500.00 for its costs associated with investigating and monitoring the Alleged Contraventions and entering into this Undertaking;
 - (b) a sum of \$8,000.00 for external consultant costs associated with the Alleged Contraventions; and
 - (c) a further sum of \$40,000.00 for its legal costs in prosecuting the Alleged Contraventions in case number 2023/234870.

(Further Sums)

- (7) The Further Sums will be deposited into the following General Business account of Council:

Bank: Commonwealth Bank
Account Name: Canterbury Bankstown Council
BSB: 062-111
Account Number: 00000010

Ref: Legal Fees Recovery – Court Awarded Costs – WBS:27.334.01
GL: 53707 – GC202306-46

- (8) Within 30 days after the Commencement Date and upon provision of a Direction from the Department, the Builder will pay the Department of Planning, Industry and Environment the sum of \$1,000.00 for its legal costs associated with accepting this Undertaking.

(Departmental Costs)

- (9) The Departmental Costs will be deposited into the following account:

Bank: Westpac
Account Name: DPIE Operating ACC No 2
BSB: 032-001
Account Number: 114428

- (10) The Builder will implement the following to satisfy Council that the undertakings have been complied with:

- (a) Email to Council Coordinator Certificate and Building Compliance Gavin.May@cbc.city.nsw.gov.au a copy of the training program described in 4.1(2);
- (b) Email to the Coordinator Certificate and Building Compliance Gavin.May@cbc.city.nsw.gov.au enclosing a copy of the bank statement or transaction receipt that confirms the payment described in paragraph 4.1(4) has been made, within 7 days of making that payment;
- (c) If required, email to the Coordinator Certificate and Building Compliance Gavin.May@cbc.city.nsw.gov.au enclosing a copy of the bank statement or transaction receipt that confirms the payment described in paragraph 4.1(5) has been made, within 7 days of making that payment
- (d) Email to the Coordinator Certificate and Building Compliance Gavin.May@cbc.city.nsw.gov.au enclosing a copy of the bank statement or transaction receipt that confirms the payment described in paragraph 4.1(6) has been made, within 7 days of making that payment;
- (e) Email to the Director - Compliance and Investigations of the Department of Planning, Industry and Environment at compliance@planning.nsw.gov.au enclosing a copy of the bank statement or transaction receipt which confirms that the payment described in paragraph 4.1(9) has been made, within 7 days of making that payment.

5. Acknowledgements

5.1 Council acknowledges:

- (1) that while the Undertaking is complied with it will not prosecute the Builder for the Alleged Contraventions; and
- (2) it will withdraw proceedings 2023/234870 within 7 days of the Commencement Date, with no order as to costs.


5.2 The Builder acknowledges:

- (1) the Department will make this Undertaking publicly available including by publishing it on the department's public register of section 9.5 undertakings on its website
- (2) the Department will, from time to time, make public reference to this Undertaking including in news media statements and in department's publications
- (3) this Undertaking may be tendered by the Prosecutor in the Land and Environment Court Proceedings No. 2023/234871 – 2023/234874,
- (4) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct, and
- (5) The Department may include details of any compliance audits it undertakes

of this Undertaking, including records provided under 4.2(1), may be held with this Undertaking in the public register.

Executed as an Enforceable Undertaking under section 9.5 of the Environmental Planning and Assessment Act 1979 (NSW)

Executed by **Decode Sydney Pty Limited** (ACN 604 521 173) under s.127 (1) of the *Corporations Act 2001*



Sign

Office (director or secretary)

HAMZE ELRIHANI
Full name

1-2-2024
Date



Sign

Office (director or secretary)

SAM ELRIHANI
Full name

2/2/24
Date

Council has negotiated the undertaking with Decode Sydney Pty Limited (ACN 604 521 173) in relation to Council's functions under the EP&A Act and recommends that the Secretary accept the Undertaking

Date: 6.2.24

Signature of General Manager, Canterbury-Bankstown Council



Accepted by the Secretary of the Department pursuant to section 9.5 of the *Environmental Planning and Assessment Act 1979* (NSW) on:

Date: 20 February 2024

Secretary of their delegate:



David Gainsford
Deputy Secretary Development
Assessment and Infrastructure