

14 July 2021



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Ministry for the Environment
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Dear Max,

PROPOSED DEVELOPMENT AT 6-10 THE STRAND, 21 HURSTMERE ROAD, 33-45 HURSTMERE ROAD, TAKAPUNA ("PROPERTY")

1. BACKGROUND

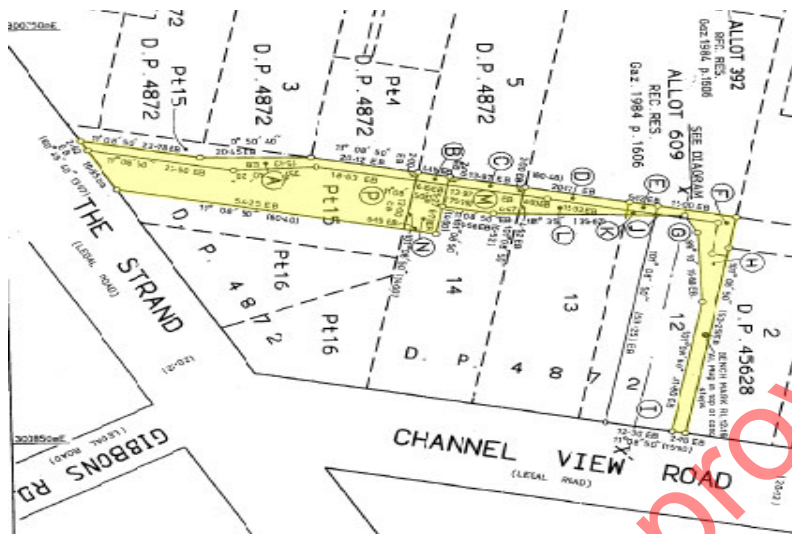
- 1.1 HND TS Limited ("HND") is proposing to develop the Property into a mixed use residential and commercial development.
- 1.2 We have been engaged by HND to provide advice in relation to a pedestrian right of way easement as contained in Easement Instrument C625305.4 ("Easement"). The Easement is registered against that part of the property at 6-10 The Strand, Takapuna which is contained in Record of Title NA93C/394 ("The Strand Property"). A copy is attached to this letter in Annexure 1.
- 1.3 The Easement was registered on 12 July 1994 at the time the North Shore City Council sold The Strand Property to the then owners pursuant to an agreement under Section 17 of the Public Works Act 1981 dated 25 May 1994 ("Agreement"). A redacted copy of the agreement is available.

2. THE COUNCIL'S RIGHTS UNDER THE EASEMENT

- 2.1 The Easement is in favour of the Auckland Council ("Council") in its capacity as local authority over the area of The Strand Property highlighted in yellow on Figure 1 ("Easement Area").
- 2.2 The Easement gives rights to the Council, employees, and members of the public to pass "on foot" along the Easement Area. There are no rights held by the Council to

use the Easement Area for vehicles, bicycles, scooters or any other forms of transport. The rights over the Easement Area are for pedestrians only.

Figure 1



- 2.3 The Council has the right to construct a footpath up to 2 meters wide over the area highlighted green in Figure 2 below. It is clear that the green area is intended for sole pedestrian use rather than the full width of the Easement Area. While this footpath could be established it would not be provided for the full length as the green area does not extend past lot 14 DP 4872 and vehicle access to / from the building at 35-45 Hurstmere (which is a two-lane access) is provided across the Easement Area.
- 2.4 The Council has had over 25 years to construct a pedestrian path over the area highlighted in green below to implement these easement rights but has not done so. At present, there is no formal pedestrian footpath, car parks and manoeuvring area occupy this space with pedestrians walking through the middle of the carpark or along the pedestrian path adjacent to the building in the right-hand side of the easement area as viewed from the Strand (see Figure 1A below).

Figure 1A

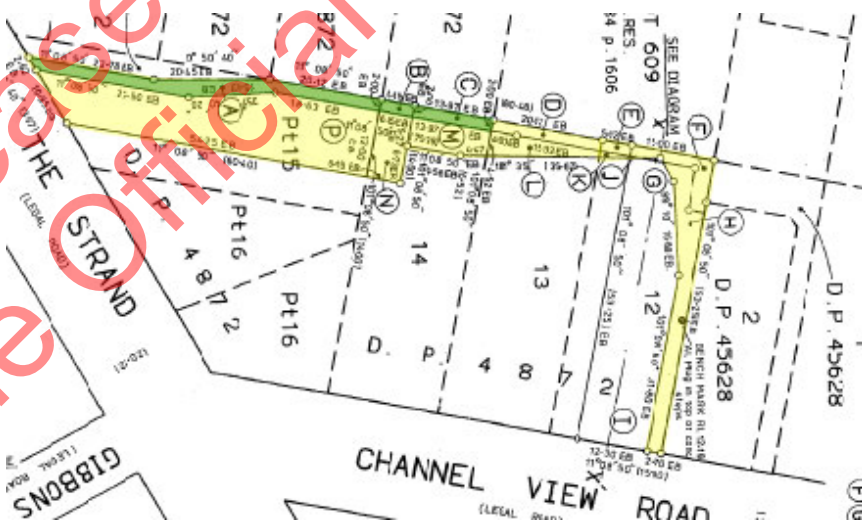


Figure 2



- 2.5 The Council is responsible to repair, clean and, if required, renew any footpaths that are located over the Easement Area. Applying this principle, there is no minimum vertical clearance associated with this easement given it is only for pedestrian rights but up to 2.4m would be appropriate / reasonable as this is the common standard height for residential buildings in NZ and Auckland.¹ Potentially a lower height might also be reasonable, but we have not seen a need to consider that yet.

3. HND'S RIGHTS UNDER THE EASEMENT

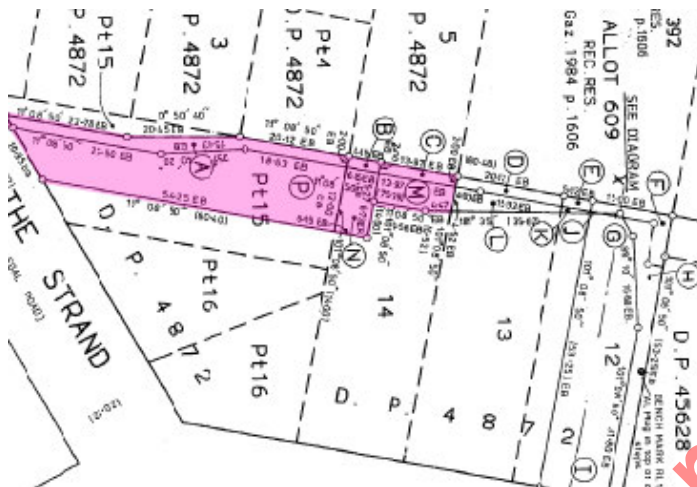
- 3.1 The Easement provides HND a right to park cars and other motor vehicles over the area highlighted in pink in Figure 3 below. It is clear carparking rights do not prevail over the area highlighted in green on Figure 1A, but otherwise prevails across the area where the pink area overlays the yellow area. You can see the outline of the pedestrian footpath included in the pink area below as the 2 metre wide strip at the top of the diagram at Figure 3.
- 3.2 The Easement (unlike many other easements we typically see) does not prohibit HND from placing further improvements or other erections on the Easement Area.
- 3.3 HND may, without the consent of Council, build over the Easement Area as long as the buildings do not substantially interfere with the Council/ public's rights to pass and repass on foot over the Easement Area (McKellar v Guthrie [1920] NZLR 729). In this regard the purpose / function of a pedestrian easement is not for occupation (such as a lease) or to undertake an activity on the land (such as a profit a prendre), it is to access from one point to another.

¹ Department of Building and Housing Simple House Acceptable Solution ISBN 0-477-01606-5 at clause 1.2
Auckland Design Manual: <http://www.aucklanddesignmanual.co.nz/sites-and-buildings/mixed-use/guidance/thebuilding/buildingform/floor-to-ceiling-heights>

- 3.4 In addition to this, the Easement does not preclude the owner from adjusting ground level or the surface of the Easement Area. Thus, height at which pedestrians may utilise the Easement Area is able to be raised or lowered from the current ground level.
- 3.5 In this case HND's development if necessary, should be able to be amended to comply with the requirements of the easement through:
- (a) The proposed pedestrian connection, as shown in Figure 5; along with
 - (b) Access through the development's carparking levels, as shown on the plans in Annexures 2, 3 and 4.
- 3.6 The "Levels Reference Diagram" on the right-hand side of the plan in Annexure 4, shows how the site slopes down from Hurstmere Road to Channel View Road, thus as people walk north from Hurstmere Road, they will need to walk down the relevant ramps in order to end up at Ground Level at the walkway between Hurstmere Green and Channel View Road.
- 3.7 As noted, there would need to be changes to the design to achieve this outcome. Given the size of the site and complexity of the development as a whole, it is reasonable to expect that there could be multiple solutions to achieve such an outcome and any specific design would need to be worked through with the architect along with traffic and civil engineers along with other relevant advisors. That could include:
- (a) A reduction in size / amendment of the retail block on level B 2 which faces north out onto the walkway from Hurstmere Green to Channel View Road, noting that at this point the width of the easement is quite narrow – only a sliver of the retail would need to be removed.
 - (b) Modifications to the levels B1 and B2 such as to demarcate pedestrian access and potentially realign parking and vehicle circulation areas so that it functions safely but largely in the same manner that the present access does, through a carpark. The carpark would need to be left open to the public.
 - (c) Some larger changes to the design may be made, albeit with the same building footprint and superstructure design. This could include changes to the size and location of vehicle crossings, floor to ceiling heights of floor plates, provision of additional elevators, relocation of servicing areas and/or reconfiguring some office space and apartments.
- 3.8 As you will appreciate, all of these are matters of detailed design that could be resolved through the resource consent design process.
- 3.9 This would obviously be a relatively unattractive outcome and it seems unlikely that many people would choose to use access through the parking levels when a high quality open-air access is provided on an adjacent alignment, but if necessary, it is an operation that could reasonably be accommodated without compromising the entire development, if Auckland Council is unwilling to be sensible. HND could subsequently rely on the lack of use of the current easement to seek that it be extinguished, without compromising the timing for construction and delivery of the development.
- 3.10 In our view such a connection would be sufficient to comply with HND's obligations under the Easement, irrespective of whether it might be an unattractive route. A pedestrian ramp/ tunnel is not included in the HND proposal currently. This example is

simply provided to demonstrate this Easement should not be considered as a matter that precludes HND's intended development of the land.

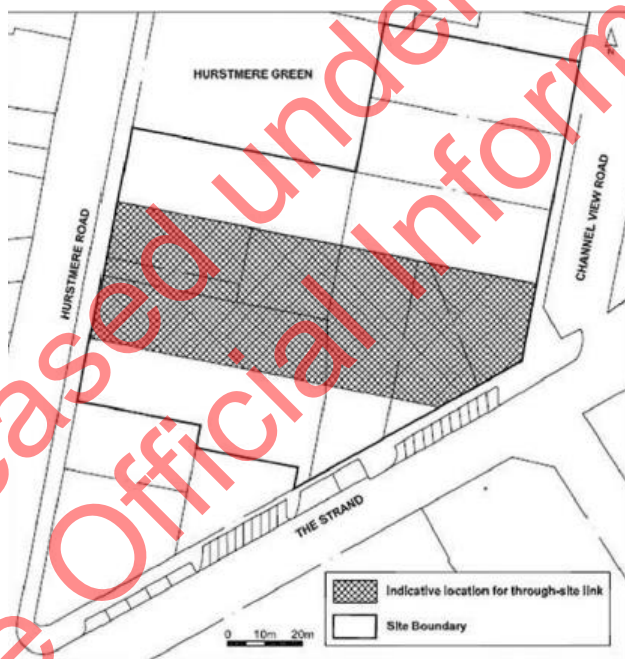
Figure 3



4. PROPOSED PEDESTRIAN CONNECTIONS IN HND'S PROPSAL

- 4.1 The Takapuna Precinct Plan Map (shown as Figure 4) does not propose a through-site link from The Strand. Instead, it only provides one from Hurstmere Road. There is no reference to providing a link from the Strand.

Figure 4



- 4.2 HND is proposing multiple pedestrian links from Hurstmere Road and The Strand. The pedestrian links are shown in red on the plans in Figures 5 and 6 below. The plans show that HND is proposing increased new (i.e., additional) or higher specified (i.e. having higher pedestrian amenity) through-site link options. Council's rights under the Easement for pedestrians are being met through this design. One could also say that

the pedestrian rights will be enlarged by HND's scheme and certainly HND's architects and urban designers and landscape architects consider that the proposed outcome is substantially better than what presently exists.

- 4.3 The pedestrian connectivity strategy is being developed by Boffa Miskell who have considered all existing pedestrian connections through Takapuna and how the development will integrate with these. Full landscape treatment and security measures (lighting, way finding) will be incorporated into the final design.

Figure 5

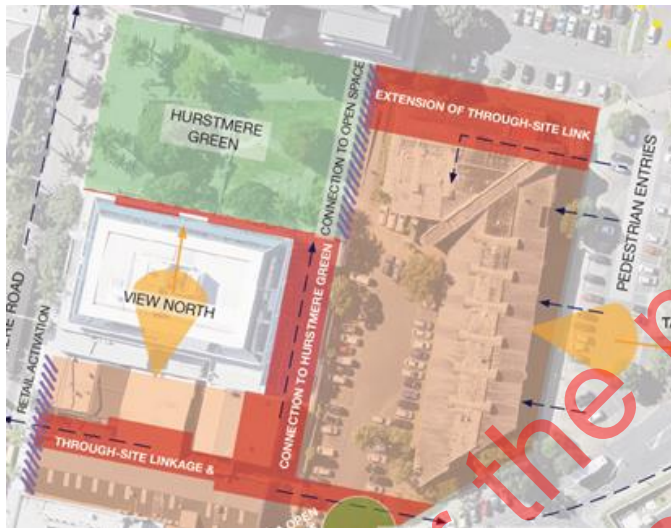


Figure 6



5. PROPERTY LAW ACT 2007

- 5.1 HND also has rights at law it could utilise if it needed to do so. Under Section 317 of the Property Law Act 2007 the court has a discretion, on the application of the occupier of land subject to an easement to modify or extinguish the easement or covenant. The (then) Supreme Court in *Re Lewis* [1959] NZLR 1040 SC allowed the shifting of a right of way from one part of the land to another to make way for the construction of a new dwelling on the servient land. HND would be able to develop the Property and provide a relocated pedestrian right of way in the areas shown in Figures 5 and 6 below. The recent decision of the Supreme Court in *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157 makes such applications easier than had previously been contemplated; but as highlighted elsewhere HND has options to implement its intended development without modifying the easement.

6. CONCLUSION

- 6.1 The Easement allows the Council and members of the public to pass and repass "on foot" along the Easement Area and it does not extend to the use of vehicles, bicycles, scooters or other forms of transport.
- 6.2 Assuming construction logistics can satisfactorily be addressed, the Easement permits HND to develop over the Easement Area provided that any development does not interfere with the free passage of the public along the Easement Area. All that is necessary is to provide reasonable opportunity for its exercise. Applying this principle, there is no minimum vertical clearance associated with this easement given it is only for pedestrian rights but up to 2.4m is reasonable, potentially a lower height might be acceptable, but we have not yet seen the need to consider what that might be.
- 6.3 The Council is responsible to repair, clean or renew any footpaths within the Easement Area and these at the least would require a break in it/them as a result of a double width (two lane) access required for vehicles to access 35-45 Hurstmere Road.
- 6.4 HND is proposing to provide a pedestrian connection from The Strand to Hurstmere Green then from Hurstmere Green to Channel View Road and Hurstmere Road. This pedestrian connection is parallel to the Easement Area and achieves exactly the same function, such that the existing easement is not necessary and could be modified to align with the new pedestrian accessway. This could either be done by consent or as a result of a court order.
- 6.5 The alternative strategy (if Council is not amenable to this approach) is to meet the Easement obligations by enabling pedestrian access through the basement level of the proposed building. In our view this offering would meet HND's obligations under the Easement.

AlexanderDorrington

Denise Marsden

Director

DDI s 9(2)(a)

Email: s 9(2)(a)

8.

ANNEXURE 1

Released under the provision of
the Official Information Act 1982

MEMORANDUM OF TRANSFERPedestrian Easement in GrossWHEREAS

- A. The North Shore City Council in its capacity as landowner ("the Grantor") is registered as proprietor of the estate in fee simple subject however to such encumbrances, liens and interests as are notified by memoranda underwritten or endorsed hereon in the land described in the first schedule below ("the Servient Land").

1. GRANT OF EASEMENT

- 1.1 In consideration of the sum of ONE DOLLAR (\$1.00) receipt of which is hereby acknowledged paid to the Grantor by The North Shore City Council in its capacity as local authority ("the Council") the Grantor TRANSFERS AND GRANTS to the Council as an easement in gross for ever the rights to allow the Council and members of the public to pass and repass on foot along those areas of the Servient Land marked "A", "P", "B", "C", "M", "N", "D", "L", "E", "K", "F", "H" and "J" on Deposited Plan 160230 ("the Walkway Areas").
- 1.2 And in addition the Council and its agents, servants and contractors are granted the right to construct, repair, clean or renew any footpaths within the Walkway Areas.

2. COVENANTS

2.1 The Council covenants with the Grantor that in exercising any of its rights the Council shall:

2.1.1 cause as little damage as possible to the Servient Land;

2.1.2 after construction of any footpath in the Walkway Areas, restore the Servient Land not forming part of any footpath so constructed as near as reasonably possible to its previous condition; and

2.1.3 to make good at its expense any damage done by the actions of the Council to any buildings or other improvements on the Servient Land.

2.2 The Grantor covenants with the Council that the grantor will not at any time do anything which will prevent or interfere with the free passage of the public along the Walkway Areas.

2.3 The Grantor and the Council acknowledge that in the areas marked "A", "B", "C", "N", "M" and "P" of the Walkway Areas the Grantor and its lessees and invitees have the right to park cars and other such motor vehicles.

2.4 The Grantor agrees that Council has the right to construct within areas marked "A", "B" and "C" of the Walkway Areas a formed footpath up to 2 metres wide along the western edge of those areas. Where such footpath is constructed in areas "A", "B" or "C" the Grantor shall ensure that the parking of cars and other such motor vehicles in those areas does not obstruct or encroach onto the footpath.

In witness of which this memorandum has been executed
this 27th day of June 1994. *msr*

FIRST SCHEDULE

All that parcel of land containing 5399m² more or less being part lots 12, 13, 14 and 16 and part lot 15 Deposited Plan 4872 and being part Allotment 81 Parish of Takapuna and being all the land comprised and described in Certificate of Title 93C/394 (North Auckland Registry) SUBJECT TO:

- (i) Fencing Covenants in Transfer 54632, 64889 and 67215
- (ii) Electricity Easement in gross created by Transfer CO54147.1.

THE COMMON SEAL of THE)
NORTH SHORE CITY COUNCIL was)
affixed in the presence of:)



Alison Clark

(Deputy) Mayor

[Signature]

City Secretary

THE COMMON SEAL of THE)
NORTH SHORE CITY COUNCIL was)
affixed in the presence of:)



Alison Clark (Deputy) Mayor

[Signature] City Secretary

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the Official Information Act 1982

ANNEXURE 2

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the Official Information Act 1982

Revisions
No. Description
By Date

DRAFT
WP ISSUE:
09/07/2021

Notes:

1 BED APT.	Pool / Gym
2 BED APT.	Basement Carpark
3 BED APT.	Bike Storage
3 BED PH.	Waste Room
Services Apartment	Plant / Storage
Office	Lobby
BOH	Star
Retail	Lift
Restaurant	

LEGEND: POTENTIAL POINT LOADS TO BASEMENT
 + DOWN (HEAVY) LOAD LOCATIONS
 FROM BASEMENT ABOVE

Moller Architects

The North Shore Project
For
HND TS Limited
Takapuna, Auckland

Project No. A1-030

Level B2 - Floor Plan

Design: Moller
 Drawn: [blank]
 Date: [blank]
 Scale: [blank]
 Project No: 9077023 13-07-2021
 WP
 Moller Architects Ltd
 10/100 The Esplanade, Takapuna, Auckland 1300
 Tel: 09 252 1000
 Fax: 09 252 1001
 Email: info@moller.co.nz
 Website: www.moller.co.nz

Drawing No. A1-030
 Revision



ANNEXURE 3

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ANNEXURE 4

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