

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

**Bernie Cohen and Associates Pty Ltd trading as
Essential Certifiers**

Undertaking given under Section 9.5 of the *Environmental Planning and Assessment Act 1979 (NSW)* by Bernie Cohen and Associates Pty Ltd (ACN 100 386 650) trading as Essential Certifiers

1. Persons giving the Undertaking

- 1.1 This undertaking is given to the Planning Secretary of the Department of Planning, Housing and Infrastructure (**Secretary**) by Bernie Cohen and Associates Pty Ltd (ACN 100 386 650) trading as Essential Certifiers (**Essential Certifiers**) for the purposes of section 9.5 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EP&A Act**).
- 1.2 Christopher Manzi (**Mr Manzi**) is a registered certifier formerly employed by Essential Certifiers and currently employed by Co-Cert Building Certification, which has a principal place of business at Level 1, 405 Hume Highway, Liverpool NSW 2170.

2. Background

Background to the Development

- 2.1 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 (**the Consent**) lodged by Al Faisal College Ltd (**Al Faisal**) 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**).
- 2.2 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**).
- 2.3 Mr Manzi as an employee of Bernie Cohen & Associates Pty Ltd trading as Essential Certifiers (**Essential Certifiers**) was appointed as the principal certifying authority (**PCA**) in relation to the Approved Development at all relevant times.
- 2.4 Al Faisal was the principal in the construction of the school and entered into a contract with Decode Sydney Pty Ltd ACN 604 521 173 (**Decode**) for the carrying out of development at the Premises. 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 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.
- 2.5 In his role as PCA, Mr Manzi:
- (1) Had knowledge of the Consent (including its terms and the approved plans); and
- (2) Undertook a number of inspections of the Premises (including an inspection on 7

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December 2020), when Council alleges the Unauthorised Works had commenced.

- 2.6 Council raised the Unauthorised Works with Mr Manzi in September 2021. Mr Manzi undertook an inspection of the Premises after this time and initially denied the existence of the Unauthorised Works.
- 2.7 On 22 October 2021, Mr Manzi issued a Written Direction Notice in relation to the Unauthorised Works.

The Alleged Contraventions

- 2.8 Council alleges that, between September 2020 and April 2021, Al Faisal, Decode, and ADN Investments Pty Ltd ACN 107 361 160 (ADN) carried out (or caused to be carried out) the Unauthorised Works, in contravention of section 4.2 of the EP&A Act.
- 2.9 Council further alleges that Mr Manzi aided, abetted, counselled or procured Decode to carry out the Unauthorised Works by being the PCA in relation to the Approved Development, attending the site to carry out mandatory inspections and failing to take steps to stop or require rectification of the Unauthorised Works (the Alleged Conduct).
- 2.10 Essential Certifiers offered this Undertaking to Council.

Response to the Contraventions

- 2.11 Essential Certifiers acknowledges that the Unauthorised Works were carried out contrary to section 4.2 of the EP&A Act and acknowledges the community impacts which may 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 and for the certification of works as they are completed. 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.
- 2.12 Essential Certifiers acknowledges that Mr Manzi could have taken steps to stop or require rectification of the Unauthorised Works prior to issuing the Written Directions Notice on 22 October 2021, subject to the extent of knowledge which he had. Council acknowledges those carrying out the works were not proactive in ensuring Mr Manzi was informed as to the Unauthorised Works.
- 2.13 Essential Certifiers acknowledges that where a certifier fails to take action, this undermines confidence in the system of private certification and professional standards for certifiers established by the EP&A Act and the Design and Building Practitioners Act 2020 (DBPA).
- 2.14 Essential Certifiers are concerned by the Alleged Conduct and are committed to ensuring compliance with the EP&A Act.
- 2.15 Council has no knowledge of any breaches of the planning laws by Essential Certifiers prior to the Alleged Conduct and in relation to activities undertaken by them 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 Essential Certifiers; and
- (2) This Undertaking so executed by Essential Certifiers is executed by the Secretary or his delegate

(the Commencement Date).

4. Undertaking

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

- (1) Within 28 days of the Commencement Date, undertake a 12 month training program (at its own cost) to be completed every three months, with each training session to be for a minimum duration of 1.5 hours consisting of face to face training relating to
 - a) the legislative obligations of PCAs under the EPA Act, DBPA and accompanying Regulations (including any changes to those legislative obligations);
 - b) the legal principles relating to statutory interpretation and the interpretation of development consents; and
 - c) recent case law and decisions of the relevant Courts and/or Tribunals in NSW regarding the validity (or otherwise) of development consents, complying development certificates, construction certificate and/or occupation certificates.

Such training is to be delivered by a legal practitioner holding a current NSW Practising Certificate. Essential Certifiers will make the training available to all employees of Essential Certifiers and Co-Cert Building Certification.

4.2 Within 30 days of the Commencement Date, Essential Certifiers will make a financial contribution to Council in the amount of \$25,000.00 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 of Australia
Account Name: Canterbury Bankstown Council
BSB: 062-111
Account Number: 00000010

4.3 Within 30 days of the Commencement Date, Essential Certifiers will pay Council a further sum of \$40,000.00 for its legal costs in prosecuting the Contraventions in case number 2023/00234871.

(Further Sums)

4.4 The Further Sums will be deposited into the following General Business account of Council:

Bank: Commonwealth Bank of Australia
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

4.5 Within 30 days of the Commencement Date and upon provision of a Direction from the Department, Essential Certifiers will pay the Department of Planning, Housing and Infrastructure the sum of \$1,000.00 for its costs associated with accepting this Undertaking.

(Departmental Costs)

- (3) 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

- (4) Essential Certifiers will implement the following to satisfy Council that the undertakings have been complied with:
- (a) Email to Council Coordinator Certification and Building Compliance Gavn.May@cbc.city.nsw.gov.au a copy of the training program described in 4.1(1);
 - (b) Email to the Coordinator Certification 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(2) has been made, within 7 days of making that payment;
 - (c) Email to the Coordinator Certification 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(3) has been made, within 7 days of making that payment
 - (d) Email to the Director - Compliance and Investigations of the Department of Planning, Housing and Infrastructure 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(5) 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 Mr Manzi for the Alleged Contraventions; and
- (2) it will withdraw proceedings 2023/00234871 within 7 days of payment of the contributions and costs referred to section 4 above.
- (3) The withdrawal of proceedings 2023/00234871 will be with no order as to costs.

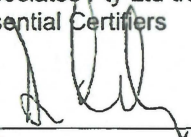
5.2 Essential Certifiers acknowledges:

- (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 Prosecutor will make this Undertaking publicly available including but not limited to publishing it on Council's website and including it in news media statements, press releases and in Council publications,
- (3) the Department will, from time to time, make public reference to this Undertaking including in news media statements and in department's publications,
- (4) this Undertaking may be tendered by the Prosecutor in in the Land and Environment Court Proceedings No. 2023/234871,
- (5) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the Contraventions, and

- (6) 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.
- (7) To the extent that the Undertaking is published or referenced in accordance with clause 5.2(2), any such publication must also make reference to the Undertakings entered into by Decode Sydney Pty Ltd, Al Faisal College Ltd, Complete Construction Engineering Pty Ltd and ADN Investments Pty Ltd in respect of the Unauthorised Works.

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

Executed for Bernie Cohen and Associates Pty Ltd trading as Essential Certifiers



Sign

13/3/25

Date

Witnessed by:



Sign

Pamela Elizabeth Anstey

Full Name

Accountant

Capacity

13-3-25

Date

Council has negotiated the undertaking with Essential Certifiers and Christopher Manzi in relation to Council's functions under the EP&A Act and recommends that the Secretary accepts the Undertaking

21.03.25

Date



Signature of General Manager, Canterbury-Bankstown Council

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

10/04/2024

Date



Secretary of their delegate: Deputy Secretary,
Development Assessment and Sustainability