

Rock Anchor Easement or Deed?

This will depend on the circumstances.

On 1 July 2020, the Design and Building Practitioners - Particulars for Regulated Designs Order 2021 (**Regulated Designs Order**) came into effect. Under section 5(3) of the Design and Building Practitioner Act 2020 (NSW) (**DBPA**), the Minister may, by order published in the Gazette, specify particulars that are additional to those prescribed by the regulations for regulated designs or regulated designs belonging to a particular class.

By reason of the Regulated Designs Order, regulated designs prepared for building work involving ground anchors that will extend to the neighbouring property are now required to meet the specified particulars set out in Schedule 2 of the Regulated Designs Order.

Importantly, prior to the commencement of any building work involving the construction of a class 2 building or a mixed-use building, where a part of the building is a class 2 building, the builder or developer will need to provide evidence of a registered easement over the neighbouring property granting the right to install an anchor over the neighbouring property, otherwise a registered design practitioner will not be able to provide a design compliance declaration as required by the DBPA.

The Regulated Designs Order applies to all building work commencing after 1 July 2021 by operation of the transitional provisions under the DBPA, even if the designs were prepared before 1 July 2021 and even if the developer and builder had already obtained a construction certificate authorising the commencement of the building works.

Previously, builders and developers would commonly negotiate with neighbouring owners to enter into a rock anchor deed or agreement. Now, the additional requirements will mean that there will be more time involved and costs to the developer and builder to register an easement over the neighbouring property.

As the Regulated Designs Order only applies to the construction of class 2 building or mixed-use buildings where a part of the building is a class 2 building, builders and developers may still attempt to negotiate and enter into a rock anchor deed or agreement with the neighbouring owners if the type of building being constructed is not caught by the DBPA.

What if negotiations are unsuccessful?

Where builders and developers are unable to successfully negotiate with the neighbouring property, builders and developers may apply to the Supreme Court under section 88K of the Conveyancing Act 1919 or, in limited circumstances, apply to the Land and Environment Court and make an application

under section 40 of the Land and Environment Court Act for an order imposing an easement over the adjoining land.

The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.

Such an order may be made only if the Court is satisfied that:

- use of the land having the benefit of the easement will not be inconsistent with the public interest, and
- the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the Real Property Act 1900 can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and
- all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.

Costs of the proceedings are generally payable by the party who commences the proceedings.

Compulsorily acquired easements – No compensation payable for rock anchors

Where an easement is compulsorily acquired by a state authority under the Land Acquisition (Just Terms Compensation) Act 1991 (NSW) (**Just Terms Act**), by reason of section 62 of the Just Terms Act, compensation is not payable in relation to an easement under the surface for the construction and maintenance of works, except for actual damage done in the construction of the work or caused by the work. The Court has found that ground anchor easements compulsorily acquired under the Just Terms Act are not entitled to compensation: see *Bligh Consulting Pty Ltd v Ausgrid* [2016] NSWLEC 75.

Further, where an easement is compulsorily acquired by a state authority under the Transport Administration Act 1988 (NSW) for the purpose of constructing underground rail facilities, compensation will not be payable unless the following circumstances have occurred *after* the construction of the underground rail facilities:¹

- the surface of the overlying soil has been disturbed, or
- the support of that surface has been destroyed or injuriously affected by the construction of those facilities, or
- any mines or underground working in or adjacent to the land have thereby been rendered unworkable or are injuriously affected.

The first thing an owner should do after receiving any request regarding an easement or rock anchor deed for the installation of rock anchors is to contact a lawyer to request legal advice. The lawyer can assist with ensuring that the owner's rights are protected, with obtaining proper compensation and reimbursement of costs for the owner (where applicable), with briefing the other expert

¹ *Landan Development Pty Ltd v Sydney Metro; Opera Australia v Sydney Metro; Altomonte Holdings Pty Ltd v Sydney Metro* [2019] NSWLEC 65.

consultants required and, for strata owners corporations, ensuring compliance with the requirements of the Strata Schemes Management Act 2015. We have dealt with many such matters and could assist.

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