PROPOSED AGED CARE FACILITY AT 158 MACQUARIE RD; CARDIFF. HAMMONDCARE.

MEMORANDUM OF ADVICE

HAMMONDCARE
C/O SMYTH PLANNING
SUITE 67, LEVEL 4
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PROPOSED RESIDENTIAL CARE FACILITY AT 158 MACQUARIE RD; CARDIFF.
HAMMONDCARE.

MEMORANDUM OF ADVICE

I am briefed to provide an advice in respect of a proposed aged care facility at lot 2 DP 78889225 being 158 Macquarie Rd; Cardiff ("the subject land").

HammondCare propose to lodge a development application for the aged care facility pursuant to State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 ("the SEPP").

HammondCare have held pre consultation meetings with Lake Macquarie City Council officers and a number of legal issues were identified following the recent gazettal of the Lake Macquarie Local Environmental Plan 2014. ("LEP 2014")

I am briefed to advise on a number of issues relating to the permissibility of the proposed development pursuant to the SEPP.

ADVICE

Do the Council's "internal pink flood maps have statutory weight?

1. In my opinion the internal maps do not form part of LEP 2014 and it follows do not constitute a "planning instrument" for the purposes of

Schedule 1 to clause 4(6) of the SEPP. However regardless of whether part of LEP 2014 or not they will form an important consideration when the DA is considered pursuant to s.79C of the EPA Act 1979. In that context the map has some statutory weight.

2. Clause 7.3(2) of LEP 2014 applies to land identified on the "Flood Planning Map" and imposes statutory controls with a relevant objective being "to allow development on land that is compatible with the land's flood hazard--."

3. LEP 2014 has adopted a Flood Planning Map and clause 1.7 makes it clear that the plan was approved by the Minister. The Council's internal map was not so adopted and is not referred to in the planning instrument.

4. The Flood Planning Map identifies in blue colour parts of the subject land as Flood Planning Land and makes no reference to 'high hazard" as is found on the Council's internal map. The internal map is clearly distinguishable from the Flood Planning Map.

Permissibility pursuant to the SEPP

5. I am asked two questions both of which focus upon the crucial question of whether the SEPP applies to the subject land and if answered in the affirmative whether the proposed development is prohibited by the SEPP

6. The SEPP does not apply to environmentally sensitive land described in Schedule 1. Relevantly environmentally sensitive land includes:-

land identified in another planning instrument

by any of the following descriptions; OR

by like descriptions; OR

by descriptions that incorporate any of the following words or descriptions

#--- (g) floodway

(h) high flooding hazard

7. The facultative power of the SEPP only applies to land identified in another planning instrument relevantly LEP 2014. The Flood Planning Map is a part of that instrument and identifies in blue colour parts of the subject land as Flood Planning Land.

8. Firstly the LEP 2014 map does incorporate any of the words or descriptions "floodway" or "high flooding hazard."

9. The paramount question is whether is contains like descriptions to floodway or high flooding hazard. In my opinion the description of "Flood Planning Land" in the instrument map is not of a like description.

10. Flood Planning Land is not defined in LEP 2014 but clause 7.3(4) informs that words or expressions found in the clause have the same meaning as it has in "Floodplain Development Manual ---2005." ("the Manual").

11. Whilst Flood Planning Land is not found in the Manual, Flood Planning Area is defined in the Glossary (section 4 at p 21) and means:-

> "an area of land which is below the FPL and thus subject to flood related development controls. The concept of a flood planning area generally supersedes the "Flood liable land" concept'---.

12. The Glossary also assists in the meaning of the SEPP terms floodway and high flooding hazard and the purpose of excluding from the SEPP operation certain types of flood affected lands. I refer specifically to the definitions of "flood fringe areas"; "flood prone land";'floodway areas" and "hazard."

13. It is clear that there is a distinction between, on one hand the terms "flood planning area" with similar terms "flood fringe areas" and "flood prone and on the other the terms "floodway areas" and "hazard."

14. A flood planning area and similar terms all refer to the areas that receive, depending upon the flood event, some inundation such as a 1:100 flood event where development is generally permitted with consent. The terms floodway areas and hazard refer more to the major flood event when there is likely to be greater frequency, depth of flooding and velocity. This is clear from the definition of "floodway areas" which relevantly mean "those areas of the floodplain where a significant discharge of water occurs during floods. They are often aligned with naturally defined channels. ---"

15. In my opinion the purpose of the SEPP was to exclude those lands more severely affected by flooding when there a significant discharge of water occurs during floods with resultant hazard. LEP 2014 makes no such distinction but whilst the Council's internal plan makes the distinction it is not part of a planning instrument.

16. LEP 2014 does not refer to floodways and high flooding hazards or like descriptions but instead it refers to flood planning lands. There is a clear distinction. It follows that the subject lands are not excluded from the operation of the SEPP.

17. For completeness I mention that the operation of the exclusion provisions referred to in Schedule 1 and clause 4(6) of the SEPP, refer not to the whole of an allotment but to "land" affected. There is a distinction between the terms "land" and "lot". The context of LEP 2014 confirms that the terms are distinguishable. It follows that even if the subject lot 2 was found to be the affected by floodways or high flooding hazards or of like description, the SEPP would apply to the unaffected parts of lot 2.

RIPARIAN RIGHTS AND DUTIES

Prevention of Surface Flow from Higher Land

Many aspects of the law relating to riparian rights and the closely allied problem of the natural flow of surface waters are far from settled. Authorities often conflict and there is a paucity of academic comment on the principles involved. The judgment of the High Court in *Gartner* v. *Kidman*[1] is therefore welcomed as an important and authoritative decision in this area of the law. In particular the potential usefulness of the judgment of Windeyer J., in which Dixon C.J. concurred, must be acknowledged. By considering the general principles involved in rights relating to the flow of water his Honour not only brought the issues involved in the case before the court into perspective but also provided a useful instrument for future general reference.

Litigation arose in the following manner. The appellant Gartner's parcel of land was adjacent to that of the respondent Kidman, the plaintiff in the Supreme Court action. A large swamp was situated on Kidman's land and extended into Gartner's land. At times the water overflowed at a point on Gartner's land, flowed for about three hundred yards to a sandpit on his property, and there escaped into the ground. Predecessors in title to Gartner had allowed Kidman's predecessors in title to facilitate this flow by digging a drain along the same route. This substantially reduced the area of the swamp, and provided what is now Kidman's property with more grazing land. In 1958 Gartner discovered that the sand into which the water drained was of commercial value, and erected barriers to block the canal, with consequential effects on Kidman's land. Kidman brought an action in the Supreme Court of South Australia for an injunction against Gartner requiring him to remove the barriers and restraining him from obstructing the free passage of water along the canal.

The first argument put up by Kidman was that as the upper riparian owner he was entitled to the free flow of water from his land along a natural watercourse, and that the passage obstructed by Gartner was a natural watercourse. In the Supreme Court Chamberlain J. held that a natural watercourse had existed before the drain was made. In the High Court, McTiernan J. agreed with this finding but held that the work done on the channel was of a major character and that riparian rights therefore no longer attached to it. He held that Kidman was relegated to such rights as he had enjoyed before the extension operations commenced. Dixon C.J. and Windeyer J. refused to find that a natural watercourse existed at any point of time.

What in law constitutes a natural watercourse? In *Lyons* v. *Winter*[2] Hood J. said that there must be more than a mere depression in the ground which sometimes receives rain water. To constitute a natural watercourse there must be,

> a stream of water flowing in a defined channel or between something in the nature of banks. The stream may be very small and

1. (1962) 36 A.L.J.R. 43.
2. (1899) 25 V.L.R. 464.

> need not always run, nor need the banks be clearly or sharply defined. But there must be a course, marked on the earth by visible signs, along which water usually flows.

In the present case Windeyer J. accepted the "bed, banks and water" requirement and acknowledged that the water need not flow continuously. However, he emphasised the distinction between "a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water which in times of freshet or melting of ice and snow descend from the hills and inundate the country".[3] His Honour held that merely because on some occasions the swamp overflowed and ran down into the sandy basin, this did not make a watercourse in law.[4] It seems that this approach is an acceptance of the test propounded by Hood J. along with an elaboration of the words "usually flows". In order to constitute a watercourse to which riparian rights attach there must be more than the physical signs of bed and banks and the occasional flow of water, for if that flow is merely occasional it fails to comply with the test as interpreted by Windeyer J.

The majority judgment pointed out that, even if the watercourse as it originally existed had complied with the above test, nevertheless it would still fail to qualify as a natural watercourse to which riparian rights attached because the actual flow of water was confined within the limits of the appellant's land. Thus the respondent could only claim to be a riparian owner in respect of the drain after it had been extended into the swamp on the appellant's land.

Kidman also contended that even if, as the court found, there was no natural stream but only an artificial watercourse, nevertheless, it had originally been made under such circumstances and had been so used as to give rise to all the rights which the plaintiff would have had if it had been a natural stream. This argument was accepted by Chamberlain J., who relied upon the following passage from the judgment of the Privy Council in *Maung Bya* v. *Maung Kyi Nyo*[5]:

> A watercourse originally artificial may have been made under such circumstances and have been used in such a way that an owner of land situate on its banks will have all the rights over it that a riparian owner would have had if it had been a natural stream.

However, Windeyer J. held that this passage did not leave the way open for owners to acquire rights in an artificial channel independently of grant, prescription, implication of law or contract. There could be no undefined way of creating such rights. He said that the passage from *Maung's Case* refers to, and is based upon the principle referred to in *Gale on Easements*:

> In the case of some artificial watercourses the origin of which is unknown the proper conclusion from the user of the water and other circumstances may be that the watercourse was originally constructed upon the condition that all riparian owners should

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3. *Angell on Watercourses* (5th ed., 1854) 3.
4. (1962) 36 A.L.J.R. 43.
5. (1925) L.R. 52 Ind. App. 385, 395.

> have the same rights as they would have had if the watercourse had been a natural one.[6]

Thus an important distinction is drawn between artificial watercourses whose origin is unknown and watercourses (such as the one in this case), the circumstances of whose construction are known to the court. The principle seems to be that if nothing is known of the origin of an artificial watercourse, but the occupiers of the land through which the stream flows make the same use of the water as they would if they were riparian owners of land bordering a natural watercourse, then it is reasonable to conclude that when the watercourse was originally made adjoining landowners were intended to have normal riparian rights. This is known as a presumption of a lost grant.

Substantial justice may be done in many instances by conferring riparian rights on the owners of land adjacent to an artificial watercourse of a permanent character. Nevertheless,

> that an underground pipe made by a landowner to convey water to a mill, or a small stream made to convey water to a farm, can in any case, or after any length of time, be deemed a natural watercourse, and that it shall invest the owner as against other landowners, though it may be miles away, with the important rights which the law annexes only to natural streams is, without doubt, a serious proposition.[7]

By interpreting the passage from *Maung's Case* as applying only to cases dealing with a permanent watercourse whose origin is unknown, Windeyer J. has set important limitations on this "serious proposition", for the principle has been held not to apply to facts such as those before the court in the present case, where the court was conversant with the circumstances connected with the origin of the artificial watercourse.

The Court then dealt with the problem as arising from the flow of water other than in a natural watercourse. This was perhaps the most important point of law considered by the court in *Gartner* v. *Kidman*. It arose from the final contention of the plaintiff that, regardless of the existence of a natural watercourse, the defendant's land was subject to a "natural servitude" in favour of the plaintiff's land, that the plaintiff was therefore entitled to discharge upon it any water that would naturally flow there from his land in the normal use by him of his land, and that the defendant was therefore obliged to receive that water.

This argument gives rise to the problem whether the positive praedial rustic servitude of the Roman Law,[8] or the rule referred to by courts and writers in the United States as the "common enemy" rule is to apply. The former principle obliges the owner of land to receive water naturally flowing from the surface of adjoining land. According to the "common enemy" rule, water is regarded as an enemy against which man may defend himself, hence such an obligation is not recognised. *Rylands* v. *Fletcher*[9] does not provide a solution because here there is no "non-natural" user of land.

6. *Gale on Easements* (13th ed., 1959) 204.
7. J. L. Goddard: *The Law of Easements* (8th ed., 1921) 80.
8. Digest, Bk. XXXIX, Title III.
9. L.R. 3 H.L. 339.

Halsbury[10] states that where water overflows from the higher land to the lower as a result of the natural use of the higher land, the owner of the higher land is not liable for the consequences. But there is an obvious "non-sequitur" from this to the conclusion that the lower owner is under a duty to receive such overflow. The dichotomy of "right" and "duty" is a familiar one, but not every "right" is accompanied by a correlative "duty". The higher owner may have a right to allow the water to overflow in the sense that he is not liable for the consequences thereof, but it does not necessarily follow that the lower owner has a duty to receive it. Professor Derham[11] remarks that this has not always been perceived and that some of the authorities have fallen into a trap by failing to consider "whether or not the upper holder's 'right' may not be a mere 'liberty'."

Little help is to be gained from a review of the relevant English cases. This may be due to the fact that special authorities have always been present in England to deal with drainage problems, and the courts have therefore not been regularly called upon to settle disputes. Whatever its reason, the uncertainty in this area of the law is excellently demonstrated by the extensive review of the authorities made by Windeyer J. in the present case.

In *Butcher* v. *Borough of Woollahra*[12] the Supreme Court of N.S.W. held that the owner of lower land had a right to pen back surface drainage from higher land as long as it was not flowing in a defined channel. There was a contrary holding by the Full Court of the Supreme Court of Victoria in *Vinnicombe* v. *MacGregor*,[13] where the civil law rule of the "natural servitude"[14] was held to apply, although there was a strong dissent by a'Beckett J. In the High Court case of *Nelson* v. *Walker*[15] both Griffith C.J. and O'Connor J. strongly criticized the decision in *Vinnicombe* v. *MacGregor*.

In the 1915 Privy Council case of *Gibbons* v. *Lenfestey*[16] Lord Dunedin held that the Roman Law doctrine had been accepted by the common law. The case came before the court on an appeal from Guernsey and the statement was obiter[17] but its effect may be traced through a number of later decisions.[18] On the other hand Napier C.J. in *Dubois* v. *District Council of Noarlunga*[19] considered that the dicta in *Gibbons* v. *Lenfestey* should be limited to the facts of the case. Finally in *Bell* v. *Pitt*[20] Burbury C.J. held that the civil law rule was not part of the law of Tasmania and refused to follow *Vinnicombe* v. *MacGregor*.

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10. 2nd ed., Vol. 33, 630.
11. *"Interference with Surface Waters by Lower Landholders"* (1958) 74 *L.Q.R.* 361.
12. (1876) 14 S.C.R. (N.S.W.) 474.
13. (1903) 29 V.L.R. 32.
14. Note 8 supra.
15. (1910) 10 C.L.R. 560.
16. (1915) 84 L.J.P.C. 158.
17. The customary law of Guernsey is not the common law of England.
18. E.g. *Bailey* v. *Vile* [1930] N.Z.L.R. 829; *Righetti* v. *Wynn* [1950] St. R. Qd. 231; *City of Oakleigh* v. *Brown* [1956] V.L.R. 503 per Sholl J.
19. [1959] S.A.S.R. 127.
20. [1956] Tas. S.R. 161.

After a consideration of these authorities Windeyer J. concluded that the civil law rule that the owner of higher land has a right to insist upon his lower neighbour receiving surface water running off his land

> is not part of the common law as it exists in Australia and that so far as the dicta in the Privy Council case suggest that it is, they should not be followed by this court.[21]

The lower owner may block the flow of surface water by works on his land so long as they are "reasonably necessary to protect his land for his reasonable use and enjoyment".

Hence one might briefly conclude that there is now binding authority in Australia that the general principles involved in the "common enemy" rule are part of our law. In disputes of this nature the court's duty is to balance conflicting interests. If the Civil law doctrine had been followed the higher owner would have been placed in an unduly dominating position in relation to the lower owner.

21. (1962) 36 A.L.J.R. 43, 57.

REAL PROPERTY ACT 1886-1961

Equity and the Torrens System—Scheme of Development

The decision in *Black's Ltd. and Others* v. *Rix and Others*[1] is significant for two reasons. First, it endorses the propriety of noting by way of an encumbrance on the certificate of title restrictive covenants concerning land held under the Torrens system. Secondly, by invoking the equitable doctrine of a scheme of development, it throws some light on the obscurity surrounding the status of equitable interests in land registered under the Real Property Act 1888-1961.

Both the facts and the central issue were relatively simple. One of the plaintiffs, Springfield Ltd., had sub-divided an estate for the sale of separate lots to purchasers prepared to build residences of a certain minimum standard. Each lot was sold subject to certain restrictions of user, a particular restriction being the prohibition of further sub-division of any such lot. This was done by following a common conveyancing practice whereby the purchaser accepted a transfer subject to covenants comprising the restrictions, and providing for the payment, if demanded, of a perpetual and nominal annual rent charge.

In these circumstances, the substantial question before the court (Napier C.J.) was whether the plaintiffs, Springfield Ltd., and others who had purchased lots, could enforce such a covenant against the defendant, who was assignee of an original covenantor. Since the covenants existed only between original purchasers and the common vendor, and not between the covenantors inter-se, the necessary right of enforcement between the latter could be estab-

1. 1962 Law Society Judgment Scheme 289.