

24 November 2016

Gavel and Page  
Property and Construction Lawyers  
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**Attention: Ms Merlin PowerBook TA whole UK**

Dear Sirs

**DA 2016/0384 - 73-79 RAILWAY LANE WICKHAM  
CONSTRUCTION OVER RIGHT OF CARRIAGEWAY**

- 1) I refer to your request for advice on the lawfulness of building over the Right of Carriageway on the eastern side of the site the subject of the above DA.

**Summary.**

- 2) For reasons set out below, it is my opinion that:
- a) Whilst it has long been held that interference with a Right of Carriageway must be substantial in order for it to be actionable, whether any particular interference is substantial depends on its facts and circumstances, and needs to balance the competing rights and interests of the respective parties; and
  - b) In the present case, given that the proposal will provide a height clearance of more than 6m, well in excess of Australian Standards, it cannot be said to interfere with the rights of the beneficiaries to the Right of Carriageway, substantially or at all.

**Facts.**

- 3) I am instructed that relevant facts are as follows:
- a) The subject land is Lot 11 DP 1106378 and Lot 110 in DP 1018454, being land at 73-79 Railway Lane Wickham;
  - b) The south-east part of Lot 11 is subject to a Right of Carriageway, created pursuant to DP 1074080; DP 1074080 provided for a "Right of

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Carriageway 7 wide and variable”,<sup>1</sup> burdening Lot 1 and benefiting lots 2 and 3 DP 1074080;

- c) Lots 2 and 3 DP 1074080 are now consolidated together with what was Lot 1 DP 274845 to form Lot 123 DP 1090081, on which the adjoining hotel is situated. Therefore parts of Lot 123 benefit from the Right of Carriageway.

**Law.**

***Clause 1.9 A of Newcastle LEP.***

- 4) Clause 1.9A of Newcastle Local Environmental Plan 2012 provides, relevantly:

**1.9A Suspension of covenants, agreements and instruments**

- (1) For the purpose of enabling development on land in any zone to be carried out in accordance with this Plan or with a consent granted under the Act, any agreement, covenant or other similar instrument that restricts the carrying out of that development does not apply to the extent necessary to serve that purpose.

- (2) This clause does not apply:

...

- 5) None of the exceptions set out in clause 1.9A(2) apply in the present case, and therefore, the Right of Carriageway does not apply to the extent necessary to enable development on the subject land.
- 6) Regardless thereof, I am instructed that the applicant is willing to delete Unit 1.21 from Level 1 Floor Plan,<sup>2</sup> thereby providing a clearance height of the Right of Carriageway of at least 6.1m (see paragraph 14) below).

***Substantial interference.***

- 7) It has long been held possible to construct a building on land that is affected by a right-of-way, so long as there is no substantial interference with the rights pursuant to that right-of-way.<sup>3</sup>

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<sup>1</sup> Section 181A and Schedule 8 of the *Conveyancing Act 1919* provide for a right of carriageway in those terms to mean as follows:

*Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, to go, pass and repass at all times and for all purposes with or without animals or vehicles or both to and from the said dominant tenement or any such part thereof.*

<sup>2</sup> I note that Right of Way is to the east of the 2 sets of fire stairs and the electrical substation, so they are not affected.

<sup>3</sup> *Petty v Parsons* [1914] 2 Ch 653

- 8) What constitutes a substantial interference is a "question of fact to be determined upon the circumstances of the particular case, with a due regard to the competing rights and interests of the parties." <sup>4</sup>
- 9) In the present case:
  - a) The Right of Carriageway benefits Lot 2 and 3 DP 1074080, which are now part of the rear yard of the adjoining hotel;
  - b) The Right of Carriageway is used to enable liquor trucks servicing the hotel to be loaded or unloaded.
- 10) It must be borne in mind that the Right of Carriageway provides no more than a right of carriageway. Whilst such a right might include a right to unload whilst stationary on the carriageway, this might be displaced depending on the circumstances.<sup>5</sup> Given the absence of buildings on Lots 2 and 3 DP 1074080, it cannot be suggested that the Right of Carriageway extended to any height beyond that reasonably necessary for the passing and repassing of vehicles, now servicing the hotel .
- 11) I note Section 4.2 of Part 2 of Australian Standard AS2890.2 - 2002, relating to the dimensions of "service areas".<sup>6</sup> It is reasonable to utilise these requirements in the present case given the use of the Right of Carriageway by the hotel for unloading.
- 12) Section 4.2 of AS 2890 provides for the minimum vertical clearance of 3.5m for a service area to accommodate a Small Rigid Vehicle (SRV), and 4.5m for an medium rigid vehicle (MRV), heavy rigid vehicle (HRV), and for an articulated vehicle (AV).<sup>7</sup>
- 13) In the present case, the ground level Floor Plan, Drawing A102 Rev Q provides for the surface level of the Right of Carriageway to be at RL 2.150. The elevations and sections show the height of Level 1 floor to be RL 6.100, and the floor level of Level 2 to be RL 9.100.

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<sup>4</sup> *Gohl v Hender* [1930] SASR 158. See also *Mantec Thoroughbreds Pty Ltd v Batur* (2009) 25 VR 507; *Owners Corporation of Strata Plan 42472 v Menala Pty Limited* (1998) BPR 9717 p. 16336

<sup>5</sup> *Robmet Investments Pty Limited v Don Chen Pty Limited & Anor* (1997) BP 15,461 (Windeyer J, 23 ay 1997); *Tomara Holdings Pty Limited v Pongrass* [2002] NSWSC 195 at [18]

<sup>6</sup> "Service areas" are defined in clause 1.4.16 of the standard as "a designated space clear of the apron to accommodate a commercial vehicle parked at a loading dock."

<sup>7</sup> Section 4.2 also suggests a minimum clearance of 5.0m where access to the top of a tall vehicle, eg pantechnicon, or load is required. That clearance is satisfied in the present case as well.

- 14) With the deletion of unit 1.21 from Level 1, the clearance for the Right of Carriageway is  
 $9.100 - 2.700 - 0.200 \text{ or } 0.300 \text{ (for the Level 2 slab) = at least 6.1m.}$
- 15) As the clearance height for the Right of Carriageway (at least 6.1 m) is significantly greater than the height required for a service area pursuant to AS 2890, it is my opinion that such a clearance height does not interfere with the Right of Carriageway, substantially or at all.
- 16) Furthermore, as a result of clause 1.9A of the LEP, it is doubtful whether the existence of the Right of Carriageway should be able to affect the proposed development.

Should you have any queries, please do not hesitate to contact me.

Yours faithfully

A handwritten signature in black ink, appearing to read 'S M Berveling', with a long horizontal stroke extending to the right.

**S M Berveling**