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OUR REF: SR 180152

YOUR REF:

06 April 2021

Mr Gordon Kirby
Chairman
Southern Regional Planning Panel
C/- Planning Lab
Level 24
300 Barangaroo Avenue
SYDNEY NSW 2000

BY EMAIL

Dear Sir

RE: **DA0563/2019**
71 Fig Hill Lane Dunmore ("the Subject Site")
Assessment Report Summary

We act on behalf of David Moodie Pty Limited and Alotap Pty Limited, the owners of the Subject Site on whose behalf the above development application has been lodged ("the Owners"). We have been sent a copy of the Council's Assessment Report Summary dated 25 March 2021 ("the Assessment Report") in relation to the above development application.

We believe it is necessary to address the inaccuracies and the misunderstandings in that Assessment Report in relation to the legal rights attaching to the rights of carriageway benefitting the Subject Site.

The Assessment Report in Section 2.3.2 refers to the two relevant rights of carriageway benefitting the Subject Site as "restrictions". The rights of carriageway are not "restrictions" but rather are valuable proprietary rights that attach to and benefit the Subject Site.

Despite Council's assertions in Section 2.3.2 that the two rights of carriageway created by DP 1063834 (13 & 10 wide) and by DP 717776 (10.06 wide) are on different terms they are, in fact, on the same terms, namely, the terms contained in Part 1 of Schedule 8 of the Conveyancing Act 1919. It is incorrect for Council to say in relation to the right of carriageway created by DP 717776 that "*there are no terms of the restriction within 88B*". Section 181A(1) of the Conveyancing Act 1919 provides that the words in Part 1 of Schedule 8 are imported into the Section 88B Instrument lodged with DP 717776. Section 181A(1) and Part 1 of Schedule 8 are in the following terms (with emphasis added):

Section 181A(1)

> *"In an instrument executed or made after 1 January 1931 … and purporting to create a right-of-way the expression right of carriageway … has the same effect as if there had been inserted in lieu thereof … the words contained in Part 1 of Schedule 8."*

Part 1 of Schedule 8

> *"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 purposes with or without animals or vehicles or both to and from the said dominant tenement or any such part thereof."*

The rights of carriageway benefitting the Subject Site are in the widest possible terms in that they allow every person entitled to an estate or interest in the Subject Site and everyone authorised by them to pass and repass over the site of the right of carriageway **for all purposes and at all times**.

Section 2.2 of the Assessment Report states that "*It is Council's position that the terms of these Rights of Carriageway do not allow for the undertaking of upgrade works to provide for the intensification in use resulting from the development*". The Assessment Report also says in Section 2.3.2 that "*On review of all available information and relevant Case Law it is Council's position that the existing terms of the restrictions would not allow for intensification of use resulting from the development, or the works required to upgrade the pavement to provide for this intensification of use*".

With respect, Council's position in Sections 2.2 and 2.3.2 is difficult to justify in light of the decisions of the High Court of Australia, the NSW Court of Appeal and the NSW

Supreme Court in the following cases particularly when the terms of the rights of carriageway benefitting the Subject Site are on the terms set out in Part 1 of Schedule 8 of the Conveyancing Act which allows the Subject Site (the dominant tenement) to use the rights of carriageway for all purposes and at all times by every person entitled to an estate or interest in the Subject Site:

(a) *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45;

(b) *Nirimba Developments Pty Ltd v Sertari Pty Limited* [2007] NSW SC 252;

(c) *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSW CA 324;

(d) *Lowe v Kladis* [2018] NSW CA 130;

(e) *Kirkjian v Towers* – an unreported decision of Waddell CJ in Equity in the Supreme Court of NSW.

The Council's position is particularly difficult to reconcile in light of the decision of the NSW Court of Appeal in Sertai Pty Ltd v Nirimba Developments which considered the rights of the dominant tenement under a right of carriageway which was "for all purposes and for all times" and was otherwise on similar terms to the rights of carriageway benefitting the Subject Site. That case involved the development of 2 hectares of the dominant tenement of a right of carriageway where the dominant tenement had an initial area of 557 acres. The development of the 2 hectares involved the construction of 236 apartments with 351 carparking spaces.

The Court of Appeal said:

> *"The owner of a dominant tenement is entitled to construct improvements on the servient tenement where this is necessary or convenient for the exercise of the rights conferred by the easement. In Kirkjian v Tower Waddell CJ in Eq held that the owner of the servient tenement could be ordered to consent to the lodgement of a development application for construction of improvements which are reasonably necessary for the proper enjoyment of the easement. This decision has been followed: 117 York Street Pty Ltd v Proprietors of Strata Plan 16123; Owners Strata Plan 50411 v Cameron North Sydney Investments Pty Limited."*

> *"The servient owner's refusal of consent, where this is legally necessary, obstructs the dominant owner in the exercise of rights under the easement. Obstruction by legal means in this way is just as much an infringement of the dominant owner's rights as a direct physical obstruction."*

"Windeyer J held that the words of the grant were clear and since it was a right for all purposes and at all times all persons connected with the proposed residential development were entitled to use the right of carriageway. In these circumstances the question of excessive user, which was essentially one of construction, could not arise." (Emphasis added)

"This Court is therefore limited to the materials in the folio identifiers, the registered instrument, the deposited plans, and the physical characteristics of the tenements. These provide no basis for reading down the clear and unqualified words of the grant. The grant was for all purposes, for use at all times, and extended to every person with an estate or interest in any part of the dominant tenement with which the right was capable of enjoyment, and persons authorised by them."

Council does not appear to understand the extent of rights of the owner of the dominant tenement which has the benefit of a right of carriageway. These rights are summarised by Sackville AJA of the NSW Court of Appeal (with whom Meagher JA and White JA agreed) in Lowe v Kladis as follows and apply to the Owners of the Subject Site:

"It follows from what has been said that the dominant owner has a commensurate right to enjoy the easement of carriageway free from substantial interference by the servient owner. In addition, the dominant owner has such ancillary rights as are reasonably necessary for the exercise or enjoyment of the easement. This is a common law principle but it has been applied to easements registered on the title to land under the Real Property Act 1900 (NSW). Thus in Hemmes Hermitage Pty Ltd v Abdurahman this Court held that the owner of the dominant tenement was entitled to go onto the servient tenement beyond the boundaries of a footway, to undertake works necessary to maintain the trafficability of the right of footway.

The ancillary rights of the dominant owner include, where appropriate, the right to obtain the written consent of the owner of the servient tenement to the lodgement of a development application by the dominant owner."

In light of this decision of the NSW Court of Appeal in Sertari v Nirimba (which was subsequently followed in June 2018 by the NSW Court of Appeal in Lowe v Kladis) Council's stated position in relation to the rights of carriageway benefitting the Subject Site cannot be supported. We would be interested to know what decisions of the NSW Land & Environment Court and what Case Law purportedly support Council's position that the terms of the rights of carriageway that benefit the Subject Site do not allow for the use of the site of the rights of carriageway in connection with the redevelopment of the Subject Site.

The rights of the Owners (being the owners of the dominant tenement of the rights of carriageway) to undertake works on the site of the rights of carriageway clearly extend to the necessary repairs to the shoulders of the existing trafficable areas of the rights of carriageway which are approximately 5.5 metres wide including two 0.9 metre gravel shoulders which have been washed away and are in need of repair. The rights of carriageway benefitting the Subject Site are between 10 metres and 13 metres in width and the development of the Subject Site will only be utilising, at the current time, 5.5 metres of the rights of carriageway which is significantly less than their strict legal entitlements.

Attached is a separate letter which was sent to Council on 12 March 2021 explaining the ancillary rights of the owner of the dominant tenement to carry out works on the servient tenement which are reasonably necessary for the effective and reasonable exercise of the rights expressly granted by the rights of carriageway registered on the Certificate of Title for the Subject Site.

Should you require any further information in relation to the above matters please let us know.

Yours faithfully
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