

Attachment 2 - Mills Oakley Letter of Advice



28 June 2023

Mills Oakley
ABN: 51 493 069 734

Privileged and confidential

Your ref:
Our ref: AXGS/JZAS/3687853

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Dear Carl

Advice regarding development application DA-2022/1357 over 39-43 Princes Highway Corrimal

You have asked us to provide advice on:

- whether development application DA-2022/1357 is integrated development and whether the granting of development consent is dependent on authorisation from Rural Fires Services (**RFS**) under section 100B of the *Rural Fires Act 1997* (**the Rural Fires Act**) in the form of a bush fire safety authority;
- the legal capacity and appropriateness of the consent authority granting development consent with a deferred commencement condition requiring the provision of an easement to allow:
 - the use of Lot 31 DP1006013 (**Lot 31**) in favour of 39-43 Princes Highway Corrimal (**Lot 6**);
 - for the purpose of creating an asset protection zone for bushfire protection and the obtaining of development consent for that use; and
- whether the easement adjoining Lot 31 —as shown on DP 1006012 and created under D944459 — conflicts with the asset protection zone over Lot 31 foreshadowed as part of the development application.

Summary advice

In our opinion:

Integrated development

- It is **not legally possible** for the RFS to issue a bushfire safety authority for this development under section 100B of the Rural Fires Act. The granting of development consent is not dependent on authorisation from the RFS in the form of a bush fire safety authority.
- To the extent that bushfire safety issues are relevant to the subject development application, they are to be evaluated by a consent authority.
- The Council is free to consult the RFS if it so wishes, but it is ultimately for **the consent authority** to determine the appropriate responses to bush fire safety issues, informed by PBP.
- The development application can and should be legally assessed without it being treated as integrated development by reason of bush fire safety.
- It was incorrect for the development to be nominated as integrated development in relation to a bush fire safety authority requirement. You should withdraw this nomination as part of any amended

development application documents you submit. You should ensure that your town planner makes this clear in any cover letter submitted as part of the amendment.

Bushfire safety impacts

- There is no existing registered easement over Lot 31 that benefits Lot 6, which you can rely on for the purposes of creating an APZ for bushfire protection.
- We consider the provision of the easement over Lot 31 — and obtaining any required development consent over the easement area within Lot 31 — can be the subject of deferred commencement conditions. This is provided that the environmental impacts of the use of Lot 31 as an APZ are fully evaluated in the course of determining the application.
- There is substantial case law that confirms the proposition that a development application need not include in the application land the use of which is necessarily involved in the subject of the application.
- You should ensure your town planner, in the planner's cover letter that forms part of the amendment development application, makes it clear you do not propose that any consent granted actually authorises any work or use of Lot 31 for the purposes of creating an APZ.
- On this basis, consent of the owner of Lot 31 to the current development application is not required. Landowner's consent to a development application is not required if development consent for development on the landowner's land is not sought as part of the development application documents.
- The imposition of a condition requiring work to be carried out on land does not give rise to its notional inclusion within the development application.
- The granting of a development consent does not affect the proprietary rights of a third party — such as the owner of Lot 31 — which will be burdened by the foreshadowed easement for the purposes of creating an APZ.
- At most — in determining a development application — it is only necessary for the consent authority to note the possibility of the registration of a new easement. The prospect of a new easement being registered as foreshadowed is a contingency that may or may not be fulfilled. It is a commercial risk that the proponents must decide whether to bear. The uncertainty as to whether the applicant would be able to obtain the necessary approvals for the use of Lot 31 as an APZ is not a reason to refuse consent to the current development application.
- The consent authority may legally grant development consent with a deferred commencement condition requiring:
 - the registration of an easement to create an APZ for bush fire protection;
 - the grant of a separate development consent for the use of Lot 31 for that purpose; and
 - such a condition would be appropriate in the present case.
- Such a deferred commencement condition is capable of being a condition under section 4.17(4) of the EP&A Act.
- Despite the fact the use of Lot 31 is not **approved** as part of the determination of the present development application, we consider that the likely impacts of the APZ (and whether Lot 6 is suitable for the development) must still be considered by the consent authority. You should ensure that documentation will be submitted to the consent authority that fully addresses the impacts of the APZ in all relevant respects.
- If there is no agreement by the owner of Lot 31 to the imposition of an easement for the purposes of creating an APZ, you may seek to obtain a Court-ordered easement. The consent authority does not, therefore, need to consider the likelihood of any agreement between the owner of Lot 31 to the imposition of a drainage easement.

The easement burdening Lot 31 shown on DP1006012

- The easement shown on DP1006012 and created by D944459, which directly adjoins the northern boundary of Lot 6, is an 'easement for drainage'.
- The easement created by the dealing D944459 is an 'easement for drainage' which has been recorded on the title folio of Lot 6 and on the title folio of Lot 31.
- Lot 6, and other land, **benefits** from the 'easement for drainage' created by dealing D944459. Lot 31 is **burdened** by the easement.
- The terms of the easement grants the transferee (being the owner of Lot 6 among others) the **right** to enter the adjoining land being transferred (that is, Lot 31) to:
 - construct trenches for the purpose of discharging effluent from the septic tank(s) which is to be erected by the transferee;
 - lay, construct and maintain all pipes and other connections to the trenches; and
 - to keep, maintain, enlarge, reconstruct, inspect and repair the same or replace the said pipes with others.
- The terms of the easement impose **obligations** on the transferee (such as the owner of Lot 6):
 - to restore the surface of the land after the construction of the trenches;
 - not to permit effluent to lie on the surface of the burdened land;
 - not to injure shade trees in the construction of the trenches; and
 - to keep the burdened land from becoming sewage sour to the detriment of the burdened land or the destruction of shade trees.
- The obligation 'not to injure shade trees' is **not** relevant to the current owners of Lot 6 as that obligation relates only to the right to enter the land **for the purposes of constructing the trenches**.
- If the owner of Lot 6 does not enter Lot 31 to construct trenches, the obligation not to injure shade trees does not arise.
- If the owner of Lot 6 enters Lot 31 under the terms of a future easement for an APZ, the terms of the easement for drainage will have no application.
- There is no conflict between the 'easement for drainage' and the foreshadowed APZ.

Background

We understand and assume the relevant facts to be as follows:

- You are the developer of 39 Princes Highway Corrimal (also known as 85 Midgley Street Corrimal) (**Lot 6**). Lot 6 is legally known as Lot 6 in DP29329.
- Lot 6 is within the local government area of Wollongong City Council (**the Council**).
- On 16 December 2022, you lodged development application DA-2022/1357 (**the development application**) with the Council.
- The development application is for the demolition of existing structures, tree removal and construction of a mixed-use development comprising a permanent group home, centre-based childcare facility and respite day care centre, with associated basement car parking, roadworks and landscaping.
- Lot 31 has not been nominated (in the application documents) as land that is the subject of the development application. It is not your intention to include Lot 31, in any amendment application documents, as land that is the subject of the development application. Your intention is that any

required development consent for Lot 31 will be obtained separately after the grant of development consent for Lot 6.

- Lot 6 is not mapped as bush fire prone land on the map maintained by the NSW Rural Fire Service (RFS).
- Part of Lot 31 to the north of Lot 6 is mapped as bush fire prone land.
- Lot 31 is owned by Wollongong Resources Pty Ltd (formerly known as Wollongong Coal Limited).
- The Council (at the first pre-development application meeting) requested that a bush fire protection assessment be undertaken for the proposed development detailing compliance with the PBP 2019.
- A bush fire protection assessment was carried out by Travers Bushfire & Ecology on 13 December 2022, which assesses the development application against the PBP 2019 (**bushfire report**).
- The bushfire report concludes that bush fires can potentially affect the proposed development from the bushland vegetation north of the development resulting in future buildings being exposed to potential radiant heat and ember attack. Schedule 1 of the bushfire report illustrates that an asset protection zone (**APZ**) is required over Lot 31 as the bushfire protection measure for Lot 6.
- The development application does not currently include the use of Lot 31 for an APZ for bush fire protection which would require an easement and section 88B instrument to be registered over Lot 31.
- The development application has been nominated as 'integrated development' by you at the request of the Council. The development application has been referred to the RFS and identified as a 'special fire protection purpose' development within the meaning of section 4.14(2) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) and section 100B of the Rural Fires Act.
- On 24 March 2023, the RFS issued a letter advising that the development application cannot be supported in its current form.
- On 19 May 2023, you received a letter from the Council requesting additional information. The letter includes a summary of issues. The issues raised by Council, which we have been instructed to advise on in this letter, are as follows:
 - b. NSW Rural Fire Service (RFS)

A s100B referral has been sent to the NSW RFS as the group home is considered a Special Fire Protection Purpose building and a response was received dated 24 March 2023 which is attached below. This letter outlines a range of matters which need to be addressed. Of particular note is the need to provide documentation demonstrating that the required APZ on the adjoining mine site can be lawfully established and maintained for the life of the development.
 - c. Mine Site owner's consent

In relation to point 1(b) above owner consent from the mine site owner is to be provided as part of this development application. If this owner's consent cannot be provided then the application cannot be supported in its current form.
 - d. DP1006012 – Easement adjoining north boundary

Additionally, it is noted that an area of the mine site directly adjoining the northern boundary of the subject site contains an easement, which would potentially conflict with the required APZ areas. This easement is to be investigated and a detailed response provided to Council for review. It should be noted if the purpose of the existing easement conflicts with the required APZ, then changes are to be made to the proposal if possible.
- The consent authority has not yet determined the development application.

Please tell us if any of the above facts are not correct, as it may change our advice.

Detailed advice

1. Integrated development

- 1.1 Integrated development is defined in section 4.46 of the EP&A Act. It includes (amongst other things) development (not being State significant development or complying development) that, in order for it to be carried out, requires:
 - (a) development consent; and
 - (b) authorisation under section 100B of the Rural Fires Act in respect of bush fire safety of development of land for 'special fire protection purposes' under section 100B.
- 1.2 The proposed land uses are development for 'special fire protection purposes'.
- 1.3 Section 100B of the Rural Fires Act relevantly says:
 - (1) The Commissioner may issue a bush fire safety authority for—
 - (a) a subdivision of bush fire prone land that could lawfully be used for residential or rural residential purposes, or
 - (b) development of **bush fire prone land** for a special fire protection purpose (bold added).
- 1.4 The term 'bush fire prone land' has the same meaning in the Rural Fires Act as it has in the EP&A Act. Section 4.14 of the EP&A Act provides a definition of 'bush fire prone land', being :

land for the time being recorded as bush fire prone land on a relevant map certified under section 10.3(2).
- 1.5 Lot 6 is not mapped as bush fire prone land on the map maintained by RFS.
- 1.6 Even though the proposed development is for a 'special fire protection purpose', Lot 6 is not mapped as 'bush fire prone land'. In our opinion, this means that section 100B of the Rural Fires Act **does not** apply to the proposed development.
- 1.7 We consider that it is **not legally possible** for the RFS to issue a bush fire safety authority for this development under section 100B of the Rural Fires Act.
- 1.8 To the extent that bush fire safety issues are relevant to the subject development application, they are to be evaluated by a consent authority under section 4.15(1)(b)-(c) of the EP&A Act. That is, bush fire safety considerations may arise if:
 - (a) there is a real chance or possibility that the development will create a bush fire safety risk to the safety of its occupants ;and
 - (b) whether in that context, it is desirable to consider whether the site is suitable for the development.
- 1.9 In this situation *Planning for Bushfire Protection 2019 (PBP)* is the appropriate guide to inform the consent authority in its evaluation process. This is reflected in figure 1.5 on page 14 of PBP. This figure says that even when land is not mapped as bush fire prone, PBP will still apply if,

the development is potentially exposed to a bush fire threat ..
- 1.10 In short, in our opinion:
 - (a) The granting of development consent is not dependent on authorisation from the RFS in the form of a bush fire safety authority.
 - (b) The Council is free to consult the RFS if it so wishes, but it is ultimately for **the**

consent authority to determine the appropriate responses to any bush fire safety issues, informed by PBP.

- (c) The development application can and should be legally assessed without it being treated as integrated development by reason of bush fire safety.
 - (d) It was incorrect for the development to be nominated as integrated development in relation to a bush fire safety authority requirement. You should withdraw this nomination as part of any amended development application documents you submit. You should ensure your town planner makes this clear in any cover letter submitted as part of the amendment.
- 1.11 For completeness, we note a Court has expressly determined that the statutory provisions relating to integrated development are there for the benefit of the applicants for development consent and are not to hinder them (*Maule v Liporoni* [2002] NSWLEC 25 at [83]-[87]).
 - 1.12 There is no compulsion on an applicant to nominate that an application is for an integrated development approval — if an applicant chooses not to do so.
 - 1.13 When an applicant has elected not to take the benefit of the integrated development process, there is nothing unlawful in a local council's failure to process a development application as if it were for integrated development (*Maule v Liporoni* at [87]).
 - 1.14 Whether approval under the Rural Fires Act is required or not, does not change an applicant's legal position in choosing whether to nominate the application for integrated development.
 - 1.15 In short, even if the Council does not agree with our analysis above, the Council does not need to withhold its approval of an amendment to the development application because of this disagreement.

2. Easement over Lot 31 benefitting Lot 6 for the purposes of an asset protection zone

- 2.1 There is no existing registered easement over Lot 31 that benefits Lot 6, which you can rely on for the purposes of creating an APZ for bushfire protection.
- 2.2 We consider the provision of the easement over Lot 31 — and obtaining any required development consent over the easement area within Lot 31 — can be the subject of deferred commencement conditions. This is provided that the environmental impacts of the use of Lot 31 as an APZ are fully evaluated in the course of determining the application. We will explain why we hold this view.

Landowner's consent to the development application

- 2.3 There is substantial case law that confirms the proposition that a development application need not include in the application land the use of which is necessarily involved in the subject of the application (*Huntington & Macgillivray v Hurstville City Council & Ors (No 2)* [2005] NSWLEC 155 at [21], per Pain J).
- 2.4 One authority is *King v Great Lakes Shire Council* (1986) 58 LGRA 366. Cripps J held that a development consent was not void by reason of the land intended for the effluent treatment works not being included in the land subject of the development application. His honour said [at 380]:

It would seem therefore that *Grace Bros* is authority for the proposition that the jurisdiction of a council in New South Wales to entertain a development application is not dependent upon there being included in the application land the use of which is necessarily involved in the use the subject of the application. Accordingly, and notwithstanding that the evaporative ponds are a necessary part of the caravan park, I reject the submission that the development application is defective because it did not include in it land intended to be used for the ponds.

- 2.5 We recommend that you ensure your town planner, in the planner's cover letter that forms part of the amendment development application, makes it clear you do not propose

that any consent granted authorises any work or use of Lot 31 for creating an APZ. It is important, for clarity's sake, that this is expressly stated in the amended development application documents.

- 2.6 On this basis, consent of the owner of Lot 31 to the current development application is not required. Landowner's consent to a development application is not required if development consent for development on the landowner's land is not sought as part of the development application documents: *Farah v Warringah Council* [2006] NSWLEC 191 [39]; *Rydge v Byron Shire Council* [2012] NSWLEC 155 [31]; *Hillpalm v Tweed Shire Council* [2002] NSWLEC 17 [68]; *Lyne v Moree Plains Shire Council* [1999] NSWLEC 240 [23], [25] and [37]; *Currey v Sutherland Shire Council* (1998) 100 LGERA 365, 367.
- 2.7 The imposition of a condition requiring work to be carried out on land does not give rise to its notional inclusion within the development application: *Currey v Sutherland Shire Council*, 367-368.
- 2.8 Therefore, the consent of the owner of Lot 31 to the current development application is **not** required. This is because the current development application does not propose any work or use of Lot 31 if development consent is granted.

Legal capacity of the Council to grant a development consent with a deferred commencement condition

- 2.9 A consent authority is empowered to grant a development consent subject to a deferred commencement condition. In this respect section 4.16(3) of the EP&A Act says:
- “Deferred commencement” consent** A development consent may be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority, in accordance with the regulations, as to any matter specified in the condition. Nothing in this Act prevents a person from doing such things as may be necessary to comply with the condition (bold added).
- 2.10 A deferred commencement condition does not free the consent authority from the obligation to consider all relevant matters (*Farah v Warringah Council* [2006] NSWLEC 191 at [59]).
- 2.11 A matter may be the subject of a deferred development condition where the resolution of issues under the condition will not:
- (a) result in a development which is significantly different from the development for which the application is made;
 - (b) alter the development in a fundamental respect; and
 - (c) have the effect of changing the manner in which the consent operates.
- (*GrainCorp Operations Limited v Liverpool Plain Shire Council* [2012] NSWLEC 143 at [49]).
- 2.12 Under section 4.17(4) of the EP&A Act, any condition of development consent — including a deferred commencement condition — may be expressed in a manner that identifies both of the following:
- (a) one or more express outcomes or objectives that the development or a specified part or aspect of the development must achieve; and
 - (b) clear criteria against which achievement of the outcome or objective must be assessed.
- 2.13 The Court of Appeal specifically considered what is now known as section 4.17(4) in *Kindimindi Investments v Lane Cove Council* [2006] NSWCA 23. It said that the provision's intent is to allow an initial level of uncertainty and lack of finality. The provision allows a condition to require a variation of a proposal where the intended result is sufficiently identified, but the means of achieving it are left to the proponent (at [57] and

[59]). A court will not regard conditions as being impermissibly uncertain or imprecise if — although in general terms — the conditions identify **the outer limits of what is being authorised** (*GPT RE v Belmorgan Property Development* [2008] NSWCA 256 at [57]).

- 2.14 A development consent can allow a degree of practical flexibility or imprecision — the reason is that the relevant degree of flexibility or imprecision does not contravene any statutory limit on the power being exercised (*Kindimindi* at [55]).
- 2.15 Additionally, we consider that there is no legal issue with a deferred commencement condition whose satisfaction is contingent on a separate development consent being for works on neighbouring land (not part of the development site): *Stellar Hurstville Pty Ltd v Georges River Council* [2019] NSWLEC 1143 at [11] and [27];

Legal capacity and appropriateness of a deferred commencement condition in the present case

- 2.16 The granting of a development consent does not affect the proprietary rights of a third party — such as the owner of Lot 31 — which will be burdened by the proposed easement for the purposes of creating an APZ: *Rothwell Boys Pty Ltd v Coffs Harbour City Council* (2012) 186 LGERA 366 at [37]; *Sydney City Council v Ipoh Pty Ltd* [2006] NSWCA 300 at [84]).
- 2.17 In *Ipoh*, Hodgson JA said (at [2]-[3], with Santow JA agreeing at [10]) that:
- The question of whether a person can lawfully carry out development on land depends upon both (1) considerations associated with title to the land and (2) considerations associated with questions of environmental planning.
- ... The granting of development consent by a council **concerns (2) but not (1)**; and whether or not a person who is not the owner of land can carry out on that land a development, for which development consent has been granted, will depend on legal issues **separate from those arising under the Environmental Planning and Assessment Act** ..., such as the law relating to trespass, leases, licences, contracts and estoppel (bold added).
- 2.18 If the carrying out of a development in accordance with the terms of an approval involves interference with any such proprietary rights, then, at the point at which an **unlawful** interference with those rights is threatened, imminent or occurring, the affected party can approach **the Supreme Court**: *Botany Bay City Council v Minister for Planning and Infrastructure* [2015] NSWLEC 12 at [78].
- 2.19 **At most** — in determining a development application — it is only necessary for the consent authority to note the **possibility** of the existing easement being extinguished (or varied): cf *Botany Bay City Council* at [80]. We consider this equally applies to the possibility of the **registration** of a new easement.
- 2.20 The prospect of the easement being extinguished (or registered, as in this case) as proposed is a **contingency** that may or may not be fulfilled. It is a commercial risk that the proponents must decide whether to bear (*Botany Bay City Council* at [81]).
- 2.21 The existence of the **contingency**:
- (a) has no relevance to the validity of a development consent; and
 - (b) does not give rise to any actual or threatened breach of the EP&A Act; and
 - (c) is not a valid reason, by itself, for the refusal of a development application,
- (cf *Botany Bay City Council* at [81]; *Telstra Corporation Limited v Port Stephens Council* [2015] NSWLEC 1053 at [69] and *Yu v Ku-Ring-Gai Council* [2004] NSWLEC 569 at [52]).
- 2.22 For example, *HP Subsidiary Pty Ltd v City of Parramatta Council* [2020] NSWLEC 135 was a merit appeal concerning a development application. The Chief Judge of the Land and Environment Court (Preston CJ) upheld the appeal, and in doing so, imposed

condition 19 in the following terms:

The applicant must obtain all necessary consents, approvals and authorisations (including but not limited to authorisation under section 122 of the Road Transport Act 2013 and approval under the Roads Act 1993) for the following works and must carry out and complete those works (at no cost to the Council or Transport for NSW):

- a. the installation of a median island in Hill Road from the intersection of Hill Road and Carter Street to the existing median in Hill Road so as to prevent right turn movements into and out of the site; and
- b. the installation of a "No U-Turn" sign in Hill Road at the Carter Street intersection, facing northbound traffic in Hill Road.

All measures approved to satisfy this condition 19 must be installed and completed to the satisfaction of Council's Traffic and Transport Manager prior to the issue of any Occupation Certificate.

All required measures shall be at no cost to Council or Transport for NSW.

Reason: To ensure maintenance of traffic flow and safety on the surrounding road network.

2.23 In deciding to impose the condition in this form Preston CJ said (at [113]) that:

Any risk associated with carrying out construction of the development before the traffic control devices have been approved and installed, **such as not being able to obtain or a delay in obtaining the necessary authorisation and approval of the traffic control devices**, will be borne by HP Subsidiary [the Applicant]. It must decide if it is inclined to or can afford to take that risk. If it does not wish to take the risk, it can defer commencement of construction of the development until it has obtained the necessary authorisation and approval of the traffic control devices (bold added).

2.24 Hence, the Chief Judge did not consider that the uncertainty as to whether the applicant would be able to obtain the necessary approvals for the traffic control devices was a reason to refuse development consent. The risk would be borne by the applicant. Of course, in the present case, if a deferred commencement condition is sought, there will be no prospect of construction starting before an easement (and the development consent) for the APZ within Lot 31 is in place. The development consent would not be operational until those matters were resolved to the consent authority's satisfaction.

2.25 We consider that:

- (a) the consent authority may legally grant development consent with a deferred commencement condition requiring:
 - (i) the registration of an easement to create an asset protection zone for bush fire protection; and
 - (ii) the grant of a separate development consent for the use of Lot 31 for that purpose; and
- (b) such a condition would be appropriate in the present case.

2.26 We do not consider that such a condition is capable of:

- (a) resulting in a development that is significantly different from the development for which the application is made;
- (b) altering the development in a fundamental respect; or
- (c) having the effect of changing the manner in which the consent operates (given that the consent would not operate at all unless the deferred commencement condition has been satisfied).

2.27 In our view such a deferred commencement condition is capable of being a condition under section 4.17(4) of the EP&A Act. In this case the 'express outcome' that would be

achieved is:

- (a) the registration of an easement over Lot 31 benefiting Lot 6 for an APZ; and
- (b) the grant of development consent for the use of Lot 31 for an APZ for the bush fire protection of Lot 6 in accordance with the bushfire report.

2.28 The 'clear criteria' against which the outcome could be assessed could be:

- (a) the provision of documentation evidencing registration of an easement that accommodates the use of Lot 31 for an APZ that is the subject of the development consent; and
- (b) the development consent provides for the use (including any necessary works) of Lot 31 for an APZ for bush fire protection in accordance with the bushfire report.

Assessment of likely impacts

2.29 The APZ over Lot 31 cannot be **approved** as part of the determination of the present development application (as the owner of Lot 31 has not consented to the application and such approval is not going to be sought).

2.30 Nonetheless, in determining a development application, the consent authority must consider the matters listed under section 4.15(1) of the EP&A Act. This includes:

- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
- (c) the suitability of the site for the development ...

2.31 The phrase 'likely impacts of that development' embraces not only site-specific impacts, being impacts of the proposed development on the development site, but also off-site impacts. Off-site impacts can be caused not only by the proposed development impacting adjoining or other land in an area of influence, but also by some other development provided that the impacts of that other development have 'a real and sufficient link' with the proposed development, such as where the impacts are caused by "some further undertaking that is 'inextricably involved' with the proposed development": *Bell v Minister for Urban Affairs and Planning* (1997) 95 LGERA 86 at 101; *Environmental Defence Society Inc v South Pacific Aluminium* (No 4) [1981] 1 NZLR 530 at 534-535; *Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41 at [6].

2.32 The critical factor is that there is a connection between the likely impact and the proposed development. This is because the category of relevant matters required to be considered is 'the likely impacts of that development'. Basten JA held in *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349 at [44]:

The impact must be one flowing from the development the subject of the development application: the question is how remote a 'likely' impact must be, in order to disqualify it from the scope of the consideration.

2.33 Accordingly, despite the fact the use of Lot 31 is not **approved** as part of the determination of the present development application, we consider that the likely impacts of the APZ (and whether Lot 6 is suitable for the development) must still be considered by the consent authority. This is because the APZ is an undertaking that is inextricably involved with the proposed development. Impacts from the APZ are not remote from the proposed development.

2.34 You should ensure that documentation will be submitted to the consent authority that fully addresses the impacts of the APZ in all relevant respects. For example, this will include a report from an arborist which will detail the vegetation that needs to be cleared on Lot 31 to create the APZ as part of a future development application. Similarly, the intended use of Lot 31 should be considered by an ecologist.

2.35 The assessment material prepared by the arborist, ecologist (and any other experts) that

consider the impacts of the asset protection zone over Lot 31 should be prepared **for environmental assessment purposes only and not for approval**. Such material should identify **the outer limits of what may occur** (cf *GPT RE v Belmorgan Property Development* [2008] NSWCA 256 at [57]). Provided that the evaluation of impacts is based on those outer limits, then the relevant requirement of section 4.15(1) will have been satisfied.

Securing an easement

2.36 In our opinion:

- (a) If there is no agreement by the owner of Lot 31 to the imposition of an easement for the purposes of creating an APZ, you may seek to obtain a Court-ordered easement.
- (b) The consent authority does not, therefore, need to consider the likelihood of any agreement between the owner of Lot 31 and the imposition of a drainage easement.

2.37 We will explain our reasons for this opinion. Section 88K of the Conveyancing Act allows the Supreme Court to make an order for the grant of an easement. In certain circumstances, the Land and Environment Court also has this power. The power can only be exercised (by either court) if the following conditions are satisfied:

- (a) the easement is reasonably necessary for the effective use or development of the land benefitting from the easement;
- (b) the use of the land benefitting from the easement will not be inconsistent with the public interest;
- (c) the owner (and each other person having an estate or interest in that land that is evidenced by a registered instrument) of the land to be burdened by the easement can be adequately compensated; and
- (d) all reasonable attempts have been made to obtain an easement,

(*Ross Bilton v Georgia Ligdas* [2016] NSWSC 1262 at [111]).

2.38 While each case turns on its own facts, we note that *Louisiana Properties Pty Ltd v Hakea Holdings Pty Ltd* [2017] NSWLEC 37 was a case involving a condition of consent imposed by Wyong Shire Council (now Central Coast Council), which required an easement to be registered for the purposes of creating an APZ for bushfire protection.

2.39 The condition in that case was as follows:

- 78 Prior to the issue of the **Final** Occupation Certificate, compliance with the Bush Fire Safety Authority issued by the NSW Rural Fire Service as outlined in its correspondence dated 5 August 2013 as follows:

Asset Protection Zones

The intent of measures is to minimise the risk of bush fire attack and provide protection for emergency services personnel, residents and others assisting fire fighting activities. To achieve this, the following conditions shall apply:

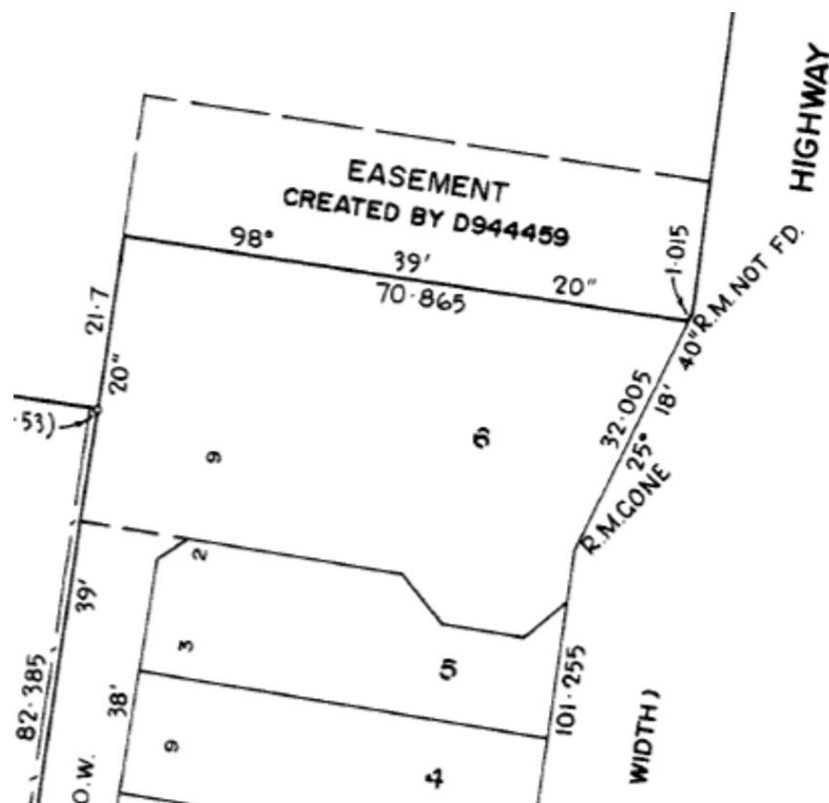
- A At the commencement of building works and in perpetuity the property around the proposed building to a distance of 50 metres to the east and south and to the property boundary to the north and west, shall be maintained as an inner protection area (IPA) as outlined within section 4.1.3 and Appendix 5 of 'Planning for Bush Fire Protection 2006' and the NSW Rural Fire Service's document 'Standards for asset protection zones'.

- B The balance of the asset protection zone (APZ) not achievable on Lot 101 is to be provided on adjoining Lot 102 DP 1091897 for the full distance of the required APZ. **In accordance with section 88B of the 'Conveyancing Act 1919' an easement is to be registered benefiting Lot 101 and burdening Lot 102 requiring the provision of this APZ** which shall be maintained as outlined within section 4.1.3 and Appendix 5 of 'Planning for Bush Fire Protection 2006' and the NSW Rural Fire Service's document 'Standards for asset protection zones'. This easement can be extinguished upon commencement of any future ~~residential~~ development on adjacent lots, but only if the hazard is removed as part of the proposal (some bold added).

- 2.40 The Applicant in *Louisiana Properties* applied to the Court for a Court-ordered easement for the purposes of creating an APZ under 'section 88K' of the *Conveyancing Act 1919* (NSW) (**the Conveyancing Act**) as required under a condition of consent imposed by the consent authority in that case. The Court granted the easement (at [204]).
- 2.41 An easement for the purposes of creating an APZ for bushfire protection was also ordered by the Court under 'section 88K' of the *Conveyancing Act* in *RVA Australia Pty Ltd v Rosemary Elizabeth Marzouk* [2017] NSWLEC 160.

3. Easement directly adjoining the northern boundary of Lot 6 shown on DP1006012

- 3.1 There is an 'easement' shown on DP1006012 which directly adjoins the northern boundary of Lot 6 which has been created by D944459. Below is an extract of DP1006012 which shows the location of the easement.



- 3.2 The easement created by the dealing D944459 is an 'easement for drainage' which has been recorded on the title folio of Lot 6 and on the title folio of Lot 31.

3.3 According to dealing D944459:

- (a) the land subject to the **burden** of the 'easement for drainage' is the land 'coloured' **red** on DP363332; and
- (b) the land that **benefits** from the 'easement for drainage' is the land **transferred**.

3.4 As shown on DP363332:

- (a) The land 'coloured' red is the parcel of land now identified as Lot 31 being the land that is burdened by the 'easement for drainage'. The title search for Lot 31 also confirms that Lot 31 is burdened by the 'easement for drainage' created by D944459.
- (b) The transferred land with the benefit of the 'easement for drainage' is the land identified by the letter 'A' on D944459. The parcel of land marked 'A' has been subsequently subdivided (as shown on DP1006012) to create Lot 6 as well as Lot 5 DP29329, Lot 4 DP29329, Lot 3 DP29329, Lot 2 DP29329 and Lot 1 DP29329. A title search of the created lots confirms that the 'easement for drainage' benefits the aforementioned lots.

3.5 This means that Lot 6, and other land, **benefits** from the 'easement for drainage' created by dealing D944459. Lot 31 is **burdened** by the easement.

3.6 Dealing D944459 includes express terms for the 'easement for drainage' as follows:

TOGETHER ALSO with full and free liberty right and authority for the Transferee and all contractors workmen employees and other persons authorised by the Transferee at any time and from time **to time to enter upon the adjoining land of the Transferor**

coloured red on the said Plan for the purposes following or any of them, that is to say:-

To construct trenches on the said land in such position and of such dimensions as the Transferee shall require **for the purpose of discharging effluent** from septic tank or septic tanks which shall hereafter be erected by the Transferee on the land hereby transferred and to lay construct and maintain all pipes and other connections to the said trenches as may be necessary or proper for the purpose aforesaid and to keep maintain enlarge reconstruct inspect and repair the same or replace the said pipes with others but so that the Transferee shall after the construction of such trenches restore the surface of the said land, and shall not permit the said effluent to lie on the surface of the said land, but shall construct as many trenches or such length or dimension of trenches in such position as shall be reasonably necessary to render the effluent from the said septic tank or tanks clear and harmless and drain such effluent away to the satisfaction of the Local Government Body or Health Board charged with the supervision of any such work **And (sic) shall not in the construction of such trenches injure shade trees at present on the said land** and shall keep the said land from becoming sewage sour to the detriment of the said land or the destruction of such trees. AND the Transferee COVENANTS with the Transferor that the Transferee will when and so often as need be repaid and mend any defect or leakage in the said pipes so as to prevent any nuisance arising therefrom and that should any nuisance arise from the said use of the said land by the Transferee the Transferee shall take all steps necessary to abate such nuisance and to protect and hold harmless the transferor in respect thereof or shall in the alternative cease to use the said land in manner aforesaid (bold added).

3.7 As can be seen from the above, the terms of the easement grants the transferee (being the owner of Lot 6, among others) the **right** to enter the adjoining land being transferred (that is, Lot 31) to:

- (a) construct trenches for the purpose of discharging effluent from septic tank or septic tanks which is to be erected by the transferee;
- (b) lay, construct and maintain all pipes and other connections to the trenches; and
- (c) to keep, maintain, enlarge, reconstruct, inspect and repair the same or replace the said pipes with others.

- 3.8 The terms of the easement imposes **obligations** on the transferee (such as the owner of Lot 6):
- (a) to restore the surface of the land after the construction of the trenches;
 - (b) not to permit effluent to lie on the surface of the burdened land;
 - (c) not to injure shade trees in the construction of the trenches; and
 - (d) to keep the burdened land from becoming sewage sour to the detriment of the burdened land or the destruction of shade trees.
- 3.9 In the present case, the right to enter the burdened land (Lot 31) conferred by the easement is coupled with corresponding obligations imposed on the owners with the benefit of the easement.
- 3.10 The general common law rule is that a burden or obligation (also referred to as a 'positive covenant') affecting freehold land does not 'run' with the land. In other words, the successors in title are not bound by the burden or obligation because it goes against the common law rule that a person cannot be made liable under a contract unless they are a party to it (*Rhone v Stephens* [1994] 2 AC310 at 316-317).
- 3.11 However, there are avenues where a burden or obligation —imposed by the creation of an easement for example — can bind successors in title notwithstanding the general rule in *Rhone v Stephens*.
- 3.12 There are a number of cases based on a general principle that a person who takes the benefit of an arrangement will be bound by any associated burden contained in it despite the fact that he was not a party to the original arrangement. This was applied in *Halsall v Brizell* [1957] Ch. 169 and later developed in *Tito v Waddell* (No. 2) [1977] 1 Ch. 106. The principal is that a person may, in appropriate circumstances, be bound by an obligation which is imposed by the same transaction that grants a benefit of which he wishes to take advantage but is not a condition of that benefit. This is commonly referred to as the benefit and burden principle which provides that a party may not take the benefit of a right granted without accepting the corresponding burden which goes with that right. The benefit and burden principle has been narrowed by subsequent decisions and the position was summarised in *Davies v Jones* [2009] EWCA Civ 1164 as follows:
- (a) The benefit and burden must be conferred in or by the same transaction;
 - (b) The receipt or enjoyment of the benefit must be relevant to the imposition of the burden in the sense that the former must be conditional on or reciprocal to the latter. Whether that requirement is satisfied is a question of construction of the documents where the question arises.
 - (c) The person on whom the burden is alleged to have been imposed must have or have had the opportunity of rejecting or disclaiming the benefit, not merely the right to receive the benefit.
- 3.13 In circumstances where the owner of land burdened by an easement seeks to enforce a positive covenant against the owner of land, which benefits by reason of an easement, the conditional benefit principle has at least three requirements.
- 3.14 Firstly, is that there be a right held by the defendant, such as a right of way, to which a condition, such as a payment covenant, is attached.
- 3.15 Secondly, is that it was intended that the covenant run with the land.
- 3.16 Thirdly, is that the burden which the covenant places on the dominant land is conditional or reciprocal in the sense that it can be characterised as benefiting the servient land by ameliorating the effects or sharing the costs of being subject to the correlative burden in favour of the dominant tenement: *Aust-One Investment Pty Ltd v New World Investments Pty Ltd* [2023] NSWCA 22 at [264].

3.17 In the present case:

- (a) The benefit and burden are conferred by the transfer (dealing D944459) which creates the 'easement for drainage' which relates to the same transaction.
- (b) The burden on the lot is conditional or reciprocal in the sense that it can be characterised as benefiting the servient land by ameliorating the effects of being subject to the correlative burden in favour of the lot benefitted.
- (c) The owners with the benefit of the easement (e.g., Lot 6) can choose not to take advantage of the easement.

3.18 Based on *Davies*, in our opinion, if the owner of Lot 6 continues to enjoy the benefit of the pipes constructed in the easement area for the purposes of discharging effluent from Lot 6, then the corresponding obligations associated with the rights enjoyed under the 'easement for drainage' will bind the current owners of Lot 6 as the successors-in-title).

3.19 In *GM Amalgamated Investments (Dulwich Hill) Pty Ltd v Mills* [2014] NSWCA 202, Sackville AJA said as follows (at [68]):

Nonetheless, **an owner of the dominant tenement who exercises his or her right to enter the servient tenement under an easement to drain water may become subject to an enforceable obligation to comply with the terms of the proviso, regardless of whether the dominant owner was a party to the creation of the easement.** The relevant principle is that where an easement is created subject to a condition, **the burden imposed by that condition is enforceable against the owner for the time being of the dominant tenement, if the condition is relevant to the exercise of the dominant owner's rights under the easement...** This principle applies even if the current owner of the dominant tenement against who the obligation is sought to be enforced is not the party in whose favour the easement was originally created: that is, even if he or she is a successor in title to the original owner of the dominant tenement. Whether an obligation imposed on the owner of the dominant tenement is a condition of the rights conferred by the easement on the owner of the dominant tenement or is an independent obligation is a question of construction (bold added).

(In this matter Lot 6 is the 'dominant tenement' and Lot 31 is the 'servient tenement'.)

3.20 In response to the issue raised by the Council, the only obligation imposed by the 'easement for drainage' which could have any relevance to the creation of the APZ is the obligation 'not to injure shade trees'. This is because the creation of an APZ may involve the clearing of vegetation, including trees, on Lot 31.

3.21 Nonetheless, in our opinion:

- (a) The obligation 'not to injure shade trees' is **not** relevant to the current owners of Lot 6 as that obligation relates only to the right to enter the land **for the purposes of constructing the trenches.**
- (b) If the owner of Lot 6 does not enter Lot 31 to construct trenches, the obligation not to injure shade trees does not arise.
- (c) If the owner of Lot 6 enters Lot 31 under the terms of a future easement for an APZ, the terms of the easement for drainage will have no application.
- (d) There is no conflict between the 'easement for drainage' and the foreshadowed APZ.

3.22 We **enclose** a copy of the following documents referred to in this section of the advice for your reference:

- (a) Title search for Lot 6;
- (b) Title search for Lot 31;
- (c) DP1006012;

- (d) D944459; and
- (e) DP363332.

Please do not hesitate to contact Aaron Gadiel on (02) 8035 7858 or Julide Ayas on (02) 8035 7918 if you have any queries regarding this advice.

Yours sincerely



Aaron Gadiel
Partner

Accredited Specialist —Planning and Environment Law

Julide Ayas
Senior Associate

Encl (5)



Order number: 79837473
Your Reference: 3687853
09/06/23 11:28



NSW LRS - Title Search

NEW SOUTH WALES LAND REGISTRY SERVICES - TITLE SEARCH

FOLIO: 6/29329

SEARCH DATE	TIME	EDITION NO	DATE
9/6/2023	11:28 AM	6	21/2/2022

LAND

LOT 6 IN DEPOSITED PLAN 29329
AT CORRIMAL
LOCAL GOVERNMENT AREA WOLLONGONG
PARISH OF WOONONA COUNTY OF CAMDEN
TITLE DIAGRAM DP29329

FIRST SCHEDULE

NASICE PTY LTD

(T AF907079)

SECOND SCHEDULE (8 NOTIFICATIONS)

- 1 RESERVATIONS AND CONDITIONS IN THE CROWN GRANT(S)
- 2 D944459 RIGHT OF CARRIAGEWAY APPURTENANT TO THE LAND ABOVE DESCRIBED AFFECTING THE LAND SHOWN AS RIGHT OF WAY 12.19 AND 9.145 WIDE IN DP29329
- 3 D944459 EASEMENT FOR DRAINAGE APPURTENANT TO THE LAND ABOVE DESCRIBED AFFECTING THE LAND SHOWN SO BURDENED IN DP363332
- 4 W437319 RIGHT OF CARRIAGEWAY AFFECTING THE PART OF THE LAND ABOVE DESCRIBED SHOWN AS RIGHT OF WAY VARIABLE WIDTH IN DP29329
- 5 DP1015086 EASEMENT FOR SERVICES 1.5 METRE(S) WIDE APPURTENANT TO THE LAND ABOVE DESCRIBED
- 6 AF125235 EASEMENT FOR SERVICES 1.5 WIDE AFFECTING THE SITE DESIGNATED 'A' IN PLAN WITH AF125235
- 7 AG275319 EASEMENT FOR SERVICES 1.5 METRE(S) WIDE AFFECTING THE PART(S) DESIGNATED (A) SHOWN IN PLAN WITH AG275319
- * 8 AR899944 CAVEAT BY CNGB ELASSAL PTY LTD

NOTATIONS

UNREGISTERED DEALINGS: NIL

*** END OF SEARCH ***

PRINTED ON 9/6/2023

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Dye & Durham Property Pty Ltd an approved NSW Information Broker hereby certifies that the information contained in this document has been provided electronically by the Registrar General in accordance with section 96B(2) of the Real Property Act 1900.

NSW LRS - Title Search

NEW SOUTH WALES LAND REGISTRY SERVICES - TITLE SEARCH
-----FOLIO: 31/1006012

SEARCH DATE	TIME	EDITION NO	DATE
-----	----	-----	----
9/6/2023	11:28 AM	10	10/10/2016

LAND
-----LOT 31 IN DEPOSITED PLAN 1006012
AT CORRIMAL
LOCAL GOVERNMENT AREA WOLLONGONG
PARISH OF WOONONA COUNTY OF CAMDEN
TITLE DIAGRAM DP1006012FIRST SCHEDULE

WOLLONGONG COAL LIMITED (CN AK667457)

SECOND SCHEDULE (14 NOTIFICATIONS)

- 1 RESERVATIONS AND CONDITIONS IN THE CROWN GRANT(S)
- 2 A107947 EASEMENT AFFECTING THE LAND SHOWN SO BURDENED IN
THE TITLE DIAGRAM
- 3 A107948 EASEMENT AFFECTING THE LAND SHOWN SO BURDENED IN
THE TITLE DIAGRAM
- 4 D944459 EASEMENT AFFECTING THE PIECE OF LAND SHOWN AS
EASEMENT CREATED BY TSFR D944459 IN THE TITLE DIAGRAM
- 5 L837913 COVENANT
- 6 F10473 RIGHT OF CARRIAGEWAY 6.095 METRE(S) WIDE AFFECTING
THE PART(S) SHOWN SO BURDENED IN THE TITLE DIAGRAM
- 7 G606151 EASEMENT FOR WATER SUPPLY 6.095 WIDE AFFECTING THE
PART(S) SHOWN SO BURDENED IN THE TITLE DIAGRAM
- 8 G617354 EASEMENT FOR TRANSMISSION LINE 10.06 WIDE AFFECTING
THE PART(S) SHOWN SO BURDENED IN THE TITLE DIAGRAM
- 9 L837914 EASEMENT FOR WATER SUPPLY 7.62 WIDE AFFECTING THE
PART(S) SHOWN SO BURDENED IN THE TITLE DIAGRAM
- 10 DP1006012 DRAINAGE EASEMENT 3 WIDE AFFECTING THE PART(S) SHOWN
SO BURDENED IN THE TITLE DIAGRAM
- 11 DP1006012 EASEMENT FOR STORMWATER DETENTION AFFECTING THE
PART(S) SHOWN SO BURDENED IN THE TITLE DIAGRAM
- 12 AK784083 RIGHT OF CARRIAGEWAY 6.095 AFFECTING THE PART
DESIGNATED (C) IN PLAN WITH AK784083
- * 13 AN2100 CAVEAT BY STATE BANK OF INDIA
- * 14 AN2101 CAVEAT BY STATE BANK OF INDIA

NOTATIONS

UNREGISTERED DEALINGS: NIL

*** END OF SEARCH ***

PRINTED ON 9/6/2023

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CERTIFICATE ORDER SUMMARY

Transaction Details

Date: 15/06/2023 09:56

Order No. 79905313

Certificate No: 119044228

Your Reference: 3687853

Certificate Ordered: NSW LRS - Copy of Plan - Deposited Plan 1006012

Available: Y

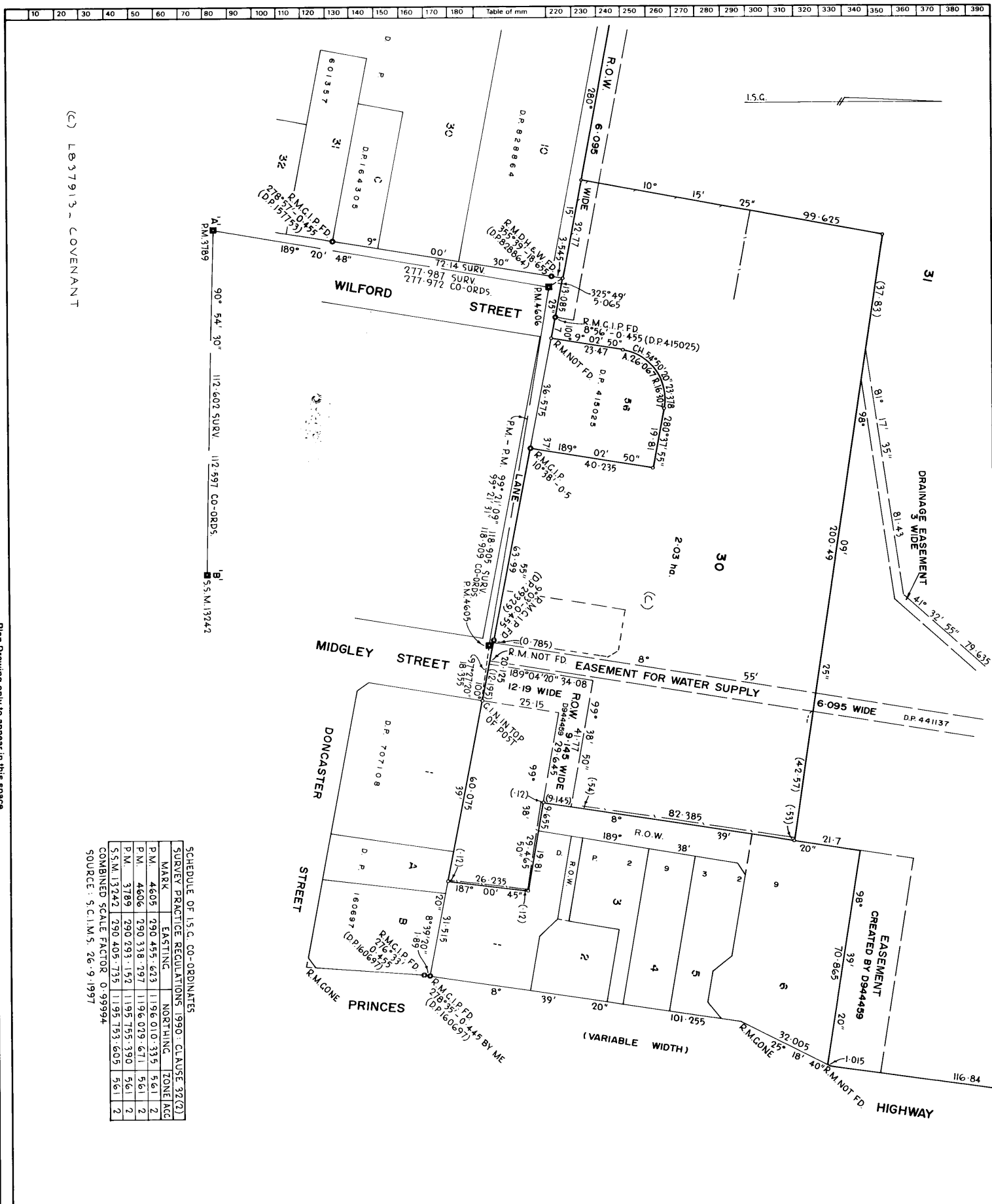
Size (KB): 156

Number of Pages: 2

Scan Date and Time: 15/11/1999 15:56

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DP1006012

Registered: 12-10-1999

This is sheet 2 of my plan in 2 sheets dated 28 SEPTEMBER 1997

A.C.

Surveyor registered under Surveyors Act 1929

This is sheet 2 of my plan of 2 sheets covered by my Certificate No G514 of 12-1-98

General Manager, Licensed Person

For use where space is insufficient in any panel on Plan Form 2

SCHEDULE OF L.S.C. CO-ORDINATES

MARK	EASTING	NORTHING	ZONE	ACC
P.M. 4605	290 455.623	1196 010.335	561	2
P.M. 4606	290 338.197	1196 079.671	561	2
P.M. 3789	290 293.152	1195 755.390	561	2
S.S.M. 13242	290 405.735	1195 753.605	561	2

COMBINED SCALE FACTOR 0.99994
SOURCE: S.C.I.M.S. 26-9-1997

CERTIFICATE ORDER SUMMARY

Transaction Details

Date: 13/06/2023 16:34

Order No. 79878804

Certificate No: 119009947

Your Reference: 3687853

Certificate Ordered: NSW LRS - Copy of Dealing - Dealing D944459

Available: Y

Size (KB): 654

Number of Pages: 4

Scan Date and Time: 14/08/1998 10:04

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MEMORANDUM OF TRANSFER
(REAL PROPERTY ACT, 1900).

(REAL PROPERTY ACT, 1900).

Fees:—
Lodgment 15:—
Endorsement 10:—
Certificate ... 10:—
Rt of Way & Eas. 15:—
3 10:—
23-12-48

THE BELLAMBI COAL COMPANY LIMITED

(herein called transferor)
being registered as the proprietor of an estate in *fee simple* in the land hereinafter described,
subject however, to such encumbrances, liens and interests as are notified hereunder in
consideration of SIX HUNDRED AND FORTY POUNDS
£ 640.0.0 (the receipt whereof is hereby acknowledged) paid to it by
JOINT COAL BOARD

(herein called transferee)
do hereby transfer to the said transferee—
ALL such its Estate and Interest in ALL THE land mentioned in the schedule following:—

County.	Parish.	Reference to Title (c)			Description of Land (if part only). (d)
		Whole or Part.	Vol.	Fol.	
Camden	Woonona	Part	2580	14	Being the land shown upon the Plan annexed hereto marked "A"
Together with the easements set forth and contained in the Annexure hereto marked "B"					
And the transferee covenants with the transferor—					

ENCUMBRANCES, &c., REFERRED TO.

Reservations of all mines of gold and silver.

Signed at
THE COMMON SEAL of THE BELLAMBI

the 7th day of December 1948.

Signed in my presence by the transferor
COAL COMPANY LIMITED was hereunto
affixed pursuant to a Resolution
of the Board of Directors and in
the presence of the undersigned
Directors.

Countersigned:
Signed

Secretary.

James Denny
H. B. B. B.

Transferor *

DIRECTORS.

THE COMMON SEAL of the JOINT

COAL BOARD was hereunto duly
affixed by authority of the said
Board the day and year last

WHO IS PERSONALLY KNOWN TO ME
hereinbefore mentioned in the
presence of:

Assistant Secretary

it is
Accepted, and I hereby certify that the transfer to be correct
for the purposes of the Real Property Act.

R. A. Cameron
H. B. B. B.
Transferee.
Members.

* If signed by virtue of any power of attorney, the original power must be registered, and produced with each dealing, and the memorandum of non-revocation on back
of form signed by the attorney before a witness.

† N.B.—Section 117 requires that the above Certificate be signed by Transferor or his Solicitor, and renders any person falsely or negligently certifying liable
to a penalty of £50; also to damages recoverable by parties injured. Unless the instrument contains some special covenant by the transferee, the solicitor may sign
in cases where it is established that the transferee's signature cannot be obtained without difficulty. The Solicitor must sign his own name and not that of his firm.

No alterations should be made by erasure. The words rejected should be scored through with the pen, and those substituted written over them, the alteration being
verified by signature or initials in the margin, or noticed in the attestation.

THIS IS THE ANNEXURE MARKED " B " REFERRED TO IN MEMORANDUM OF TRANSFER
DATED THE *seventh* DAY OF *December* 1948
from THE BELLAMBI COAL COMPANY LIMITED to the JOINT COAL BOARD.

TOGETHER with an easement of "Right-of Carriage-way" as defined by the Conveyancing Act 1919 over and along the land coloured blue on the said Plan annexed hereto.

TOGETHER ALSO with full and free liberty right and authority for the Transferee and all contractors workmen employees and other persons authorised by the Transferee at any time and from time to time to enter upon the adjoining land of the Transferor coloured red on the said Plan for the purposes following or any of them, that is to say: -
To construct trenches on the said land in such position and of such dimensions as the Transferee shall require for the purpose of discharging effluent from septic tank or septic tanks which shall hereafter be erected by the Transferee on the land hereby transferred and to lay construct and maintain all pipes and other connections to the said trenches as may be necessary or proper for the purpose aforesaid and to keep maintain enlarge reconstruct inspect and repair the same or replace the said pipes with others but so that the Transferee shall after the construction of such trenches restore the surface of the said land, and shall not permit the said effluent to lie on the surface of the said land, but shall construct as many trenches or such length or dimensions of trenches in such position as shall be reasonably necessary to render the effluent from the said septic tank or tanks clear and harmless and drain such effluent away to the satisfaction of the Local Government Body or Health Board charged with the supervision of any such work And shall not in the construction of such trenches injure shade trees at present on the said land and shall keep the said land from becoming sewage sour to the detriment of the said land or the destruction of such trees. AND the Transferee COVENANTS with the Transferor that the Transferee will when and so often as need be repair and mend any defect or leakage in the said pipes so as to prevent any nuisance arising therefrom and that should any nuisance arise from the said use of the said land by the Transferee the Transferee shall take all steps necessary to abate such nuisance and to protect and hold harmless the transferor in respect thereof or shall in the alternative cease to use the said land in manner aforesaid.

AND IT IS HEREBY DECLARED as follows:

- (a) The land subject to the burden of the hereinbefore granted easement of carriage-way is the land coloured blue on the said Plan.
- (b) The land subject to the burden of the other easements hereinbefore granted is the land coloured red on the said Plan.
- (c) The land to which the benefit of both the said easements is appurtenant is the land hereby transferred.
- (d) The said easements or any of them may at any time be released by the Transferee.
- (e) The persons by whom or with whose consent the said easements or any of them may be varied or modified are the Transferee and the registered proprietors for the time being of the said land coloured blue on the said Plan insofar as the said easement of carriage-way is concerned and the Transferee and the registered proprietors for the time being of the land coloured red on the said Plan insofar as the other easements are concerned.

Humphry
Assistant Secretary
JOINT COAL BOARD
for and on

James Dwyer
H Bon
Robinson
Directors.
Secretary.

B

~~Municipality of Shire of~~

CITY OF GREATER WOLLONGONG

Certificate of New Road or Subdivision

LOCAL GOVERNMENT ACT, 1919, SEC. 327, ORDINANCE No. 32, FORM 1.

Certificate No. 98

~~COUNCIL CHAMBERS~~ TOWN HALL
WOLLONGONG

14th October 1948

APPLICANT

(Name) MESSRS. ALLEN, ALLEN & HEMSLEY
(Surname First)

(Address) A.P.A. Chambers, 53 Martin Place,
SYDNEY

OWNER

(Name) Joint Coal Board.

(Address)

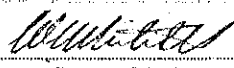
NEW ROAD (Particulars)

SUBDIVISION (Particulars)

Subdivision of part of the land comprised in Certificate of Title
Volume 2580, Folio 14, Parish of Wonona, County of Camden.

CERTIFICATE

I hereby certify that the requirements of the Local Government Act 1919, (other than the requirements for the registration of plans) have been complied with by the above-named applicant in relation to the proposed Subdivision above described
(Insert New Road or Sub-division)
and more particularly set out in the accompanying plan ~~having the Council's seal and~~ marked
"Plan approved by Council, Covered by Council Clerk's Certificate No. 98 of 14/10/48"


Deputy Town ~~Shire~~ Clerk.

D944459

LODGED BY



CONSENT OF MORTGAGEE.¹

I, mortgagee under Mortgage No.
 release and discharge the land comprised in the within transfer from such mortgage and all claims thereunder but without prejudice to my rights and remedies as regards the balance of the land comprised in such mortgage.

¹ This consent should not be used when the transfer is of the whole of the land affected by the mortgage.

Dated at this day of 19
 Signed in my presence by who is personally known to me.

Mortgagee.

MEMORANDUM AS TO NON-REVOCATION OF POWER OF ATTORNEY.

(To be signed at the time of executing the within instrument.)

Memorandum whereby the undersigned states that he has no notice of the revocation of the Power of Attorney registered No. Miscellaneous Register under the authority of which he has just executed the within transfer.

¹ Strike out unnecessary words. Add any other matter necessary to show that the power is effective.

Signed at the day of 19
 Signed in the presence of —

FORM OF DECLARATION BY ATTESTING WITNESS.¹

Appeared before me at the day of one thousand
nine hundred and forty the attesting witness to this instrument
 and declared that he personally knew the person
 signing the same, and whose signature thereto he has attested; and that the name purporting to be such
 signature of the said is own handwriting, and
 that he was of sound mind and freely and voluntarily signed the same.

¹ May be made before either Registrar-General, Deputy Registrar-General, a Notary Public, J.P., or Commissioner for Affidavits. Not required if the instrument itself be made or acknowledged before one of these parties.

MEMORANDUM OF TRANSFER of
Acres roods perches.
Shire
Municipality
Parish (Together with Right of Way and other easements)
Transferee.

DOCUMENTS LODGED HEREWITH.		
To be filled in by person lodging dealing.		
Nature.	No.	Reg'd Propr., M't'gor, etc.
<u>Memorandum of Transfer</u>		
<u>Diagram</u>		
<u>Deed</u>		

Particulars entered in Register Book, Vol. 2580 Fol. 14
 the 7th day of July 1949.
 at minutes 12 o'clock in the noon.

J. H. Wells
 Registrar-General

LEAVE THESE SPACES FOR DEPARTMENTAL USE.

PROGRESS RECORD.

	Initialed.	Date.
Sent to Survey Branch...		
Received from Records...		
Draft written ...		<u>16/6/49</u>
Draft examined...		<u>17/6</u>
Diagram prepared ...		<u>4/6/49</u>
Diagram examined ...		<u>5/6</u>
Draft forwarded ...		<u>15/6</u>
Supt. of Engravers ...		<u>16/6</u>
Cancellation Clerk ...		<u>16/6</u>
VOL. <u>6035</u> Fol. <u>249</u>		
Diagram Fees ...		
Additional Folios ...		

If the parties be resident without the State, but in any other part of the British Dominions, the instrument must be signed or acknowledged before the Registrar-General or Recorder of Titles of such Possession, or before any Judge, Notary Public, Justice of the Peace for New South Wales, or Commissioner for taking affidavits for New South Wales, or the Mayor or Chief Officer of any municipal or local government corporation of such part, or Justice of the Peace for such part, or the Governor, Government Resident, or Chief Secretary of such part or such other person as the Chief Justice of New South Wales may appoint.

If resident in the United Kingdom then before the Mayor or Chief Officer of any corporation or a Notary Public.

If resident at any foreign place, then the parties should sign or acknowledge before a British Minister, Ambassador, Envoy, Minister Chargé d'Affaires, Secretary of the Embassy or Legation, Consul General, Consul, Vice-Consul, Acting-Consul, Pro-Consul, or Consular Agent, who should affix his seal of office, or the attesting witness may make a declaration of the due execution thereof before one of such persons (who should sign and affix his seal to such declaration), or such other person as the said Chief Justice may appoint.

The fees are:—Lodgment fee 12/6 (includes endorsement on first certificate), and 2/6 for each additional certificate included in the Transfer, and 1/1 for every new Certificate of Title issuing upon a Transfer on sale for a consideration of not more than £1,000, and 1/1 5s. for a new Certificate of Title in every other case. Additional fees, however, may be necessary in cases involving more than a simple diagram or more than six folios of engrossing.

Tenants in common must receive separate Certificates.

If part only of the land is transferred a new Certificate must issue for that part, and the old Certificate will be retained in the Office. A new Certificate may be taken out for the residue if desired.

CERTIFICATE ORDER SUMMARY

Transaction Details

Date: 22/06/2023 08:39

Order No. 80008090

Certificate No: 119171476

Your Reference: 3687853

Certificate Ordered: NSW LRS - Copy of Plan - Deposited Plan 363332

Available: Y

Size (KB): 147

Number of Pages: 1

Scan Date and Time: 07/03/2001 15:34

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D944459

FP363332 (E)

Plan Form N:6 (for transfers, leases, etc.)

NEG. PREP

Municipality of
Shire of

PLAN

CITY OF GREATER WOLLONGONG

of subdivision of part of the land comprised in Certificate of Title
Volume 2380 Folio 14

Parish of Wonong County of Camden

Scale 100^{ft} to an Inch.

Scale in Feet

(B) BLUE COLOUR
(R) RED COLOUR
(T) TRANSFERRED LAND

M.P. S. (R.P.)
No 63332

EASEMENT FOR
DRAINAGE - D944459

26° 06' 00" 233.6

26° 06' 00" 232.6

1R11AP

26° 06' 00" 232.6

1A3R1AP

30° 05' 30" 96.8

172° 22' 25" 86.1

103° 4' 34" 103.4

35° 06' 00" 35.9

33° 2' 2 1/2" 33.2

179° 09' 00" 179.09

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Approved by Council and covered by Council
Clerks Certificate

No. 98 of 14/10/48

Deputy Council Clerk

Subscribed and declared before me at WOLLONGONG
this 14th day of May A.D. 1948

Justice of Peace

And I make this solemn declaration conscientiously believing the same to be true, and
by virtue of the provisions of the Oaths Act, 1900.

(Signature)

Surveyor registered under the Surveyors Act, 1929.

DATUM LINE OF AZIMUTH - AZ

*Strike out either (1) or (2).

†Insert date of Survey.
*Correct connection is 615' 10 1/2".
see plan in G317683 + sh. 7 pps. thereof.
Date 19/11/55

8998 (L)

This is the plan marked "H" referred to in
the copy sent to the Registrar-General
dated 7 Jan 1948

DESIGNATIONS (B), (R) & (T) ADDED IN L.P. N. 526/2001
19.6.3.2001

Director's Secretary