

11 February 2011

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Partner
Peter Calov

Dear Bryan

Project Application 07_0006 for the proposed Kendall Bay Marina - public access

We refer to the above Project Application currently before the Department of Planning.

This letter is provided in response to the public submissions querying the means of public access to the proposed marina, which will be adjacent to Breakfast Point.

The public are able to access the general area of the proposed marina due to the operation of:

1. the Open Access Ways forming part of the Community Property in the Breakfast Point Development (being lot 1 DP 270347) (**Land**); and
2. the lease (**Foreshore Lease**) between the Council and Community Association DP 270347 over council owned land (being lot 501 DP 1052824) (**Foreshore Lot**); and
3. the Easement for Public Access registered on the Land.

Open Access Ways

As you are aware, community title developments are governed by the *Community Land Development Act (NSW) 1989* and the *Community Land Management Act (NSW) 1989* (**Legislative Framework**).

We are instructed that Breakfast Point Pty Limited as developer of the Land ensured that the Open Accessways were constructed in accordance with standards applicable to Public Roads and that the Open Access Ways have the "look and feel" of Public Roads.

The relevant provisions of the Legislative Framework relating to Open Accessways are set out in Schedule 1.

The Community Management Statement registered on the Land (**CMS**) governs the ability of the Community Association to deal with Open Accessways and sets out the rules in relation to the operation and use of the Open Accessways.

The relevant provisions of the CMS relating to Open Accessways are set out in Schedule 2.

The Legislative Framework and the CMS contemplate that the Open Accessways may be used by the public. Further, the terms of the CMS contemplate and makes rules in relation to vehicular traffic on Open Accessways. Accordingly, it is untenable to assert that the vehicles are not permitted access to the Open Accessways.

Further, the Open Accessways may only be closed if authorised by a unanimous resolution of the Community Association. As the proposed marina operator will be a member of the Community Association such a resolution will not be passed and therefore the Community Association will not be able to close the Open Access Ways.

Foreshore Lease

The term of the Foreshore Lease is for 299 years, commencing 9 October 2006 and terminating on 8 October 2305. The Foreshore Lease provides all members of the public unrestricted access to the Foreshore Lot, as stated in clause 2.3 as follows:

"2.3 Public access

The Lessee must allow members of the public unrestricted access to the Premises [defined as the foreshore land known as Lot 501 in DP 1052824] to pass and repass on foot or by bicycle and remain on the Premises to use the Premises as a foreshore park, recreation area, access trail and landscaped area during such periods of time and subject to such rules as may be approved by the City of Canada Bay Council."

Easement for Public Access

An Easement for Public Access is registered on the Community Property which provides for pedestrian and cycle access over the Community Property.

This easement entitles the public to access all relevant parts of Community Property.

Access Regime

Access to the proposed marina is treated in the same manner as access to any other stage of development at Breakfast Point. That is, the public and invitees of members of the Community Association have been able to travel by vehicle, foot or cycle on any of the Open Accessways without the need for consent of the Community Association. There is no legal basis for the development of the proposed marina to be treated differently.

On a practical basis we understand that access to the proposed marina will be as follows:


1. access from the Public Road to the carpark (lot 55) or the Foreshore Lot (lot 501) will be by way of the Open Accessways; and
2. access from the Foreshore Lot to the proposed marina will be either by way of lot 55 (owned by the proposed marina operator) or by way of the community property (which is the subject of the Easement of Public Access).

We trust this addresses your query. Please contact us if you have any queries.

11 February 2011
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Marina - public access**

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Yours faithfully
Corrs Chambers Westgarth

A handwritten signature in black ink, appearing to read 'Peter Calov', with a long, horizontal flourish extending to the right.

Peter Calov
Partner

Schedule 1 - Legislative Framework

Section 41 of the CLDA states:

- "41 Open access way in community property*
- (1) All or part of the land comprising the community property in a community scheme may be set apart as a means of open access connecting part of the community parcel and a public place.*
 - (2) A setting apart under subsection (1) is effected if the CMS includes a plan that:
 - (a) is in the approved form, and*
 - (b) defines as an Open Access Way the land to be set apart, and*
 - (c) includes the prescribed information."**

Section 47 of the CLDA states:

- "47 Access ways remain as association property*
- (1) Land does not cease to be association property because it is set apart as an Open Access Way or a private access way and the setting apart does not affect the obligation of a Community Association to maintain it as association property.*
 - (2) This section has effect to the exclusion of anything in the Roads Act 1993 that operates to vest land in a council as a public road."*

Part 2 of Schedule 1 of the CLMA states:

- "2 Management and maintenance of property*
- (1) An association must control and manage its open access ways and private access ways, and all other parts of its association property, and must do so for the benefit of its members.*
 - (2) Subclause (1) does not authorise any action that would be inconsistent with:
 - (a) an Act in so far as, under section 116, it applies to an access way, or*
 - (b) a function in so far as, under that section, it may be exercised on, or in relation to, an access way.**
 - (3) An association must properly maintain, and keep in a good and serviceable state of repair, any part of its association property that is an access way.*
 - (4) An association must inform the consent authority if any part of the association property is to be, or is, used for commercial purposes.*
 - (5) In this clause:*

access way means an open access way or a private access way."

The right of the Community Association to regulate Open Access Ways is set out further in the following provisions:

- Clause 2(a) of Schedule 3 and 4 of the CLDA requires the Community Association to make provision in the community management statement for the location, control, management, use and maintenance of Open Access Ways.
- Section 40 of the CLMA requires a Community Association to take out insurance in respect of death and bodily injury occurring on Open Access Ways.
- Clauses 3(h), 17(h) and 31(h) of Schedule 5 of the CLMA require a Community Association to include in its agenda for its first annual general meeting the issue of whether any by-laws should be made, amended or revoked to control, prohibit or otherwise regulate the passage of persons through, and the activities of persons on, Open Access Ways (to an extent not inconsistent with the CLMA or any other Act or law).
- Section 14(2) of the CLMA states that the CMS may not be amended in a manner inconsistent with any restriction imposed by that Act or in a manner that would make the CMS inconsistent with the CLMA or the CLDA.

Section 116 of the CLMA states:

"116 *Open and private access ways*

- (1) *An Open Access Way is not a road or road related area or a public place but, except to the extent that this Act or the Community Land Development Act 1989 otherwise provides, the provisions of:*
 - (a) *the road transport legislation within the meaning of the Road Transport (General) Act 2005, and*
 - (b) *the Motor Accidents Compensation Act 1999, and*
 - (c) *Division 2 of Part 7 of the Roads Act 1993, and*
 - (d) *the Summary Offences Act 1988,**apply to an Open Access Way as if it were a road or road related area.*
- (3) *An Open Access Way is a private road for the purposes of the Roads Act 1993 and is not a public road for the purposes of that Act.*
- (4) *A private access way is a road or road related area for the purposes of the Motor Accidents Compensation Act 1999 .*
- (5) *An authorised person may enter an Open Access Way or a private access way and there exercise a function that the person could have exercised if the access way had been a road or road related area.*
- (6) *Except as provided by subsections (4) and (5), a private access way is not for any purpose a road or road related area, a public road or a public thoroughfare or way.*
- (7) *In this section:*

"authorised person" means:

- (a) a member of the Police Force, or*
- (b) an employee of the Roads and Traffic Authority, or*
- (c) a person authorised by the Roads and Traffic Authority, or*
- (d) a person prescribed by the regulations as an authorised person for the purposes of this section.*

"road" or "road related area" means a road or road related area within the meaning of the Road Transport (General) Act 2005 (other than a road or road related area that is the subject of a declaration made under section 15 (1) (b) of that Act relating to all of the provisions of that Act)."

"43B Unanimity required for closure of Open Access Way

An Open Access Way within a community parcel may not be closed unless the closure is authorised by a unanimous resolution of each of the associations whose members are entitled to use the access way."

Schedule 2 - Community Management Statement

By-laws 29 and 80 relate to Open Access Ways and state the following:

“29. Open Access Ways and the Pedestrian/Cycle Shareway

- 29.1 *The Community Association must control, manage, maintain in good condition and repair and replace the Open Access Ways.*
- 29.2 *The Community Association must control, manage, maintain in good condition and repair and replace the Pedestrian/Cycle Shareway.*
- 29.3 *The Community Association must control, manage, maintain in good condition and repair and replace any Subsidiary Body Property set apart as a means of open access under section 42 or section 43A of the Development Act.*
- 29.4 *No one may:*
- (a) ride a skateboard; or*
 - (b) use roller skates or roller blades; or*
 - (c) play games,*
- on any Open Access Way or any Subsidiary Body Property set aside as a means of open access under section 42 or section 43A of the Development Act.*
- 29.5 *A bicycle may be ridden in Community Property or Subsidiary Body Property only on the Pedestrian/Cycle Shareway.*

80. Controlling traffic in Community Property and Restricted Subsidiary Body Property

- 80.1 *In addition to its powers under the Management Act and elsewhere in this management statement, the Community Association has the power under this by-law 80 to:*
- (a) impose a speed limit for vehicular traffic in Community Property and Subsidiary Body Property; and*
 - (b) impose restrictions on the parking of Vehicles in Community Property and Subsidiary Body Property; and*
 - (c) install speed humps and other traffic control devices in Community Property and Subsidiary Body Property; and*
 - (d) install signs to control traffic and regulate the parking of Vehicles in Community Property and Subsidiary Body Property.*
- 80.2 *A vehicle may not be driven in the Community Parcel:*
- (a) at more than the speed limit determined by the Community Association; and*
 - (b) unless the Vehicle is registered; and*

11 February 2011

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- (c) *unless the driver has a licence to drive a Vehicle on a public road; and*
- (d) *if the Vehicle is unreasonably noisy or produces an unreasonable quantity of fumes.”*

We note that there are no by-laws required by Authorities in Part 5 of the CMS which relate to Open Access Ways.