Annexure "L"

NICOL ROBINSON HALLETTS
LAWYERS
ESTABLISHED 1890

Our ref: PT:DDT:AMM:512195
Your ref:

22 July 2005

Mr John Gilliland and Mr Pat McGlade
Cathedral Place Community Body Corporate
BY EMAIL: john.gilliland@syzygycorp.com.au; pmcglade@sskb.com.au

Dear John and Pat

Queries regarding the by-laws and development approval for Cathedral Place

You have instructed us to advise the committee of the Cathedral Place Community Body Corporate (the "Body Corporate") regarding matters concerning the Cathedral Village carpark and the development approval ("DA") for Cathedral Place. Specifically, we are instructed to address the following queries raised by the Body Corporate in meeting:

1. Were community by-laws 25 and 28 created properly and, if so, are they binding?

2. Do the community by-laws conflict with the DA?

3. Is the DA in conflict with the town plan under which it was created?

Factual Background

We understand that the Body Corporate's main objective in seeking the above advices is to ensure that it is using, or permitting the use of the Village carpark in a manner that is at all times consistent with the DA and the by-laws.

We also understand that these instructions have come about as a result of the recent advice the Body Corporate has obtained from Gadens Lawyers in respect of the validity of by-law 28 (and Easements R & S attaching to that by-law) and other ancillary issues associated with the DA.

Although we have not yet been provided a copy of Gadens' advice, we are instructed that the advice generally concluded that:

- Appropriate and sufficient documentation exists to evidence the creation and grant by the proprietors of "Notre Dame" of Easements R & S in favour of the Body Corporate in or about 1999 – which, we note is consistent with our previous advice to CVBC;

Level 10 175 Eagle Street Brisbane Queensland 4000 Australia
GPO Box 380 Brisbane Queensland 4001
T 07 3853 8888 F 07 3853 8800 E clientserv@nrh.com.au www.nrh.com.au DX 175 Brisbane
ABN 72 185 545 568

- By-law 28 (and therefore Easements R & S) is now valid and of full effect (again, also consistent with our previous advice to CVBC), with the formalities of registration of the by-law and the Easements R & S attaching to that by-law now completed; and

- The charging of an entry fee by Cathedral Village Body Corporate ("CVBC") for use of the Village carpark is contrary to Condition 2(v) of the DA, which requires *"unrestricted access for bona fide visitors to any visitor car parking bay"*.

You may recall that we had previously advised CVBC on those issues concerning the carpark. A copy of that advice had, as we understand it, also been provided to the Body Corporate at the time.

Although that advice does not specifically address the Body Corporate's queries here, some of the comments and conclusions we made at the time will nonetheless also be relevant in addressing the Body Corporate's present issues. We therefore will refer to some of those comments and conclusions (where relevant or appropriate) in advising the Body Corporate here.

Our comments below are based on the above understanding. Should we be wrong in any regard or if there is anything further we should be aware of, please let us know as it may impact on our advice.

Community By-Laws 25 and 27

By-law 25:

- Refers to the allocation of specific carpark spaces to the lot owners and/or occupiers of lots for their exclusive use. The allocation of those "exclusive use" carparking spaces is in accordance with the "Allocation Schedule" and "Carparking Plan" annexed to the By-Laws; and

- Was registered on title on 15 June 2000.

By-law 28:

- Essentially confers upon CVBC (and any person authorised by it) a right to use and maintain the Village carpark, but only:

  (a) for purposes ancillary to the Mixed Use Development of the site; and

  (b) in a manner that complies with the Body Corporate's by-laws from time to time;

- Was passed by comprehensive resolution at general meeting on 29 November 2000;

- Was not, however, registered on title until 1 September 2003.

Our views

Were community by-laws 25 and 28 created properly and, if so, are they binding?

There is no evidence whatsoever to suggest that by-laws 25 and 28 were improperly created, based on our review and understanding of the background to the matter. In fact, all the evidence indicates the contrary.

In our view, the facts that:

- Both by-laws are registered (which constitutes at least *prima facie* evidence of the by-laws' existence, validity and effect);
- All concerned parties have, for the past 5-6 years, conducted themselves:
  (a) in a manner consistent with the adoption of the by-laws; and
  (b) in reliance upon the understanding that the by-laws were in full effect and registered;
- The costs expended by the parties over the years in that regard have been expended on that understanding – particularly with regard to by-law 28, where CVBC has incurred (and continues to incur) considerable costs in maintaining the Village carpark in reliance upon the rights and obligations conferred upon it under that by-law;

clearly support the position that the by-laws were created and/or adopted.

Therefore, in the absence of any evidence to the contrary, we are of the view that both by-laws 25 and 28 were properly created and therefore are binding on all concerned parties. We note that Gadens also formed this view in its recent advice to the Body Corporate - at least insofar as it relates to by-law 28.

However, even if the validity of those by-laws were now challenged on the grounds that they were improperly created (or on any other ground(s) for that matter), then:

- There is, in our view, sufficient documentation and evidence (both at law and in equity) for the Body Corporate to successfully defend any challenge mounted in that regard; and
- The evidentiary onus is on the person (or persons) challenging the by-laws to prove their case, and that burden would be extremely onerous in the circumstances.

They would need to prove (among other things) that registration of the by-laws was invalid – and that, as you can appreciate, would be extremely difficult (and costly) to prove, requiring a detailed forensic review and a complete unravelling of all matters that have transpired over the years from when those by-laws were initially tabled to their eventual registration.

Do the community by-laws conflict with the DA?

Again, there is no evidence whatsoever to suggest that the by-laws are in conflict with the DA.

We assume, however, that this particular query has come about as a result of Gadens' conclusion that CVBC's use of the carpark pursuant to the grant of control in its favour under by-law 28 (ie. its charging of an entry fee to users of the carpark) is in conflict with Condition 2(v) of the DA.

Assuming that is the case, we note that this was an issue that we had previously advised CVBC on, and our comments and views in that regard remain unchanged. At the time, we advised CVBC as follows:

- We were never instructed to advise upon, or make any recommendations whatsoever as to the charge of an entry fee to the carpark;
- When the issue was raised, we expressed some concern that the charge of an entry fee might be in breach of the requirement under DA for "unrestricted access" to any visitor carpark;
- The Body Corporate (which was, at the time, effectively the developer) subsequently considered the issue we had raised and, at that time, formed the view that the requirement for "*unrestricted access*" does not necessarily mean "free access";
- The Body Corporate formed the view that, as the by-laws required it to supervise, control and keep the carpark area under constant scrutiny so as to ensure it is used:

  (a) only for purposes ancillary to the Mixed Use Development of the site; and

  (b) in a manner that is compliant with the by-laws from time to time of the Body Corporate;

  it is therefore not unreasonable to charge for the fair cost of that supervision;
- As far as we were aware, the installation of the boomgates and fee charging progressed on the basis of the Body Corporate's own conclusions, without it obtaining legal opinion on the issues – at least not from us;
- We were of the view (and remain of the view) that the requirement for "unrestricted access" *does not* necessarily mean that the Body Corporate is prohibited from imposing conditions of entry – in fact, nothing in the DA prohibits fee charging;
- The better view was (and remains) that access should be subject to the by-laws and any conditions imposed by the Body Corporate as it deems appropriate from time to time.

We remain of the view that if the Body Corporate charges a reasonable fee as a condition of entry to the carpark, and that fee is commensurate to its reasonable costs incurred in supervising

and maintaining the carpark (as distinct from operating a commercial carpark for profit, which is prohibited under the DA) – which we understand it is – then there is a strong arguable case that the fee charging is not in breach of the DA.

There is otherwise no indication (or, to our knowledge, suggestion by anyone) that the by-laws are in conflict with the DA.

Is the DA in conflict with the town plan under which it was created?

We are unsure of the intention or rationale behind the Body Corporate's query here.

That said, however, if the query is placed in the context of the Body Corporate's two preceding queries then this third query should, in our view, be a non-issue – because, as long as the by-laws and the actions/conduct of Body Corporate (and its delegates) are *not* inconsistent with the conditions of the DA then, in our view, it is immaterial (at least from the Body Corporate's perspective) whether the DA is in conflict with the town plan or not.

This third query is otherwise extremely broad, and could potentially be interpreted in any number of ways. Therefore, it would be unrealistic to expect, or for us to suggest to you that the query could be addressed at this stage without significant cost to the Body Corporate.

At the very least, we would need the Body Corporate to narrow the scope of its query here, to make it more realistic to answer – otherwise a detailed forensic review of the Town Plan, DA and matters generally (including enquiries with the relevant authorities, where appropriate) would be required before the query can be properly addressed.

The following general comments may be sufficient:

- The DA was issued pursuant to a "site specific" Development Control Plan ("DCP") under the then operational but since repealed *Local Government (Planning and Environment) Act 1990* and the then operational but since superseded Town Plan for the City of Brisbane. The interaction of the Town Plan with the *Mixed Use Development Act 1993* (under which the Body Corporate is constituted) means that the uses in the DA had to be consistent with the Town Plan before the Mixed Use Development could be approved.

- To our recollection, an amendment was made to the DCP as part of the approval process. That amendment required approval of both Brisbane City Council and the Queensland Government. We regard it as extremely unlikely that there is any conflict between the DA and the Town Plan as modified by the DCP, as the entire approval process is designed to avoid such conflict.

Having said that, we will need more detailed instructions and a clear understanding of the Body Corporate's objectives with regard to this query before we can properly address this query in any substantial detail.

Yours faithfully
NICOL ROBINSON HALLETTS
per:

PETER TOWNLEY

PARTNER
ACCREDITED SPECIALIST PROPERTY LAW

Please contact Dawn Tran
Direct Line: (07) 3853 8851

Email: dtran@nrh.com.au