

From: Michael Mantei

Sent: Thursday, 11 October 2007 15:25

To: bruce.mccann@shellharbour.nsw.gov.au; Tim.Mcleod@shellharbour.nsw.gov.au

Subject: FW: Delmo Albion Park and Shellharbour Council - Proposed Business Park and Public Positive Covenant

Hello Bruce,

I have received the following email from David Malouf, solicitor, on behalf of Delmo Albion Park Pty Ltd concerning the proposed business park at Albion Park. The email responds to my written advice to Council dated 12 September 2007 on the same subject.

After reviewing the Malouf advice I have reconsidered my advice and have come to the conclusion that the concerns I expressed about the potential invalidity of the proposed public positive covenant are not well founded. I overlooked the fact that the potential subject matter of a "public positive covenant" as defined in section 87A of the *Conveyancing Act* is not limited to the 3 subject matters listed in the definition. That is because those 3 matters are preceded by the word "includes", which means that the definition is not exhaustive but rather extends the ordinary meaning of the word covenant. The subject matter of the covenant proposed by Delmo in respect of the wetland can theoretically be dealt with as a public positive covenant.

I also raised some practical difficulties in my advice. I agree with the Malouf advice that Council need not negotiate contracts with 61 individual lot owners, rather the terms of any agreement can be created in the covenant itself. However, it may be a drafting challenge to ensure that the terms are sufficiently flexible, yet certain, in order to take into account changing circumstances such the cost of maintaining the wetland or different levels and degrees of maintenance over time. There will always be an administrative cost to Council (in terms of monitoring compliance with covenant) that I still do not believe can be recouped by way of an obligation under a public positive covenant. Whether or not that cost is acceptable to Council is a matter for Council.

The Malouf advice does not deal with the second question in my advice, that is whether or not Council can be forced to accept ownership of the wetland.

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