

SUBMISSION

(Prepared by Landerer & Company, Solicitors)
(20 April 2007)

DELMO ALBION PARK PTY LIMITED ILLAWARRA REGIONAL BUSINESS PARK PROPOSED POSITIVE COVENANT

Executive Summary

In summary, we believe a public positive covenant which falls within the ambit of section 88E of the Conveyancing Act 1919 would be legally enforceable, would achieve the stated goals of both Delmo and Shellharbour Council, and would afford the Council adequate rights to ensure compliance with the public positive covenant.

We set out below our detailed reasons.

Our detailed reasons

Section 88E of the Conveyancing Act 1919 empowers a "prescribed authority" to impose what are known as "public positive covenants" on land.

For the purposes of section 88E, a "prescribed authority" includes a public or local authority, in this case Shellharbour Council.

Section 88E empowers a prescribed authority to impose, amongst other things, "public positive covenants" on any land not vested in the authority, so that the public positive covenant is enforceable by the authority whether or not the benefit of the public positive covenant is annexed to other land. Where a public positive covenant takes effect pursuant to Section 88E, the prescribed authority that imposed the public positive covenant may enforce it against any person who is, or claims under, a signatory to the memorandum or deed that imposed the public positive covenant as if that person had entered into a binding covenant with that prescribed authority to observe the public positive covenant.

In this case, Shellharbour Council as the prescribed authority would impose a public positive covenant on the developed area. Delmo as the original developer and signatory to the memorandum or deed that imposed the public positive covenant, and all successors in title of the developed area (for example, any purchasers from Delmo of lots in the developed area).

Section 87A of the Act defines what a public positive covenant is. It provides:

“public positive covenant, in relation to land, **includes** (our emphasis added) a covenant which imposes obligations requiring:

- (a) the carrying out of development on or with respect to the land within the meaning of the Environmental Planning and Assessment Act 1979;
- (b) the provision of services **on the land or other land in its vicinity** (our emphasis added); or
- (c) the maintenance, repair or insurance of any structure or work on the land,

or impose any term or condition with respect to the performance or failure to perform any such obligation (our emphasis added)".

When this definition is analysed we concluded that:

1. It is not an exhaustive definition. This means that a public positive covenant could include a covenant which imposes different obligations to those specifically set out in paragraphs (a), (b) and (c) of the definition.
- 2.. Paragraph (b) of the definition specifically contemplates the creation of a public positive covenant in relation to land (in this case the developed area) requiring the provision of services on or to other land in its vicinity (in this case the wetlands area).
3. The definition allows the public positive covenant to impose any term or condition with respect to, amongst other things, the performance of the obligation the subject of the public positive covenant. This empowers the Council to regulate the manner in which the maintenance services are to be carried out including how those maintenance services are to be paid for.

Based on our analysis of the definition of public positive covenant, we are of the view that the subject matter of the public positive covenant as proposed by Delmo is of a type which falls within that definition.

The proposed public positive covenant could be drafted along the following lines:

1. that there be imposed on the developed area obligations requiring the provision of maintenance services on or to the wetlands area;
2. that in full satisfaction of that obligation the owners of the developed area be required to contract out the maintenance services to the Council; and
3. that the owners of the developed area be required to pay or reimburse the Council the fair and reasonable costs of carrying out the maintenance services on behalf of the owners of the developed area.

The suggested drafting in paragraphs 2 and 3 above is also consistent with section 88F of the Act (which grants certain specific powers of enforcement to a prescribed authority having the benefit of a public positive covenant - see below) in that section 88F contemplates a prescribed authority

carrying out work the subject of a public positive covenant and recovering the cost reasonably incurred.

The Council also has adequate protection under the Act to legally enforce the public positive covenant. These protections include:

1. The definition of public positive covenant permits it to impose any term or condition with respect to, amongst other things, the failure to perform any obligation imposed under the public positive covenant.
2. Section 88F of the Act grants certain specific powers of enforcement to the Council. In addition to those specific powers, section 88F(3) expressly states that those specific powers do not prevent the imposition on land the subject of a public positive covenant of powers of a like nature to or a different nature from those specific powers.
3. If the Council obtains a judgement for an amount payable to it for a failure by the owners of the developed area to comply with the public positive covenant, Section 88F (4) entitles the Council to register a charge over the developed area as security for payment.
4. Section 88H of the Act entitles the Council to make application for an injunction to prevent any conduct which would be in breach of the public positive covenant or grant an injunction requiring the doing of an act or thing in compliance with the public positive covenant.