Footways and Rights of Way
in
Cambria Drive and Dolphin Sands

Cambria Drive

The "Cambria Drive Subdivision" was created by Sealed Plan 122591 which was registered by the Recorder of Titles in November 1995. The original owner of the subdivision was Great Oyster Bay Developments Pty. Ltd.

A copy of the Plan of Survey attached to SP 122591 is attached for reference.

The subdivision consists of 83 lots as follows:

- There are no lots numbered from 1 to 32.
- Lots 33 to 78 inclusive are residential building lots ranging in area from just over 1 ha to just over 2.5 ha (uncoloured).
- Lot 79 is the undeveloped "balance" of the subdivided land (uncoloured).
- Lot 100 contains most of the public street that is now known as Cambria Drive together with two small extensions located respectively adjacent to lots 62 to 70 and between lots 40 and 41 (coloured blue).
- Lots 125, 130 and 135 are each designated as a "Footway" (coloured yellow).

Every lot within the subdivision is subject to (and has the corresponding benefit of) a restrictive covenant (i.e., a promise that adheres to the land) which limits the ability of owners to "chop down, destroy or remove" any "indigenous vegetation" generally and "*Eucalyptus Viminalus*" (sic) and "*Bansksia Marginata*" in particular.

Restrictive covenants also prevent the owners, from time to time, of lots 50 to 53 and 61 to 68 from permitting the construction of any vehicular access from their land to lot 101 on SP110471 (coloured mauve) and

from removing any “indigenous vegetation” “within a distance or setback of 20 metres from their respective boundaries with lot 101.

Likewise, the owners of lots 125, 130 and 135 (the “Footways”) covenant not to remove any “indigenous vegetation” otherwise than as may be approved by the Glamorgan Spring Bay Council.

(The foregoing is a summary of the effect of *some* of the restrictive covenants which affect lots within the Cambria Drive subdivision. Individual owners should peruse their certificates of title and the Schedules of Easements for complete information regarding their rights and responsibilities.)

No lot within the subdivision has the benefit of any registered right of way over any of the "footways" shown on Sealed Plan No 122591. Rather, the ownership of the land concerned (like Cambria Drive itself) appears to be vested in the GSBC and the “footways” are *public* ways to which every member of the public - not just neighbouring landowners - has a right of access and to pass and repass over them. The “footways” are shown on the LISTMap as being “Casement Land”. According to Tasmaps’ Cadastral Parcel dataset, the term “Casement Land” is used to describe “Land which forms part of the Road, Railway or Footway network” in Tasmania.

While it is reasonably clear is that the "footways" are owned and managed by the GSBC, it is doubtful whether the Council has any enforceable legal obligation in relation to the maintenance of the footways beyond not permitting them to fall into such disrepair as to present a "hidden danger" or “particular risk” to members of the public who may. Even then, it may be sufficient for Council to erect warning signs rather than maintain the footways.

The Council probably also has a duty to abate any statutory or other nuisances (such as bushfire hazards) resulting from excessive vegetation growth but the precise circumstances in which that duty may be legally enforced are somewhat uncertain.

Dolphin Sands

There is no doubt that the 25 lots numbered 295 to 320 (inclusive) in the Dolphin Sands subdivision (Sealed Plan No. 2798) are each burdened with *private* rights of carriage way in favour of each of lots 1 to 94 and lots 96 to 240 (inclusive).

It is important to point out that, unlike the Cambria Drive subdivision, where the "footways" may be used by the general public, these rights of way are *private* rights enjoyed only by the owners of residential lots in the Dolphin Sands subdivision and "every person authorized" by them.

These rights of way were created as part of the original Dolphin Sands subdivision with ownership of the lots over which the rights of way exist (i.e., lots 295 to 320 - the "servient tenements") being retained by the subdivider, C.H.I. (Tas.) Pty. Ltd.

The practical effect of this arrangement is that the owners, from time to time, of every "residential" lot in the Dolphin Sands subdivision (the "dominant tenements") have the benefit of a right of carriage way over each and every one of the servient tenements. So for example, the owners of lot 101 have a right of way over all 25 servient tenements and not just merely over the servient tenement or tenements that is or are closest to lot 101.

(It should be borne in mind that the lot numbers are those shown on Sealed Plan 2798 and bear no relation to the RA numbers now commonly used to identify properties at Dolphin Sands. By way of example, lot 190 on Sealed Plan 2798 is known as RA 1195, Dolphin Sands Road.)

As mentioned, the rights of way are in fact "rights of carriage way" which means, in the rather quaint language of the law, that they include the right "…to go, pass, and repass at all times and for all purposes with or without animals or vehicles or both…" However as virtually none of the servient tenements is currently "made" to a standard that would permit passage by vehicle - and in some cases possibly even by foot - the matter gets rather complex.

Although ownership of the servient tenements was retained by CHI (Tas) Pty Ltd, that company was put into receivership and was eventually de-registered by the corporate regulator, ASIC. As a

consequence ownership of the servient tenements passed to ASIC which subsequently sold all 25 lots to GSBC in 2010 for a nominal amount.

Importantly, these changes of ownership had no effect at all upon the rights of way enjoyed by the owners of the dominant tenements. Those rights cannot be extinguished without the consent of those owners.

These circumstances give rise to a number of interesting issues.

First, the "public" beach access road between 516 and 518 Dolphin Sands Road has been constructed on one of the servient tenements (lot 303 on SP2798). GSBC, as owner of the land is entitled to do anything on that land *provided* that it does not interfere with the rights of way enjoyed by the dominant tenements. Arguably the construction of a public roadway leading to Nine Mile Beach does not, of itself, hinder the use by the owners of the dominant tenements of lot 303 as a right of way. Indeed, arguably it is now the only servient tenement that is suitable for use as a carriage way!

On the other hand if members of the public were to block the right of way by parking vehicles across it, that would undoubtedly be an interference with the rights of the dominant tenements, and one that is arguably facilitated by the council.

Secondly, firebreaks or fire-trails have fairly recently been been constructed on lot 309 (between RA 848 and RA 860 - just west of the junction of Yellow Sand Banks Road) and on lot 320 (between RA 1230 and RA 1238 - just before the loop in the road). These too are passable by vehicles and, without more, would not be an interference with the rights of way. However, posts and a chain have been placed across the entrances to the lots and signs have been erected which purport to advise that only fire vehicles may use the track.

All of this was done, no doubt with the best of intentions, but it was done without the consent (or in most cases, the knowledge) of the owners of the dominant tenements. The erection of a chain is clearly an interference with the rights of the dominant tenements. In fact, the chain at lot 320 has been broken down on several occasions; whether by the owner of a dominant tenement asserting his or her right of way or merely by vandals, is not known.

It is clear however that whoever put up the chains was not, and is not, acting lawfully.

What if anything should be done about that is a matter of some delicacy. If the chains were to be removed it would allow not only the owners of the dominant tenements to use the tracks (as they are clearly entitled to do) but it may also encourage their use by the general public much to the annoyance of adjoining owners and possibly even the owners of some of the adjacent dominant tenements.

One solution might be to provide keys to the owners of dominant tenements to allow them to use the track but, depending on how many wanted keys, this could be a very cumbersome arrangement to administer. Another may be to obtain the agreement of all of the owners of the dominant tenements to extinguish the relevant rights of way - but *every* owner of *all* 290 or so dominant tenements would need to unanimously agree!

It should perhaps be added that a right of way does not include a right to park so that, strictly speaking, an owner of a dominant tenement would only be entitled to drive down the trails as far as the Crown coastal reserve and put down or pick up passengers and then return.

Thirdly, in order to "make" any of the remaining servient tenements to a standard capable to allowing them to be used by vehicles, the person(s) proposing to carry out that work would almost certainly need to lodge a development application and obtain a planning permit from the GSBC (Which raises the question: Did GSBC obtain planning permission from itself for the construction of the beach access or the fire trails?)

Under the provisions of the current interim planning scheme, it might be difficult to obtain such permission. However, there may be an argument that the owners of the dominant tenements have a common law right to make their rights of way to the necessary standard and that that entitlement constitutes a "non-conforming use right" which does not require planning approval. However, that argument is unlikely succeed unless it could, at least, be shown that there had been prior vehicular use of the relevant servient tenement <u>before</u> the commencement of <u>any</u> planning scheme.

In any case, it may not be a good idea to construct more "roadways" which would be visible and presumably attractive to the general public.

On the other hand, many of the owners of dominant tenements may wish to clear a footway along one or more of the servient tenements and it is possible that, even under the current interim planning scheme, they would be entitled to undertake such "landscaping" or other vegetation clearance to enable passage over the servient tenements by foot provided that that did not involve the removal (as distinct from the trimming) of any trees or shrubs.

However, the position is far from clear and it is understood that the GSBC may have a contrary view. Perhaps the better course would therefore be for the Association to try to obtain some sort of shared understanding with the Council about what sort of “landscaping” the owners of the dominant tenements may and may not carry out on the servient tenements.

Fourthly, as mentioned, each of the servient tenements is now owned by the GSBC. Arguably the council is therefore liable to take appropriate measures to reduce any bushfire or other hazards created by the vegetation on its land. This is likely to be a matter of real concern to the owners of land adjoining the servient tenements. However past correspondence from the GSBC indicates that the council may not fully appreciate its own legal position in relation to the servient tenements and misunderstands the legal rights of the owners of the dominant tenements. For example, council has apparently suggested that those using the rights of way would need to erect lockable gates across the entrances to servient tenements. The basis for such a belief is far from clear.

Again, it is probably best that the Association takes these matters up with the Council on behalf of members in the hope of reaching agreement about what can and should be done and by whom.

Dated 25 March 2017

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