Sent:	30/01/2022 6:24:02 PM
Subject:	Submission DA2021/2590
Attachments:	Letter - NBC - DA 40 Pine St, Manly (1).docx;

Dear Sr or Madam,

Please find enclosed submission for this DA

Thanks

Rob

From: DASUB@northernbeaches.nsw.gov.au
Sent: Sunday, 30 January 2022 6:21 PM
To: Rob O'Brien
Subject: Submission Acknowledgment

30/01/2022

MR Robert OBrien
1 Herbert ST
Manly NSW NSW 2095

RE: DA2021/2590 - 40 Pine Street MANLY NSW 2095

Dear Sir/Madam,

Thank you for your submission in respect of the above-mentioned property. Please be reminded that under provision of the Government Information Public Access Act, all submissions will be posted on Council's Website against the application.

The matters that you have raised will be noted and taken into consideration in the assessment of the proposal process. However, please note as previously stated in the notification letter, Council will not enter into correspondence in respect of any submission due to the large number of submissions Council receives annually.

Should you wish to monitor the progress of this development application, please feel free to visit the Planning and Development section of Council's Website at www.northernbeaches.nsw.gov.au .

We thank you for your submission and should you have any queries, please do not hesitate to contact Council on 1300 434 434.

Yours faithfully

Northern Beaches Council

For your reference please find below a copy of your submission:

I would like to upload a letter I have sent of objection to this DA

Northern Beaches Council

Robert O'Brien
Resident, Manly NSW

Northern Beaches Council
PO Box 82
Manly NSW 1655

RE: DA2021/2590 – 40 Pine Street, Manly NSW 2095 – Lot 5 DP 939161

Dear Sir or Madam,

I write in objection to the DA2021/2590 proposed for the above-mentioned lot.

40 Pine St, Manly is not suitable for residential devevelopment and should be rezoned to Public Open Space and nominated to be acquired by Council on under the *Land Acquisition (Just Terms Compensation) Act 1991*.

Council has a duty of care to the community and future owners to rezone this site to an appropriate zoning. The existing residential zoning provides the community with a false premise that this site is worthy of development when it certainly isn't. This was confirmed in *Goarin v Manly Council* [2014] NSWLEC 1108.

- The land is a 101m^2 block of residential zoned land, landlocked between the back fence of two residential properties and located adjacent to a public walkway.
- The site has no prospects of achieving reasonable or practical access. Neither future generations (who may be mobility impaired, or injured), or emergency authorities (Police, Fire and Ambulance) are able to access the site. It is noted there is a paper road under the *Local Government Act 1993* (NSW), which links the site but the grade and practical logistics of converting this to appropriate access for all essential services, for all stages of life, are not appropriate. The only easy way to get a stretcher to the site for example, is via an access laneway which is not a paper road.
- There is a large gum tree on the site, with significant roots which are holding the soil together. This tree will need to be removed to make room for a dwelling house, however upon removal of this tree, landslip is likely, regardless of whether or not the house is built on poles, a suspended slab or with an assortment of retaining walls.
- The dwelling house looks straight onto a public path, at people coming back from the beach, and is jammed up against the back wall of the neighbours, looking down into their backyards. This is contrary to privacy.
- Access, slope and other constraints are only going to get worse, with global warming, including floods, land slip and land subsidence.
- Multiple owners have attempted to develop the site, on the premise of its residential zoning, however no one can make the site work.
- 3 months ago, I submitted to Council advising that any DA is going to be met with multiple objections from everyone in the area, therefore any applicant will lose hundreds of thousands of dollars on process – and this proposal is precisely why.
- Prospective developers have come up with multiple reports, on how they think they can overcome land use constraints, resulting in long DA processes, deemed refusals, then Land & Environment Court appeals, which don't amount to anything.
- Meanwhile, Local and State Government subsidise the whole process, while neighbours and residents remain in limbo over what will happen next on this site.

The problem is founded in the incorrect zoning of this block of land. Having this site incorrectly zoned is a waste of ratepayer and taxpayer money. This is a very expensive anomaly which the community at large are absorbing every day it continues. By zoning the

site residential, Council are burdening the community with a false expectation that the site can be developed when it can't.

- The access and logistical problems at this site on Pine St are not going away. Resolving access issues are (at best) likely to require planning agreements, easements and the like, however it is still going to be messy and unfeasible.
- Some of the features of this block, with its history, its circumstances and its characteristics could well give rise to an adverse possession claim by adjoining owners under s28U(2) and 45C(2) of the *Real Property Act 1900* and provide claim by the adjoining owners at common law as highlighted in a recent Supreme Court Case, *Hardy v Sidoti* [2020] NSWSC 1057, contested in Redfern and won by the plaintiff.
- This site should have either been consolidated with adjoining residences, many years ago, or amalgamated with the public open space.

Council needs to act, to stop the illusion that 40 Pine St, Manly is a residential site, when it isn't practical. The current zoning is setting people up to fail and costing people a lot of money who really don't know what they are doing. Every time the site is listed for sale, it causes Council multiple enquires. This is an unnecessary use of resources. The latest owner bought the land, site unseen, while in COVID-lockdown offshore and having started a battle spanning several years, at a cost of hundreds of thousands of dollars, to try to develop a site that can't be developed.

- A similar scenario arose on the North Coast of NSW, after SEPP Rural Land Sharing Communities caused access impaired sites all over rural parts of NSW. The NSW Government abolished this SEPP because the inordinate costs of providing for communities, who became more and more disconnected by way of access, over several generations, as people got older and as young couples had kids. Floods, landslip, and natural disasters led to another generation of impoverished people living away from essential services.

Before this DA is considered, Council needs to resolve access issues to the parcel. In landlocked sites, this is generally done by way of a 'right of way' easement. However, in this case, there is no existing 'right of way' and no adjoining residential block which can practically facilitate access to the site. The only option is through public land, which is currently used for a pedestrian footpath. It is neither practical, feasible or safe for such a footpath to be shared with vehicles for the sake of access to this site.

The legal and property implications of having a residential site located where this one is needs to be considered. The context of my concerns are as follows:

- An easement will be impliedly granted or reserved over a servient tenement where it is necessary for the use of the dominant tenement, for example, where the land is 'absolutely in-accessible or useless' without the easement: *Union Lighterage Co v London Graving Dock Co [1902] 2 Ch 577.*
- However, a right of way will not be considered necessary where there is another means of accessing the land, even though it might be highly inconvenient and expensive to utilise: *Titchmarsh v Royston Water Co Ltd* (1899) 81 LT 673.
- In an easement of necessity, public policy does not play any role in the construction of the conveyance. The courts will construe the document in an endeavour to ascertain the intention to the parties: *North Sydney Printing Pty Ltd v Sabemo Investment Co Pty Ltd* [1971] 2 NSWLR 150; *Nickerson v Barraclough [1981]* Ch 426.
- The necessity must exist at the time of the acquirement of the dominant land unless the owner of the servient tenement knew that a necessity would arise at a later date: *St Edmundsbury v Clark (No 2)* [1975] 1 WLR 468. Nonetheless, the general rule is that the terms of the right are based upon the common intention of the individuals at the date of transfer: *Adealoon International Pty Ltd v London Borough of Merton* [2007] All ER 225.

The above-mentioned points, while may not be entirely understood to those not legally trained, illustrate how the lack of thought in the zoning of this property, will cause considerable undue legal costs to the community at large for limited community outcomes.

I would expect any Judge of the Supreme Court required to make a determination on an easement at this site will be directing to Council / asking council why such a block was zoned residential in the first place. Courts are rarely forgiving when Council's zoning regime creates expensive legal issues.

The history of this parcel becomes problematic in terms of achieving an easement of common intention. The site was once reclaimed by Council and re-sold after rates were not paid and has been left zoned residential ever since. The current circumstances mean gaining practical and legal access is near impossible. 40 Pine St, Manly has no option for access, other than through public land, or by way of demolishing adjoining buildings. Again, this is impracticable and cannot be legally enforced.

In *North Sydney Printing Pty Ltd v Sabemo Investment Co Pty Ltd* [1971] 2 NSWLR 150, a case involving a block of land that had no road frontage and no access to any public road, Hope J stated (at 160):

> *"It seems to me that the balance of authority establishes that a way of necessity arises in order to give effect to an actual or presumed intention. No doubt difficulties could arise in some cases because of differing actual intentions on the part of the parties, but it seems to me that at the least one must be able to presume an intention on the part of the grantor, in a case such as the present, that he intended to have access to the land retained by him over the land conveyed by him before one can imply the grant or reservation of a way of necessity over the land conveyed. In the present case, there was no such intention and indeed the actual intention of the grantor was to the contrary".*

An easement will be implied where it is required to give effect to the common intention of the parties. In *Pwllbach Colliery Co Ltd v Woodman [1915] AC 634,* Lord Parker divided implied easements into two groups: easements of necessity (as discussed above) and easements that are required for the proper enjoyment of the land. **It must be demonstrated that the easement is required to give effect to the common intention of the parties.** Lord Parker stated (at 646-7):

> *"The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used… But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use."*

At 40 Pine St, to achieve common intention of current and future access, the only option appears to be an easement over the existing public pathway. This ignites a conflict of intention between pedestrians and motorists and a new regime which is almost impossible to administer in a safe and lawful manner without inordinate costs. An example of a successful shared motorist/pedestrian arrangement is the one-way street serving the 20 or so, properties long Winter Ave, North Sydney. However, all those properties have driveway access and the circumstances in this case is very different. It is a landlocked sliver of land of 101m^2. To provide access to the site would require a complete reconfiguration of a public pathway and turning it into a shared roadway, just to provide access for this one very small block. It is not appropriate.

The two requirements of an easement of common intention (if this were to be the manner in which such an easement were sought) are that the parties must, at the time of grant, share an express or implied intention that the dominant tenement should be used for a particular purpose and the easement must be necessary to give effect to that intended use. This is an interesting point with regard to 40 Pine St, given the history of the site (where by the most recent DA was refused), and the development which has occurred since. I suspect Council may find themselves in some legal trouble if this were to be fleshed out in a court of law.

The source of the problem is the zoning of the land. This is a very expensive anomaly which the community at large are absorbing every day it continues and which carries great legal risk to council in sorting out the costs that are likely to come about.

I suggest if this block is to be developed for a single dwelling and thus remain residential in use, councils transport, property and legal services teams need to come up with a way to ensure the site does not cause Council undue legal matters and the community don't lose the public pathway to a future driveway for 40 Pine St, Manly.

If this does not happen, the DA needs to be refused and the zoning needs to be reviewed.

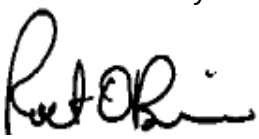
I suggest Council resolve this situation acquire the site under the *Land Acquisition (Just Terms Compensation) Act 1991* and either:

a) Rezone it to public open space and embellish it; or

b) Retain the residential zoning, sell it to the adjoining owners for $1 and fix up the subdivision pattern by consolidating the site with the adjoining land.

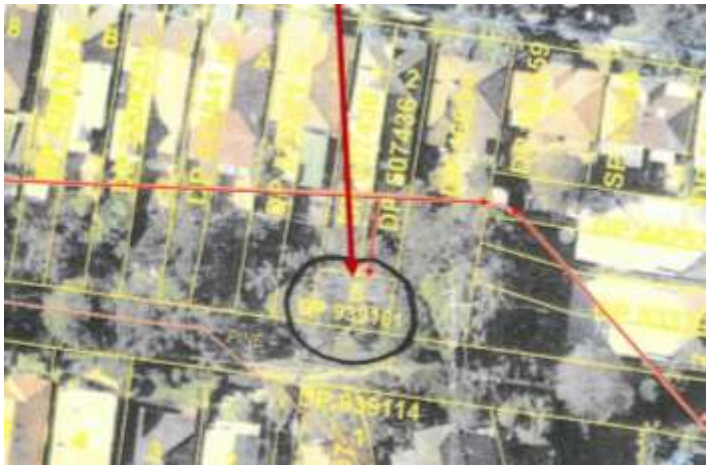
I expect any Land and Environment Court Commissioner would come to a similar conclusion given the circumstances of the site.

Yours Sincerely



Robert O'Brien
30/01/2022

ATTACHMENT – PLANS and MAPS



Land

To the left of this photo (but out of view), is a large gumtree, holding the land together from future landslip. Once this is removed, the land will become unstable and properties below will incur ongoing sediment load.