

## ATTACHMENTS DISTRIBUTED UNDER SEPARATE COVER

### BR 16/04/24 – COMMUNITY CARRIAGEWAY BETWEEN CALDWELL AND LLEWELLYN STREETS, MEREWETHER

- 6.2**            **Attachment A:**      Report to the Ordinary Council Meeting  
of 28 March 2023 – *Llewellyn Street,  
Merewether – Right Of Way Review*
- 6.2**            **Attachment B:**      Letter from the Hon Jihad Dib MP,  
Minister for Emergency Services



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## 8.5. 37 LLEWELLYN STREET, MEREWETHER – RIGHT OF WAY REVIEW

**REPORT BY:** PLANNING AND ENVIRONMENT  
**CONTACT:** INTERIM EXECUTIVE DIRECTOR PLANNING AND ENVIRONMENT / ACTING EXECUTIVE MANAGER, PLANNING, TRANSPORT & REGULATION

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### PURPOSE

To provide an investigation report regarding the right of carriageway (the **ROW**) located at 37 Llewellyn Street Merewether.

### RECOMMENDATION

That Council:

- 1 Receive this report presenting the investigation into the ROW at 37 Llewellyn Street, Merewether.
- 2 Notes the investigation is continuing and possible regulatory action against the Developer and Certifier may be considered.
- 3 Notes that the Interim Executive Director of Planning & Environment has issued written correspondence to the Minister for Emergency Services and Resilience Hon. Steph Cooke MP, the State Member for Newcastle, Tim Crakanthorp MP, and Crown Lands, Department of Planning and Environment, seeking support for a public access to be created through the Merewether Fire and Rescue Station, known as 39 Llewellyn Street Merewether.
- 4 Notes that a formal complaint has been lodged with NSW Fair Trading about the professional conduct of the Private Certifier and that the Interim Executive Director of Planning & Environment has issued written correspondence to the Minister for Fair Trading, Hon. Victor Dominello MP, asking that he investigate the circumstances surrounding the private certifier who provided an occupation certificate contrary to the Development Consent (DA2016/01411 as modified) for the property located at 37 Llewellyn Street Merewether despite it not complying with CN's condition that a right of carriageway be created over the property.

### KEY ISSUES

- 5 In 1982 a 3.66m wide right of carriageway (the **ROW**) was established over 37 Llewellyn Street, Merewether (the **subject site**), located along the full length of the northern boundary. The ROW also extended over part of an adjoining site, known as No.41 Llewellyn Street Merewether.
- 6 The ROW was established as an easement in gross favouring CN as a public authority. In accordance with schedule 4A of the *Conveyancing Act 1919*, a right of carriage way has the effect of *a full and free right for Council and every person authorised by it, to go, pass, and repass at all times, and for all purposes, with or without animals or vehicles or both* over the land burdened.

- 7 The ROW was established when the subject site was registered as Old System title. In or around 1995, the NSW Land Registry Service (the **LRS**), as it is known now, commenced conversion of the Old System title land to the Torrens title system. During this conversion the LRS negligently failed to carry over the ROW to the Torrens title register.
- 8 In March 2018 a development consent (DA2016/01411) (the Consent) was issued for the 'erection of mixed-use development including 12 residential apartments, ground floor commercial premises, associated car parking, site works and 12 lot strata subdivision' at the subject site. No submissions were received.
- 9 Relevant to the ROW the Consent included conditions 69 & 86, as follows:  
Condition 69 provided:  
*"The proposed driveway to a height of 3.5m for the full length of the property is to be the subject of an appropriate reciprocal right-of-carriageway for access to lot 25 Caldwell Street, Merewether and the necessary survey plan and accompanying instrument under Section 88B of the Conveyancing Act 1919 (NSW) being registered with NSW Government Land & Property Information prior to the issuing of any Occupation Certificate for the proposed development, it being noted that the instrument is to provide that the right-of-way is unable to be relinquished, varied or modified without the concurrence of The City of Newcastle."*
- 10 In effect, Condition 69 required the creation of a new ROW, being a ROW that achieves a standardised clearance height, suitable for the type of vehicles likely to be used to gain access to the rear of the land at 25 Caldwell Street Merewether.
- 11 Condition 86 states:  
*"A minimum clear opening height of 3.5m being maintained over the proposed 'right of carriageway' within 37 Llewellyn Street and servicing 25 Caldwell Street, Merewether."*
- 12 In December 2021, a modification application was received (MA2021/00495) which sought to delete Condition 69 of the Consent. Whilst the application was not formally notified to the local community, a total of 84 submissions were received objecting to the modification and raising concerns with the impact of the development upon public access through the ROW. The application was not supported and was ultimately withdrawn by the Applicant in March 2022 following a meeting with CN where it was communicated that the request would not be supported. A site inspection conducted at the time, in association with the application, determined that the development as constructed significantly restricted safe and unimpeded access through the ROW for both CN vehicles and the public.
- 13 In February 2022, CN requested that NSW LRS investigate the lack of formal recognition of the existing ROW, and on 21 July 2022, the existing ROW was formally registered by LRS on the title of the land.
- 14 Throughout 2022, CN continued to investigate the ROW and satisfaction of Condition 69, including on-going discussions with the Applicant and Developer to seek to resolve the matter. It was stipulated to the Applicant and Developer that an Occupation Certificate could not be issued until such time as Condition 69 was

- addressed to the satisfaction of CN. CN staff also advised the Private Certifier of the obligations imposed by Condition 69.
- 15 CN approached NSW Fire and Rescue, to seek to obtain an alternative pedestrian ROW over the land located at 39 Llewellyn Street, Merewether, however this request was formally refused.
- 16 A strata subdivision of the property was registered on 15 December 2022. CN obtained a copy of the strata plan by-laws, which include:
- "The Owners Corporation is aware that it and all lot owners are bound by a registered easement to enable Newcastle City Council and its employees and representatives' access through the garage area from time to time."
- 17 CN obtained a copy of the Occupation Certificate (the **OC**) for the building on the site, on 30 January 2023. The OC was issued by a Private Certifier and is dated 9 December 2022.
- 18 A certifier is required to use the Portal to give the determination of an Occupation Certificate to the applicant and to CN within two days of making the determination. This did not occur, and to date CN has not received a copy of the OC formally through the portal, and thus has been unable to make the Private Certifier's OC available to the public.
- 19 While there is a penalty prescribed for non-compliance, an OC, which has not been delivered through the Portal, would not be invalidated by a failure to enter the required information in the Portal.
- 20 The Private Certifier issued the OC without Condition 69 being satisfied and contrary to advice provided by CN.
- 21 It is noted that the NSW Fair Trading 'Certifier Disciplinary Register' shows that eight disciplinary decisions have previously been made in respect of the conduct of the Private Certifier that issued the Occupation Certificate. The decisions involved cautions, reprimands, an order to complete training and a total of \$55,000 in fines. CN has no role in the NSW Government's decision to allow the certifier to continue certifying properties.
- 22 In terms of the potential for challenging the validity of the OC for the development, Section 6.32 of the Environmental Planning and Assessment Act 1979 (the **EP&A Act**) excludes occupation certificates from the scope of Land and Environment Court orders that can be made to declare a building or subdivision certificate invalid.
- 23 During a further site inspection on 30 January 2023 (the **Inspection**), it was established that the constructed minimum floor to ceiling clearance height over the ROW, is less than the 3.5m clearance height required by Condition 69 and 86 of the Consent. Height clearances were measured to be as low as 3.11m between structural elements of the building and 2.85m to the lowest service pipe extending below the first-floor structure.
- 24 The required 3.5m clearance height relates to the standard clearance for a small rigid vehicle, as specified in Australian Standard 2890.2. When imposing the

- relevant conditions, it was considered that this type of vehicle was required for CN to complete maintenance of Caldwell Street Park.
- 25 During the Inspection, the required turning circle of a vehicle, to make the turn from the subject site through an opening in the building structure, towards the Caldwell Street Park, is a further limiting factor on the size of vehicle that can be used. In addition, as a result of the ground level being constructed below the approved finished floor level, a substantial level change exists between the site and adjoining property, creating a step which was unable to traverse.
- 26 The Inspection confirmed that the development as constructed has resulted in that safe and unimpeded use of the ROW by CN vehicles and the public cannot be achieved. To satisfy access for CN vehicles a smaller vehicle would need to be utilised by CN and works such as installation of ramping between the site and adjoining property would be necessary.
- 27 Whilst we understand there is a legal basis for Council to authorise public access through the site established by the ROW, it is considered that safe public access would be difficult to achieve as a matter of practicality without demolition of part of the constructed building. Achieving safe access could also adversely impact the new residents of the development, who are not responsible for the actions of the Developer or the Private Certifier.
- 28 Further, whilst we understand CN and the public have a clear legal basis to utilise the ROW, the prospects of enforcing this right through litigation is unknown due to the variable nature of court matters and the likely requirement that part of the building be demolished. There is a substantial cost and time associated with such action and the end result may not be desirable from a public safety perspective or community expectation.
- 29 The preferred practical option is for public access to be facilitated through the adjoining Fire and Rescue Station property at 39 Llewellyn Street. This would require obtaining an easement over the existing pathway located on 39 Llewellyn Street, and amendments to the existing easement over 41-43 Llewellyn Street. However, as noted above, the initial approach to Fire and Rescue was unsuccessful.

## **FINANCIAL IMPACT**

- 30 Costs associated with the investigation and preparation of this report is within operational budget.
- 31 Costs associated with litigation, should action be taken against either the Developer or Private Certifier, would be substantial and are unbudgeted. Independent legal advice confirms CN's position from a property law perspective is strong relative to the ROW, however the prospects of success are unknown due to the uncertainty associated with court proceedings.

## **NEWCASTLE 2040 ALIGNMENT**

- 32 The issues discussed in this report relate to the following strategic direction of the Newcastle 2040 Community Strategic Plan:

### **Liveable Newcastle**

- 1.3 Safe, active and linked movement across the city.  
1.3.1 Connected cycleways and pedestrian networks.

## **RISK ASSESSMENT AND MITIGATION**

- 33 There is risk that should litigation be commenced that CN's action may be unsuccessful in achieving adequate access and/or does not meet community expectations.
- 34 There is a significant financial risk associated with any litigation proceedings.

## **RELATED PREVIOUS DECISIONS**

- 35 At the Ordinary Meeting on 13 December 2022, Council adopted the Notion of Motion Item 41.
- 36 At the Ordinary Meeting on 28 February 2023, Council adopted the Notion of Motion Item 9.1.

## **CONSULTATION**

- 37 Extensive consultation and communication with the affected local community has been managed predominantly via Ward Two Councillor Carol Duncan.

## **BACKGROUND**

- 38 In May 2019, an application to modify the consent (DA2016/01411.01) was approved. The modification included changes to the floor plan layout, boundary setbacks and parking.
- 39 In August 2020, a further application to modify the consent (DA2016/01411.02) was approved. The modification sought to amend condition 7(a) of the Consent which related to on-site parking requirements.
- 40 On 9 March 2021, a further application to modify the consent (MA2021/00047) was approved. The modification approved amendments to the commercial tenancy, including a basement storage area and other minor works.
- 41 In December 2021, modification application MA2021/00495, was submitted to CN seeking the deletion of Condition 69 of the Consent (the requirement for a ROW), however this was not supported by CN and was ultimately withdrawn.

- 42 From January 2022, CN staff commenced investigation into the ROW and satisfaction of Condition 69. In February 2022, CN requested that NSW LRS investigate the lack of formal recognition of the existing ROW.
- 43 On 21 July 2022, the existing ROW was formally registered on the title of the land.
- 44 On 9 December 2022, the Private Certifier issued an Occupation Certificate (the **OC**) for the development. A copy of the OC was uploaded to the Planning Portal however at that time, this was not made available to CN.
- 45 On 15 December 2022, the strata plan for the site, which was registered, was issued and identifies the existing ROW.
- 46 On 30 January 2023, a copy of the OC was provided to CN.

## **OPTIONS**

### **Option 1**

- 47 The recommendations at Paragraphs 1-4. This is the recommended option.

### **Option 2**

- 48 Certificates issued by the Private Certifier in respect of the approved development. It is noted that the EP&A Act places a time limit on legal challenges to the validity of a construction certificate, being within three months after the issue of the certificate. Further, the EP&A Act restricts action being made against the validity of an Occupation Certificate. This is not the recommended option.

### **Option 3**

- 49 Attempts to negotiate an access outcome directly with the owners of the property. The strata subdivision has been registered and units have been sold into private ownership. Further the development has been constructed in a manner which prevents safe and unimpeded access. Discussions with the Developer to date have been unsuccessful. Therefore, this is not the recommended option.

## **REFERENCES**

## **ATTACHMENTS**

Nil.





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**The Hon Jihad Dib MP**

Minister for Customer Service and Digital Government  
Minister for Emergency Services  
Minister for Youth Justice



Ref: FRN21/1084  
MINS-287005395-96

Ms Michelle Bisson  
Executive Director Planning & Environment  
City of Newcastle Council  
PO BOX 489  
Newcastle NSW 2300

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Re: Proposed acquisition of an easement for a right of way at Merewether Fire Station

Dear Ms Bisson,

Thank you for your correspondence dated 6 April 2023 and for bringing this matter to the Government's attention.

Merewether Fire Station is critical infrastructure, serving and protecting the local community since 1933.

Fire and Rescue NSW (FRNSW) advises me that the proposal for an easement for a right of carriageway at Merewether Fire Station was previously raised with them and deemed unsuitable as it would significantly impact the functionality of the fire station.


This includes FRNSW's ability to respond to emergencies, conduct onsite staff training and store equipment.

In addition, I am advised that the location of the proposed right of way would impede access to the fire station's main entrance, increase the security risk to the fire station and diminish the heritage value of the site.

I understand FRNSW representatives also met Council onsite in August 2022 to discuss the proposal and explain the potential impact on their operations.

I can appreciate residents' concerns about the removal of the previous right of way as a result of the adjoining development. However, I am unable to support the proposal on the basis of FRNSW advice that it would have a detrimental effect on the operations of the fire station and their ability to assist the community by responding swiftly to an emergency.

Yours sincerely

  
**The Hon Jihad Dib MP**  
Minister for Customer Service and Digital Government  
Minister for Emergency Services  
Minister for Youth Justice

02/06/2023