Body Corporate Law Queensland
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17 September 2019

Our Ref: BC-19-133
Your Ref: CA3238

To:	Attn: Jenny Elphinstone CEO Douglas Shire Council Front Street MOSSMAN QLD 4873
Sent Via:	**Email to:** jenny.elphinstone@douglas.qld.gov.au **CC:** enquiries@douglas.qld.gov.au

MOST URGENT

Dear Sir/Madam,

Re: Application for Development Approval by Niramaya Developments Pty Ltd ACN 621 516 863 As Trustee - Lot 906 SP 277141

We have been asked by our client Niramaya Developments Pty Ltd to respond to your letter to our client of 11 September 2019. We reiterate that our client does not pursuant to Section 51(2) of the Planning Act 2016 (Qld) require the consent of the Body Corporate "to the north".

Our client repeats and relies upon our letter of 22 August 2019.

In addition in relation to the definitions in Schedule 2 to the Planning Act 2016 (Qld);

Schedule 2:

- **Land**; includes an estate in, on, over or under land; and the airspace above the land and any estate in the airspace; and the subsoil of land and any estate in the subsoil;
- **Owner, of land, premises or a place, means the person who**: is entitled to receive rent for the land, premises or place; or would be entitled to receive rent for the land, premises or place if the land, premises or place were rented to a tenant; and
- **Premises means**: …, ***land***, whether or not a building or other structure is on the land.

Our client is the owner of the land the subject of the development application. In no respects could the Body Corporate for Niramaya Luxury Villas and Spa Residential Community Titles Scheme 34781 be regarded as an owner of the premises.

Section 51(2) of the Planning Act

Section 51(2) says that written consent must accompany the application "to the extent the applicant is not the owner". Given the definition of "owner", the Body Corporate for Niramaya Luxury Villas and Spa Residential Community Titles Scheme 34781 is not an "owner".

Further in the Queensland Court of Appeal in ***Bowyer Group Pty Ltd v Cook Shire Council*** **[2018] QCA 159** (Bowyer Group & Cook Shire) Crown lessees claimed that their consent was needed to a development approval had their appeal dismissed.

> The Court of Appeal held, at [42], that the natural and ordinary meaning of the language used in the definition of "owner" is that the owner is the person (or persons or entity) who is (currently) entitled to receive the rent for the land, or (where the land is not, currently, let) who *would* be entitled to receive the rent for the land, if it were let to a tenant at a rent.
>
> And at paragraph [44] …. there does not appear to be any reason why "owner" should be interpreted in an expansive way, so that it might include any person, in addition to the person principally entitled to receive the rent for the land (either actually or suppositiously), who may be or become entitled to receive a payment by way of rent, for example from a sub-lessee, or even a sub-sub-lessee. On the applicant's analysis not only would the Crown lessees be "owners", but potentially numerous sub-lessees as well.
>
> And at paragraph [30] there is no reason, having regard to the context and purpose of the provision, and the language used, why a lessee, or sub-lessee, of land, should ***have a right to veto*** the making of a development application in respect of land in which they have a limited interest. That right appropriately rests with the "owner", in the sense of the person principally entitled to receive the rent for the land. Others, including those with an interest in the land, or who occupy the land, or own or occupy adjacent land, may be submitters, and object to the development proposal on its merits – but do not have a right to veto the making of the application.
> The Court of Appeal referred at paragraph [45] to the conclusion reached by McLaughlin QC DCJ in Stradbroke Island Management Organisation Inc v Redland Shire Council [2001] QPEC 57; [2002] QPELR 121 at [18]: that the apparent intent of the definition of "owner" (in the equivalent Integrated Planning Act provision) was to denote a person who is entitled to the possession of land without having to pay rent for it.

Here the legal positions of the Crown lessees in *Bowyer Group & Cook Shire* and Body Corporate for Niramaya Luxury Villas and Spa Residential Community Titles Scheme 34781 (the Body Corporate) are the same. There is no requirement under Section 51 (2) of the Planning Act that the body corporate gives its consent and in fact it would be contrary to law to hold up the processing of the development application based on the misconception that the consent of an entity, not the owner of the premises, is required. Furthermore as is set out below the Body Corporate has no right of veto as the Crown Lessees had no right of veto in *Bowyer Group & Cook Shire.*

Body Corporate and Community Management Act 1997 (Qld) The BCCM Act and the Body Corporate and Community Management (Accommodation Module) Regulation 2008 (the Accommodation Module)

Lot owners are not required under the BCCM Act to obtain the consent of the body corporate to carry out improvements to a lot. Such Consent is only required when Common Property is intended to be improved and that is not the case here.

The Accommodation Module applies here and pursuant to section 181 of that module the only obligation on the part of an owner of the lot, improving it's lot is to give to the body corporate details of the nature and value of the improvements, *as soon as practicable after substantially completed s181 (3)* .

The CMS for Niramaya Luxury Villas and Spa Residential Community CTS 34781

Parts of the CMS refer to the "Original Owner". Our client is the original owner as defined in paragraph 12 of Schedule B of the CMS.

As described in paragraph 5 on page 5/49 of the CMS Lot 906 is a "balance development lot", with the intent, as recorded in paragraph 5 on page 5 of the CMS, that it will be further developed. The Body Corporate, as constituted by the lot owners, are bound by the intent that Lot 906 will be developed.

Lot 906, as is provided for in paragraph 1.1 of Schedule B of the CMS, may at the discretion of our client be subdivided by either a standard format plan or a building format plan. Paragraph 12 of Schedule B of the CMS defines the lot owner of lot 906, presently our client, from time to time as the "Original Owner".

The discretion of the owner of Lot 906 to redevelop Lot 906 is broad with the concept plan set out in Annexure "A" to the CMS being conceptual only with our client having the power pursuant to paragraph 2.4 of Schedule B, for example, to increase or decrease the number of new lots and with the power to redevelop in stages as provided for in paragraph 2.5 of Schedule B of the CMS. We mention these points only to demonstrate the extent of the authority given to our client by the Body Corporate as recorded in the CMS to redevelop its land, that is, Lot 906.

The CMS places no obligation upon our client to obtain the consent of the Body Corporate in fact as is provided for in 5.3 of Schedule B to the CMS upon the redevelopment of Lot 906 the Body Corporate is obliged to execute a new CMS.

In relation to queries 1- 5 inclusive of your letter of 11 September 2019.

Please note that addressing these queries is not to be taken to any extent that the consent of the Body Corporate is required to the development application.

1. It is proposed that Lot 906 is to be developed as further lots in Community Title Scheme CTS 34781 as is contemplated and sanctioned by the CMS to that scheme, as a subsidiary scheme. Our client agrees with your comment that a new CMS will be required and we refer to the obligation on the Body Corporate pursuant to 5.3 of Schedule B to the CMS upon the redevelopment of Lot 906 the Body Corporate is obliged to execute a new CMS.
2. A building format plan is contemplated.
3. It is not proposed to rely on any services "in the Nirayama development to the north".
4. The development will be "stand alone" in relation to infrastructure and services.
5. The arrangements in relation to Council's water supply extending through Lot 906 to service land to the north can be retained or other suitable network arrangements can be established. Any provision of waters services would be subject to future detailed engineering investigations.

We understand that our client, the applicant, has made the Application in the approved form and in the circumstances, would you please confirm that upon payment to the Council of the application fee, our client's Application will be accepted.

Risk to our client.

Our client has expended substantial time other resources and funds of and incidental to preparing and making the development application and stands to suffer a substantial monetary loss, including the risk of not being able to proceed with the development, if it's development application is not now accepted. We are instructed the application fee has been paid.
In the circumstances please confirm now that our clients' application will be accepted.

Yours faithfully,
Body Corporate Law Queensland

N S Hope

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Member of Queensland Law Society