

10.15.Brightmore Street Drainage Reserve - Draft Plan of Management and Lease Terms for 33A Benelong Rd, Cremorne

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ATTACHMENTS	1. DRAFT POM Brightmore Drainage Reserve [10.15.1 - 23 pages] 2. Brightmore Street Cremorne Lot 34 Sec C DP 5107 [10.15.2 - 18 pages] 3. CONFIDENTIAL - Draft Plan of Management and Lease Terms for 33A Benelong Road, Cremorne [10.15.3 - 1 page] 4. CONFIDENTIAL - Rental valuation of vehicular access Brightmore Street Drainage Reserve for 33A Benelong Rd, Cremorne [10.15.4 - 20 pages]
CSP LINK	2. Our Built Infrastructure 2.1 Infrastructure and assets meet diverse community needs

PURPOSE:

The purpose of this report is to:

- present the draft Plan of Management for Brightmore Street Drainage Reserve;
- outline the legal and access issues concerning 33A Benelong Road Cremorne including the proposed control measures; and
- seek Council's endorsement to proceed with public consultation on the draft Plan of Management and the proposed five-year licence agreement.

EXECUTIVE SUMMARY:

- The Brightmore Street Drainage Reserve is classified as Community Land and serves as an overland flow path for stormwater management. However, it is also the only viable access route to 33A Benelong Road, which lacks direct vehicular access.
- A historical 1998 Court Order granted consent for a carport to be constructed, leading to the adoption of a Plan of Management in 1998 under the legal framework of the *Local Government Act 1993* which provided a lease for access. This Plan was subject to a sunset clause linked to ownership changes and a five-year lease period. No further Plan of Management has been prepared since the cessation of the original arrangement.
- This report presents a new Draft Plan of Management for Brightmore Street Drainage Reserve, outlining legal and access considerations concerning 33A Benelong Road. The primary objective is to seek Council's endorsement to proceed with public consultation on the draft Plan of Management and the proposed five-year Licence agreement.
- The public consultation process, in compliance with Section 47A of the *Local Government Act 1993*, will involve a 28-day public exhibition period.

- The confidential attachment includes monetary information relating to the potential income for the use of the vehicular access for private use.

RECOMMENDATION:

1. THAT Council notes that the provisions of Section 46(4)(b) of the *Local Government Act 1993* do not apply as the drainage reserve is not a dedicated 'public road'.

2. THAT Council approve the commencement of the public consultation process for the proposed five-year licence and the Draft Plan of Management, to be exhibited concurrently for a minimum of 28 days.

3. THAT the Chief Executive Officer be granted delegated authority to negotiate the terms of the licence including the rental.

4. THAT should the relevant stakeholders or residents support the proposal, or no feedback is received during the consultation, the Plan of Management will be considered adopted.

5. THAT Council acknowledge a further report will be submitted following the public consultation period summarising the community feedback should feedback in opposition to the proposal be received.

6. THAT Council resolves that the identified attachment to this report is to be treated as confidential in accordance with section 11(3) of the Local Government Act for the following reason under section 10A(2) of the Local Government Act:

(d) commercial information of a confidential nature that would, if disclosed

(ii) confer a commercial advantage on a competitor of the Council

It is further noted that release of this information would, on balance, be contrary to the public interest as it would affect Council's ability to obtain value for money services.

Background

The Site

The land to which the draft Plan of Management relates is known as Lot 34 Section C DP 5107 and lies between 16 and 18 Brightmore Street Cremorne at the southern end, whilst the northern end of the reserve extends onto Benelong Road.

There is a flight of stairs constructed over the lower half of the laneway at the Benelong Road end, which precludes vehicular access to Benelong Road. This is illustrated in Figure 3 in this report.

Adjoining the lower end of the laneway is a residential property known as 33 Benelong Road, with 33A Benelong Road, which is the subject of this report, at its rear (refer to Figure 1, below).

There is no vehicular or pedestrian access to 33A Benelong Road other than via the drainage reserve. Refer to Figures 2 and 3. All other properties adjacent to 33A Benelong Road have the benefit of vehicular access from the street.

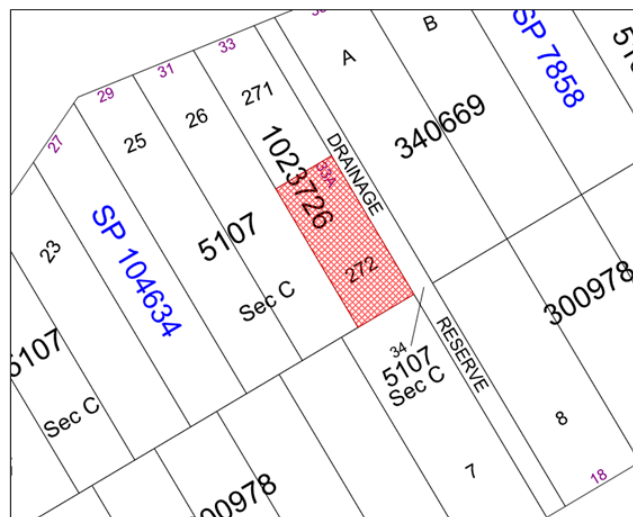


Figure 1: location of 33A Benelong Road, Cremorne shown in red

Zoning

The drainage reserve is currently zoned R2 Low Density Residential under North Sydney Local Environmental Plan (NSLEP) 2013.

The objectives and permitted use of this zone in accordance with the North Sydney LEP is:

Zone R2 Low Density Residential

1 Objectives of zone

- To provide for the housing needs of the community within a low-density residential environment.*

- To enable other land uses that provide facilities or services to meet the day-to-day needs of residents.
- To encourage development of sites for low density housing, including dual occupancies, if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.
- To ensure that a high level of residential amenity is achieved and maintained.

2 Permitted without consent

Environmental protection works; Home occupations

3 Permitted with consent

Centre-based childcare facilities; Dual occupancies (attached); Dwelling houses; Group homes; Health consulting rooms; Home-based childcare; Information and education facilities; Medical centres; Oyster aquaculture; Places of public worship; Pond-based aquaculture; Recreation areas; Respite Day care centres; Roads; Semi-detached dwellings; Tank-based aquaculture

4 Prohibited

Any development not specified in item 2 or 3



Figure 2: Reserve pictured from Brightmore St looking north



Figure 3: Reserve from Benelong Rd looking south



Figure 4: Aerial view of Drainage Reserve

Classification

The drainage reserve is currently classified as Community Land in accordance with the *Local Government Act 1993* and was vested in Council pursuant to the provisions of *Section 398 of the Local Government Act 1919* (now repealed), for drainage purposes. The reserve is 3.1m in width with an area of approximately 250m².

Development Application 317/98

On 9 July 1998, a Development Application was lodged for the alterations and additions to the then existing dwelling and the subdivision of the property into 2 lots (now known as 33 & 33A Benelong Rd, Cremorne).

33A Benelong Road

Council rejected DA317/98 for the alterations and additions of the then newly proposed carport which was to be located at the rear of the property, because of manoeuvrability, amongst other issues.

The main issue was that there was no vehicular access to the property other than via the drainage reserve which was, and still is, classified as Community Land pursuant to the provisions of the *Local Government Act 1993*.

Court Order

The owners filed an action against Council, and on 17 December 1998 the court issued Orders granting Consent to DA 317/98, which included the construction of the carport. The Orders, however, did not address access and egress and as the only entry and exit to the property was via the drainage reserve, Council was left with no alternative but to grant No. 33A Benelong Road carriageway via the drainage reserve under the following Plan of Management.

Plan of Management 1998

Following the order of the court and to address the access issues, it is noted that Council proceeded to grant vehicular access via the drainage reserve by way of an adoption of the above Plan of Management, which was subject to a sunset clause, if and when there was a change of ownership or limited to a term of five years.

At some point after the consent was acted upon, there was a change of ownership which resulted in the Plan of Management ceasing. A new Plan of Management has since not been prepared and the legal considerations outlined below necessitate addressing the access and egress issues for 33A Benelong Road.

Legal Advice dated 6 June 2015 in relation to the Court Order

The following advice was prepared by Council's in-house Solicitor, on request on the validity of the court order.

- 1. The Court consent remains in force and the new owner of the property has the benefit of that consent (sections 80 and 81A of the Environmental Planning and Assessment Act 1979).*
- 2. The conditions of the consent allow the construction of a carport and vehicular access to the property.*
- 3. Even though the carport was, in the past, removed and the vehicular access to the drainage reserve fenced, the consent and its conditions are saved and remain active (section 109B of the Act which saves the effect of existing consents)*
- 4. There is case law which confirms that if existing active consents (and their conditions) are abandoned, such consents (and their effect) can be saved and later acted upon (see Yan v Marrickville Council [2001] NSWLEC71 by Sheahan J at 34).*
- 5. In terms of planning law, <the owner> can assert their rights to act on the consent and construct a carport and open the fence in anticipation of vehicular access via the drainage reserve.*

Report

Legal Considerations in relation to 33A Benelong Road

1. Section 46(4)(b) of the *Local Government Act 1993*

The Local Government Act 1993 sets out the legal requirements for leasing or licensing community land, which directly impacts Brightmore Street drainage reserve and the proposed vehicle access rights for 33A Benelong Road.

1.1 Interpretation and Application of Section 46(4)(b) "the provision of public roads" under the *Local Government Act 1993*

The application of Section 46(4)(b) of the *Local Government Act 1993* in relation to the drainage reserve at Brightmore Street requires careful consideration.

The land in question is classified as Community Land and vests in Council for *drainage purposes*.

However, the key issue is whether granting vehicular accessway to the owner of 33A Benelong Road over the drainage reserve falls within the meaning of "the provision of public roads" under Section 46(4)(b). This is interpreted as follows:

- Under Section 46(4)(b) of the *Local Government Act 1993*, one of the prescribed purposes for which a lease, licence, or other estate in community land may be granted is “the provision of public roads.”
- Under the *Roads Act (NSW) 1993*, a “public road” is typically one that is dedicated to public use and is maintained by a public authority.
Note: There is no evidence of the drainage reserve been dedicated as a ‘public road’.
- However, if the accessway is to be used exclusively by the owner of 33A Benelong Road for vehicular access, we need to be mindful that the laneway is not a “*dedicated public road*”, but a ‘*drainage reserve*’ which will be used for private access over community land and is not covered by the provisions of Section 46(4)(b).

1.2 Implications for the Drainage Reserve under its current status

- The drainage reserve remains classified as community land, categorised as a *drainage reserve* and is **not** a ‘*dedicated public road*’.
- The grant of a lease or licence for private vehicular access does not amount to the creation of a public road, as it benefits only a specific private property owner and not the public at large.
- To comply with Section 46, the Act requires a Plan of Management for Community Land where exclusive use of this nature such as the granting of vehicular access is proposed.
- The Plan of Management must explicitly authorise a lease or licence for vehicular access.

1.3 Council’s alternative to a Plan of Management

As an alternative to preparing a Plan of Management to regulate the use of the land, Council could consider reclassifying the land from *Community* to *Operational Land*.

This process would require an amendment to the Local Environmental Plan (LEP), including the preparation of a Planning Proposal and obtaining Gateway Determination in accordance with the Environmental Planning and Assessment Act 1979.

While reclassification would provide Council with greater flexibility in managing the land and determining its future use, it may also result in adverse consequences, particularly given the land’s ongoing function as a drainage reserve. Some of the potential impacts are listed below.

1.4 Potential adverse impacts of reclassification

- Operational Land is not subject to the same statutory protections as Community Land, meaning Council would have the discretion to sell, lease, or otherwise dispose of the land without requiring a public consultation process.
- Reclassification requires extensive statutory processes, including the preparation of a Planning Proposal, LEP amendments, public consultation, and potential legal challenges, which may be time-consuming, costly, and resource intensive.

- Reclassifying the 250m² drainage reserve to operational land may face opposition from local residents and stakeholders who may seek similar vehicular access rights as those granted to the owner of 33A Benelong Road.
This could set a precedent for increased access requests, potentially resulting in overuse and degradation of the drainage reserve.
- Increased vehicular access could compromise the reserve's primary function as it currently serves as an overland flow path for stormwater management, which could lead to various risks such as the potential structural strain on the existing drainage infrastructure.

Given these considerations, it is recommended that Council carefully assess the implications of reclassification in comparison with a Plan of Management which would be a more appropriate mechanism for managing the land while preserving its public and environmental values.

2. Provisions of the Draft Plan of Management 2025

Under the Local Government Act 1993, all land classified as “community land” must be managed in accordance with an adopted Plan of Management. Council cannot approve any use of community land unless the proposed use is consistent with the applicable Plan of Management and complies with all relevant criteria under Sections 46 and 47A of the Act (in this case, as the licence is for a period of five years). In addition, Section 44 of the Act provides that, until a Plan of Management is adopted, the nature and use of the land must not be changed. Accordingly, Council cannot grant a lease, licence, or other estate over the land until a Plan of Management has been adopted.

To address this issue a Draft Plan of Management for the Brightmore Street drainage reserve has been prepared to explicitly permit the granting of a licence to the owner of 33A Benelong Road for vehicular access. This is a necessary step to ensure compliance with Section 46 of the *Local Government Act 1993*.

As the owner of 33A Benelong Road currently lacks formal vehicular access, the draft Plan of Management provides a legal framework to address this issue while ensuring that the drainage function of the reserve remains protected and uncompromised.

2.1 Proposed Lease/Licence Under Section 46 of the *Local Government Act 1993*

Section 46(1)(b) of the Act restricts Council from granting a lease, licence or other estate over Community Land unless it is:

- expressly permitted by a Plan of Management, and
Section 46(1)(b)(i) provides that it is for a purpose prescribed by any of Sections 36E to 36N as a core objective of the categorisation of the land.

Therefore, Section 36I(b) of the Local Government Act 1993 would apply in this instance. It provides:

36I Core objectives for management of community land categorised as general community use

The core objectives for management of community land categorised as general community use are to promote, encourage and provide for the use of the land, and to provide facilities on the land, to meet the current and future needs of the local community and of the wider public—

- (a) in relation to public recreation and the physical, cultural, social and intellectual welfare or development of individual members of the public, and*
- (b) in relation to purposes for which a lease, licence or other estate may be granted in respect of the land (other than the provision of public utilities and works associated with or ancillary to public utilities).*

Council intends to grant a licence to the owner of 33A Benelong Road for vehicular access within the drainage reserve, subject to conditions outlined in the draft Plan of Management.

2.2 Essential licence terms and conditions including provisions to mitigate risks

The proposed licence to be granted to the owner of 33A Benelong Road for vehicular access over Brightmore Street Drainage Reserve shall be subject to the following essential conditions.

- **Term of Licence:**
 - Five Years - *Section 46A* provides that a lease or licence for a term exceeding five years may be granted only by tender, unless it is granted to a non-profit organisation. Therefore, Council cannot grant a licence beyond five years, including any options.
- **Permitted Use:**
 - Vehicular access purposes only.
- **Financial Considerations:**
 - The proposed licence fee has been determined by a registered valuer, based on the principles of fair and reasonable compensation for the use of Council's Community Land. Details of the valuation and the recommended licence fee are provided in the Confidential Attachment to this report for Council's consideration.
- **Maintenance Obligations:**
 - The licensee (owner of 33A Benelong Road) will be responsible for the general upkeep of the accessway, ensuring there is no damage or obstruction to the reserve's primary drainage function.

- Council reserves the right to impose rectification works on the licensee should any impact on the stormwater infrastructure occur as a result of the private vehicular access.
- **Public Access Considerations**
 - While the licence grants exclusive vehicular access rights to the property owner, pedestrian access to the reserve for public benefit will not be unduly restricted.
 - The licence will include provisions to ensure public safety and clear delineation of access rights.
- **Liability & Safety Considerations**
 - The presence of vehicular traffic on a drainage reserve may present potential public safety risks.
 - Council may be held liable for any injuries or damages resulting from the accessway unless adequate risk mitigation measures are put in place, such as:
 - Signage and access control measures.
 - Insurance and indemnity clauses within the licence agreement.
- **Sunset Clause**
 - **Term Limitation:** The licence shall be granted for a fixed term of five (5) years, with no automatic renewal or extension beyond this period. Any continuation of the licence beyond the expiry date will require a new application and approval process, subject to Council's discretion and compliance with all statutory requirements.
 - **Change of Ownership:** The licence is personal to the current owner of 33A Benelong Road and shall not be transferable to any subsequent owner. In the event of a change in ownership of 33A Benelong Road, the licence will automatically terminate, and the new owner must apply to enter into a new licence, subject to Council approval, and compliance with the relevant provisions of the *Local Government Act 1993*, the Plan of Management and any other applicable Council Policies.
- **No Assignment Clause**

The licence is not assignable under any circumstances.
- **Council's Right to Terminate**

Council reserves the right to terminate the licence at any time before its expiry if:

 - The licensee fails to comply with the terms and conditions of the licence.
 - There is a material impact on the drainage function or public use of the reserve that necessitates revocation of the licence.
 - The land is required for an overriding public purpose, as determined by Council. In such cases, reasonable notice shall be provided to the licensee, and where feasible, alternative arrangements may be considered.
- **Legislative or Planning Changes**

If amendments to the Local Environmental Plan (LEP) or any other planning instruments result in zoning changes or other regulatory modifications that impact the

licence or the Plan of Management, Council reserves the right to review, amend, or terminate the licence to ensure compliance with the updated framework.

- **Review of the Plan of Management**

The Plan of Management is not limited by the Sunset Clause, so the Plan of Management will not cease. It shall be subject to a formal review every ten (10) years to ensure its continued relevance and alignment with Council objectives, legislative requirements, and community interests.

2.3 Infrastructure Considerations:

Council recently undertook an assessment of the resurfacing requirements for the Brightmore Street Drainage Reserve in consideration of its decision to permit vehicular access to the owner of 33A Benelong Road. To safeguard the structural integrity of the reserve while preserving its drainage function, several engineering measures were implemented:

Comments by Council's Engineering Project Manager:

The pathway was constructed to the specifications of a standard driveway, incorporating SL82 steel mesh reinforcement to enhance its structural stability. The surface comprises 32MPa concrete, compliant with current Australian Standards for strength and durability. The reserve has a load-bearing capacity of 5 tonnes, ensuring its ability to accommodate the anticipated vehicle movements without compromising its function.

2.4 Public Consultation Process for the proposed five-year Licence

In accordance with Section 47A of the *Local Government Act 1993*, Council is required to undertake public consultation before granting a licence over Community Land. As the proposed licence for vehicular access to 33A Benelong Road has a term of five (5) years, Council is required to publicly exhibit the proposal and consider submissions from the community before making a final determination.

2.5 Public Notification Requirements

The public consultation process will involve:

- **Public Exhibition and Submission Period**

The Draft Plan of Management and the proposed five-year licence agreement will be placed on public exhibition concurrently for a minimum of 28 days during which time the public can make written submissions regarding these proposals.

- **Notification Methods**

- A public notice will be published on Council's website, outlining its purpose, duration, and any specific conditions which may require inclusion.

- Direct notification will be provided to adjoining landowners, precinct committees and other stakeholders who may be affected by the proposal.

2.6 Consideration of Public Submissions

At the conclusion of the public exhibition period, Council will:

- Review and assess all submissions received.
- Address any concerns raised by the community.
- Prepare a report summarising any feedback opposing the proposal, along with any recommended amendments or conditions to be incorporated into the final licence.

Conclusion

The draft Plan of Management for Brightmore Street Drainage Reserve provides a clear legal and operational framework to address the vehicular access needs of 33A Benelong Road while preserving the drainage functionality and public interest. It aligns with statutory obligations under the *Local Government Act 1993* and ensures compliance through the incorporation of appropriate conditions within the licence, including risk mitigation clauses.

Following the public consultation process, the proposal will be referred to Council for final consideration and adoption. If significant objections are raised that cannot be resolved, the matter may require further review or modification before proceeding with the licence.

By undertaking this transparent community consultation process, Council ensures compliance with its statutory obligations while balancing community interests to satisfy the obligations imposed upon Council by the Court, which is to facilitate lawful vehicular access to 33A Benelong Road.

Consultation requirements

Community engagement will be undertaken in accordance with Council's Community Engagement Strategy.

Financial/Resource Implications

The rental for the use of the drainage reserve was determined by a registered Valuer and is outlined in the Confidential Report.

Legislation

The Local Government Act 1993, particularly Section of 46, regulates the use of Community land.