



Legal Opinion

Title: 16_06_Ipswich_21_02_06

Date:

Number: 16.06

Council: Ipswich

Legal Subject: Extension of Council sewerage scheme; entry to land; order for entry to land

CASE FACTS

1. Council seeks advice in relation to the construction of a sewerage extension through private properties where some owners have withheld consent.
2. Council proposes to construct a new sewer to service properties in order to obviate a perceived health risk. The target properties are less than 1500m² in area and have existing residences serviced by on-site treatment systems. The on-site systems are now considered inadequate due to the limited area of land available to absorb the effluent generated. The development of these un-sewered lots was approved by the previous Moreton Shire Council prior to its amalgamation with Ipswich City Council.
3. In order to service the target properties, the proposed sewerage extension must also pass incidentally through un-sewered large lot properties. This is due to the physical constraints of the topography and the location of existing sewerage infrastructure. These large lots have adequate on-site sewerage systems.
4. Council has written to the owners of all the potentially affected properties, seeking their permission to construct the proposed sewer through their properties. No easement has been sought in the interests of minimising the cost of the project. Once constructed, Council intends to rely on its rights under the *Local Government Act* and its sewerage by-laws to maintain and protect the sewer.
5. Several owners, of both target and incidental properties, have refused to consent to construction of the proposed sewer. Can Council use section 1063 of the *Local Government Act* to obtain an order to gain access to the target and incidental properties for construction? Is there power under another act, apart from the *Acquisition of Land Act*, to gain access for construction without the owners' consent?

OPINION

1. Section 1070 (1) of the *Local Government Act* permits an employee or agent of Council to enter land if the entry is necessary for the exercise for Councils jurisdiction including, for example, carrying facilities into, through, across or under the land. However, section 1070(2) says that such entry can only occur if, so far as is relevant for the purposes of this advice, the owner and occupier agree to the entry or the entry is made under an order obtained pursuant to section 1063.
2. Clearly, section 1070 contemplates Council making an application for an order pursuant to section 1063.

Accordingly, and in response to your primary question, Council can utilise section 1063 to obtain an order to gain access for the purposes of construction of the relevant infrastructure.

3. However, regardless of whether the entry is made with the owner and occupiers agreement or by court order, Council remains liable to compensate any person who incurs loss or damage because of such entry. Council's liability for compensation is found in section 1071. Where Council facilities are installed using the statutory powers of entry under section 1070 (and, if necessary, section 1063), but Council declines to take any easements in relation to the area within which the infrastructure is laid, Council is potentially liable to a new compensation claim under section 1071 each time it does anything in relation to the facilities it has installed that causes disturbance to the owners' properties. In addition, for matters other than compensation, any legal dispute between Council and the owner is left to be determined in accordance with common law principles. This is because exercise of the statutory power of entry involves no agreement between the parties, and therefore no agreed terms and conditions to govern the ongoing interaction between Council's rights and the land owners' rights.

4. It is for this reason that it is our consistent advice to Councils that it always obtains easements over land that will contain its infrastructure. The advantages of obtaining an easement include that it is registered on the title and runs with the land. The easement terms will invariably confer a much broader power of entry than that conferred under section 1070. The easement may also contain agreed terms and conditions governing matters such as the respective responsibilities of the parties in relation to damage or disturbance to the land when Council exercises its rights. In this respect, an easement will generally provide that there is no compensation payable for Council carrying out work within the easement provided that any disturbance to the land is reinstated as near as is practicable to its previous state. Finally, an easement will address the issue of compensation (for the loss, if any, to the value of the land) on a once and for all basis.

5. Finally in response to your secondary question, there is no other legislation that will permit Council to gain access for construction without the owners' consent.