

Unnamed public road off Tom's Court – proposed authorisations pursuant to sections 221 and 222 of the *Local Government Act 1999 (SA)*

Strategic Alignment - Strong Economies

2020/01605

Confidential - s 90(3) (h) legal advice

ITEM 7.2 08/12/2020

The Committee

Program Contact:

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Approving Officer:

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EXECUTIVE SUMMARY

The Karidis Corporation (Karidis) are nearing completion of a 14-storey mixed use development at 20 Tom's Court.

The major feature of the development will be the "Tom's Court Hotel". Primary access to the development will be from Tom's Court, a public road.

Karidis would like to create secondary, higher profile, access to the development from King William Street, through one of its other properties. This access would traverse across the northern portion of an unnamed public road (that runs off Tom's Court) between the two Karidis properties.

The amenity of the unnamed public road is poor and Karidis have therefore applied to Council for:

1. an authorisation to construct a visual screen on the northern portion of the public road; and
2. a permit to exclusively occupy that portion of public road.

Public consultation was sought on the proposed authorisation, in accordance with Council's Community Consultation Policy.

Four objections were received, three on behalf of the owner of the adjacent property (Winfang Pty Ltd) and one from their lessee (Allneeds Computers).

In assessing whether to provide the authorisation, Council is required to consider specific matters, which include whether or not the proposed authorisation, if granted, would result in the road being "unduly obstructed".

Legal advice obtained states that the authorisation would result in the road being "unduly obstructed", due to its impact on the current access from the road to the property owned by Winfang Pty Ltd, which would, in turn, result in the number of parking spaces on Winfang's property being reduced.

This impact does not preclude Council from granting the authorisation if Council is satisfied that there are other considerations that warrant this. However, there appears to be none. As such, a decision to provide the authorisation could be seen as choosing the business interests of one property owner (and ratepayer) over the business interests of another property owner (and ratepayer).

The Administration therefore recommends that Council should not grant the authorisation and permit requested by Karidis.

Consideration in confidence is recommended because the Report includes legal advice provided to Council.

The following recommendation will be presented to Council on 15 December 2020 for consideration

That Council:

1. Does not authorise Karidis Corporation to:
 - 1.1. Pursuant to section 221 of the *Local Government Act 1999 (SA)*, build a structure on the unnamed public road lettered "A" on Figure 1 in Attachment A to Item # on the Agenda for the meeting of the Council held on 15 December 2020.

- 1.2. Pursuant to sections 222(1) and 222(2) of the *Local Government Act 1999 (SA)*, exclusively occupy (for a business purpose) the unnamed public road lettered "A" on Figure 1 in Attachment A to Item # on the Agenda for the meeting of the Council held on 15 December 2020.
 2. In accordance with Section 91(7) and (9) of the *Local Government Act 1999 (SA)* and because Item # [Unnamed public road off Tom's Court] listed on the Agenda for the meeting of the Council held on 15 December 2020 was received, discussed and considered in confidence pursuant to Section 90(3) (h) of the *Local Government Act 1999 (SA)*, this meeting of the Council do order that:
 - 2.1 The resolution and Figure 1 in Attachment A become public information and included in the Minutes of the Council meeting.
 - 2.2 The report, the discussion and any other associated information submitted to this meeting and the Minutes of this meeting in relation to the matter remain confidential and not available for public inspection until 31 December 2027.
 - 2.3 The confidentiality of the matter be reviewed in December 2021.
 - 2.4 The Chief Executive Officer be delegated the authority to review and revoke all or part of the order herein and directed to present a report containing the Item for which the confidentiality order has been revoked.
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IMPLICATIONS AND FINANCIALS

<p>City of Adelaide 2020-2024 Strategic Plan</p>	<p>Strategic Alignment – Strong Economies</p> <p>If Council authorises Karidis Corporation to construct a screen on the portion of the unnamed public road lettered “A” on Figure 1 in Attachment A and exclusively occupy that land (pursuant to sections 221 and 222 of the <i>Local Government Act 1999 (SA)</i>), it will provide economic benefit to Karidis.</p> <p>However, it would be at the direct economic expense of an adjoining property owner, Winfang Pty Ltd, (John and Helen Karafotias), and their tenant (Allneeds Computers) because they would lose at least one of their four existing car parks. Winfang Pty Ltd would also lose future development opportunities.</p>
<p>Policy</p>	<p>The authorisation requested by Karidis Corporation pursuant to sections 221 of the <i>Local Government Act 1999 (SA)</i> to construct a screen on a public road is inconsistent with Council’s Encroachment Policy. However, this alone, does not prohibit Council from authorising the screen.</p>
<p>Consultation</p>	<p>The Administration consulted with the community in accordance with the requirements of Council’s Community Consultation Policy. Four objections were received, three on behalf of the owner (Winfang Pty Ltd) and one from their tenant (Allneeds Computers).</p>
<p>Resource</p>	<p>Legal advice has been sought on the matter. Extensive internal staff resources have also been engaged to deal with this matter to ensure a thorough assessment of the application.</p>
<p>Risk / Legal / Legislative</p>	<p>Council, if it chooses, may authorise Karidis Corporation to construct a screen on the portion of unnamed public road lettered “A” on Attachment A, pursuant to sections 221 and 222 of the <i>Local Government Act 1999 (SA)</i>.</p> <p>In relation to the risk to Council of doing so, the legal advice from Kelledy Jones lawyers is that: -</p> <p><i>“a decision to grant the Proposal, will not, of itself, give rise to a civil cause of action against the Council for any resultant loss that might be alleged to be suffered by the owners or occupiers of the Land through a reduction in car park spaces. That said, it is not possible to prevent a person who is aggrieved by the Council’s decision (this could be either Karidis or Karafotias) in respect of the Proposal from seeking to challenge it, whether by way of application for internal review or complaint to the Ombudsman or, even, by way of judicial review proceedings”.</i></p> <p>The risk of a successful challenge can be mitigated where Council can demonstrate proper consideration of the application on its merits in accordance with the applicable legislative requirements. This report serves to address those requirements.</p> <p>Further, if Council is minded to grant the authorisation and permit then there is the potential for risk concerns to be mitigated by the imposition of conditions.</p>
<p>Opportunities</p>	<p>Not as a result of this report</p>
<p>20/21 Budget Allocation</p>	<p>Not as a result of this report</p>
<p>Proposed 21/22 Budget Allocation</p>	<p>Not as a result of this report</p>
<p>Life of Project, Service, Initiative or (Expectancy of) Asset</p>	<p>Not as a result of this report</p>
<p>20/21 Budget Reconsideration (if applicable)</p>	<p>Not as a result of this report</p>
<p>Ongoing Costs (e.g. maintenance cost)</p>	<p>Not as a result of this report</p>

Other Funding Sources	Not as a result of this report
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GROUNDS AND BASIS FOR CONSIDERATION IN CONFIDENCE

Grounds

Section 90(3) (h) of the *Local Government Act 1999 (SA)*

(h) Legal advice

Basis

This Item is confidential because it includes legal advice given to Council to support Council in assessing the application and associated legal risks.

The disclosure of information in this report would reasonably be expected to prejudice Council's position if there were future legal challenges.

DISCUSSION

1. The Karidis family (**Karidis**), through a series of related companies, is the owner of the land coloured yellow on Figure 2 in **Attachment A**.
2. The Karafotias family (**Karafotias**), through a series of related companies, is the owner of the land coloured green on Figure 2 in **Attachment A**.
3. On 15 December 2016 the State Commission Assessment Panel (SCAP) gave Development Plan Consent (S10/30/2016) for Karidis to construct a 31-storey mixed use building (comprising retail, office and residential uses) on the land hatched on Figure 3 in **Attachment A**.
4. The proposed development can be seen in these images (Link 1 view [here](#)) from the application. The Development Plan Consent for S10/30/2016 has now lapsed.
5. On 12 July 2018 SCAP gave Development Plan Consent (S10/32/2018) for Karidis to construct a 14-storey mixed use building (comprising café, hotel and residential/serviced apartments) on the land hatched on Figure 4 in **Attachment A**.
6. The development will mostly comprise the hotel, which is to be named the “Tom’s Court Hotel”. The development, seen in these images (Link 2 view [here](#)) from the application, is almost complete. The primary access for the proposed development will be from Tom’s Court.
7. Notwithstanding this access arrangement, Karidis recognises that access to the Tom’s Court Hotel would be greatly enhanced if it was from a major road and therefore proposes to create a pedestrian link from King William Street to the Hotel.
8. The pedestrian link is shown as a red dashed line on Figure 5 in **Attachment A**.
9. The pedestrian link would traverse across the northern end of an unnamed public road. That portion of the public road is lettered “A” on Figure 5 in **Attachment A**.
10. On 26 March 2020, Karidis lodged a development application (DA/171/2020) to create the pedestrian link. The land on which DA/171/2020 would occur is hatched on Figure 6 in **Attachment A**. DA/171/2020 proposed changing the use of the existing building from a shop to a café, with ancillary gym and two office meeting rooms, as can be seen in this plan (Link 3 view [here](#)) from the application.
11. The pedestrian link, along with the portion of public road required for the pedestrian link (the **Road**) is also shown on the plan (Link 3 view [here](#)) (highlighted in yellow and lettered “A”).
12. The amenity of the unnamed public road (through which the pedestrian link traverses) is poor, as can be seen in this photo (Link 4 view [here](#)) because its primary function is a service lane for businesses fronting King William Street. As such, DA/171/2020 proposed the construction of a visual screen (the **Screen**) on the Road in order to improve the customer experience for the patrons of the Tom’s Court Hotel.
13. The Screen can be seen on this plan from DA/171/2020 (Link 3 view [here](#)). The Screen would exclude members of the public from the Road, thereby enabling it to be exclusively occupied by Karidis in connection with the operation of the Tom’s Court Hotel.
14. Council must determine whether it agrees to grant an authorisation to facilitate the construction of the Screen. It must do so in two capacities:
 - 14.1. As the ‘relevant authority’ under the *Development Act 1993 (SA)*; and
 - 14.2. As the owner of the road under the *Local Government Act 1999 (SA) (LG Act)*.
15. The Administration has advised Karidis that Council’s approval under the *Development Act 1993 (SA)* will be considered if Council agrees to grant an authorisation and permit for the Screen pursuant to the LG Act (as contemplated in this Report).
16. There are two sections of the LG Act relevant to the authorisation of the Screen:
 - 16.1. Section 221(2)(b) of the LG Act states that a person must not erect a structure on a public road without the council’s authorisation.
 - 16.2. Section 222 of the LG Act states that a person must not use a public road for a business purpose unless authorised to do so by the council by way of a permit.
17. Karidis has requested that Council grant it the authorisations and permit required in respect of the Screen pursuant to sections 221 and 222 of the LG Act.
18. Section 223(1) of the LG Act states, in part, that:
 - (1) *If a council proposes to grant an authorisation or permit:*

(a) *that would result in any part of a road being fenced, enclosed or partitioned so as to impede the passage of traffic to a material degree.*

the council must, before granting the authorisation or permit, follow the relevant steps set out in its public consultation policy.

19. The proposal from Karidis to erect the Screen on the Road has been assessed and was deemed, consistent with legal advice, to be a proposal that would, if granted, impede the passage of traffic to a 'material degree'.
20. Accordingly, the Administration followed the relevant steps in Council's 'Community Consultation Policy' in relation to the proposal to grant an authorisation and permit pursuant to sections 221 and 222 of the LG Act. The community consultation concluded on 19 November 2020. The Administration received four objections to the proposal to authorise Karidis to erect the Screen:
 - 20.1. Objection 1 (Link 5 view [here](#)) - from John Karafotias (a Director of Winfang Pty Ltd (**Winfang**), the owner of the land hatched on Figure 7 in **Attachment A**).
 - 20.2. Objection 2 (Link 6 view [here](#)) - from Helen Karafotias (a Director of Winfang).
 - 20.3. Objection 3 (Link 7 view [here](#)) - from Anderson Lawyers (for Winfang).
 - 20.4. Objection 4 (Link 8 view [here](#)) - from Bill Kapetanios (All Needs Computers (Winfang's tenant)).
21. Section 221(4) of the LG Act states that:
 - (4) *Before the council authorises the erection or installation of a structure under subsection (2)(b), the council must give consideration to whether the structure will:*
 - (a) *unduly obstruct the use of the road; or*
 - (b) *unduly interfere with the construction of the road; or*
 - (c) *have an adverse effect on road safety.*
22. Each of these considerations have been taken into account in assessing the proposal for the Screen.
23. In relation to Council's obligation pursuant to section 221(4)(b) of the LG Act to consider whether the Screen will "*unduly interfere with the construction of the road*", any interference can be adequately mitigated by way of the imposition of a condition upon any authorisation, that requires Karidis to reinstate the road to its original condition when the authorisation lapsed (or was revoked).
24. In relation to Council's obligation pursuant to section 221(4)(c) of the LG Act to consider whether the Screen will "*have an adverse effect on road safety*" the Administration's traffic engineers have advised that there would be no substantial effect on road safety if Council authorised the Screen.
25. In relation to Council's obligation pursuant to section 221(4)(a) of the LG Act to consider whether the Screen will "unduly obstruct" the use of the Road, the potential loss of access from the Road to the adjacent land and, in turn, the parking space(s) on Winfang's property is a relevant factor.
26. In order to demonstrate the impacts for car parking if Council authorised the Screen, Karidis engaged Tonkin to undertake a 'turn path' assessment. Tonkin's Report, dated 3 August 2020, is shown at Link 9 view [here](#).
27. Council's traffic engineers assessed Tonkin's Report and discovered that it was relying partly on land that was currently occupied by a building (steps) and was therefore based on inaccurate assumptions.
28. The Administration invited Karidis to provide a revised 'turn path' assessment. Tonkin's revised Report (Link 10 view [here](#)) seeks to demonstrate that three standard sized vehicles (B85) can be parked on Winfang's property.
29. Council's traffic engineers reviewed Tonkin's revised Report and provided their comments in an Internal Memo (Link 11 view [here](#)). In summary, the review concluded that, in relation to the car park layout proposed by Tonkin:-
 - 29.1. Winfang's property currently has four marked car parks at 90 degrees to the unnamed public road – three for standard size vehicles (B85) and one for a smaller vehicle - meaning at least one car park would be lost if Council authorised the Screen (given Tonkin can (at best) demonstrate only three vehicles can be parked on Winfang's property).
 - 29.2. The distance between manoeuvring vehicles and other parked vehicles and structures being significantly less than the Australian Standard (AS/NZS 2890), thereby increasing the risk of damage to those vehicles and structures.
 - 29.3. Manoeuvring out of two of the car parks would require a six-point turn (also increasing the risk of damage to vehicles and structures).

- 29.4 A vehicle having to be taken out of the car parking area in order for another vehicle to be able to exit its park i.e. having to “shuffle” vehicles.
30. Karidis also engaged an eminent Queens Counsel (QC) - Mr Brian Hayes - to provide advice (Link 12 view [here](#)) on Karidis’ request for Council to authorise the Screen.
31. The QC provided two primary arguments why the Screen should be authorised by Council:
- 31.1. Winfang will not be impeded in any way from continuing to use its site to its fullest current extent; and
- 31.2. There is no common law right to access one’s land from every point along the boundary of a public road.
32. The Administration sought legal advice from Kelledy Jones Lawyers (Link 13 view [here](#)) on the proposal for Council to authorise the Screen.
33. In relation to the position expressed by the QC that Winfang would not be impeded in any way from continuing to use its site to its fullest extent, Kelledy Jones state (in part) that:
- “both the engineering reports from Tonkin and the Council evidence that access to the Land will be impeded if the Proposal were progressed as the occupiers would not be able to continue using the existing car parking spaces on the Land. The assertion in Mr Haye’s advice to the contrary does not appear to be supported by the available engineering evidence.”*
34. In relation to the position expressed by the QC that there is no common law right to access one’s land from every point along the boundary of a public road, Kelledy Jones state (in part) that:
- “There is no dispute that a person does not enjoy a common law right to the person’s land from every point on its boundary with a public road. The issue in this case, however, is that owners and occupiers of the Land currently enjoy this benefit and the Proposal, if progressed, will directly impact the manner in which the Land is currently used for car parking.”*
35. In relation to Council’s obligation under section 221(4) of the LG Act to consider if the Screen will “unduly obstruct” the public road, Kelledy Jones state (in part) that:
- “In my opinion, the concerns raised in the objections regarding the real or potential adverse impacts to existing parking arrangements on the Land, as confirmed by the Council’s traffic engineers, constitute reasonable grounds to refuse the Proposal.”*
- and
- “It is reasonable, on the evidence presented, for the Council to find that the Proposal would unduly obstruct the use of the Road.”*
36. Kelledy Jones go on to state, however, that:
- “... whether or not the Council considers that this impact, alone, justifies the Proposal being refused, turns on its assessment of all relevant considerations including, for example, whether the Proposal aligns with any relevant strategic objectives of the Council.”*
37. In relation to what considerations might be “relevant”, this should include Council’s Strategic Plan objectives and its policies.
38. In relation to policies, Council’s Encroachment Policy “provides the basis for Council’s assessment and decision making on encroachments” (an “encroachment” being a structure built on a public road). The Encroachment Policy lists encroachments that are “unacceptable” and therefore “not allowed” and this includes a:
- “Floor area encroachment including habitable floor or occupiable floor area of a building, enclosed balconies and structures that occupy a public road, airspace above a public road and/or land beneath a public road.”*
39. Notwithstanding this, Council has, prior to its adoption of the current Encroachment Policy, authorised structures contrary to this current Policy position where it has considered this to be appropriate.
40. Council may in this instance, if it chooses, authorise structures contrary to its current Policy where it considers there are good reasons to depart from the Policy.
41. In relation to what other considerations might be relevant, Outcome 2 in Council’s Strategic Plan 2020-2024 is “Strong Economies”. It is acknowledged that authorising Karidis to construct the Screen would assist them deliver a major development for the City. However, it must also be acknowledged that the Screen’s purpose is simply to provide improved amenity for people accessing the development from King William Street and is not critical to the development. To that end, the advice from Kelledy Jones states that:-

“the hotel is not contingent on the Proposal being granted – the hotel could still operate, and its customers/visitors could continue to access the hotel via the Road regardless of whether or not the screen is installed.”

42. In relation to “Strong Economies” it is also worth noting that, as stated in the advice from Kelledy Jones:

“the correspondence from Winfang about the impact of the Proposal on future development of the Land, is relevant insofar as it would result in an impediment to economic development by an adjoining landowner”.

Summary:

43. Granting the authorisation and permit requested by Karidis would assist them with a major development (noting that the lack of authorisation would not prevent the development from occurring - the Screen would simply improve the amenity for guests/visitors).
44. Granting the authorisation and permit would, however, be at the direct expense of an adjoining property owner (Winfang Pty Ltd) and their tenant (Allneeds Computers) who would, at the very least, lose a minimum of one out of their four existing car parks and have impeded access to their land that would require them to shuffle vehicles. The Administration therefore recommends Council does not grant the authorisation and permit requested by Karidis.

DATA AND SUPPORTING INFORMATION

- Link 1** – images of proposed development in S10/30/2016.
- Link 2** – images of the proposed development in S10/32/2018.
- Link 3** – plan from DA/171/2020.
- Link 4** – View looking south along the unnamed public road.
- Link 5** – objection from John Karafotias (Director of Winfang Pty Ltd).
- Link 6** – objection from Helen Karafotias (Director of Winfang Pty Ltd).
- Link 7** – objection from Anderson Lawyers (on behalf of Winfang Pty Ltd).
- Link 8** – objection from Bill Kapetanos (Allneeds Computers).
- Link 9** – turn path assessment by Tonkin – dated 3 August 2020.
- Link 10** – (Revised) turn path assessment by Tonkin.
- Link 11** – review of Tonkin turn path assessment by council traffic engineers.
- Link 12** – legal advice provided to Karidis by Mr Brian Hayes QC.
- Link 13** – legal advice provided to council by Kelledy Jones.

ATTACHMENTS

Attachment A – Maps, including one showing the portion of public road lettered **“A”**

- END OF REPORT

Figure 1

Legend

Public Road



Legend

-  Public Road
-  Karidis
-  Karafotias

Figure 2

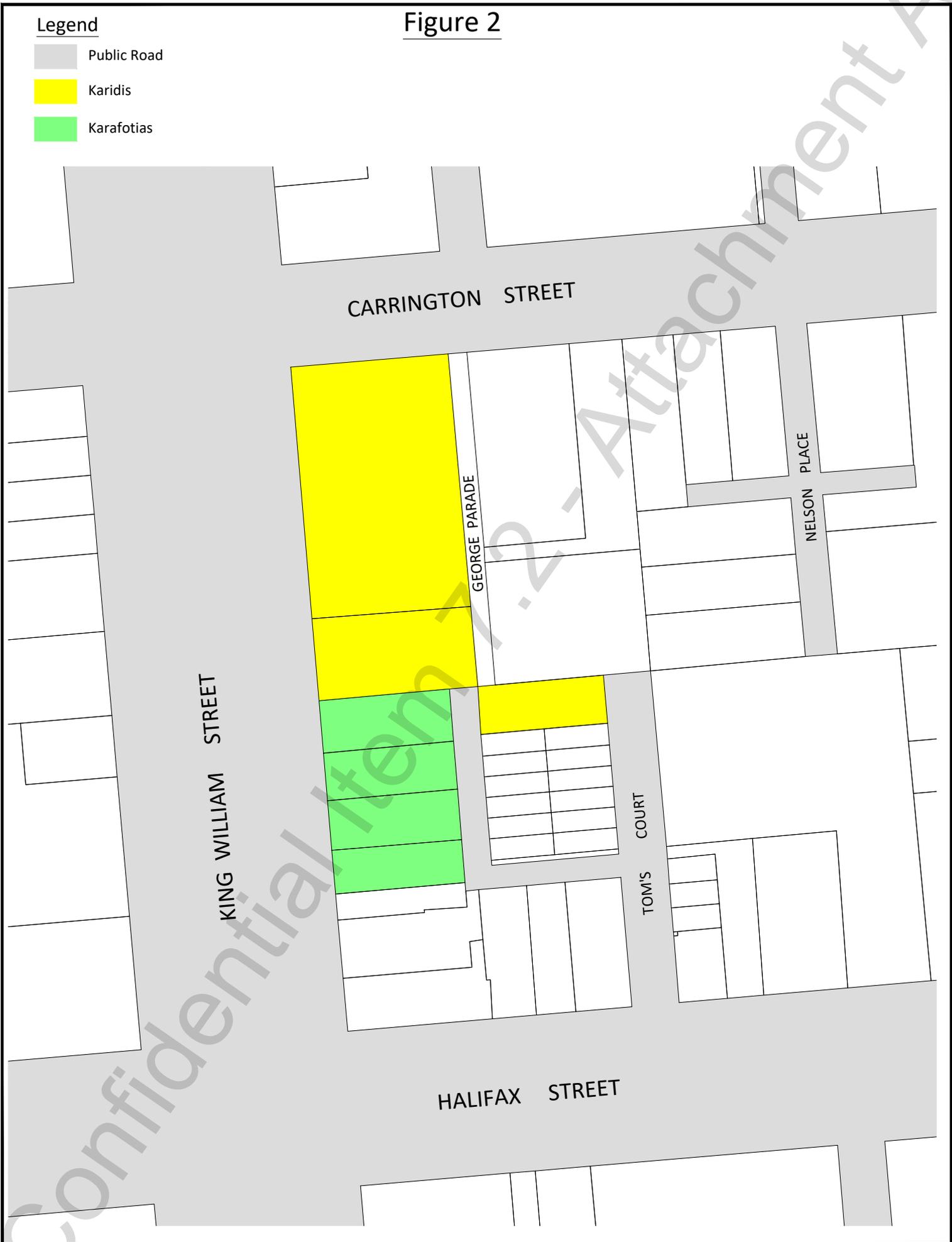


Figure 3

Legend

- Public Road
- Karidis - S10/30/2016 - 31 storey mixed use development
- Karafotias

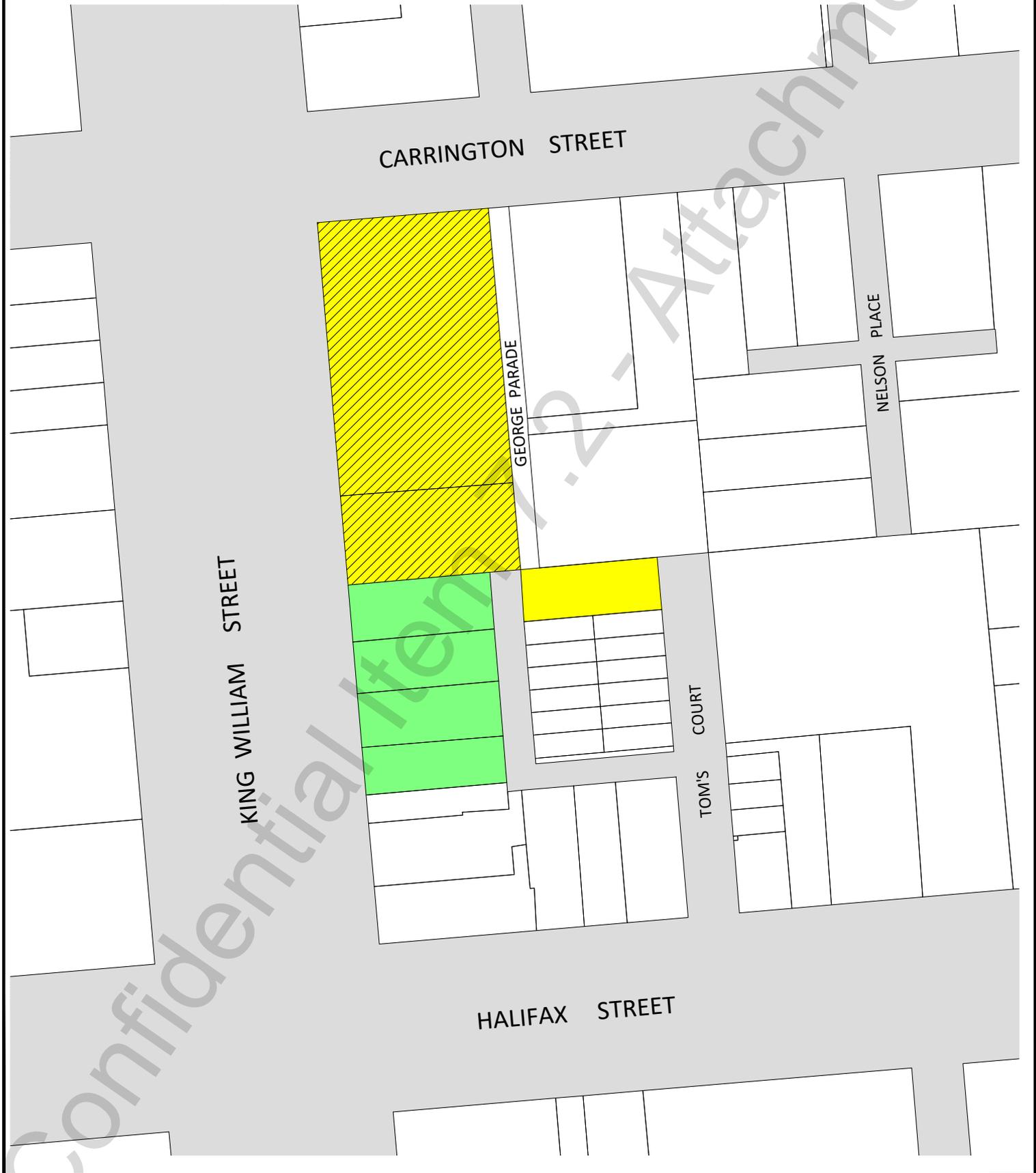
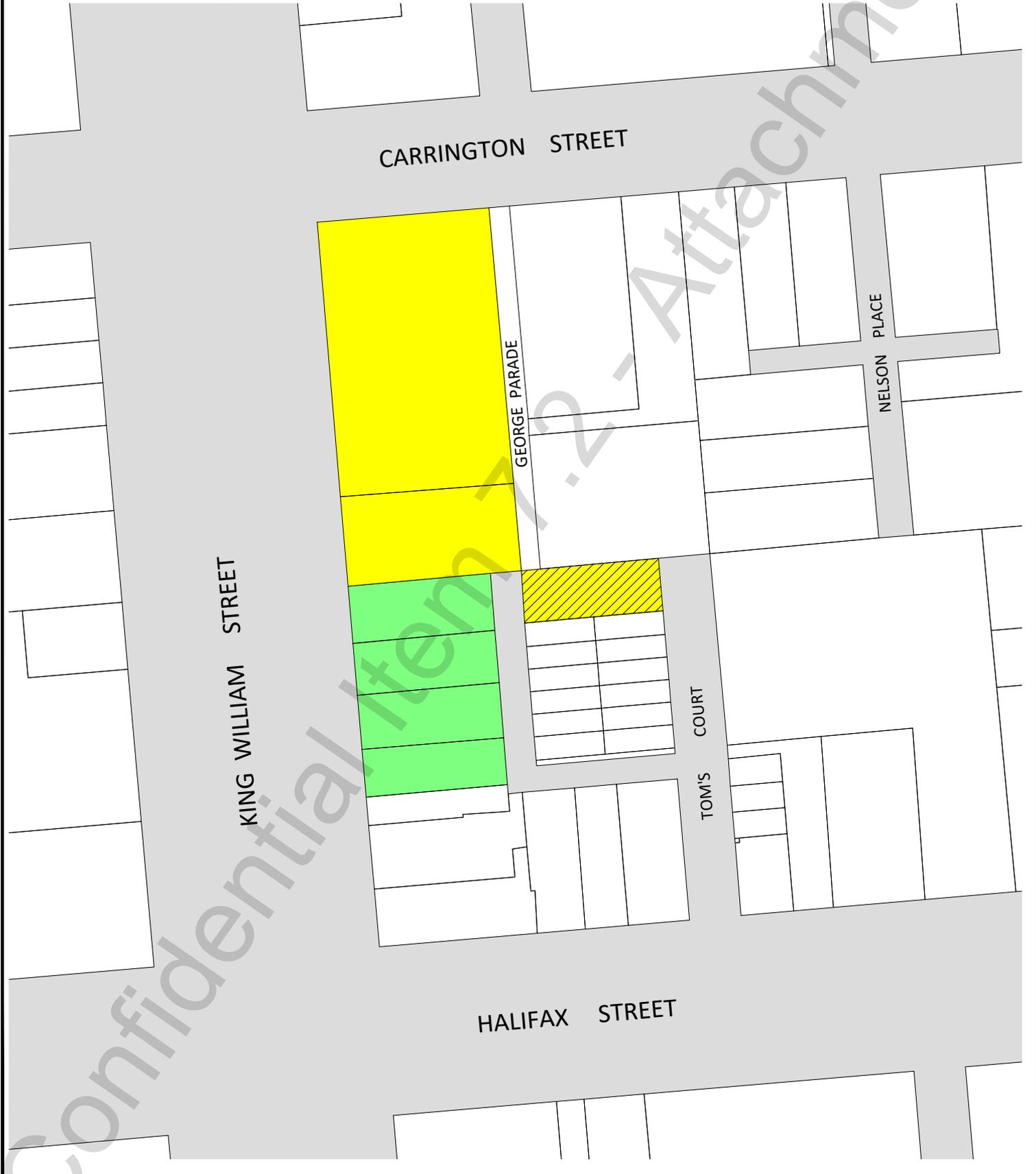


Figure 4

Legend

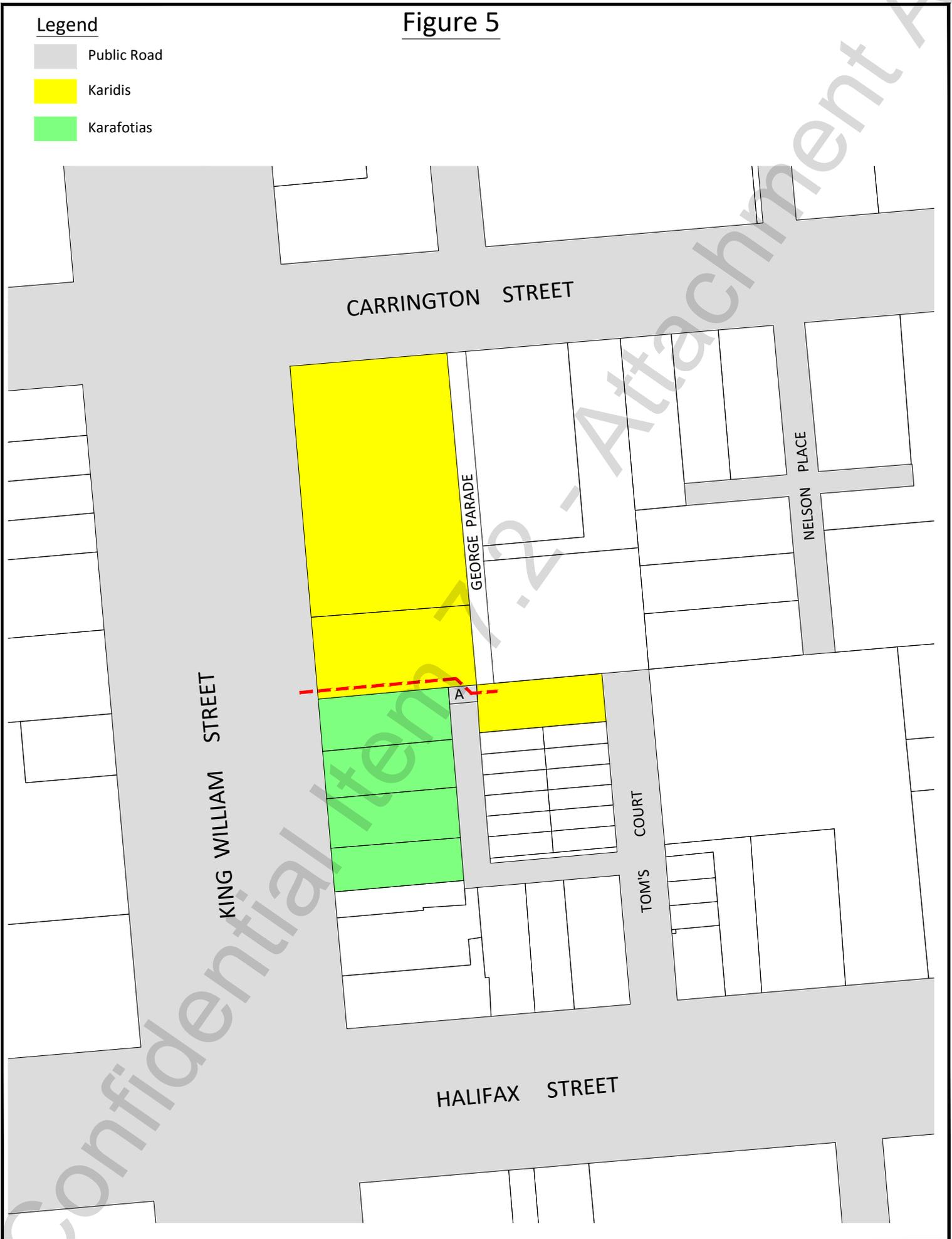
- Public Road
- Karidis - S10/32/2018 - 14 storey mixed use development
- Karafotias



Legend

-  Public Road
-  Karidis
-  Karafotias

Figure 5



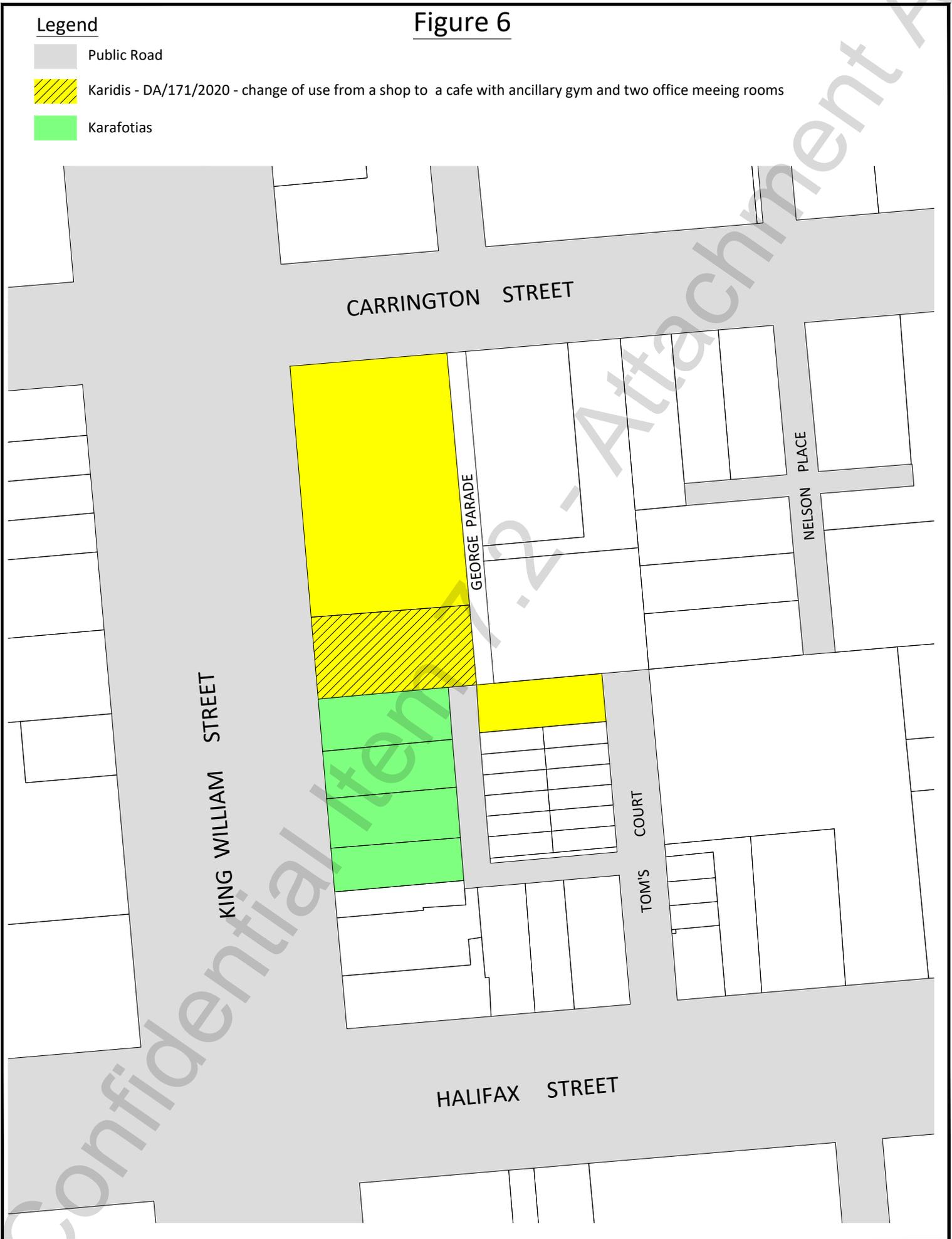
Legend

Public Road

Karidis - DA/171/2020 - change of use from a shop to a cafe with ancillary gym and two office meeing rooms

Karafotias

Figure 6



Legend

-  Public Road
-  Karidis
-  Karafotias

Figure 7

