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11 June 2020

Kenlie Williams
President
Newport Action Group

Dear Kenlie

**RESPONSE TO JOINT REPORTS OF TRAFFIC EXPERTS
PLANNING & ENVIRONMENT COURT, QUEENSLAND APPEAL NO. 3331 OF 2019**

We act for the Body Corporate for Newport Harbour CTS 26444, who own the land immediately adjoining the northern boundary of the Appellant Developer's land. We have been instructed by our client's Body Corporate Committee to present our client's comments and concerns in relation to the 3 traffic options proposed in the Joint Reports by the Traffic Experts in this matter ("the Traffic Reports").

1. GENERAL COMMENTS

a. No Consultation, Discussion, Written Notification

It is worth noting that the Appellant Developer has not once, during the whole of the development application and appeal process, formally consulted with, discussed, written to, advised or sought approval or input from the Body Corporate for Newport Harbour CTS 26444 for any proposed or potential traffic modifications /options that would affect our client's rights over the access easements.

b. Shared Access Easement Referred to as a "Road"

The Traffic Reports frequently refer to the shared access easement as a "road", which implies it is on public land with all the legal implications of what goes with being a "public road". There is even discussion about "kerbside on street car parking" (26 (d) p9).

In reality, this shared access easement "driveway" is on **private land** and is not open to the public. It is made up of a series of reciprocal access easements. All parties have identical reciprocal access rights over these easements. This private driveway is not subject to Local Council or State road rules/regulations. The associated Easement Documents set out the reciprocal rights and obligations over these easements. The most pertinent appear to be specifically Clause 2. Grant of Easement re 2.1 and Clause 5 Obstruction, which we comment on further below.

DIRECTORS Andrew C Stewart BA, LLB (Hons) | Dick Burr LLB (Hons) | Dean Mayr BAgEc, LLB
CONVEYANCING MANAGER Karen Humphreys JP (Qual)

c. Access to and Exit from the Body Corporate's Land

It appears that no consideration has been given in the Traffic Reports for safety and sight lines for vehicles entering and exiting Gate 1 on our client's land. There has been no assessment undertaken on how Options 1, 2, or 3 would impact the residents of the Newport Harbour Community Titles Scheme and our client's view is that the various option proposals would be very disruptive and, potentially, extremely dangerous.

d. Pedestrian Safety

There are genuine concerns for the safety of pedestrians, and in particular for children, using the proposed walkway. Cars exiting driveways from Lots 1 to 10 will not be able to clearly see pedestrians or cyclists on the walkway because of the 1.2m fencing constructed along the boundary of the walkway and Lots to 10. Normal Council safety distances and set backs have not been adopted or adhered to.

e. Appellant Developer's Lost Opportunity for More Viable Solution

Lots 1 to 10 on the western side of the access easement driveway was once wholly owned by the Appellant Developer. In choosing to subdivide its land to create and sell Lots 1 to 10, now comprising the Marina Avenue CTS 50717, the Appellant Developer maximised its financial returns on this part of its land but choked any future possibility of the access driveway being widened westwards. In short, the current access restriction is a problem of the Appellant Developer's own making and it is not our client's responsibility to resolve the issue.

f. Impact and Cost of any Proposed Changes

The Traffic Reports seem to assume that our client might be prepared to support one or more of the traffic solutions. Each solution seriously impacts our client's existing rights and, if taken forward, would result in a significant cost burden to our client to ensure our client's rights were upheld and protected.

g. Existing Easements

By way of background, our client has the benefit or burden of the following 7 easements on its land:

- i. **Easement B on RP182073 (Easement in Gross)** – this is an access easement, highlighted blue and marked EMT B on SP290319 attached to this letter, approximately 4 metres wide but splaying to 8 metres wide at the junction with Griffith Road. This easement burdens our client's Common Property and other land in favour of Council. The Council has a right of way with or without vehicles over the easement area, which overlays Easement Area L, commented on below, and includes a small portion on the western side of the driveway centreline and a thin strip of our client's grass verge. Council can exercise its rights under this easement in the normal course of its duty.
- ii. **Easement K on SP105124** – a 2m wide strip fronting Griffith Road on the immediately adjacent property at 156A Griffith Road benefitting our client's Common Property, but this easement has no effect on the matters commented on in the Traffic Reports;
- iii. **Easement C on RP182082** – an access easement comprising roughly the western half of the driveway benefitting our client and burdening the

proposed marina development land (Lot 21 on SP297765) owned by JKindred & DB Pty Ltd;

- iv. **Easement F on SP105124** – the roundabout easement on the north western end of the driveway benefitting our client and burdening the proposed marina development land (Lot 21 on SP297765) owned by JKindred & DB Pty Ltd;
- v. **Easement D on SP105124** - the access easement comprising roughly the eastern half of the driveway at the Griffith Road end benefitting our client and burdening the adjacent property at 156A Griffith Road (Lot 34 on SP105124) owned by JKindred & DB Pty Ltd;
- vi. **Easement E on SP105124** – the roundabout easement area on the north eastern end of the driveway benefitting JKindred & DB Pty Ltd's land and burdening our client's land and shown highlighted yellow on the annexed plans; and
- vii. **Easement L on SP105124** – the access easement comprising roughly the eastern half of the driveway at its northern end only benefitting JKindred & DB Pty Ltd's land and burdening our client's land and shown highlighted purple on the annexed plans.

The Easements of most relevance to the matters raised in the Traffic Reports are Easements E and L and the reciprocal equivalents, Easements F & C. They each provide in clause 5:

"5.1 Subject to clause 5.2, a Party shall not obstruct or interfere or allow any obstruction or interference with the rights granted to the other Party by this document unless permitted in writing by the other Party and only to the extent permitted and upon such terms and conditions as the other Party stipulates.

5.2 During the period that the Grantee is exercising the rights under clause 6 [which relates to the construction of a roundabout], clause 5.1 shall not apply to Easement E /Easement F [as appropriate]..."

Easements E and F also contemplate the future construction of a roundabout and not a road widening exercise on our client's land. For ease of reference, we enclose with this letter copies of the Easements.

We now comment on each of the Options set out in the Traffic Reports as follows:

2. OPTION 1

The assumption that the Appellant Developer has the right to construct any works (proposed 1.9m wide concrete walkway, and new kerbing across the roundabout) on our client's Common Property or easement is refuted. Our client does not approve of or give permission for any new construction works on Newport Harbour's Common Property (Ref. grassed area 28. P7) or easements. nor on any of the other easements of which it has reciprocal rights of way over (the shared access easement driveway) and neither does it approve of any narrowing of the access easement.

3. OPTION 2

Our client wishes to bring to your attention that the paved surface of the driveway is not

the full width of the combined road access easements. The easement plans show that Newport Harbour's Easement L (and Easement B which overlays it) is around 4 m wide and Easement C (the western side, the 10 dwellings at 160 Griffith Rd) is around 4.5m wide, meaning a total easement width of about 8.5m. **The greater part of the unpaved easement space is on the western side of the driveway.**

Any concrete pathway would need to be constructed on non-easement land. Our client notes that the Appellant Developer has constructed concrete kerbing and driveways on the easement driveway without our client's approval. If additional easement space is required and our client's right over the full width of the access easement is to be maintained then it would appear that there is not enough space to construct this walkway. The 10 lots along the western edge of the access easement directly abut the easement and any suggested modification to the easement would also require the agreement of the individual lot owners. It is not for the Appellant Developer to impose this arrangement.

4. OPTION 3

a. Use of Roundabout Easements E and F as Key Entrance Point

There appears to be a total disregard for our client's reciprocal rights over the easement reserved roundabout land. These rights are enshrined clearly in both Easements E and F. Our client will not permit the roundabout area to be used as a private entry driveway or as part of a permanent traffic, parking or manoeuvring proposal or constructed in a manner which interferes with our client's rights.

It is important to note our client's rights under clause 6 of Easements E and F, which provide as follows:

- "6.1 Subject to clause 6.4 the Grantee may construct the roundabout at any time if they comply with this clause 6.*
- 6.2 All costs associated with the construction of the Roundabout and any incidental costs are to be borne by the Grantee solely.*
- 6.3 If the Grantee wishes to construct the Roundabout they shall give not less than 1 month's prior written notice to the Grantor of their intention to construct the Roundabout. The notice shall include plans of the proposed Roundabout and the proposed timetable for construction."*

To be clear, Easements E and F reserve rights for either party to give notice to the other requiring the construction of a roundabout on the easement land if and whenever they so wish. **Our client reserves the right to construct a roundabout on this land, which right is incompatible with the Appellant Developer's proposals as set out in the Traffic Reports.**

b. Quasi Land Grab

As submitted, the proposal effectively amounts to the taking over of the roundabout land which denies our client's legal rights under clause 5 of the relevant easements.

c. Parking Bay

It is noted that a 'Waiting Bay' or Parking Bay is slated to be permanently positioned on the easement land. This is unacceptable to our client.

d. Truck Reversal

It is also noted that truck reversing is proposed on the roundabout land. This is

considered extremely dangerous and not acceptable to our client.

e. Disregard for Legal Land Ownership/Easement Rights

Our client notes that the Experts' Traffic Reports fail to consider any impact on our client's legal and easement access rights. Any Traffic solutions should acknowledge the rights of all parties and not propose solutions contrary to existing rights.

In summary, the Body Corporate for the Newport Harbour Community Titles Scheme will not agree with any proposal which:

- modifies the easements, as mentioned in this letter;
- results in any change to our client's use of its land, to any new construction or alteration on the existing easements;
- would affect in any way to our client's rights over the easements; or
- result in the narrowing of the access driveway by construction works on the easements

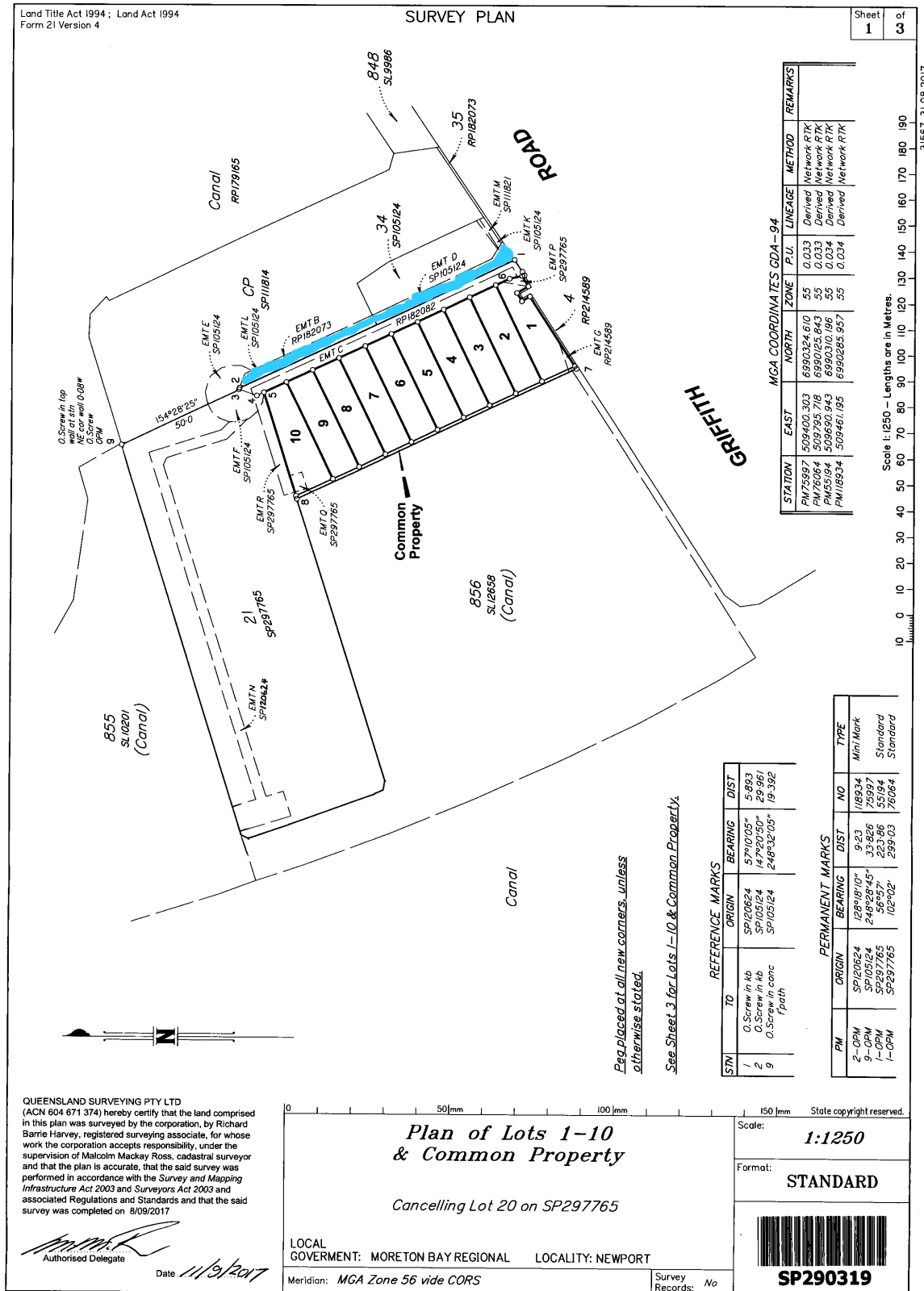
without our client's express prior written agreement or consent.

We trust that due consideration will be given to the above concerns of the residents of the Newport Harbour Community Titles Scheme.

Yours faithfully

STEWART BURR AND MAYR LAWYERS

Dick Burr
Director



Land Title Act 1994 ; Land Act 1994
Form 21 Version 2

Sheet 1 of 1

