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12 October 2004

Attention: - Mr Pat McGlade

Cathedral Place Community Body Corporate
Level 2, The Precinct
12 Browning Street
WEST END QLD 4101

Dear Sir,

Review of Easements etc at Cathedral Place
Our Ref: MFL: FAK: 241284

We refer to your instructions to consider easement areas K, L, M, N, P, Q, R & S as identified on the attached Easement Plans (the "Areas").

We confirm that these Areas, are intended to be divided into car parks and each car park is either for visitor car parking, or for car parks to be for the exclusive use of Lots in the Cathedral Place Scheme.

The Areas are peculiar in that they are located in the common property of different Building Units Plans ("BUP") to the BUPs where Lots to which they are to be allocated for exclusive use are located.

Cathedral Place was developed as a Scheme under the Mixed Use Development Act ("MUD Act"). Under the Scheme there is one Community Property Lot ("CPL"), Lot 4 on MCP 106902 and a number of Community Development Lots, all of which have been redeveloped in subdivision by BUPs. Broadly speaking, what exists now is one CPL and a number of Lots on BUPs and common property on BUPs.

Your instructions include:-

1. to determine whether or not the car parks in the Areas have been validly secured for the benefit of the relevant Lots;
2. if not, determine the strategy to best effect that; and
3. Implement the strategy.

Assumptions

1. The "site" of the MUD Act Scheme for Cathedral Place, is the whole of the land in Plan 106902.
2. All relevant BUPs have registered.
3. The car park allocation plans supplied to us by PMM are correct.
4. The Thoroughfares for the Scheme are wholly within CPL, Lot 4.
5. The Plan of Development provided to us by PMM is correct.
6. By-Laws of the Community Body Corporate and Bodies Corporate of the BUPs, imaged with the Department of Natural Resources, are current.

Executive Summary

Subject to the outcome of conferences with the Titles Office and the Office of the relevant Minister and our assumptions, we consider:-

1. By-Law 25 presently in existence identifies all car parks in the areas and allocates exclusive use of those car parks to Lots in accordance with the car park allocation plans supplied to us by PMM. Under wording of that By-Law, it commences to operate to grant Exclusive Use over a car park in the Areas to a Lot Owner, only when an easement is registered over the Area in favour of the Community Body Corporate ("CBC"). Thus an easement must be registered even though, if the By-law had not been so drafted, an easement was not required. An easement over Areas "R" and "S" has been registered but not over the other Areas.
2. The best strategy seems to be to remove sub-clause (b) from By-Law 25(c) so that an easement is not required to trigger the By-Law. By-Law 25 will then give exclusive use of each of the relevant car parks to the correct Lot. However, the By-Law does not give complete access to the car park. Access to the relevant car parks is partly over thoroughfares in the CPL, Lot 4 and then through common property of parcels in BUPs. Existing easements over common property in favour of CPL, Lot 4, purport to give Lot Owners, the right to use the relevant common property but because the Lot Owners are not parties to the Easement, a Lot Owner may not be entitled to enforce the right. Accordingly, if you are arranging for a new By-Law to delete sub-clause (b) from By-Law 25(c), add into the new By-law a right of access.
3. We shall proceed to prepare the new By-Law including the documents necessary to have the easements approved by the relevant new By-Law adopted and registered.

Detailed Reasoning

1. CBC's Power to make By-Laws

1.1 Issue

An ordinary By-Law, By-Law 25, is recorded in the Department of Natural Resources, Mining and Energy which purports to grant exclusive use over carparks located on the CPL and car parks located on common property of a subsidiary Body Corporate and secured (or to be secured) for the benefit of the CPL by easement. This raises a question of the validity of the By-Law or a similar By-Law, in respect of the Areas.

1.2 Sources of CBC's By-Law making powers

Under the MUD Act, there are a number of sections empowering the CBC to make by-Laws:-

203 Community activities by-laws

The community body corporate may, by comprehensive resolution, make by-laws ("activities by-laws") for the control, management, use or enjoyment of lots (other than community property or precinct property) within the site.

204 Application of community development control by-laws and community activities by-laws

(1) Development control by-laws and activities by-laws--

- (a) may apply to the whole of the site or a particular part of the site; and*
- (b) do not have effect until--*

(i) the Minister approves the by-laws; and

(ii) notification of the Minister's approval is published in the gazette; and

(c) subject to subsection (3), do not affect the operation of any Act or other law.

(2) The development control by-laws and the activities by-laws bind--

- (a) the community body corporate; and*
- (b) the members of the community body corporate; and*
- (c) the proprietors of lots created by the registration of a building units or group titles plan; and*
- (d) a precinct body corporate; and*
- (e) the members of a precinct body corporate; and*
- (f) the proprietors of lots created in a staged use precinct by the registration of a building units or group titles plan; and*
- (g) a mortgagee in possession (whether by the mortgagee or another person) of a lot within the site; and*
- (h) a lessee or occupier of a lot within the site.*

(3) A development control by-law or activity by-law prevails to the extent of any inconsistency with--

- (a) a precinct by-law; or*
- (b) a by-law made by a body corporate under the Building Units and Group Titles Act 1980.*

206 Community property by-laws

- (1) *Subject to subsection (5), the community body corporate may, by comprehensive resolution, make by-laws ("property by-laws") for the control, management, administration, use or enjoyment of the community property.*
- (5) *A property by-law may not prohibit, destroy or modify any easement, service right or service obligation implied or created by this Act.*
- (6) *A property by-law may apply to all the community property or a particular part of the community property specified in the by-law.*

Section 206(1) is qualified by Section 206A which relevantly provides:-

206A Restricted community property by-laws

- (1) *The community body corporate may make by-laws under section 206 that restrict the use of any part of the community property ("restricted community property") to--*
 - (a) *a member of the community body corporate; or*
 - (b) *a body corporate created by the registration of a building units or group titles plan; or*
 - (c) *a proprietor of a lot created by the registration of a building units or group titles plan; or*
 - (d) *a precinct body corporate; or*
 - (e) *a member of a precinct body corporate; or*
 - (f) *a proprietor of a lot created in a staged use precinct by the registration of a building units or group titles plan; or*
 - (g) *a lessee or occupier of a lot within the site; or*
 - (h) *someone else while the person is engaged in construction works in the site or in a future development area or subsequent stage.*
- (2) *Despite section 206(1), the by-law may only be made by resolution without dissent.*
- (3) *The by-law may restrict the use of community property that is to be created in a subsequent stage.*
- (4) *To remove any doubt, the by-law made may give the use of restricted community property to the person who is, for the time being, the proprietor or other person mentioned in that subsection.*
- (5) *The by-law that restricts the use of any part of the community property--*
 - (a) *must include--*
 - (i) *subject to paragraph (c), a description of the restricted community property; and*
 - (ii) *details of the persons entitled to use the restricted community property; and*
 - (iii) *the conditions on which the persons may use the restricted community property; and*
 - (b) *may include--*
 - (i) *particulars about--*
 - (ii) *particulars of the hours when the restricted community property may be used; and*
 - (iii) *provisions about the maintenance of the restricted community property; and*
 - (iv) *provisions about imposing and collecting levies from the persons entitled to use the restricted community property; and*
 - (c) *need not describe the restricted community property, if--*
 - (i) *the by-law prescribes a way of identifying the property; or*

- (ii) *the by-law authorises a person to identify the property; and*
 (d) *may authorise a person to allocate the use of the restricted community property.*
- (6) *If a person identifies the restricted community property under a by-law mentioned in subsection (5)(c), the person must, as soon as practicable, give the community body corporate a description of the property.*
- (7) *If a person allocates the use of the restricted community property under a by-law mentioned in subsection (5)(d), the person must, as soon as practicable, give the community body corporate details of the persons to whom use of the property has been allocated.*
- (8) *The description and details given to the community body corporate under subsection (6) or (7) are taken to be a by-law made under section 206 when both the description and details are received by the community body corporate.*
- (9) *The community body corporate must give a by-law made or taken to be made under this section to the Minister for approval under section 206 as soon as practicable but not later than 3 months after it is made or taken to be made.*
- (10) *If the by-law is approved by the Minister, the Minister must give details of the by-law to the registrar of titles as soon as practicable after the Minister approves it.*
- (11) *A by-law made under this section does not have effect until the registrar of titles has recorded details of the by-law on the relevant community plan.*

1.3 Analysis of the By-Law making Powers

The power to make By- Laws under section 203 is restricted to the control, management, use or enjoyment of lots (other than community property or precinct property) within the site and may apply to the whole or part of the site. The operation of a By-Law made under Section 203, is not necessarily limited to Lots. The By-Law must relate to the control, management, use or enjoyment of a Lot but may apply to the whole or part of the Site. Therefore the operation of the activities By-Law made under section 203, can apply to any part of the Site. By contrast, the operation of a by-Law under section 206, is limited to a community property lot (see section 206(6)).

"Site" of a mixed use scheme means the site of the scheme. "Mixed use scheme" means a scheme for a mixed use development approved by the Governor in Council under this Act, and includes any amendments of the scheme and any approval of a subsequent stage. We understand that the whole of the land contained in MCP 106902 is the Site.

In terms of section 203, a By-Law granting exclusive use of a car park within the site to the owner of a Lot could be said to be for the "use and enjoyment" of the Lot and applies to the car park which is part of the site. Section 203 does not suffer the same restriction that is placed upon Section 206 by section 206A. A By-Law in relation to car parks on the Areas, does not affect the use of a community property lot and therefore the By-Law, validly adopted under section 203, would not be subject to Section 206A.

That an exclusive use By-Law can be adopted under section 203 is supported by the existence and wording of Section 206A:-

- (a) Section 206A operates despite section 206(1) (see subsection (2)) and subsection (1) of section 206A envisages that the By-Law of the type mentioned in Section 206A will be adopted under the By-Law making power of Section 206. Section 206A merely alters the way a By-Law under section 206 that is of the type regulated by section 206A must be adopted (resolution without dissent instead of a comprehensive resolution).
- (b) The essence of one type of By-Law covered by Section 206A (a Restricted Community Property By-Law restricting the use of part of a community property lot to the proprietor of one Lot) is the same as an exclusive use By-Law (under the Building Units and Group Titles Act ("BUGTA") or the Body Corporate and Community Titles Act ("BCCM Act")).
- (c) Therefore section 206 must include the power to make a By-law, in the nature of an exclusive use by-law.

While Section 206 relates to community property lots and section 203 relates to ordinary lots, the empowerment wording of the two sections is identical ("for the control, management, use or enjoyment of"). Therefore, the power under Section 203 to make By-Laws must include the power to make an exclusive use By-Law for the use and enjoyment of a Lot applying to any part of the Site.

Common Property in a BUP over a parcel within the site, is still part of the Site. Therefore, the CBC has power under Section 203 of the MUD Act to grant exclusive use of the car parks within the Areas to owners of Lots.

Theoretically, the Community Body Corporate could also make a By-Law granting exclusive use of a Lot to a person other than the owner of the lot. However, By-Laws must be approved by the Minister and presumably he would not approve such a By-law.

1.4 By-Law 25 and its commencement

By-Law 25(c) of the CBC By-Laws states:-

"Effective Date of allocation

The allocation of the benefit of exclusive use of the carparking space in this By-Law 25 is effective from the date that both:-

- (a) *the Building Units Plan for the Lot Owners has registered; and*
- (b) *if applicable, the easement granting the benefit of the car parking space to the Body Corporate has registered."*

In accordance with our argument that an exclusive use by-law may be granted under section 203 of the MUD Act, we consider that there was no need to grant an easement in favour of Community Property Lot 4 before allocating exclusive use.

However, the wording of the existing By-Law 25 does not commence to operate in respect

of a car park in the Areas until an easement is registered, "if applicable". This is a curious expression because it requires a criteria by which the applicability of an easement can be determined.

Sub-clause (a) of By-Law 25 purports to provide this criteria. The car parking space can be located on Common Property (first dot point of By-Law 25(a)) or on Common Property of a subsidiary Body Corporate and be the subject of an easement in favour of the Common Property (second dot point of By-Law 25(a)). The use of the term Common Property is curious. The term is not defined in the By-Laws. The MUD Act does not use the term "Common Property". It uses the term "Community Property" and "Community Property Lots". However, the nearest thing to "Common Property" in the Scheme is the Community Property Lot. Accordingly, we assume that the reference to Common Property (of the Scheme) is a reference to the Community Property Lot. If the car parking space is within the CPL, Lot 4, the CBC has, in a sense, the benefit of the Area without the need for an easement. Obviously, for car parks outside the CPL and inside common property of a BUP, the CBC does not have the benefit of the car park in any sense without an easement. On the basis of this criteria, sub-clause (b) of By-Law 25(c) would be applicable to the Areas. Accordingly, an easement is required to trigger the commencement of the allocation of the car parking spaces in the Areas.

1.5 Car Park Strategy

Because of the uncertainty concerning the criteria and the use of the term Common Property to refer to Community Property Lot, it is dubious to rely upon this conclusion.

It would be better to delete sub-clause (b) from paragraph (c) of By-Law 25 and to amend By-Law 25(a) so that the references to Common Property (of the CBC) are references to the Community Property Lot and there is no reference to an easement. Then the allocation would operate without the need for an easement.

1.6 Access

Not only must the lot Owners have the exclusive right to use the car park but they must have a right to access the car park. The Plan of Development provided to us by PMM shows only those areas within CPL, Lot 4, that are used to drive around the car park area are thoroughfares. No area outside Lot 4 is a thoroughfare. Therefore section 155 of the MUD Act does not operate on areas outside Lot 4 to enable access rights to be used by occupiers.

The access to the car parks is partly through community property and partly through common property of the BUPs. There are easements over the relevant areas of common property but those easements are in favour of the CBC and purport to give the Lot Owners the right to use the access ways. However, the Lot Owners are not parties to the easements and may not be able to enforce the rights. The CBC could but not necessarily the Lot Owners.

An activities By-Law for the use of the Lot Owners would be enforceable.

1.7 Schedule to By-Law 25 is confusing

The schedule to By-Law 25 is confusing. In the explanatory notes there is a reference to only car parks marked "M". This may mean that the By-Law was not intended to operate in respect of all lots and car parks but only those marked "M" in the relevant schedules. This would mean that a lot of the schedule is unnecessary additional wording. Alternatively the reference in the explanatory notes may be by way of explanation only. Accordingly, it is ambiguous and confusing. Any new By-Law should rectify this confusion.

1.8 Car parks in common property for a BUP for exclusive use by Lot in same BUP

Under the current By-Law 25, it is arguable that it does not operate to effect exclusive use of the relevant car parks in one BUP common Property in favour of the Lots in the same BUP because there is no easement in favour of the CBC and therefore the By-Law has not commenced to operate.

This defect would also be remedied by the strategy proposed because the need for an easement to trigger operation of the By-Law in respect of any car park, would be deleted.

1.9 Strategy

The best strategy seems to be to fix all these problems with a new By-Law removing the need for an easement at all and securing access to the car parks. Please confirm that it is in order for us to implement this strategy.

This proposal will be discussed with the Officers of the Minister and the Department of Natural Resources Titling Office before implementation.

Should you have any further queries, please do not hesitate to contact the writer.

Yours faithfully
M.F. LYONS & ASSOCIATES

per:


Mick Lyons