

Minutes of a Committee Meeting of the Body Corporate for "**CATHEDRAL PLACE CBC MCP**" - 106902 held in the offices of Stewart Silver King and Burns, "The Precinct" Ground Floor, 12 Browning Street, West End on 20th July 2006 at 6.00pm.

COMMITTEE MEMBERS
Peter Lewis – Chairperson – Notre Dame
Patrick Brown – Oxford & Cambridge
John Gilliland – Village
Ken Morrisby – Kensington & Sandringham
Tony Rich – Canterbury & Westminster
Randall Edwards - Duhig

IN ATTENDANCE
John Millard of Stewart Silver King and Burns (Community Manager)
Peter Zunker (employee of Caretaking Contractor – Cathedral Place Management (CPM))
Barry Budd – Duhig Chairperson

QUORUM The chairperson advised a quorum, and declared the meeting open at 6.15pm.

CONFIRMATION OF MINUTES

VOTING – YES **4** NO **0** ABSTAIN **2**

That the minutes of the Committee Meeting held on 26th June 2006 be confirmed and signed as a true and correct record of the proceedings of that meeting.

WATER PROJECT

VOTING – YES **6** NO **0** ABSTAIN **0**

Three proposals were tabled from Airwater Makers Qld, McCrackens Water Services and Ryan Pumping & Irrigation. The various proposals were discussed at length, and it was **Resolved** that GHD will certify the load requirements of the proposed tank installations, and once this certification has been received, the body corporate purchase three (3) Bushmans tanks from McCrackens Water at the quoted cost of \$7,380.00 inc GST. Further quotations for a suitable pump, and ancillary connection works will be tabled at the next meeting of the Committee for consideration.

CORRESPONDENCE

VOTING – YES **6** NO **0** ABSTAIN **0**

That the inwards and outwards correspondence be received.

- From McCracken's Water Services re. quotation for water project.
- From Ryan Pumping & Irrigation re. quotation for water project.
- From Airwater Makers Qld re. water project.
- From CPM re. lift car carpet replacement. **Resolved** that the individual subsidiaries would make the decision for replacement or otherwise. It was also **resolved** that the following standards be applied:- a) colour will be patterned & autumnal toned, b) replacement carpet will be synthetic, c) ALL lift car carpets in any subsidiary must be replaced if replacement is decided upon in that subsidiary.
- From Lee Izzard Painter re. non-payment of his account. It was noted that CPM would advise Lee Izzard that the work in Canterbury & Westminster needed completion. It was further noted that the Body Corporate requires a consistent standard for such work – the specifications provided by Riley Shelley in December 2003 are the minimum standards applicable. Any temporary repairs required should be notified to CPM and repaired on a timely basis, with the subsequent invoice being certified by CPM as having been satisfactorily completed.

FINANCE

1. FINANCIAL REPORT FOR THE PERIOD TO 20TH JULY 2006

VOTING – YES **6** NO **0** ABSTAIN **0**

The financial statements for the period ended 20th July 2006 were tabled, discussed & accepted with the following change – provision ERC cash discrepancy \$75,000.00 in both the balance sheet and Electricity trading fund.

OTHER MATTERS

1. MANAGEMENT RIGHTS TENDER PROCESS

A full discussion on this matter took place with the employee from CPM. It was noted that Peter Zunker stated that he supported a tender process, provided that the scope of works was similar to that contained in the Dell Linken Report of April 2004, and that all tenders were treated equally. An undertaking was given that the process would be fair & equitable to all concerned, and that the incumbent would remain in the process until the final tenders were considered by the Committee.

Peter Zunker left the meeting at 8.30pm.

2. EXPRESSION OF INTEREST (EOI)

VOTING – YES **6** NO **0** ABSTAIN **0**

Noted That a first draft of the EOI was tabled. The committee will review this draft and advise John Gilliland within seven days of any changes which may be required. It was further noted that John Gilliland will advise the committee of a proposed budget to run the EOI and tender process. The secretary will advise CPM that the EOI process has commenced, and re-iterate to them that their tender (as the incumbent Caretaking contractor) will be assessed against the last of the future tenders received. It was **Resolved** that every Principal representative will sign a confidentiality clause with regard to the EOI and all tender documents received, and the appropriate document be sourced, and that the secretary request NRH to prepare same which will be submitted to the next meeting of the committee.

3. SINKING FUND ANALYSIS UPDATE

VOTING – YES **6** NO **0** ABSTAIN **0** - ACTION: SSKB

Resolved That the Committee authorise Stewart Silver King and Burns to request Napier Blakeley to prepare an upgraded Sinking Fund Analysis, to determine the rate of contributions to the Sinking Fund and the cost be met by monies in the Sinking Fund Account.

4. LEGAL ADVICE RE. TENDER PROCESS

VOTING – YES **6** NO **0** ABSTAIN **0**

Resolved That the Committee authorise Stewart Silver King and Burns to include the legal advice received from Nicol Robinson Halletts (22nd April 2005) and Herdlaw Solicitors (4th April 2006) with these minutes. The Notice of an Order of a Referee which was included with the Notice of Meeting was also noted at this time.

5. CPM MONTHLY NEWSLETTERS

VOTING – YES **6** NO **0** ABSTAIN **0** - ACTION: SSKB

Resolved That the Committee authorise SSKB to request CPM to provide all back-dated and future CPM newsletters to be kept in a publication file at SSKB. (This is required so that any inconsistencies that may appear can be rectified at time of publication.)

6. CONTRACT EXTENSION MOTIONS – SUBSIDIARY BODIES CORPORATE

VOTING – YES **6** NO **0** ABSTAIN **0** - ACTION: SSKB

Resolved That SSKB advise all subsidiary bodies corporate that the motions relating to the caretaking & letting agreements, which formed part of their Annual General Meeting Notices, now has no effect as the matter of the caretaking contract is going to tender.

7. BODY CORPORATE ADMINISTRATION TENDER STATUS

VOTING – YES **6** NO **0** ABSTAIN **0** - ACTION: P LEWIS, K MORRISBY

Resolved That Peter Lewis and Ken Morrisby meet with Tony McQuillan (SSKB) to assess the final price/terms of the tender quotation provided by SSKB.

DATE TIME AND VENUE OF THE NEXT COMMITTEE MEETING

VOTING – YES **6** NO **0** ABSTAIN **0**

The next meeting of the Committee will be held at a date & time to be advised.

CLOSURE

There was no further business, and the meeting concluded at 9.45pm.

JOHN MILLARD

Community Manager

STEWART SILVER

KING AND BURNS

For and on behalf of your Secretary – John Millard

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Herdlaw

SOLICITORS

Our Ref: RJH
Your Ref: Peter Lewis
Contact: Robert Herd
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April 4th, 2006

The Chairman
Community Body Corporate for Cathedral Place
C/- Stewart Silver King & Burns

West End QLD 4101

Dear Sir

BODY CORPORATE FOR CATHEDRAL PLACE – NEW MANAGEMENT RIGHTS AGREEMENT

We confirm your instructions to provide advice to the Body Corporate regarding the procedure and requirements for entry into new management rights agreements.

We confirm that the current caretakers Mr & Mrs Zunker have requested that the Body Corporate enter into a new caretaking agreement with them.

We note that the Body Corporate has received legal advice from another solicitor that the Body Corporate must submit at least 2 tenders to the Body Corporate in order to enter into a new caretaking agreement.

We note that the current caretakers have strongly opposed the Body Corporate seeking tenders for the Caretaking Agreements and have tried to force the Community Body Corporate to re-appoint them as caretakers without seeking other tenders.

The current caretakers have been lobbying for the support of the respective subsidiary Bodies Corporate. In particular we understand that the caretakers have been seeking that each subsidiary body corporate pass a resolution to request a General Meeting of the Community Body Corporate. In addition they have sought that the Subsidiary Bodies Corporate submit a motion to appoint the Caretakers as the caretaker. We also understand that the Caretakers have sought to direct or control the Subsidiary Body Corporate's representative to vote in favour of the motion.

We confirm that we met representatives of the Community Body Corporate and the current caretakers to consider the issue. We note that it was suggested that both parties engage this firm to provide the advice.

We confirm that we have declined to act for both parties and confirm that we will act only for the Body Corporate.

We are prepared to answer the question put by the Caretakers with respect to their strategy to be reappointed as caretaker as an answer to this question must be provided to the Body corporate.

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We understand the Caretakers question to be

- Can the Body Corporate in General Meeting appoint a new caretaker without requiring that at least two tenders be submitted?
- Can the Subsidiary Body Corporate representatives be forced to vote in favour of the motion to appoint a new caretaker by resolution of the subsidiary Bodies Corporate.

Can the Body Corporate in General Meeting appoint a new caretaker without requiring that at least two tenders be submitted?

The short answer to this question is no. A body corporate must submit at least two tenders where a motion is proposed to expend money for work to be performed.

The Body Corporate is governed by the Mixed Use Development Act 1993 ("MUD Act"). The MUD Act is not as prescriptive as the Body Corporate and Community Management Act 1997 in the management of affairs of a Body Corporate.

The Body Corporate is required to have an executive committee by the MUD Act. A decision of the Executive Committee is taken to be a decision of the Body Corporate unless it is in relation to a "Restricted Matter".

A Restricted Matter is defined in section 189(1) of the MUD Act to be

- (a) a matter relating to the fixing of a special levy on all members of the body corporate; or
- (b) a matter that seeks to alter the rights, privileges or obligations of members of the body corporate; or
- (c) a matter that seeks to alter the annual contribution of members of the body corporate; or
- (d) a matter on which a decision may only be made by the body corporate under a comprehensive resolution or in general meeting of the body corporate.

This section does not prevent an executive committee from entering into agreements. However section 190(1) of the MUD Act prevents an executive committee from undertaking expenditure unless it is authorised by comprehensive resolution of the Body Corporate or by the Minister in an emergency.

We understand that the Caretaker is of the view that the restriction of obtaining two tenders only applies where expenditure is to be undertaken by the Executive Committee. We cannot agree with this proposition.

The effect of Section 190 of the MUD Act is that there is a requirement to obtain Body Corporate approval in General Meeting for all expenditure of the Body Corporate.

The key is the wording of section 190(2) which provides

"In relation to any proposed expenditure that the executive committee is unable to undertake because of subsection (1), the executive committee must ..."

- (a) *submit the proposal for determination at an extraordinary general meeting of the body corporate convened for the purpose of, or for purposes that include, consideration of the proposal; and*
- (b) *if the proposed expenditure is for work to be performed or the purchase of personal property—submit at least 2 tenders to the meeting with the proposal.*

When read literally, this subsection applies to all expenditure of the Body Corporate because any proposed expenditure is unable to be undertaken by an executive committee because of section 190(1) of the MUD Act.

Accordingly, as expenditure is unable to be undertaken by the Executive Committee subsection (2) must apply which requires the submission of 2 tenders for consideration at an extraordinary general meeting where the expenditure is for "work to be performed".

This is the effect whether the proposal is by the committee or a member of the Body Corporate.

We therefore confirm that the entry into a new caretaking agreement which requires the undertaking of expenditure must be voted on by the Body Corporate in general meeting and must have two tenders submitted.

Motion must be ruled out of order

If a motion has been proposed by a member for consideration by the Body Corporate that does not comply with section 190(2) of the MUD Act the motion must be put to a general meeting, however the chairman must rule the motion out of order pursuant to Section 4 of Schedule 2 of the Building Units and Group Titles Act 1980, on the grounds that the motion would conflict with the MUD Act or the by-laws or would otherwise be unlawful and unenforceable.

Can the Subsidiary Body Corporate representatives be directed to vote in favour of the motion to appoint a new caretaker by resolution of the subsidiary Bodies Corporate.

The simple answer to this question is no. The voter for the purposes of meetings of the Body Corporate is the member's nominee appointed pursuant to section 169 of the MUD Act.

There is no requirement in the MUD Act that the members nominee must vote in accordance with the directions of the body corporate which appointed them.

This is in contrast with layered schemes under the Body Corporate and Community Management Act 1997. Section 50(5) of the Body Corporate and Community Management (Standard Module) 1997 prescribes that a subsidiary scheme representative must represent their Appointor in the way that they are directed and in the best interests of their scheme.

There is no similar provision under the MUD Act. Accordingly, the subsidiary body corporate representative is not subject to any direction or control by his/her appointing Body Corporate. We consider that there is an implicit duty that a representative in exercising their vote must act reasonably and in the best interests of their appointing scheme, however they are not subject to direct control.

Accordingly, any motion by a subsidiary scheme purporting to direct its nominee on how to vote should have been declared out of order. In any event, even where such a motion is passed it is unenforceable.

May 29, 2006

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The only way that a subsidiary scheme can control its nominee is to cancel their appointment.

Conclusion

The motion proposing that the Body Corporate undertake expenditure for work to be performed (i.e. appointment of a caretaker) must also submit at least two tenders for the work to be performed. If the motion has been submitted by either the Executive Committee or a member body corporate without the submission of the tenders, the Chairman must rule the motion out of order at the general meeting at which the motion is to be considered.

Further, any attempt to control or direct the votes of the members nominees on the Body Corporate will be ineffectual. The members nominees must act reasonably and in the best interests of the Body Corporate in exercising their vote.

In the circumstances, the Committee should be seeking tenders in relation to the provision of caretaking services. The current caretaker does not have any power to prevent the Executive Committee from obtaining at least two tenders for the caretaking contract.

Given that the Body Corporate must control and administer the common property for the benefit of all members and only has the powers that are reasonably necessary to do this, we submit that the Executive Committee in fact have a duty to obtain at least two tenders for the caretaking contract. The Committee members may find themselves exposed to a claim in damages if it can be established that a better caretaking contract could have been obtained, in circumstances where they did not seek a tender.

If you have any queries in relation to the above please contact Robert Herd of our office.

Yours faithfully
HERDLAW



Robert Herd
Principal

Our ref: PT:AMM:508247
Your ref:

22 April 2005

Mr Pat McGlade
Community Titles Manager
Stewart Silver King & Burns
BY EMAIL: pmcglade@sskb.com.au

Dear Pat

Management rights - Cathedral Place

We have been instructed to advise the committee of the Cathedral Place Community Body Corporate regarding proposals for the caretaking and letting arrangements for the development.

Existing management rights

The current caretaking and letting arrangements for the Cathedral Place Community Body Corporate are generally in accordance with industry practice. That consists of the following:

1. A management appointment from each subsidiary residential body corporate (namely Notre Dame, Oxford and Cambridge, Canterbury and Westminster, Kensington and Sandringham, and Duhig) appointing the community body corporate to arrange services on behalf of each subsidiary;
2. A caretaking agreement between Cathedral Place Community Body Corporate and Cathedral Place Management Pty Ltd, for the performance of caretaking services to the parcel;
3. A letting agreement between Cathedral Place Community Body Corporate and Cathedral Place Management Pty Ltd, granting the right to conduct a letting agency business from the parcel;
4. A "by-law package", specifically community by-laws 22, 22A, 23, 24 and 26, supporting the exclusive right of the owners of the "management unit" to conduct an onsite management and letting business;
5. A deed of consent between the community body corporate and the caretaker/letting agent's financier, Suncorp Metway Ltd;

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Mr Pat McGlade
Community Titles Manager
Stewart Silver King & Burns

22 April 2005

6. A similar package in connection with Cathedral Village, consisting of:
- (a) caretaking agreement;
 - (b) letting agreement;
 - (c) by-laws; and
 - (d) deed of consent.

Under the arrangements, Cathedral Place Management Pty Ltd has the obligation to perform various caretaking functions, in exchange for a stated remuneration, which is reviewable annually.

Under the arrangement, the caretaker also has the exclusive right to conduct a letting business at Cathedral Place.

The arrangements were originally put in place for a five-year term with a five-year option. The option has been exercised and the agreements will expire on 3 November 2008.

Rights of caretaker on expiry

The caretaker/letting agent has no automatic right to a renewal of the existing agreements.

However, expiry of the current agreements does not take away from the caretaker/letting agent's existing proprietary rights.

In particular, the caretaker/letting agent will continue as the owner of the "management lot" and will continue, as the owner of that lot, to have the benefit of protective by-law arrangements.

Section 35(1)(c)(i) of the *Property Agents and Motor Dealers Act 2000* requires a "restrictive letting agent's licence" in order to conduct the limited letting arrangements which form part of the normal management rights package.

Although the letting agreement will expire, the owner of the management unit will continue (until the by-laws are revoked) to have the benefit of by-law 23, which expressly authorises the owner of the management unit to act as letting agent and expressly consents to the owner of the management unit applying for a restricted letting agent's licence.

By-law 23 could be revoked by a comprehensive resolution of the community body corporate. The caretaker/letting agent has no vote on the community body corporate and could not prevent such a resolution being passed.

However, even if by-law 23 is revoked, the caretaker/letting agent will still have the benefit of by-law 22. That by-law expressly authorises the owner for the time being of lot 4 to use it for

Mr Pat McGlade
Community Titles Manager
Stewart Silver King & Burns

22 April 2005

“the sale and letting of units in the buildings on behalf of the proprietors”. The by-law also provides that it is not to be “revoked without the written consent of the proprietor of the lot”.

Accordingly, under those circumstances, if the caretaker/letting agent could obtain a general real estate agent’s licence, it would still be able to carry on the letting business from the current lot 4.

However, assuming that the community body corporate took the appropriate steps to revoke by-laws 22A and 23, the caretaker/letting agent would lose the benefit of its current exclusivity in the conduct of an onsite letting agent’s business.

Rights of the community body corporate

The community body corporate has no right to require the owner of the “management unit” to transfer it to any party.

The community body corporate has the right to amend its own by-laws, subject to obtaining the appropriate comprehensive resolution.

However, this ability to amend its by-laws is limited in the case of by-law 22, which is “entrenched” for the benefit of the owner of lot 4 in Notre Dame, by specifying that it may not be amended without the consent of the proprietor of the lot.

It follows that the community body corporate may not prevent lot 4 from being used for the purposes of conducting a letting business, nor may the community body corporate grant exclusive rights to any other lot.

The community body corporate has (subject to appropriate amendments to by-laws 22A and 23) the right to appoint an alternative caretaker/letting agent.

The community body corporate has the right to separate the caretaker and letting agent functions and deal with them in the way which seems the most advantageous to the body corporate and its members.

Contracting process

Any contract for the appointment of a replacement caretaker/letting agent, or for the renewal of the appointment of the current caretaker/letting agent, or for the letting of substantial services, must be approved by the community body corporate in general meeting rather than by the committee of the community body corporate. This follows from section 190 of the *Mixed Use Development Act 1993*. That section also requires “at least two tenders” to be obtained by the committee and submitted to the body corporate in general meeting, if the expenditure proposed “is for work to be performed”.

As a result, it is our view that even if the committee of the community body corporate is minded to simply re-appoint the existing caretaker/letting agent, it must not do so without obtaining at least one competitive tender for consideration of the body corporate.

Mr Pat McGlade
Community Titles Manager
Stewart Silver King & Burns

22 April 2005

This position is to be contrasted with the position under the *Body Corporate and Community Management Act 1997*. Under arrangements under that legislation, the requirement to obtain at least two quotes or tenders does not apply to the engagement of a service contractor who also is the letting agent (see, for example, *Standard Module Regulation* Section 104(1)(a)).

Recommendation

As we understand it, the committee of the body corporate is generally satisfied with the performance of the existing caretaker/letting agent.

However, as we understand it, the committee is not comfortable with the request for a further ten-year term, with a ten-year option, unless adequate safeguards are included for the benefit of the body corporate, both to allow ongoing review of prices and performance and to require compulsory transfer of the “management rights package” in the event of a major dispute between the caretaker/manager and the body corporate.

In addition, the body corporate is aware of its obligations regarding tenders and of its general obligation to obtain the best possible economic outcome for owners of the units in the development.

As a result, one possible approach would be as follows:

1. allow the existing arrangements to expire;
2. revoke by-laws 22A and 23;
3. allow the owner of lot 4 to conduct a non-exclusive onsite letting agent’s business, assuming that they obtain the appropriate real estate agent’s licence.
4. Revoke all by-laws granting exclusivity and allow for competition for the provision of onsite letting services.

This will allow the existing letting agent, with the benefit of ownership of lot 4 and of incumbency, to preserve both the value of its asset in lot 4 and also the goodwill in its existing letting agent’s business.

At the same time, the “caretaking” function could be separated from the letting agent’s business and put to tender on a commercial basis.

In our recommendation, such a contract should be for a short term (no more than five years) with a full range of commercial protection for the body corporate and put to tender on a commercial basis.

This approach would, in our view, permit the body corporate to take appropriate control over the quality and cost of caretaking services, while allowing the current caretaker/letting agent to

Mr Pat McGlade
Community Titles Manager
Stewart Silver King & Burns

22 April 2005

preserve, so far as is possible, the benefit of the goodwill it has developed in its letting agent's business.

Yours faithfully
NICOL ROBINSON HALLETTS
per:



PETER TOWNLEY ^{ES}



PARTNER
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cc: John Gilliland
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