

RELEASED  
10 DEC 2019  
C10219/1703

17.3 Minda Update (Report No: 46/17)

Exclusion Of The Public – Section 90(3)(h & i) Order

Motion

C140217/675

- 1 That pursuant to Section 90(2) of the *Local Government Act 1999* Council hereby orders that the public be excluded from attendance at this meeting with the exception of the Chief Executive Officer and Staff in attendance at the meeting in order to consider Report No: 46/17 Minda Update in confidence.
  
2. That in accordance with Section 90(3) of the *Local Government Act 1999* Council is satisfied that it is necessary that the public be excluded to consider the information contained in Report No: 46/17 Minda Update on the following grounds:
  - h. pursuant to section 90(3)(h) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is legal advice that has been provided by Norman Waterhouse Lawyers and this information ought not be made available to the public as it could detrimentally affect the Council's position.
  
  - i. pursuant to section 90(3)(i) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information relating to actual litigation, or litigation that the Council believes on reasonable grounds will take

place involving the Council regarding the negotiations with Minda regarding their development, and this information ought not be made available to the public as it could detrimentally affect the Council's position.

3. The Council is satisfied, the principle that the meeting be conducted in a place open to the public, has been outweighed by the need to keep the information or discussion confidential.

Moved Councillor Clancy, Seconded Councillor Lonie

Carried

#### **Minda Update (Report No: 46/17)**

Formal mediation occurred on 3 February 2017 with Minda in respect to outstanding land matters in relation to the Somerton Surf Life Saving Club. This has resulted in an 'in principle' Agreement between the parties subject to ratification by the Minda Board and its Association and Council in consultation with the Somerton Surf Life Saving Club.

The purpose of this report is to clarify the terms of the 'in principle' mediation Agreement and to seek Council's support for these terms prior to a formal Deed of Settlement being brought back to Council for ratification.

#### Motion

C140217/676

1. That Council notes, and indicates its support for, the "In Principle Agreement Subject to Ratification" reached with Minda at mediation, as set out in the Term Sheet and Annexures signed and dated 3 February 2017 located at Attachment 1 to Report Number 46/17.
2. That the Chief Executive Officer be given authority to liaise with the Somerton Surf Life Saving Club and, thereafter, to negotiate the terms of a final Deed of Settlement with Minda on the agreed basis, including suitable terms for a licence over Area A (Term 5) and the matters referred to in Terms 7, 8 and 13 of the In Principle Agreement.
3. That a final Deed of Settlement be brought back to the Council for ratification.
4. That the commencement of legal proceedings, and the making of any pre-action settlement offer, be deferred pending the above.

Moved Councillor Donaldson, Seconded Councillor Clancy

Carried



**Division called**

A division was called:

Those voting for: Councillors Lonie, Aust, Bouchée, Bradshaw, Charlick, Clancy, Donaldson, Patton, Smedley, Snewin, Wilson, Yates (12)

Those voting against: Nil (0).

His Worship the Mayor declared the motion

Carried

**Retain In Confidence - Section 91(7) Order**

Motion

C140217/677

That having considered Agenda Item 17.3 Minda Update Report No: 46/17 in confidence under section 90(2) and (3)(h & i) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the report, attachments and minutes be retained in confidence for a period of 12 months and that this order be reviewed every 12 months.

Moved Councillor Lonie, Seconded Councillor Snewin

Carried



RELEASED

10 DEC 2019

C101219/1703

## ITEM NUMBER: 17.3

## CONFIDENTIAL REPORT

### MINDA UPDATE

*Pursuant to Section 83(5) of the Local Government Act 1999 the Report attached to this agenda and the accompanying documentation is delivered to the Council Members upon the basis that the Council consider the Report and the documents in confidence under Part 3 of the Act, specifically on the basis that Council will receive, discuss or consider:*

- h. legal advice.
- i. information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council.

CONFIDENTIAL

Item No: 17.3  
Subject: MINDA UPDATE – OUTCOMES OF MEDIATION  
Date: 14 February 2016  
Written By: Team Leader Strategy  
General Manager: Business Services, Mr I Walker

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### SUMMARY

Formal mediation occurred on 3 February 2017 with Minda in respect to outstanding land matters in relation to the Somerton Surf Life Saving Club. This has resulted in an 'in principle' Agreement between the parties subject to ratification by the Minda Board and its Association and Council in consultation with the Somerton Surf Life Saving Club.

The purpose of this report is to clarify the terms of the 'in principle' mediation Agreement and to seek Council's support for these terms prior to a formal Deed of Settlement being brought back to Council for ratification.

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### RECOMMENDATION

1. That Council notes, and indicates its support for, the "In Principle Agreement Subject to Ratification" reached with Minda at mediation, as set out in the Term Sheet and Annexures signed and dated 3 February 2017 located at Attachment 1 to Report Number 46/17.
  2. That the Chief Executive Officer be given authority to liaise with the Somerton Surf Life Saving Club and, thereafter, to negotiate the terms of a final Deed of Settlement with Minda on the agreed basis, including suitable terms for a licence over Area A (Term 5) and the matters referred to in Terms 7, 8 and 13 of the In Principle Agreement.
  3. That a final Deed of Settlement be brought back to the Council for ratification.
  4. That the commencement of legal proceedings, and the making of any pre-action settlement offer, be deferred pending the above.
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### COMMUNITY PLAN

A Place that Provides Value for Money  
A Place that is Well Planned

A Place that Provides Choices and Enhances Life

### COUNCIL POLICY

Not Applicable.

### STATUTORY PROVISIONS

Any formal encroachment proceedings to secure ownership of the land encroached by the Somerton Surf Life Saving Club buildings would occur under the *Encroachments Act 1944* and be heard in the Land and Valuation Division of the Supreme Court. The mediation process, however, provides an opportunity for Council and Minda to reach agreement on these matters outside of formal litigation and potentially via a range of other legal and statutory mechanisms to resolve the matter.

### BACKGROUND

Council on 13 September 2016 resolved 'in confidence' (Resolution Number C160913/507) the following in relation to negotiations regarding the encroachment of land under the Somerton Surf Life Saving Club (SLSC) building:

1. *Council notes the advice from its legal adviser.*
2. *Prior to serving a pre-action settlement offer for the encroachment of land under the Somerton SLSC building (plus curtilage), Council seeks a formal mediation with Minda and Somerton SLSC in an effort to negotiate an outcome which is the same or more favourable to Council than that which could be achieved through litigation including, for example a 'land swap' with one of the unmade road reserves at Lynton Avenue and Lynmouth Avenue.*
3. *To assist the mediation, Council delegates authority to the Chief Executive Officer (who may sub-delegate to other Council officers as necessary) to assist negotiations and provide instructions to Council's legal advisors at a mediation to achieve a resolution in these terms. Authority to negotiate on behalf of Council is provided on the basis that any resolution reached at mediation will be subject to confirmation and approval of the Chamber.*
4. *In the event the formal mediation is not successful, Council puts a pre-action settlement offer of \$200,000 (on such terms as advised by Council's legal advisors) to Minda.*

Further to this and following receipt of late correspondence from Minda on 19 October 2016 confirming that it was prepared to mediate, Council subsequently resolved 'in confidence' on 25 October 2016 (Resolution Number C251016/561) the following:

1. *That Council notes late correspondence received from Minda's solicitors on 19 October 2016 located at Attachment 1 to Report Number 274/16 confirming that Minda is*

*prepared to mediate in relation to the encroachment of the Somerton Surf Life Saving Club onto land owned by Minda.*

2. *That Council confirms that it wishes to still proceed with mediation based on Resolution Number C130916/507, parts 2 and 3 as below:*

*"2. Prior to serving a pre-action settlement offer for the encroachment of land under the Somerton SLSC building (plus curtilage), Council seeks a formal mediation with Minda and Somerton SLSC in an effort to negotiate an outcome which is the same or more favourable to Council than that which could be achieved through litigation including, for example a 'land swap' with one of the unmade road reserves at Lynton Avenue and Lynmouth Avenue.*

*3. To assist the mediation, Council delegates authority to the Chief Executive Officer (who may sub-delegate to other Council officers as necessary) to assist negotiations and provide instructions to Council's legal advisors at a mediation to achieve a resolution in these terms. Authority to negotiate on behalf of Council is provided on the basis that any resolution reached at mediation will be subject to confirmation and approval of the Chamber."*

3. *Further to Resolution 4 on 13 September 2016 (Resolution Number C130916/507), Council also puts an alternative pre-action settlement offer of \$70,000 for the transfer of 304m<sup>2</sup> of encroachment land (as identified on the Identification Survey dated 22 August 2016), together with \$10,000 for a registered easement over the "Balance" area (or portion thereof) to provide for emergency access, building fire safety requirements, other reasonable requirements of the Council and the Somerton Surf Life Saving Club.*

## REPORT

A formal mediation session was held with Minda on 3 February 2017, which has resulted in an 'in principle' Agreement between the parties subject to ratification by both Council in consultation with the Somerton Surf Life Saving Club, and the Minda Board and its Association.

A copy of the 'in principle' Agreement and Term Sheet is located at Attachment 1 for Members' reference.

*Refer Attachment 1*

Broadly, the key elements of the Agreement include:

- Agreement by Minda to transfer for the sum of **\$150,000** (plus GST and boundary realignment costs) all constructed on areas of land, including portion of encroaching SLSC building itself, the rear balcony, perimeter pathways, eave overhangs and an area of curtilage extending approximately 3 metres from the rear (eastern side) of the building to Council, but excluding the portion of the SLSC overflow carpark over Minda's land to the south of the SLSC building. Exclusion of this area is due to concerns regarding impacts on viewsheds from Minda residents if structures were erected in this area in the future.

While the exact area of land to be transferred to Council is yet to be fully determined and would be subject to a formal land survey, it is estimated to be in order of around 370m<sup>2</sup>.

- While Minda did not agree to the transfer of the portion of the overflow car park to the south of the SLSC building and is seeking to remove existing fencing and bitumen and grass this area, it has agreed to grant Council a licence to allow the SLSC to undertake various activities in this area such as washing down of boats, but any storage or erection of structures. This will, however, require a renegotiation of Council's current lease to the SLSC and a potential sub-lease to permit the Club to use this area for activities incidental to the Club's operations.
- While Minda is prepared to transfer some curtilage at the rear (eastern side) of the SLSC building, it has:
  - requested that no perimeter fencing be erected on the boundary, instead preferring to retain a softer landscape buffer, and that a portion of the curtilage adjacent the Cafe/Repton Road remain open to protect viewsheds
  - requested that Council and the SLSC erect a waste removal bin enclosure at the rear of the Club building to screen waste areas from view of Minda residents. This is consistent with conditions applying to the development approval issued for refurbishment and upgrade of the SLSC building in 2005
  - agreed to modify its current development application for the screen fence to enable shade cloth to be attached to the current posts for a period of 12 months only to assist in growth of vegetation, following which it will remove the screen and posts
  - agreed to reinstate grass in line with the roller door located on the eastern side of the SLSC building, and to grant a right of way to the SLSC over Minda's existing fire track for emergency vehicle access to the rear of the Club in the event that access to the rear roller door is necessary in an emergency (as has occurred during recent storm events).

In addition to the above, Minda has formally acknowledged that it has no property rights in respect of the unmade portions of Lynton and Lynmouth Avenues, and has agreed to remove perimeter fencing on this land within 14 months. Further, no claims have been made by Minda in respect to the encroachment of the Gladstone Road Car Park and beach access ramp onto Minda's land.

A meeting has been arranged with representatives from Surf Life Saving SA and the Somerton SLSC on 13 February 2017 to confirm their support for the terms of the In-Principle Agreement and consent to make necessary variations to the Club's lease.



## BUDGET

Council has not yet allocated a budget for the purchase of the encroachment land and curtilage from Minda and may therefore need to increase its borrowings to fund the purchase (and associated conveyancing costs) should the mediation Agreement be accepted by the parties.

Council may also wish to consider cost recovery opportunities arising from the future disposal of the unmade portions of Lynmouth and Lynton Avenues to Minda or a third party to help off-set the purchase of the SLSC land.

Should both Council and Minda accept the terms of the mediation Agreement and settle the matter out of court, significant savings will be realised. Indeed, previous advice has suggested that legal costs in the order of \$200,000 to \$300,000 could be incurred if the matter went to Encroachment Act proceedings in the Supreme Court. This would exclude potential purchase costs for the encroachment land, which could be up to three times unimproved capital value of the land.

## LIFE CYCLE COSTS

While there are no direct life-cycle costs associated with reaching an out of court settlement with Minda in this matter, Council will incur future costs associated with formalising and acting on the Terms included in the in-principle Agreement. This would include effecting boundary realignments (including GST, LTO costs and other statutory charges and taxes), alterations to the SLSC lease, formalising a right of way over Minda's land for emergency vehicles, construction of a screened waste area for the SLSC and general property improvements at the rear of the SLSC building.

# Attachment 1

# TERM SHEET

## IN PRINCIPLE AGREEMENT SUBJECT TO RATIFICATION

### PARTIES

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MINDA INCORPORATED (Minda)

THE CITY OF HOLDFAST BAY (Council)

### TERMS

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1. This "in principle" agreement is subject to approval of the board and association members of Minda and the elected members of Council. It is also subject to the Council obtaining consents to necessary variations of the lease from Somerton Surf Life Saving Club (SLSC), and approval of any subdivision and/or boundary realignment necessary to effect the transfer referred to in clause 2.
2. In final resolution of the claims raised by Council in the mediation in respect of the land shown on Annexure A, Minda will transfer to the Council those parts of the land identified in the attached Identification Survey dated 22 August 2016, drawing reference 25312 VC02-RO (Annexure A) (Survey) as follows:
  - 2.1 Area B (eave overhang, 20m<sup>2</sup>);
  - 2.2 Area C (portion of building, 160m<sup>2</sup>);
  - 2.3 Area D (footpath, 21m<sup>2</sup>);
  - 2.4 Area E (balcony & canopy overhang, 24m<sup>2</sup>);
  - 2.5 Area F (footpath, 53m<sup>2</sup>); and
  - 2.6 the additional parts of the land identified in the Survey marked Areas G, H and I.
3. In return for the transfer of the land identified in term 2 above, the Council will:
  - 3.1 pay to Minda the sum of \$150,000; and
  - 3.2 pay all boundary realignment costs, stamp duty, GST, LTO fees and all other statutory charges and taxes.
4. Each party to otherwise bear their own costs associated with the aforesaid transfer of land.
5. The Council/the SLSC to vacate the area marked "A" in the Survey (carpark, 26m<sup>2</sup>). Minda to remediate that area within 4 weeks of being granted access to that area. Minda to grant the Council a licence to allow the SLSC to undertake activities incidental to surf lifesaving (including washing down boats) in that area, but for the avoidance of doubt not including any storage or obstruction in that area.
6. The area marked "I" in the Survey is to remain as open space and the Council is not

area <sup>Per</sup> EN

to undertake any constructions or developments in that way nor to use that area in a way that would be inconsistent with it remaining as open space.

- 7. The parties are to negotiate with the intent that there will be constructed a waste removal bin enclosure in the area marked "F" in the Survey.
- 8. The parties agree to negotiate a mechanism to ensure that a right of way is maintained for the purpose of emergency vehicle access along the fire track as shown in Annexures B and C.
- 9. Minda to reinstate the grass channel in line with the roller door on the eastern side of the SLSC building.
- 10. There is not to be any fence on or adjacent to the boundary. Minda may attach shade cloth to the existing posts but must remove those posts within 12 months.
- 11. The parties agree to resolve the issue of the Council's Enforcement Notice and Minda's Development Application, including by making any amendments to the Development Application consistent with clause 10, above.
- 12. Minda will formally acknowledge it has no property rights in respect of the unmade roads at the end of Lynton and Lynmouth Avenues, and the parties will agree appropriate arrangements for the removal of fencing installed by Minda on that land within 14 months, and Council will agree that it will assume responsibility for the care and maintenance of that land.
- 13. The parties agree to negotiate the terms of a non-disparagement clause to be included in the final agreement.
- 14. Save to the extent necessary to finalise and seek all relevant approvals contemplated by these terms, the parties agree to keep negotiations confidential, consistent with the mediation agreement.

Executed by CITY OF HOLDFAST BAY

Signature *Justin Lynch*  
 Full Name JUSTIN LYNCH  
3<sup>RD</sup> FEB '17

Witness Signature *Peter Psaltis*  
 Full Name PETER PSALTIS

Executed by MINDA INCORPORATED

Signature *Catherine Ann Miller*  
 Full Name Catherine Ann Miller  
3<sup>rd</sup> Feb 17

Witness Signature *Daniel Jenkinson*  
 Full Name Daniel Jenkinson



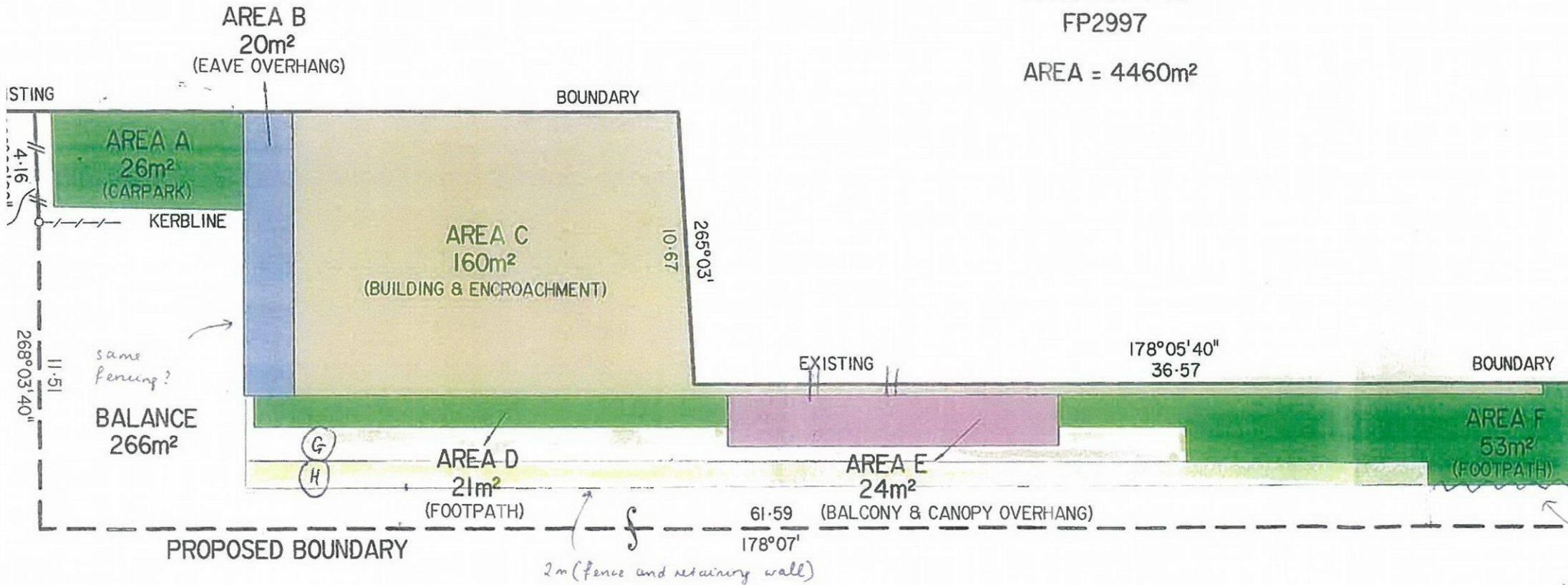
THE EAVE OVERHANG ON THE SOUTHERN END OF THE BUILDING

OF THE BUILDING ENCROACHMENT (WHICH APPEARS TO INCLUDE AREA A SURVEY, TOGETHER WITH A 2cm SLITHER OF LAND ON THE EASTERN SIDE MARKED "O-02 WALL")

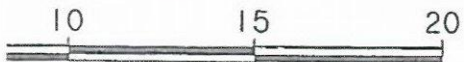
THE BALCONY AND CANOPY OVERHANG ON THE EASTERN SIDE OF THE BUILDING

ALLOTMENT III  
FP2997

AREA = 4460m<sup>2</sup>



ENLARGEMENT E1



ALLOTMENT I  
DII0280  
(APPROVED - NOT YET DEPOSITED)

1. CT 5476/969
2. FOR ANY ANNOTATIONS OR EASEMENTS DETAILS REFER TO CT 5476/969
3. FOR PREVIOUS SURVEY ON 13/04/20 PLEASE REFER TO 25312VCOI-RO







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# MINDA COAST PARK

## AERIAL OVERLAY

LEGEND

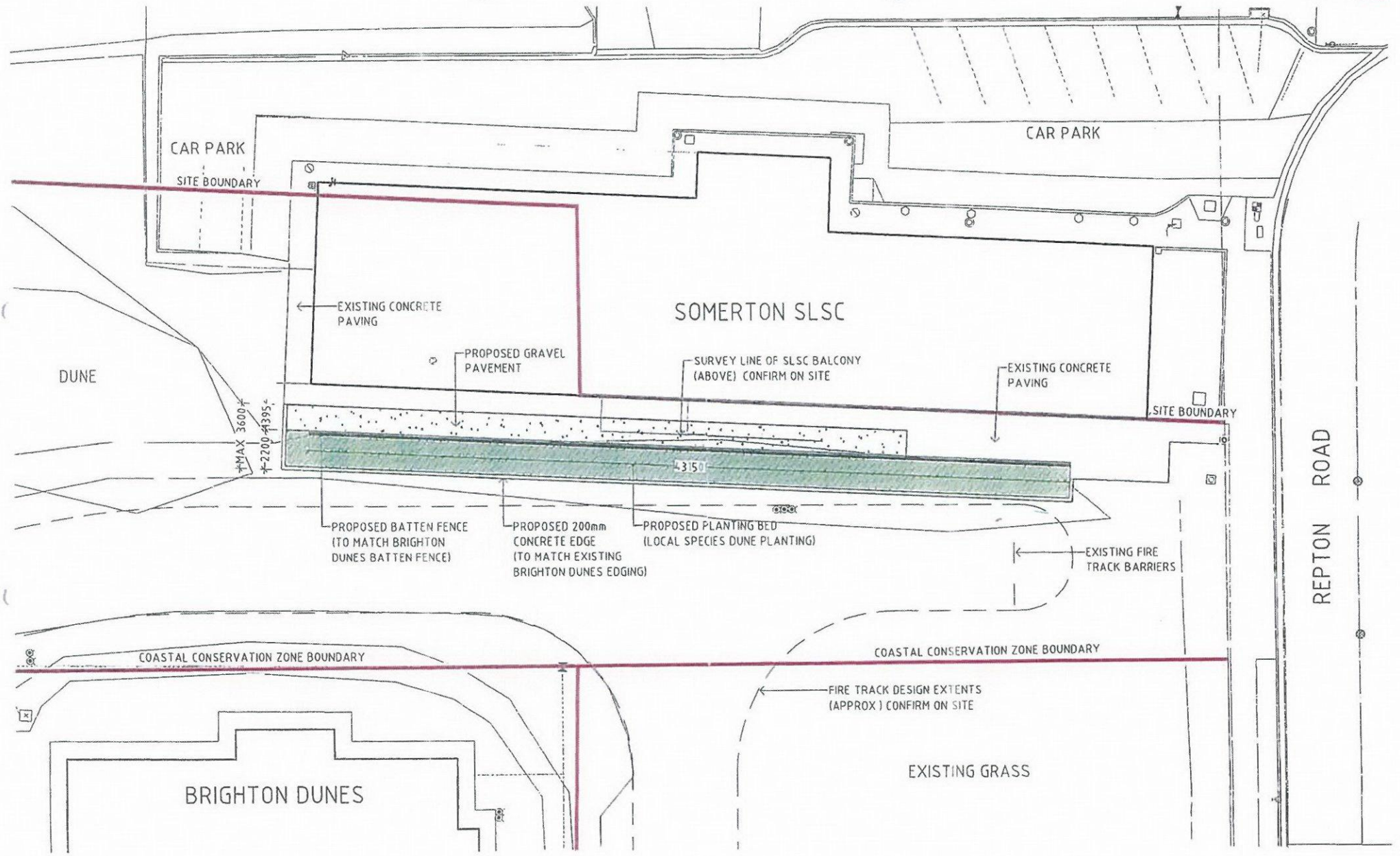
 Revegetation zone	 Secondary dune
 Timber decking	 Rock wall
 Concrete path	
 Primary dune	





Annexure C

TRIMMED



2