

17.3 Minda Update (Report No: 274/16)

Motion

C251016/560

1. That under provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public be excluded from attendance

RELEASED
10 DEC 2019
C101219/1703



at this meeting with the exception of the Chief Executive Officer, General Managers and administrative staff in attendance in order to consider in confidence this item.

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 enable the Council to discuss and to consider the matter at the meeting on the following grounds:

h. legal advice.

and

i. information relating to actual litigation, or litigation that the council believes on reasonable grounds will take place involving the council.

Moved Councillor Lonie, Seconded Councillor Clancy

Carried

Minda Update (Report No: 274/16)

Motion

C251016/561

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."*

RELEASED
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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 304m² 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.

Councillor Patton left the chamber at 9.20pm.

Councillor Patton rejoined the chamber at 9.22pm.

Moved Councillor Clancy, Seconded Councillor Lonie Carried

Division called

A division was called:

Those voting for: Councillors Bouchée, Aust, Bradshaw, Charlick, Clancy, Donaldson, Lonie, Patton, Smedley, Wilson, Yates (11)

Those voting against: Nil (0).

His Worship the Mayor declared the motion Carried

Order to Retain in Confidence

Motion

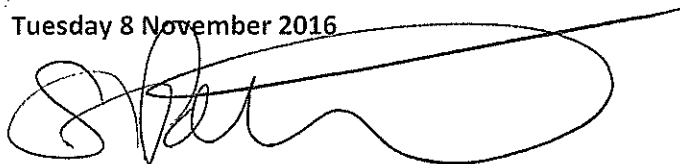
C251016/562

1. That an order be made under the provisions of Section 91(7) and (9) of the Local Government Act 1999 that the documents relating to Report No: 274/16 including minutes, report and attachment relating to discussion of the subject matter of that document, having been dealt with on a confidential basis under Section 90 of the Act, should be kept confidential on the grounds of information contained in 90(3)(h & i).
2. This resolution will be reviewed within 12 months by the Council.

Moved Councillor Clancy, Seconded Councillor Lonie Carried

CONFIRMED Tuesday 8 November 2016

MAYOR



RELEASED

City of Holdfast Bay

10 DEC 2019 1
C101219/1703

Council Report No: 274/16

ITEM NUMBER: 17.3

CONFIDENTIAL

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
Date: 25 October 2016
Written By: Senior Policy Planner
General Manager: Business Services, Mr I Walker

RECOMMENDATION

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 \$ [Council to nominate] for the transfer of 304m² of encroachment land (as identified on the Identification Survey dated 22 August 2016), together with \$ [Council to nominate] 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.
-

BACKGROUND

Council on 13 September 2016 resolved 'in confidence' (Resolution No: C130916/507) the following in relation to negotiations regarding the encroachment of land under the Somerton Surf Life Saving Club (SLSC) building:

C130916/507

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.*

At its meeting held on 11 October 2016, His Worship the Mayor provided Members a further verbal update on the negotiations with Minda and the suggested legal strategy going forward. As an outcome of those discussions, Council's solicitors were instructed to give Minda's lawyers a further 48 hours to provide a final response as to whether Minda was prepared to participate in a mediation in relation to the land encroachment matter.

As no further correspondence had been received from Minda or its solicitors within that timeframe, Council's solicitors were instructed on 17 October to proceed with preparing a pre-action settlement offer to Minda based on Resolution 4 above. However, during preparation of a letter of offer, correspondence has now been received from Minda's solicitors advising that Minda is now prepared to enter formal mediation. A copy of this letter is located at Attachment 1 for Members' reference.

Refer Attachment 1

Council's solicitors have recommended that Council still pursue mediation despite the late response from Minda.

Further, in drafting a pre-settlement offer and noting that the Court's power in proceedings under the Encroachments Act is limited to land this is subject to building encroachments (i.e. excluding curtilage), Council's solicitors have recommended that a second alternative option also be presented that would include the transfer and conveyance of 304m² of land (being all 'built-on' areas including the SLSC encroachment itself, perimeter paths, eave overhangs and the bitumised carpark area on the southern side of the Club building), together with the grant of a registered easement over the 'balance' of the curtilage area that Council is seeking (i.e.

still all adding up to 570m² of land in total but not all would be under Council's ownership). This land has been identified on a revised survey plan located at Attachment 2 for Members' reference.

Refer Attachment 2

Notwithstanding this, Council's purchase offer would be lower under this scenario to cover a lesser area of land to be conveyed and transferred (being 304m² and separately valued at \$70,000) and some compensation to Minda for an easement over the curtilage land.

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Attachment 1

Our Ref: DCJ/MIND 150805
File Principal: Daniel Jenkinson
Contact: Tom Dachs - (08) 8210 2234
Direct Email: tdachs@dmawlawyers.com.au

19 October 2016

Norman Waterhouse Lawyers
Level 15, 45 Pirie Street
ADELAIDE SA 5000

Attention: Mr Peter Psaltis

By email: ppsaltis@normans.com.au

Dear Peter

Minda Incorporated and City of Holdfast Bay

We refer to your without prejudice letter dated 30 September 2016. Given that your letter is expressed to be on a without prejudice basis, and having regard for our Tom Dachs' without prejudice telephone conversations with Mr Psaltis on 10 and 11 October 2016, we respond on a similar basis.

Our client agrees that it would be preferable for matters identified in recent correspondence to be resolved by agreement, rather than by court determination. The issue is whether an agreement on terms acceptable to both parties can be reached.

Our client is prepared to meet on a without prejudice basis for the purpose of determining whether your client is, firstly, prepared to enter into a lease of what we loosely describe as the "SLSC Land" and, if so, the terms of that lease. Our client is also prepared to accede to your client's request that the meeting be in the forum of a mediation, even though we have reservations as to whether that is the best way to address those issues at this stage.

Mr O'Sullivan QC would be acceptable to our client as a mediator, as would Phillip McNamara QC.

Our client agrees to the proposal that the mediation occur at our offices, and that our respective clients share the costs in the manner that you propose. The parties would execute a standard mediation agreement.

No doubt some of the factual and legal issues that you have raised in earlier correspondence, and our client's responses to them, will be a factor to be considered in the context of the mediation, particularly in addressing the first part of the mediation's stated purpose described above.

We will defer responding further on what you claim are the facts, as well as to the propositions that you advance, until that can be done in a more appropriate forum, such as the foreshadowed mediation, if that is to occur. Needless to say, based on our instructions, your client should anticipate that those matters will be seriously challenged, with the legal


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landscape that the parties face, and the likely outcomes that the legal system might actually deliver, seriously diverging from your client's stated objectives.

We await your response.

WITHOUT PREJUDICE

Yours sincerely
DMAW Lawyers Pty Ltd

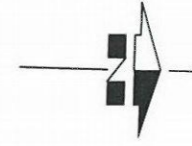


Daniel Jenkinson

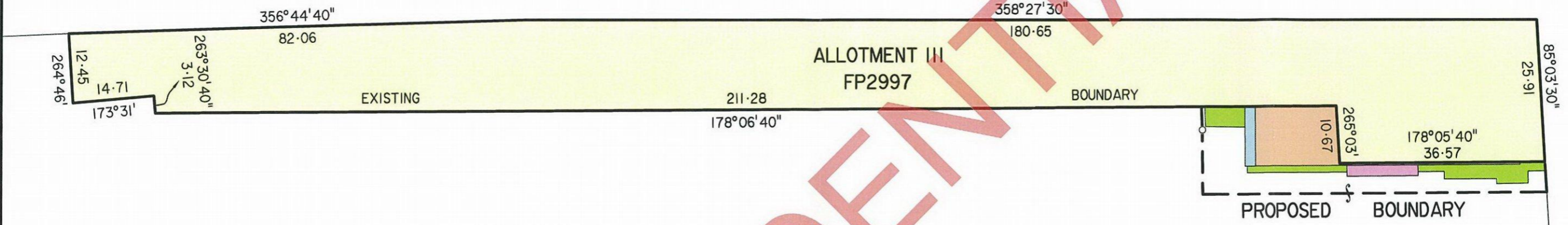
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Attachment 2










ESPLANADE



ALLOTMENT I
D110280
(APPROVED - NOT YET DEPOSITED)

LEGEND

-  ALLOTMENT III - 4460m²
-  THE AREA OF THE FORMED CONCRETE PATHS AND/OR BITUMEN (PART OF THE CARPARK) ON THE EASTERN AND SOUTHERN SIDES OF THE BUILDING
-  THE AREA UNDER THE EAVE OVERHANG ON THE SOUTHERN END OF THE BUILDING
-  THE FOOTPRINT OF THE BUILDING ENCROACHMENT (WHICH APPEARS TO INCLUDE AREA A IN THE ATTACHED SURVEY, TOGETHER WITH A 2cm SLITHER OF LAND ON THE EASTERN SIDE OF THE BUILDING MARKED "0.02 WALL")
-  THE AREA UNDER THE BALCONY AND CANOPY OVERHANG ON THE EASTERN SIDE OF THE BUILDING

VIDE
ENLGT E1
SHEET 2

1. CT 5476/969
2. FOR ANY ANNOTATIONS OR EASEMENT DETAILS REFER TO CT 5476/969
3. FOR PREVIOUS SURVEY ON 13/04/2016 PLEASE REFER TO 25312VCO1-RO

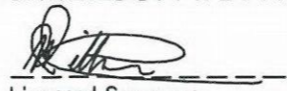


FYFE Earth Partners
ACN 008 116 130

LEVEL 3, 80 FLINDERS STREET, ADELAIDE, SA, 5000
GPO BOX 2450 ADELAIDE SA 5001
TEL (08) 8201 9600
FAX (08) 8201 9650
E-mail info@fyfe.com.au






THIS IS NOT A CERTIFIED SURVEY FOR THE PURPOSES OF THE REGULATIONS UNDER THE SURVEY ACT, 1992
THIS PLAN WILL NOT BE EXAMINED FOR BOUNDARY DEFINITION OR OTHERWISE BY THE REGISTRAR-GENERALS OFFICE
FUTURE RE-SURVEY OF ADJOINING LANDS OR SUBSEQUENT REGISTRATION OF CERTIFIED SURVEY PLANS MAY ALTER THE BOUNDARY DEFINITION OR INFORMATION HEREON

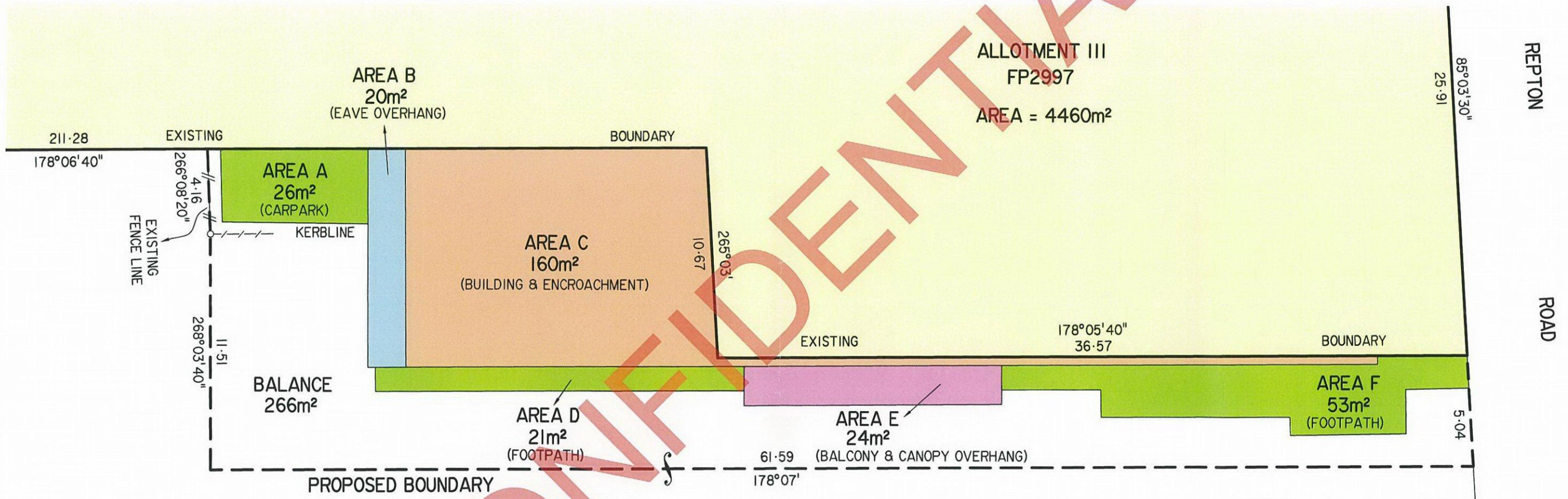
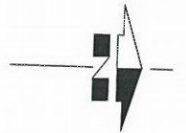
REFERENCE 25312-1-2 DWG 25312VCO2-RO
DRAFTER KAJ SHEET 1 OF 2

SURVEYED BY FYFE PTY LTD ON 16/08/2016

Licensed Surveyor
DATE 22/08/2016

IDENTIFICATION SURVEY
ALLOTMENT 111 in F2997
57 REPTON ROAD
HUNDRED OF NOARLUNGA
NORTH BRIGHTON

LEGEND

-  ALLOTMENT III - 4460m²
-  THE AREA OF THE FORMED CONCRETE PATHS AND/OR BITUMEN (PART OF THE CARPARK) ON THE EASTERN AND SOUTHERN SIDES OF THE BUILDING
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ENLARGEMENT E1




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E-mail info@fyfe.com.au

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REFERENCE 25312-1-2 DWG 25312VCO2-R0
DRAFTER KAJ SHEET 2 OF 2

SURVEYED BY FYFE PTY LTD ON 16/08/2016

DATE 22/08/2016
Licensed Surveyor

IDENTIFICATION SURVEY
ALLOTMENT 111 in F2997
57 REPTON ROAD
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NORTH BRIGHTON