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Jim Glazebrook & Associates
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Dear Sir/Madam

RE: Codlea Pty Ltd – Bayside Brunswick

We have been requested by Codlea Pty Ltd to respond to a matter raised by the Byron Shire Council in their submission dated 7 November 2011 concerning the drainage available to the proposed development, by way of subdivision, of Deposited Plan 851902. The matters we consider relevant are set out below.

The Council Submission

In a letter to the Department of Planning dated the 7th November 2011 the Executive Manager of the Byron Shire Council, responding to the exhibition of the Bayside Brunswick Concept Plan, provided the following opinion:

“The application does not demonstrate that the subdivision has a lawful point of discharge for stormwater disposal.”

A lawful point of discharge for the subdivision can be provided in one of several ways. In particular:

- (i) The subdivision might discharge into an existing water course.
- (ii) The subdivision might discharge by way of an easement over adjoining downstream properties.

Factual Background

The factual background to the matter appears to be as follows:

- (i) Historically, a waterway appears to have existed over the land immediately to the south



of the Bayside Brunswick proposed development. An aerial photograph taken in October 1958 shows the existence of a minor waterway in the approximate position of the present drain which traverses the land to the south of the proposed Bayside Brunswick development. It also appears that further extensions of that waterway pass into the land that will form the Bayside Brunswick development.

- (ii) A further photograph dated the 22nd September 1966 shows that the minor waterway evident in the earlier photograph has been replaced by a constructed waterway which occupies the present path of the east-west drain to the south of the proposed Bayside Brunswick development. There also appears to be a further minor waterway adjoining the newly created artificial waterway. This minor waterway passes into the Bayside Brunswick property.
- (iii) All of the aerial photography from 1966 onwards depicts the present hierarchy of waterways that exist on the Bayside Brunswick property and the land to the south. That is to say, there is a substantial constructed waterway that passes through the Bayside Brunswick property and into the land to the south before discharging into Simpsons Creek to the east.
- (iv) The present 1:25000 map held by the DECCW delineates the waterway described in the previous paragraph.
- (v) On a regular basis, the Byron Shire Council conducts works to ensure the waterway remains free of obstruction and is operating in a manner that allows water to drain from the property on which the Bayside Brunswick development is to be carried out.

The rights of landowners who own land in adjacent to waterways are contained within the Water Management Act 2000. That Act defines a river as follows:

“River includes:

- (a) any watercourse, whether perennial or intermittent and whether comprising a natural channel or a natural channel artificially improved, and
- (b) any tributary, branch or other watercourse in to or from which a watercourse referred to in paragraph (a) flows, and
- (c) anything declared by the regulations to be a river, whether or not it also forms part of a lake or estuary but does not include anything declared by the regulations not to be a river.

It seems reasonably clear from the factual background of the matter that the existing watercourses are natural watercourses that have been artificially improved. As a result, they constitute a “River” within the meaning of the Water Management Act 2000 and provide a legal discharge for the upstream owner, in this case the proponent of the Bayside Brunswick development.

Even if the foregoing were wrong, the existing waterways comprise a long existing and valuable

method of dealing with the natural flows of water within the properties over which they pass. They have been in place for many decades at least, and predate by a significant margin the present ownership of either the Bayside Brunswick property or the land to the south. In the event that the waterway was not considered a river within the meaning of the Water Management Act 2000, it would be open to the proponent to seek the imposition of an easement pursuant to Section 88K of the Conveyancing Act 1919. In the circumstances as they presently exist it would be practically impossible for the downstream owner to resist such an application. In any event, the correspondence from that owner indicates that he is content for an easement subject to condition.

If there is anything further you wish, please do not hesitate to contact us.

Yours faithfully
BOLSTER & CO



MARK BOLSTER