

3.1. NEGOTIATED DECISION REQUEST THE REEF MARINA WHARF STREET PORT DOUGLAS

REPORT AUTHOR(S)	Simon Clarke, Coordinator Development Assessment and Coordination
GENERAL MANAGER	Nicholas Wellwood, General Manager Operations
DEPARTMENT	Development Assessment and Coordination
PROPOSAL	Request for a Negotiated Decision for the Combined application for Material Change of Use and Reconfiguration of a Lot – Staged Development
APPLICANT	The Reef Marina Pty Ltd C/- Elizabeth Taylor, Town Planner 23 Vallely Street FRESHWATER QLD 4870
LOCATION OF SITE	Wharf Street, Port Douglas
PROPERTY	Lot 146 SR861, Part Lot 126 SR868, Lot 103 SR500 and Inlet Street Road Reserve

LOCALITY PLAN



Figure 1 - Locality Plan

LOCALITY	Port Douglas and Environs
PLANNING AREA	Port Douglas Waterfront North Planning Area
PLANNING SCHEME	Douglas Shire Planning Scheme 2006
REFERRAL AGENCIES	State Assessment and Referral Agency
NUMBER OF SUBMITTERS	Not applicable
STATUTORY ASSESSMENT DEADLINE	11 May 2017
APPLICATION DATE	7 April 2017 (Negotiated Decision Request)

RECOMMENDATION

That Council issues a Negotiated Decision for the combined application over land described as Lot 146 SR861, Part Lot 126 SR868, Lot 103 SR500 and Inlet Street Road Reserve, consisting of a material change of use comprising:

- Stage 1a – 5 x Multi-unit housing / Holiday accommodation;**
- Stage 1b – 14 x Multi-unit housing / Holiday accommodation;**
- Stage 2a – Mixed use development – 35 x Multi-unit housing / Holiday accommodation and Commercial / Retail space [Shopping facility / Restaurants / Business facilities/ Tavern];**
- Stage 2b – Public plaza, Temporary commercial/retail container shops, Temporary industrial premises, Temporary retention of slipway;**
- Stage 2c – Mixed use development – 26 x Multi-unit housing / Holiday accommodation and/or Holiday accommodation – Dual key and Commercial / Retail space [Shopping facility / Restaurants / Business facilities / Tavern];**
- Stage 3a – 5 x Multi-unit housing / Holiday accommodation and/or Holiday accommodation - Dual key**

and lot reconfiguration comprising three (3) lots into five (5) lots and easements, subject to the following amendments to conditions 4, 5 and 6 contained in its Decision Notice dated 20 February 2017:

Deed of Agreement – Port Douglas Commercial Fishermen’s Association

- 4. Execute the Deed of Agreement (Relocation of Mooring Facility) prepared by King and Company Solicitors with the Port Douglas Commercial Fishermen’s Association and Council prior to commencement of use for Stage 1.**

Deed of Agreement – Operation of Slipway

- 5. Execute the Deed of Agreement (Operation of Slipway) prepared by King and Company Solicitors prior to commencement of use for Stage 1.**

Covenant

- 6. Prior to Council being required to issue a Compliance Certificate for the Plan of Survey, a legally binding covenant is to be entered into to tie proposed Lots 1, 2 and 3 and Lot 103 (the slipway lot) restricting separate sale until such time that each stage of the proposed development is completed relative to that particular stage (e.g. via Community Title Scheme or similar). For the purposes of this condition, Council does not object to the applicant/owner executing lease arrangements via deed agreements (or similar mechanisms) to achieve development of the land in smaller management stages.**

All other conditions remain unchanged.

EXECUTIVE SUMMARY

A Combined Application for the redevelopment of land at the Port Douglas Waterfront was approved by Council at its Special Meeting held on 17 February 2017. The application consists of:

Material change of use

- 85 Multi-unit housing / Holiday accommodation units
- 1440m² new Shops/Restaurants/Offices/Tavern
- Rearrangement of 'temporary' slipway-allied industries
- Demolition of northern wing of commercial building, and other elements within the Port Douglas Waterfront that are inconsistent with the proposed development.

Lot reconfiguration

- Five (5) new lots, including public access easements.

The Reef Marina (TRM) has suspended its rights of appeal to the Planning and Environment Court in order to request changes to conditions contained in Council's Decision Notice. The specific conditions relate to:

- Condition 4: Deed of Agreement – Port Douglas Fishermen's Association;
- Condition 5: Deed of Agreement – Operation of Slipway;
- Condition 6: Covenant

The applicant has requested that the conditions be removed from the Decision Notice in their entirety. It is recommended that the conditions remain. However, the wording of each condition is to be adjusted to provide enhanced clarity and certainty.

TOWN PLANNING CONSIDERATIONS

Negotiated Decision Request

The applicant has request changes to three conditions contained within the Decision Notice as follows:

Deed of Agreement – Port Douglas Fishermen’s Association

- 4. Enter into a legally binding Deed of Agreement with the Port Douglas Fishermen’s Association and Council to confirm obligations with respect to an endorsed Heads of Agreement between all parties prior to commencement of use for Stage 1 or prior to Council being required to issue a Compliance Certificate for the Plan of Survey, whichever occurs first.**

Applicant’s representation

The condition is unclear, uncertain and unreasonable. It requires TRM to reach an agreement with a third party (Port Douglas Commercial Fishermen’s Association – PDCFA) to satisfy the Condition. This is unreasonable and unlawful.

A Deed of Agreement satisfactory to all parties, must be executed to replace Condition 4, so that there is clarity and certainty in relation to the obligations of all parties and to ensure TRM is not ‘held to ransom’ by a third party that may choose not to reach agreement with TRM.

If the Deed of Agreement is executed expeditiously, Condition 4 can and should be deleted. Alternatively, if the Deed cannot be expedited the Condition should be deleted.

Deed of Agreement – Operation of Slipway

- 5. Enter into a legally binding Deed of Agreement with Council to undertake to continue to operate the slipway for a period of three (3) years, subject to any ‘force majeure’ and to provide Council with assistance in investigating options for the relocation of the slipway or alternative ship-lifting facility prior to commencement of use for Stage 1 or prior to Council being required to issue a Compliance Certificate for the Plan of Survey, whichever occurs first.**

Applicant’s representation

This condition is unclear and uncertain.

It is understood that agreement has been reached between TRM and DSC in relation to a draft Slipway Deed. The Deed of Agreement should be finalised and executed by TRM and Douglas Shire Council.

The Deed of Agreement can be executed expeditiously and Condition 5 can, and should be deleted, as it is unlawful.

Covenant

- 6. Prior to Council being required to issue a Compliance Certificate for the Plan of Survey, a legally binding covenant is to be entered into to tie all proposed freehold lots restricting separate sale until such time that each individual stage of the proposed development is completed relative to that particular stage (e.g. via Community Title Scheme or similar). For the purposes of this condition, Council does not object to the applicant/owner executing lease arrangements via deed agreements (or similar mechanisms) to achieve development of the land in smaller management stages.**

Applicant's representation

This Condition is not reasonably required of the development and is an unreasonable imposition on the development. It is not a relevant planning condition and is therefore unlawful.

Both TRM and Douglas Shire Council are working towards a common goal: to create a coordinated master planned development of international standard on the TRM site. This will and can be achieved through the implementation of a staged development that complies with both the Preliminary Approval and the Combined Material Change of Use and Reconfiguring a Lot approval, issued by Douglas Shire Council.

Condition 6 currently provides no flexibility or opportunity for this staged development to be effectively staged or managed by TRM and any possible future joint venture partners. It also fetters and potentially compromises the existing marina and existing commercial area (proposed Lot 4 and the marina basin) by including them in the Covenant restrictions, which are really only intended to apply to the staged development site (proposed Lots 1, 2, 3 and the Slipway Lot).

Condition 6 fetters the financial flexibility of TRM to respond to investment/development opportunities associated with the staging of the development. Companies with financial flexibility are able to survive tough economic times as well as take advantage of unexpected investment/development opportunities and manage changes in the economic climate at a local, national and international level.

If TRM is unable to respond adequately and with flexibility to unforeseen impacts or economic changes during the life of the project, there is the real possibility that the project may stall.

It is certainly not the role of Council to dictate marketing and financial development strategies to TRM for the life of the project, particularly when two (2) legally binding development approvals are in place and agreed between the parties to ensure TRM project is developed as a coordinated master-planned development of international standard.

Condition 6 should be deleted or should only apply to that part of the site where new development is to occur, being proposed Lots 1, 2 and 3 and the slipway lot (notwithstanding that TRM maintains the view that the condition, in any form, is unlawful).

The applicant has supported its claims quoting various sections of the *Sustainable Planning Act 2009*.

Response to the applicant's representation

It is not the role of a town planner to make statements about the lawfulness, or otherwise, of the conditions contained within the Decision Notice, and this report will not draw any conclusions in this regard. However, it is correct to say that conditions need to be certain (i.e. capable of being implemented without ambiguity).

Conditions 4 and 5 require Deeds to be entered into among different parties to secure certain objectives contained within the Douglas Shire Planning Scheme. It is clear what these planning scheme objectives are, and the respective Deeds have been the matter of negotiation over recent months.

To ensure that conditions 4 and 5 are certain, it is proposed to amend each condition to reflect the negotiated Deeds that will be executed by each party. It is not appropriate to remove the conditions in their entirety as it would compromise Council's planning strategy having regard to both the operation of the slipway and the commercial fishermen.

Condition 6, without doubt, is an unusual condition. In effect, it is intended to mirror the condition imposed by the State in its letter of offer to freehold the land at the Port Douglas Waterfront to TRM. As is the case with Conditions 4 and 5, it is a condition designed to ensure that Council's planning strategies contained within its planning scheme are carried forward with the redevelopment of TRM's land. However, the condition does foreshadow the fact that the land will be ultimately on-sold in stages and/or via community titles schemes to other parties as progress is made in developing the land in stages.

The applicant's representation to Condition 6 is correct when it states that 'if the covenant is to apply', that it should only apply to that part of the site where new development is expected to occur, being proposed Lots 1, 2 and 3 and the slipway lot (Lot 103). The condition currently applies to Lot 146 (proposed Lot 4 and the entire marina basin). The condition can be amended to reflect this requirement. Attachment 1 clarifies the location of proposed Lots 1, 2 and 3.

Each condition is recommended to be amended as follows (underlined words being additions: strike out words being deletions):

Deed of Agreement – Port Douglas Commercial Fishermen's Association

4. Execute the Deed of Agreement (Relocation of Mooring Facility) prepared by King and Company Solicitors ~~Enter into a legally binding Deed of Agreement with the Port Douglas Commercial Fishermen's Association and Council to confirm obligations with respect to an endorsed Heads of Agreement between all parties prior to commencement of use for Stage 1 or prior to Council being required to issue a Compliance Certificate for the Plan of Survey, whichever occurs first.~~

Deed of Agreement – Operation of Slipway

5. Execute the Deed of Agreement (Operation of Slipway) prepared by King and Company Solicitors ~~Enter into a legally binding Deed of Agreement with Council to undertake to continue to operate the slipway for a period of three (3) years, subject to any 'force majeure' and to provide Council with assistance in~~

~~investigating options for the relocation of the slipway or alternative ship-lifting facility prior to commencement of use for Stage 1 or prior to Council being required issue a Compliance Certificate for the Plan of Survey, whichever occurs first.~~

Covenant

6. Prior to Council being required to issue a Compliance Certificate for the Plan of Survey, a legally binding covenant is to be entered into to tie all proposed Lots 1, 2 and 3 and Lot 103 (the slipway lot) freehold lots restricting separate sale until such time that each individual stage of the proposed development is completed relative to that particular stage (e.g. via Community Title Scheme or similar). For the purposes of this condition, Council does not object to the applicant/owner executing lease arrangements via deed agreements (or similar mechanisms) to achieve development of the land in smaller management stages.

COUNCIL'S ROLE

Council can play a number of different roles in certain circumstances and it is important to be clear about which role is appropriate for a specific purpose or circumstance. The implementation of actions will be a collective effort and Council's involvement will vary from information only through to full responsibility for delivery.

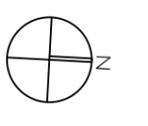
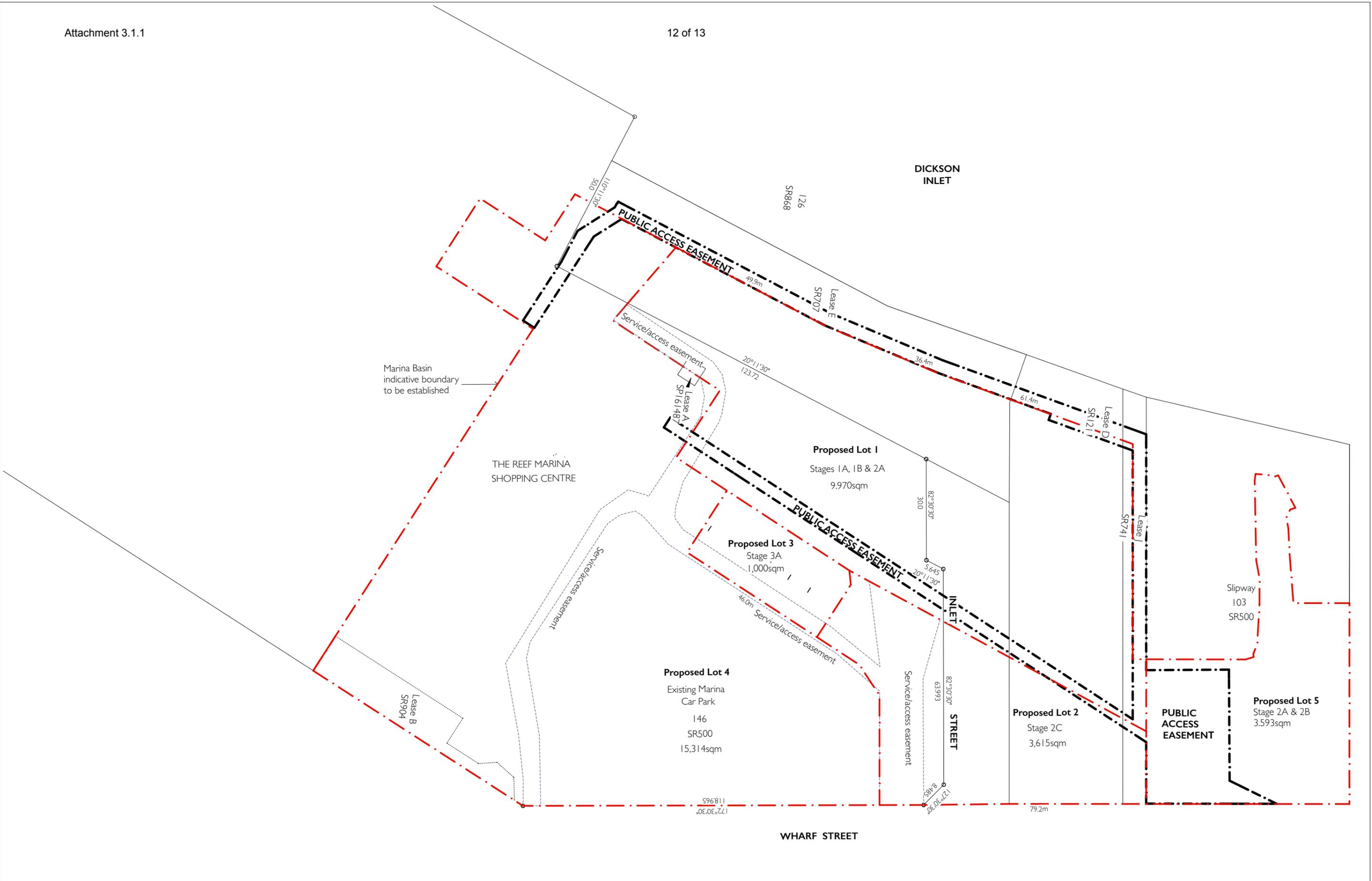
The following area outlines where Council has a clear responsibility to act:

Regulator: Meeting the responsibilities associated with regulating activities through legislation or local law.

Under the *Sustainable Planning Act 2009* and the *Sustainable Planning Regulation 2009*, Council is the assessment manager for the application.

ATTACHMENTS

1. Attachment 1 - Proposed Lot Reconfiguration Plan [3.1.1]



/Volumes/YODA/Project Files/2016/160303 The Reef Marina/3.0 Design/3.1 Design (Arch)/3.1.2 Sketch Design/160303 Reef Marina Site.pn