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BARRISTER

5 August 2021

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By email: elliott.dennett@epa.govt.nz

Dear Elliott

RE Molesworth Street Office Development

Introduction

1. You have asked me to address the correct interpretation of the definition of Site in the Operative Wellington District Plan and whether it includes the one-eighth share of Collina Terrace that is included in Record of Title WN36D/158.

2. You have also asked for the correct interpretation of Site Area in the District Plan and whether it excludes Collina Terrace as an access lot or possibly, an access strip. In this respect you ask if Collina Terrace is not excluded from the definition of Site Area, then is the full 438m² of Collina Terrace included or, is only a lesser area equivalent to a 1/8th share to be included.

3. These questions arise in circumstances that:

   3.1. Prime Property Holdings Limited (**Prime**) has made a consent application for a referred project under the COVID-19 Recovery (Fast Track Consenting) Act 2020 (**FTA**).

   3.2. Prime states that the project site should include all of the land in Record of Title WN36D/158 which includes Lot 1 DP 23575 and the 1/8th share of Lot 5 DP 1265, part of Collina Terrace.

   3.3. Prime relies on the District Plan's definition of Site and asserts, "in this case, there is only one CFR [Record of Title] for both Lot 1 DP 23575 and Lot 5 DP 1265 (Collina Terrace). Therefore, both areas are defined as a site".

   3.4. The issue as to the correct definition of Site is important in terms of compliance or otherwise with various Central Area standards in the District Plan and the resulting activity status. For example, Rule 13.3.8.14 in which the maximum building height and building mass standard must not be exceeded by more than 15% in order that the activity status remains restrictive discretionary.

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3.5. Additionally, if Collina Terrace is included in the definition of Site, then the Site would have a boundary adjoining the Inner Residential Area and Standards 13.6.3.1.9 and 13.6.3.1.10 relating to the building recession plane would apply (contrary to a statement by Prime).

3.6. A further compliance issue relating to the Mass in Standard 13.6.3.2.1 is relevant to the definition of Site and Site Area. Prime's calculations of Site Area in its Design Statement include the full land area of Collina Terrace (4.38m²). This gives rise to the question as to whether Collin Terrace is an Access Lot as defined in the District Plan (or elsewhere) and therefore excluded from the Site Area.

3.7. The Panel has sought and received further information from the applicant in an effort to clarify these issues.

4. I have reviewed the further information provided by Prime and have concluded that the issues identified by you remain outstanding.

5. In terms of the questions asked of me, I conclude in summary:

5.1. Collina Terrace/Lot 5 is an Access Lot within the definition of that term in the District Plan, and under the Property Law Act 2007.

5.2. The Site cannot reasonably include Collina Terrace/Lot 5. If Collina Terrace/Lot 5 were to be included, neither calculation as to the extent of the Site Area or building mass would be affected.

5.3. The applicable definition of Site Area is that found in rule 13.6.3.2, and not that in chapter 3. On a purposive interpretation, the applicable definition of Site Area excludes Collina Terrace/Lot 5 because it is not a site that forms part of the development.

5.4. If Prime remains of the position that the Site includes Collina Terrace/Lot 5, then rules 13.6.3.1.9 and 13.6.3.1.10 apply.

Is Collina Terrace/Lot 5 an Access Lot?

6. The District Plan definition of Access Lot is:

> …any separate lot used for access to a lot or to lots having no legal frontage.
>
> However, if that area of land is:
>
> - 5m or more wide, and
> - Not legally encumbered to prevent the construction of buildings,
>
> it is excluded from the definition of Access Lot.

7. The qualifiers are therefore:

   7.1. a separate lot used for access to one or more others;

   7.2. where the others have no legal frontage; and

   7.3. the separate lot is either less than 5m wide or legally encumbered to prevent the construction of buildings (or both).

8. For some guidance as to what is meant by the words "not legally encumbered to prevent the construction of buildings" reference to the District Plan definition of "Access Strip" is instructive:

> ACCESS STRIP:
>
> Means an access leg or an area of land defined by a legal instrument, providing access to a site or sites, or within the above meaning an area of land of an access strip if:
>
> - it is less than 5m wide, or
> - it is 5m or more in width and is encumbered by a legal instrument, such as a right-of-way, that prevents the construction of buildings. (emphasis added)

9. Access Lot is also defined by the Property Law Act 2007 (**the PLA**):

> Access lot, in sections 298 and 315 and in relation to a subdivision, means a separate allotment-
>
> (a) In the subdivision; and
>
> (b) That was created to provide access-
>
> (i) from all or any of the other allotments of the subdivision; and
>
> (ii) to an existing road or street.

The Lots on Collina Terrace

10. Collina Terrace is Lot 5 on DP 1265 and is held in shared ownership by the registered owners of Lots 1 to 4 DP 1265. Prime is the registered owner of the applicant site at 55-61 Molesworth Street (Lot 1 DP 23575 and 1/8 of Lot 5 DP 1265). DP 1265 lays out Lot 5 as practical vehicle access from Molesworth Street to Lots 1 to 4 inclusive and the rear of the Prime site. It seems to exist for no other purpose than to provide such access.

11. Lots 1 to 3 DP 1265 are also connected to Hawkstone Street via Lot 6 of DP 1265. Lot 6 is a narrow (approximately 2m wide) disused grass strip at the rear of those lots. It does not extend to Lot 4, nor does it provide any practical pedestrian or vehicle access to a legal street. Its sharp angle of incline and lack of constructed steps make it potentially unsafe, and it is both too narrow and too steep for vehicles. The only vehicle access is provided by Collina Terrace/Lot 5 DP 1265.

12. Whilst a comprehensive study of a subdivision history of DP1265 has not been undertaken, there is no evidence to suggest that any other purpose exists for Lot 5 having been set aside with joint ownership conferred on the remaining Lots, which have no other vehicle access to a legal road or street.

13. Collina Terrace/Lot 5 DP 1265 meets the requirements for an Access Lot within the meaning of s 4 of the Property Law Act 2007.

14. On further analysis, it may also be an Access Lot within the meaning conferred by the District Plan definition if it meets the remaining qualifiers within that definition, set out below.

Having no legal frontage

15. The terms "legal frontage" or "frontage" are not defined in the Plan or in any current legislation. They are discussed in case law, but in a different context.

16. The High Court in *Wright v Tan* dealt with the interpretation of a condition of subdivision under s 184 Municipal Corporations Act 1933 which included the expression "no buildings be erected having a frontage wholly to the right of way".[1] The High Court held that "frontage" is a legal rather than practical concept which, in relation to land, had the usual dictionary definition: land abutting on a street.[2] While the Court of Appeal overturned the decision on appeal, it was primarily concerned with contextual interpretation of the frontage of a building, rather than legal frontage of land. In any event, the Court of Appeal accepted as its starting point the ordinary meaning of frontage in relation to land, being "land which abuts on a river or piece of water or a road" or "the part of land abutting a street or highway".[3]

17. Although the expression legal frontage continues to be used by policy planners today, it has no more meaning than "abutting" or "fronting" an existing street or road in order to provide direct access to it.

18. There may be an arguable case that Lots 1 to 3 of DP 1265 have a semblance of legal frontage supplied by Lot 6. It also appears that Lot 4 has an easement over another parcel of land for pedestrian and vehicular access to Eccleston Hill. However, the better view is that none of Lots 1 to 4 comprise land abutting on an existing street. Accordingly, they are Lots without legal frontage for the purpose of the definition of an Access Lot.

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1 *Wright v Tan* [2002] 3 NZLR 703 (HC).
2 At [58]– [59].
3 *Wright v Tan* [2004] 2 NZLR 735 (CA) at [22].

Legally encumbered to prevent the construction of buildings

19. Another qualifier is whether a potential Access Lot is encumbered to prevent the construction of buildings.

20. In this instance, the Records of Title in which Lot 5 DP 1265 is contained do not refer to any legal encumbrance, such as a right of way, that would prevent the placement of obstructions. However, s 298 of the Property Law Act 2007 confers the same outcome:

> **298 Rights of proprietors of access lot that is or includes driveway or proposed driveway**
>
> (1) This section applies to the proprietors of an access lot that is or includes a driveway or proposed driveway.
>
> (2) Each of those proprietors has, in common with the rest of them, the same right to pass and re-pass over and along the access lot that the grantor and grantee of a vehicular right of way have (in common with one another) in respect of that right of way under clause 1 of Schedule 5.
>
> (3) Each of those proprietors has against one another in respect of the access lot the same rights that the owners and occupiers of the land for the benefit of which, and the land over which, a vehicular right of way is granted have against one another in respect of that right of way under clause 2 of Schedule 5.
>
> (4) Clause 3 of Schedule 5 applies to each of those proprietors in respect of the access lot in the same way as it applies to persons bound by, and persons entitled to force in either case in respect of a vehicular right of way, the covenants in Schedule 5.

21. The relevant clauses of Schedule 5 are entitled "Covenants implied in grants of vehicular rights of way" and provide:

> The grantor and the grantee of a vehicular right of way covenant with one another as follows:
>
> **1 Right to pass and re-pass**
>
> (1) The grantee and the grantor have (in common with one another) the right to go, pass, and re-pass over and along the land over which the right of way is granted.
>
> (2) That right to go, pass, and re-pass is exercisable at all times, by day and by night, and is exercisable with or without vehicles, machinery, and equipment of any kind.
>
> (3) In this clause, the **grantee** and the **grantor** include agents, contractors, employees, invitees, licensees, and tenants of the grantee or the grantor.
>
> **2 Right to establish and maintain driveway**
>
> The owners and occupiers of the land for the benefit of which, and the land over which, the right of way is granted have the following rights against one another:

(a) the right to establish a driveway on the land over which the right of way is granted, and to make necessary repairs to any existing driveway on it, and to carry out any necessary maintenance or upkeep, altering if necessary the state of that land; and

(b) any necessary rights of entry onto that land, with or without machinery, plant, and equipment; and

(c) the right to have that land at all times kept clear of obstructions, whether caused by parked vehicles, deposit of materials, or unreasonable impediment to the use and enjoyment of the driveway; and

(d) the right to a reasonable contribution towards the cost of establishment, maintenance, upkeep, and repair of the driveway to an appropriate standard; and

(e) the right to recover the cost of repairing any damage to the driveway made necessary by any deliberate or negligent act of a person bound by these covenants or that person's agents, contractors, employees, invitees, licensees, or tenants.

…

22. That the contents of Schedule 5 are to be carried over to Access Lots as if they were rights of way confers all of the elements of a typical right of way access for vehicular access, including that access lots be encumbered to prevent the construction of buildings.

23. In short, if Collina Terrace/Lot 5 is an Access Lot within the meaning of the PLA it is equally encumbered, albeit by statute, to prevent the construction of buildings. As a result, the exception in the District Plan definition of Access Lot would not apply.

24. The alternative approach is implausible. There is no logical inference that Collina Terrace/Lot 5 was created to be held by adjoining owners for any purpose other than to provide unobstructed access to Molesworth Street where no practical access to an existing street would otherwise be available. Logically, it is a PLA Access Lot and it is unable to be obstructed by buildings, or anything else.

Width

25. As a result of the conclusion that Lot 5 is legally encumbered to prevent the construction of buildings, it is not necessary to determine if Lot 5 is 5m wide or more. The analysis below is nonetheless undertaken for completeness.

26. Part of Collina Terrace near its intersection with Molesworth Street is less than 5m. Elsewhere, it is 5m or more.

27. At first blush, the width aspect of the Access Lot definition appears arbitrary, and it is unclear what is intended if the width of the Lot varies. It is not clear, for example, if a Lot must be 5m or more at all points along its length before it can fall within the exclusion, or if a Lot that is wider than 5m at some (or even most) points is sufficient. If the former, Lot 5 cannot fall within the exclusion to the definition of an Access Lot. If the latter, Lot 5 is capable of falling within the exclusion, but would nonetheless still be considered an Access Lot due to the PLA encumbrance to prevent building.

28. In any event, in my opinion, Collina Terrace (Lot 5 DP 1265) is an Access Lot within the meanings of s 4 of the Property Law Act 2007 and the Operative District Plan.

What is the Site and Site Area of the application?

29. As mentioned, Prime states that the project site is made up of 55–61 Molesworth (Lot 1 DP 23575 as contained in Record of Title WN36D/158 including all 428m^2 of Lot 5 DP 1265/Collina Terrace). The significance of that statement is the potential impact of certain Central Area and Residential Area rules and standards, one of which—regarding building mass—goes to the activity status of the Project.

What is the Site for the purpose of the application?

30. The term "Site" is not defined in the Resource Management Act 1991, the PLA, the Local Government Act 2002, or the Land Transfer Act 2017.

31. The District Plan definition of Site is:

> … any area of land comprised wholly in one computer freehold register or any allotments as defined by the Act, or any allotments linked pursuant to the provisions of section 77 of the Building Act 2004.

32. It appears Prime relies on the fact that Lot 1 DP 23575 and Lot 5 DP 1265 appear on the one Record of Title to conclude both Lots together fall within the first aspect of the definition of Site—"any area of land comprised wholly in one computer freehold register". However, the requirement is for the land making up the site to be wholly in one computer freehold register and in the case of Lot 5 DP 1265, only a 1/8th share is recorded on the same computer freehold register (WN36D/158) as Prime's development site at 55-61 Molesworth Street.

33. Additionally, if Prime's stated position remains, it would be inconsistent with its acceptance that Collina Terrace/Lot 5 is not the "main title", or the "main site" is repeatedly found in Prime's response to the s 92 Further Information Request at pages 3 and 4.[4] In this regard, there is an obvious lack of symmetry to the proposition that Collina Terrace/Lot 5 is a component of the site.

[4] Spencer Holmes letter of 16 July 2021.

34. The better interpretation is that Site in this context relies on the meaning of allotment as provided in the RMA. Sections 218(2) and (3) define allotment as follows:

> (2) In this Act, the term allotment means—
>
> (a) any parcel of land under the Land Transfer Act 2017 that is a continuous area and whose boundaries are shown separately on a survey plan, whether or not—
>
> (i) the subdivision shown on the survey plan has been allowed, or subdivision approval has been granted, under another Act; or
>
> (ii) a subdivision consent for the subdivision shown on the survey plan has been granted under this Act; or
>
> (b) any parcel of land or building or part of a building that is shown or identified separately—
>
> (i) on a survey plan; or
>
> (ii) on a licence within the meaning of subpart 6 of Part 3 of the Land Transfer Act 2017; or
>
> (c) any unit on a unit plan; or
>
> (d) any parcel of land not subject to the Land Transfer Act 2017.
>
> (3) For the purposes of subsection (2), an allotment that is—
>
> (a) subject to the Land Transfer Act 2017 and is comprised in 1 record of title or for which 1 record of title could be issued under that Act; or
>
> (b) not subject to that Act and was acquired by its owner under 1 instrument of conveyance—
>
> shall be deemed to be a continuous area of land notwithstanding that part of it is physically separated from any other part by a road or in any other manner whatsoever, unless the division of the allotment into such parts has been allowed by a subdivision consent granted under this Act or by a subdivisional approval under any former enactment relating to the subdivision of land.

35. The meaning of allotment in the RMA has been considered by the High Court in *Mawhinney v Waitakere City Council*.[5] Appealing against an Environment Court decision, the appellant sought to avoid the application of subdivision rules by arguing that separate parcels of land were one allotment on the basis that a cadastral survey line was a separation for which s 218(3) applied to deem the parcels one allotment. The parcels included a rural residential parcel held in fee simple, amalgamated on one title with two other parcels held in tenant in common in undivided shares. The

5

Court rejected the argument, finding that the parcels were each separate allotments in accordance with s 218(2), and that s 218(3) had no application.[6]

36. The District Plan in that case defined Site slightly differently—instead of referring to "any area of land comprised wholly in one computer freehold register", the definition focused on "an allotment":[7]

> - an allotment comprised in a single certificate of title; or
> - an allotment shown on an approved survey plan for which a separate certificate of title could be issued without further consent of the Council; or
> - the aggregation of land held in more than one certificate of title for the purpose of a particular development, where an encumbrance or equivalent is incorporated on each title so that the title cannot be disposed of separately …

37. The differences in the relevant definition before the Court makes the interpretation exercise less straightforward. But, for the reasons detailed in the section below considering Site Area, a purposive interpretation in the context of building mass calculations suggests the better interpretation of Site for this application ought to be limited to Lot 1 DP 23575.

38. Prime's alternative approach does not appear to provide a complete or persuasive answer to the correct calculation of building mass in light of the further definitions of Site Area and the purpose of the relevant District Plan controls in respect of building mass in the Central Area.

What is the Site Area for the purpose of building mass calculations?

39. Building mass is calculated using "site area". The definition of that term is complicated by the fact that there are two potentially relevant definitions of "Site Area" in the District Plan: one in chapter 3 (containing the District Plan General Provisions); and one in chapter 13 (containing the Central Area Rules).

40. The definition of Site Area in chapter 3 is found in rule 3.10, which says that Site Area:

> means the total area of a site, but excludes:
>
> - any part of the site subject to any proposed road widening
> - any designation for a public work
> - the area of any access lot or access strip that provides access to the site or to another site.

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[6] *Mawhinney v Waitakere City Council* HC Auckland CIV-2006-485-627, 19 December 2007 at [32] and [39]. The Court of Appeal considered the point "was not arguable": *Mawhinney v Auckland Council* [2021] NZCA 144 at [101].

[7] Cited at [29] of the judgment.

41. The application of that definition is not expressly limited to any particular chapter, building type, or activity. The definition as originally formulated did not include any of the bullet-pointed list of exclusions. These were introduced by Plan Change 6 (operative 2004), and modified by Plan Change 56 (operative 2009), both of which concerned residential matters—the latter in particular addressed managing the effects of infill and multi-unit housing. Plan Change 56 added "access lot" to list of exclusions, justified on the basis that it would make residential subdivision site coverage calculations "tenure neutral":[8]

> Site Coverage
>
> Site coverage assessments: can be affected by land tenure options. Changes proposed to definitions of 'site area' and 'access lot' to ensure site coverage calculations become 'tenure neutral'.
>
> Amending how site coverage is calculated to make it 'tenure neutral' will help to reduce over development of a site as perceived by the community. Stronger policy guidance and rule guidance will help to ensure site coverage is not reduced as part of the subdivision process and will prevent the cumulative effects from a number [of] site coverage breaches in a certain area.

42. Plan change 72 (operative in 2014) removed a number of references to "site area" in the definitions of infill housing and multi-unit developments. In respect of residential development, the chapter 3 definition now has limited applicability. For example, the only rule it can be found in is rule 5.6.2.7.1, which limits the height of infill housing on sites with site areas less than 800 m2.

43. Chapter 13 contains a different definition of Site Area as part of the calculation for building mass, which is found in rule 13.6.3.2:

> **13.6.3.2 Building Mass**
>
> 13.6.3.2.1 No building (or buildings) shall have a mass in excess of the total building mass (volume) for the site. Total building mass (volume) is calculated using the following formula:
>
> A. In areas where building heights are measured above ground level:
>
> Total mass = site area x height x .75

44. The rule goes on to state that, "For the purpose of calculating total building mass (volume)":

> **Site Area** – means the total area of the site (or sites) that forms part of the development, but does not include any portion of the site subject to a strata title. See also the definition of site.

[8] Section 32 Report Proposed District Plan Change 56 Managing Infill Housing Development (5 May 2007) at 16.

45. The definition does not expressly preclude the application of the chapter 3 definition. However, the introductory words—for the purpose of calculating total building mass—seems to indicate that, in conducting the calculation, the specific definition in rule 13.6.3.2 is to be preferred to the more general definition in chapter 3. In addition, while specific cross-reference is made to the chapter 3 definition of "Site", there is no similar cross-reference to the chapter 3 definition of "Site Area".

46. The chapter 13 definition was introduced as part of Plan Change 48, which sought (inter alia) to address concerns regarding built form in the Central Area. The original proposal for Plan Change 48 included inserting in chapter 3, rule 3.10, a new additional definition of Site Area as follows:

> **SITE AREA (FOR THE PURPOSES OF CALCULATING BUILDING MASS IN CHAPTER 13):** means the total area of the site (as per the definition of site).

47. One submitter (Wellington City Council) pointed out that this additional chapter 3 definition unnecessarily duplicated Plan Change 48's proposed definition within chapter 13 itself, which was originally in the following terms:

> **Site Area** – means the total area of the site (or sites) that forms part of the development, but does not include any portion of the site subject to a strata title.

48. Wellington City Council recommended, and the hearing committee accepted, that the additional chapter 3 definition should be dropped from Plan Change 48, and the words "see also the definition of site" should be added to the proposed chapter 13 definition.[9] This would, the committee suggested, "improve the clarity of the building mass provisions".

49. This history indicates the intent of Plan Change 48 was to provide a stand-alone definition of Site Area for the purpose of calculating building mass in chapter 13, without reference to the definition of Site Area in chapter 3.

50. This does not mean, however, that Prime is correct in its contention that the relevant Site Area for the purpose of calculating building mass includes Lot 5 DP 1265.

51. The chapter 13 definition is carefully limited to the total area of the site or sites that *form part of the development*. Taking a practical and purposive approach, the definition is intended to capture only those sites that in fact form part of the development. Plan Change 48 intended to militate against the expectation that landowners in the Central Area could build to the full extent of the boundaries and up to 100 per cent of the maximum height. It did so by imposing a permitted standard for building mass of 75 per cent on the theoretical maximum for a site, a standard which could be exceeded if an applicant demonstrated that other effects

[9] At 118.

(such as wind, design, heritage) were managed. In the Plan Change 48 decision, the committee noted the flexibility of the regime, and the inter-relationship of height and mass in respect of effects:[10]

> … the mass standard would be used in conjunction with the height standard to help manage the effects of over height buildings, and to provide a more flexible regime for managing the total mass of building that is developed on any given site. … The rationale behind the new rule structure was that height and mass are closely related in terms of the effects generated by new buildings. It was considered that there was increased scope to consider taller buildings if the increase in height was not accompanied by an increase in mass, as buildings have greater potential to generate adverse effects as total building bulk increases.

52. As a result of Plan Change 48, under rule 13.3.8.14, the ability to seek consent as a discretionary activity(restricted) is available if the proposal is within the following conditions:

    52.1. maximum building height is not exceeded by more than 35 per cent, and the building mass standard is not exceeded; or

    52.2. maximum building height is not exceeded by more than 15 per cent, and the building mass standard is not exceeded by more than 15 per cent.

53. In light of the purpose outlined above, it cannot be that an access lot over which building is prohibited was intended to be included as part of the Site Area that would feed into the building mass calculation imposed by Plan Change 48. Under the old rules Prime could build up to 100 per cent of Lot 1 DP 23575 up to the maximum height, but nothing on Lot 5 DP 1265 because it is an Access Lot under the PLA. Taking Prime's approach means that, under the new rules, it can take advantage of Lot 5 to increase its theoretical maximum, despite not being able to build on that Lot and despite the intention of Plan Change 48 that the theoretical maximum building mass would be substantially lowered. Prime's approach requires an inversion of the purpose of Plan Change 48. The better approach is that Lot 5 is simply not a site that forms part of the development.

54. Moreover, if Prime were correct, the result would be absurd. As a matter of principle, if Lot 5 can be used as part of a Site Area calculation, a maximum of one site should benefit in order for the District Plan to appropriately manage density in the area. However, given four other Lots have a similar or greater interest in Lot 5, on Prime's formulation all four could also make use of the entire Lot 5 area as part of their building mass calculations. For three of those Lots, such an approach would approximately double their Site Area. This would result in a distorted building mass

[10] Wellington City Council *Report of the Hearing Committee Proposed District Plan Change 48: Central Area Review* (10 October 2007) at 129.

calculation and defeat the purpose of the District Plan provisions intended to manage density and other effects of Central Area development.

55. In conclusion, the relevant definition of Site Area for the application is that found in rule 13.6.3.2. That definition requires the inclusion of the total area of sites which form part of the development. Taking a purposive approach, that definition cannot include Collina Terrace/Lot 5, because Lot 5 is an Access Lot that cannot be built on, and therefore is not a site that can form part of the development.

Application of rules for Height Control Adjoining Residential Areas

56. Rules 13.6.3.1.9 and 13.6.3.1.10 impose certain restrictions to control heights on Central Area sites adjacent to Inner Residential Areas. 13 Hawkestone Street falls within the Inner Residential Area and shares a short length of boundary with Collina Terrace/Lot 5.

57. If Prime remains of the view that both Lot 1 DP 23575 and 1 Collina Terrace/Lot 5 form the Site, then the result is that rules 13.6.3.1.9 and 13.6.3.1.10 apply to the project. The effect of those rules will apply across both Lots (not just Collina Terrace/Lot 5), so far as the rules require.

Yours sincerely

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