

Our Ref: PJB:FSR:927248.001

16 June 2026

By Email Only

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Legal professional privilege applies

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Dear Tim

Advice regarding Easement in Gross No. 601356512 in favour of Brisbane City Council at 260 Musgrave Rd Coopers Plains

Thank you for your instructions to provide advice regarding Drainage Easement No. 601356512 in favour of Brisbane City Council (**Council**) over Easement B on RP174544 (the **Easement**) located at 260 Musgrave Road, Coopers Plains QLD 4108 (**Land**).

Executive Summary

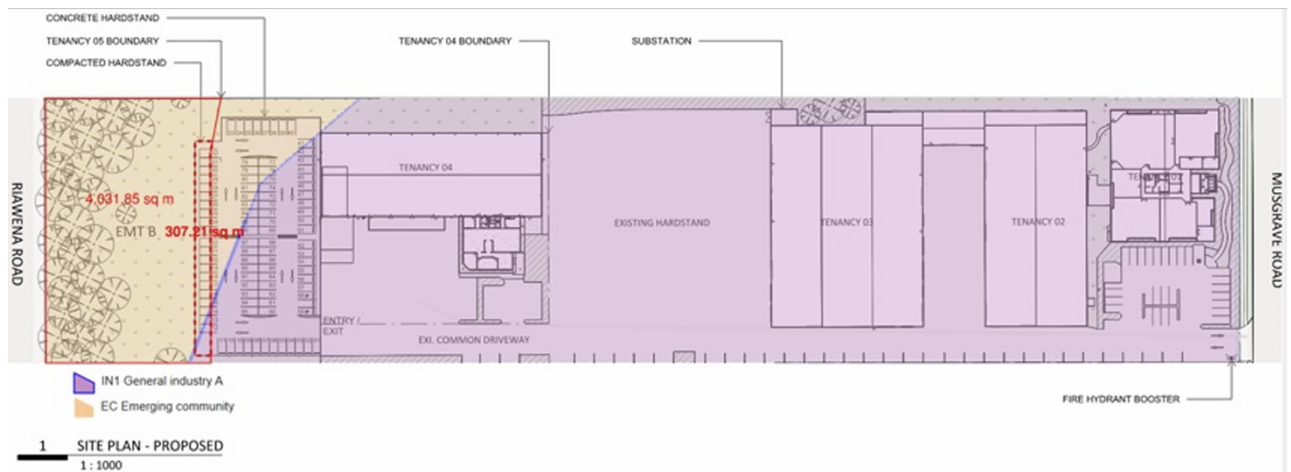
1. In our view:
 - (a) Council's permission under the easement is either not required or not able to be withheld because to do so would be unreasonable;
 - (b) the Development Application complies with the relevant assessment benchmarks under the Waterway Corridor Overlay Code; and
 - (c) the terms of the easement are not a relevant consideration for the Council in deciding a development application pursuant to the *Planning Act 2016* (Qld) (**PA**) and Council's permission under the easement is not a precondition to a properly made application.

Background

2. On 9 October 2025, Musgrave Rd Pty Ltd as trustee for Musgrave Rd Trust applied for a development application for a Material Change of Use (Development Permit) for Indoor Sport and Recreation and Warehouse (Extension), being a new car park in the Flood overlay (**Development Application**), in relation to the Land.
3. The development the subject of the Development Application proposes an extension of the existing hardstand of the car park to accommodate an additional 95 spaces including 2 accessible spaces to support the existing sport, recreation and warehouse use on the Land.

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4. The hardstand will slightly encroach into the area the subject of the Easement by approximately 307m² as depicted in the site plan **below**.



5. On 17 November 2025, Council issued an Information Request following its initial review of the Development Application, seeking, amongst other things (**Information Request**):

"3) The footprint of the car park encroaches within Council's easement which is not supported.

a) Submit an amended plan with the car park located outside Council's easement."

6. On 16 March 2026, iPlan Town Planning, on behalf of Musgrave Rd Pty Ltd as trustee for Musgrave Rd Trust, provided a response to the Information Request, stating the works within the Easement area are supported where the terms of the Easement will not be compromised by the proposed development.

7. On 11 May 2026, Council issued a Further Advice which relevantly stated that (**Further Advice**):

"Up to 1.3m deep of filling is proposed within the waterway corridor mapping and the Council drainage easement, which conflicts with the Compensatory earthworks planning scheme policy and AO1.1, AO1.2 / PO1, AO6.1/ PO6, AO7/PO7, and AO10/ PO10 of the Waterway corridors overlay code.

Additionally, the carpark footprint appears to extend approx. 5.0m into the existing drainage easement. The carparking footprint is to be reduced to prevent the filling within the Waterway corridors overlay and drainage easement."

Compliance with the Planning Scheme

8. As the Development Application is code assessable under section 60(2) of the PA, Council may only have regard to the relevant assessment benchmarks in assessing and deciding the application. This means it cannot have regard to any external considerations such as the terms of the Easement.

9. While not directly relevant to the question of whether Council's permission is required under the Easement, we observe that the material provided to us is capable of satisfying Council that the Application meets the provisions of the Waterway Corridor Overlay Code because:

(a) in respect of PO1: the proposed extension of the car park does not involve the removal of vegetation within the mapped corridor. Therefore, any riparian, native and significant vegetation in these areas will be retained;

(b) in respect of PO6:

(i) whilst the extension of the car park is partially mapped within the waterway corridor, the functions of that corridor are retained as flood modelling confirms that the expression of the natural stormwater flow will be maintained with negligible off-site impacts (<10mm);

- (ii) no vegetation removal is proposed, ensuring the preservation of ecological and amenity values;
 - (iii) no subdivision is proposed to prevent against any fragmentation to the corridor; and
 - (iv) the proposed works do not encourage any buildings being positioned within the corridor;
- (c) in respect of PO7: the hardstand extension does not involve significant cut or fill and will not result in any material increase in flooding or significant redistribution of flood storage from high to lower levels as the design for the car park surface has been lowered from the natural ground level to induce flow across the car park in larger flood events, and there will be no material impact to external properties or infrastructure; and
- (d) in respect of PO10: this assessment benchmark is not applicable to the proposed development as it does not contemplate development in the Local waterway corridor sub-category (it is instead in the Citywide waterway corridor sub-category).
10. Having regard to the above, the relevant performance outcomes under the Waterway Corridor Overlay Code can be complied with. In those circumstances, it is not necessary to consider the acceptable outcomes referenced in the Further Advice.
11. In the above premises, if compliance with the remaining codes can be met, which we understand has been demonstrated, the Council must proceed to approve the Development Application. Alternatively, if Council does not agree that compliance with all codes has been achieved, it may still approve the Development Application subject to the imposition of reasonable and relevant development conditions.

Advice

12. The relevant terms of the Easement are set out at **Appendix A**.
13. In short, we consider that the development the subject of the Development Application would not require Council's permission under the Easement because the development contemplated by the Development Application would:
- (a) maintain the "*uninterrupted flow of rain water and drainage of all kinds inclusive of stormwater run off flowing in concentration either intermittently or occasionally*";
 - (b) not affect "*the flow or escape of stormwater drainage or its or their natural outlet*"; or
 - (c) not cause "*any ponding of waters*".
14. That much is clear from the expert evidence that we have been provided and which we agree with. In those circumstances, Council's permission is simply not required.
15. If we are wrong in that view, we also consider that Council's written permission under the easement terms cannot be unreasonably withheld in circumstances where the Grantor's works will not affect Council's rights under the Easement.
16. Notwithstanding our view that the Development Application is consistent with the terms of the Easement, we also observe that:
- (a) private property rights under an Easement are not generally a relevant consideration when it comes to considering the merits of a development application and instead the relevant considerations are the assessment benchmarks (among other things), noting we are not aware of any relevant assessment benchmarks that would require consideration of the Easement;¹ and

¹ See, for example, *Lim Group Holdings Pty Ltd v Melbourne City Council* [2022] VCAT 1300.

- (b) turning to the specific context under the *Planning Act 2016*, the private rights granted by the Easement, and governed by its terms, are the personal circumstances of the Council such that section 45(5)(b) prohibits their consideration.

Conclusion

17. For the above reasons, we consider that Council's permission is not required for the development the subject of the Development Application to be carried out.
18. In any event, we see no reason why Council should not grant permission for the works proposed in the Development Application to occur in the Easement given it will not materially or adversely impact water flow and complies with the relevant assessment benchmarks.
19. Please do not hesitate to contact us if we can be of any further assistance.

Yours faithfully

Per HWLE Lawyers

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Annexure A Easement Terms

"The full and free right and liberty at all times and from time to time to have, lay, construct and thereafter forever to use and maintain on, over, through or under the land described in the Schedule hereto (which land is herein-after referred to as the "the said land") drains pipes, conduits and channels including open cut drains and channels, rain water conduits and pipes and covered and uncovered drains for the passage or conveyance of rain water and waste or foul liquids and all manholes, manhole chambers, inlets, equipment and fittings in connection therewith or for the accommodation of any adjoining or neighbouring property or properties or otherwise in the execution of the said Council's drainage powers and for the purpose of foresaid land for the purpose of obtaining free and interrupted access to the said drains, pipes, conduits and channels, manholes, manhole chambers, inlets, equipment and fittings from the surface of said land or for the purposes of changing the size and number of, operating, inspecting, patrolling, altering, removing, replacing, reconstructing and/or repairing the said drains, pipes, conduits and channels, manholes, manhole chambers, inlets, equipment and fittings, full, free and uninterrupted right and liberty at all times by day and by night and from time to time to enter upon and to go pass and repass over, along and under the said land or any part or parts thereof with or without surveyors, engineers, servants, agents, licensees, contractors, subcontractors, workmen and others authorised by the said Council and with or without horses, carts, drays, motor cars, lorries, waggons [sic], trucks, trollies, cranes, earthmoving equipment and other vehicles and things, laden or unladen and to dig into, sink shafts in, erect scaffolding upon and to open and break up the soil of the said land or any part of parts thereof as well as the subsurface as the surface thereof and to bring and place in and upon the said land or any part or parts thereof and remove such materials, machinery, equipment, tools and other articles and to do such incidental works and things in the premises as the said Council shall in its discretion think fit and also the full and free right at all times and from time to time to the uninterrupted flow of rain water and drainage of all kinds inclusive of stormwater run off flowing in concentration either intermittently or occasionally (all of which is herein called "stormwater drainage") over and along the surface of the said land without -

- (1) any obstruction, interruption, impeding, hampering, or interference, diversion, scouring, change or alteration in or to the flow or escape of stormwater drainage or its or their natural outlet (if any); or*
- (2) any ponding of waters caused by or consequent upon;*
 - (a) any use to which the said land may be put; or*
 - (b) the erection, raising, making, placing or suffering to stand or to remain of any building, fence, wall, structure (whether of the class just mentioned or not) paving or vegetation (except grass which is kept properly mown at all times) or thing whatsoever upon the said land; or*
 - (c) any alteration in level or gradient of the said land or any change to the surface of the said land or to the natural or artificial features of the said land which contain or assist in the containing the flow of stormwater drainage over the said land.*

other than as is or are permitted in writing by the said Council or the Permanent Head for the time being of the Department of Works of the said Council and only on such terms and conditions as the said Council or the said Permanent Head may impose or stipulate in the event of such permission being granted with power for the said Council ..."