

15 October 2018

Our ref: MDSS/KXMS/3286582

Willowtree Planning Pty Ltd
Suite 4, Level 7, 100 Walker Street
North Sydney NSW 2060

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215

By email: acowan@willowtp.com.au

Contact
Kate Marginson +61 2 8035 7851
Email: kmarginson@millsoakley.com.au
Fax: +61 2 9247 1315

Partner
Matt Sonter +61 2 8035 7850
Email: msonter@millsoakley.com.au

Dear Andrew

Advice on application of Development Consent 145/20/33
Property: 780 Wallgrove Road, Horsley Park

We refer to your request to provide advice in relation to the interpretation of the above development consent and its application to The Austral Brick Company's (**Austral**) operation at the above site. Specifically you have asked us to review Planning Approval and subsequent Building Approval 145/20/33 (together, **the Development Consent**) which applies to the site and provide specific advice on:

- a) The land to which the Development Consent applies; and
- b) The legal interpretation of the Development Consent and activities which it authorises.

Summary

In our view, based upon the applicable legislation, facts set out below, historical documents contained on the Land Registry Service register and our review of the Development Consent we advise as follows:

- Historical title inquiries confirm that the lots to which the Development Consent applies (being Pt. Portion 36-39, New Horsley Road and Pt. Portions 79 and 22, Parish of Prospect) are allotments which are now contained in Lot 7 DP1059698, being the lot on which the Austral operations exist.
- The Development Consent expressly authorises the manufacture of bricks, the extraction of clay and shale material and the processes required to implement those approved uses.
- The approvals granted, in accordance with the Local Government Act 1919, are deemed to be a *Development Consent* as that term is defined by the *Environmental Planning and Assessment Act 1979 (the Act)* and continue to operate.
- The Development Consent, by its own terms, contains specific requirements for the physical layout of the site including location of buildings, areas of vegetation and locations on which excavations may be carried out and applies to the whole of the Site.
- The Development Consent is to be construed liberally, according to its terms.

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CERTIFICATE ORDER SUMMARY

Transaction Details

Date: 11/07/2019 16:27

Order No. 57804352

Certificate No: 89620449

Your Reference: 3286582

Certificate Ordered: NSW LRS - Copy of Cancelled Title - Cancelled Title CT7450-163

Available: Y

Size (KB): 502

Number of Pages: 4

Scan Date and Time: 10/08/2012 21:16

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New South Wales.

[CERTIFICATE OF TITLE.]

Primary Appns. Nos. 13074 and 19307
Reference to last Titles
Vol. 6735 Fol. 26
" 6884 " 140



CANCELLED R
REGISTER BOOK.
Vol. 7450 Fol. 163

Issued on Transfer No. G465062 (part) and
request for consolidation.

HARRIE DAVIS of Guildford, Grazier, is now the proprietor of an Estate in Fee Simple, subject nevertheless to the reservations and conditions if any contained in the relevant Grants and also subject to such encumbrances, liens and interests as are notified hereon in Those pieces of land in the Shire of Blacktown, Parishes of Melville and Prospect and County of Cumberland shown in the plan hereon and therein edged red and also shown as to part as Lot D² in plan lodged with Transfer No. G465062 being the lands described in the Schedule hereunder.

SCHEDULE

Parish	Number of Portion	Name of Grantee	Date of Grant
Melville	Part 34	Ieaac Maeon	17th August 1819
	Part 36	William Bowman Junior	
	Part 37	George Bowman	
	Part 38	Andrew Thompson	
	Part 39	Julia McNally	
Prospect	Part 79 *	Samuel Terry	
Prospect	Part 222	Thomas Howard	

EXCEPTING THEREOUT the bed of Eastern Creek coloured brown in the plan hereon.

In witness whereof I have hereunto signed my name and affixed my Seal, this Twenty-eighth day of February 1958
Signed in the presence of *J. H. Pells* } *J. H. Pells* Registrar General

NOTIFICATION REFERRED TO

Right of Way appurtenant to the part of the land above described formerly comprised in Certificate of Title Volume 6159 Folio 119 affecting the piece of land coloured blue in the plan hereon created by Transfer No. C818416.

No. F793060 Mortgage dated 29th December 1952 from Harrie Davis to Rural Bank of New South Wales of part of the land above described. Produced 20th January 1953 and entered 23rd October 1953 at 12 o'clock noon.

J. H. Pells Registrar General

J. H. Pells Registrar General

No. F108160 Mortgages dated 7th October 1949 from Harrie Davis to The Commercial Bank of Australia Limited as regards the part of the land formerly comprised in Certificate of Title Volume 6159 Folio 119. Produced 9th November 1949 and entered 20th September 1950 at 12 o'clock noon.

MORTGAGE No. F108160 has been discharged.
AS REGARDS THE LAND IN DP No. H190473
Sec. H215844 Entered 7th September 1959
J. H. Pells REGISTRAR GENERAL

J. H. Pells Registrar General

No. F383834 Mortgage dated 26th June 1950 from Harrie Davis to The Commercial Bank of Australia Limited as regards the part of the land formerly comprised in Certificate of Title Volumes 6338 Folio 87. Produced 24th January 1951 and entered 16th August 1951 at 12 o'clock noon.

MORTGAGE No. F793060 has been discharged.
Sec. H232199 Entered 7th September 1959
J. H. Pells REGISTRAR GENERAL

J. H. Pells Registrar General

Covenant contained in Transfer No. F773158 affecting Lot D² above described.

J. H. Pells Registrar General

Persons are cautioned against altering or adding to this Certificate or any notification thereon.

Copy No 1 of the title in DP H190473 side the H190473

2/11/59 H232199

Handwritten notes and stamps at bottom right:
H215844 (F108160)
H232199 (F793060)
H201971 (F773158)
H230721 (F61113)
D 201190V3 R

G465062

350 ac. Ord. 26 1/2 per.
Exclusive of the area of the bed
of Eastern Creek coloured brown

Scale 10 Chains to one inch.



CERTIFICATE ORDER SUMMARY

Transaction Details

Date: 04/10/2018 10:45
Order No. 53524986
Certificate No: 83743386
Your Reference: 3286582
Certificate Ordered: NSW LRS - Copy of Plan - Deposited Plan 1042225
Available: Y
Size (KB): 325
Number of Pages: 3
Scan Date and Time: 17/07/2002 14:42

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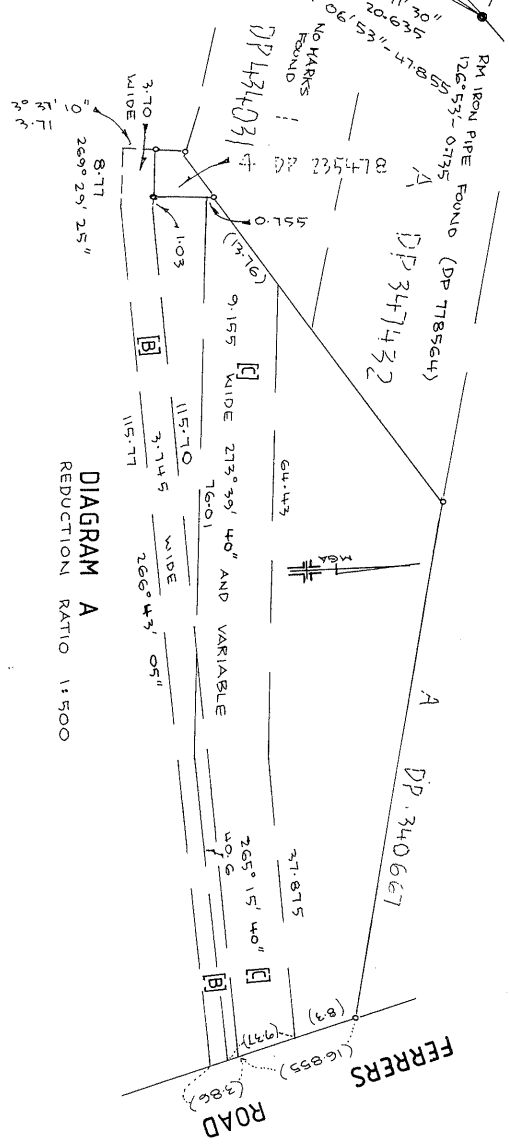
Registered: 44 10.7.2002
This is sheet 2 of my plan in 3 sheets
dated 5th OCTOBER 2000

Surveyor registered under Surveyor Act 1939
Attest: *ALP*
25.10.2000

This is sheet 2 of the plan of 3 sheets
surveyed by me Certificate No. 8196
at 25-2-2002

For use where space is insufficient in any plan on Plan
Form 2
Control Check

DIAGRAM A
REDUCTION RATIO 1:500



SURVEY PRACTICE REGULATION 1996 - CLAUSE 3(2)				
MARK	EASTING	NORTHING	ZONE	CLASS
55 3143	301208.280	6255630.973	56	B
55 17360	301213.994	6255603.451	56	B
PM 53651	301571.9146	6254617.565	56	B
PM 53652	301572.291	6254617.565	56	B
55 17361	301194.324	6255570.224	56	B
COMBINED SCALE FACTOR 1000075				
SOURCE SCAMS 31 JULY 2000				

DIAGRAM B
REDUCTION RATIO 1:500

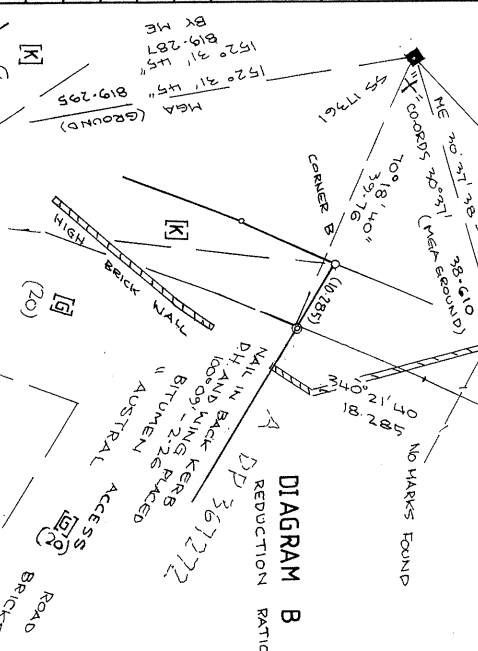


DIAGRAM C
NOT TO SCALE

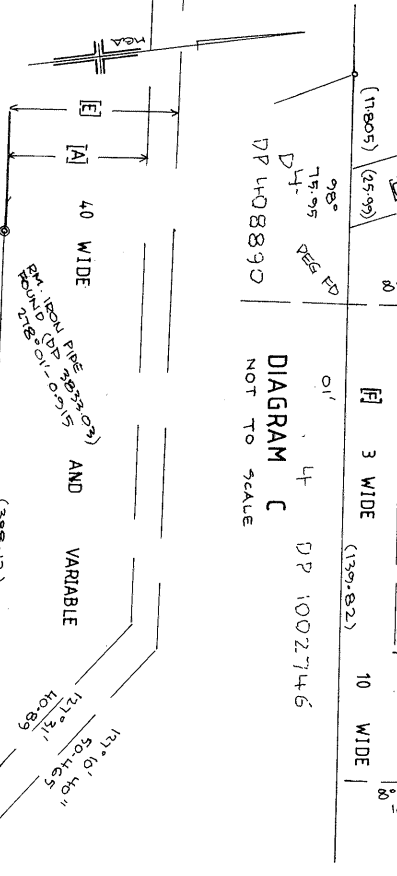
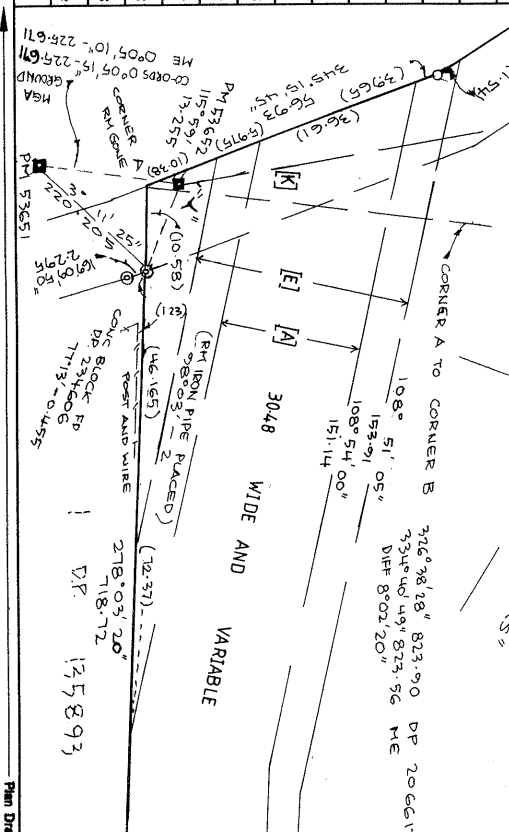


DIAGRAM D
NOT TO SCALE



DP1042225

Registered: 24 10-7-2002

This is sheet 3 of my plan in 3 sheets
dated 9th OCTOBER 2000

Surveyor registered under Surveyors Act 1999

This is sheet 3 of the plan of 3
sheets covered by my Certificate No. 8193
of 25-2-2002

For use where space is insufficient in any panel on Plan
Form 2.

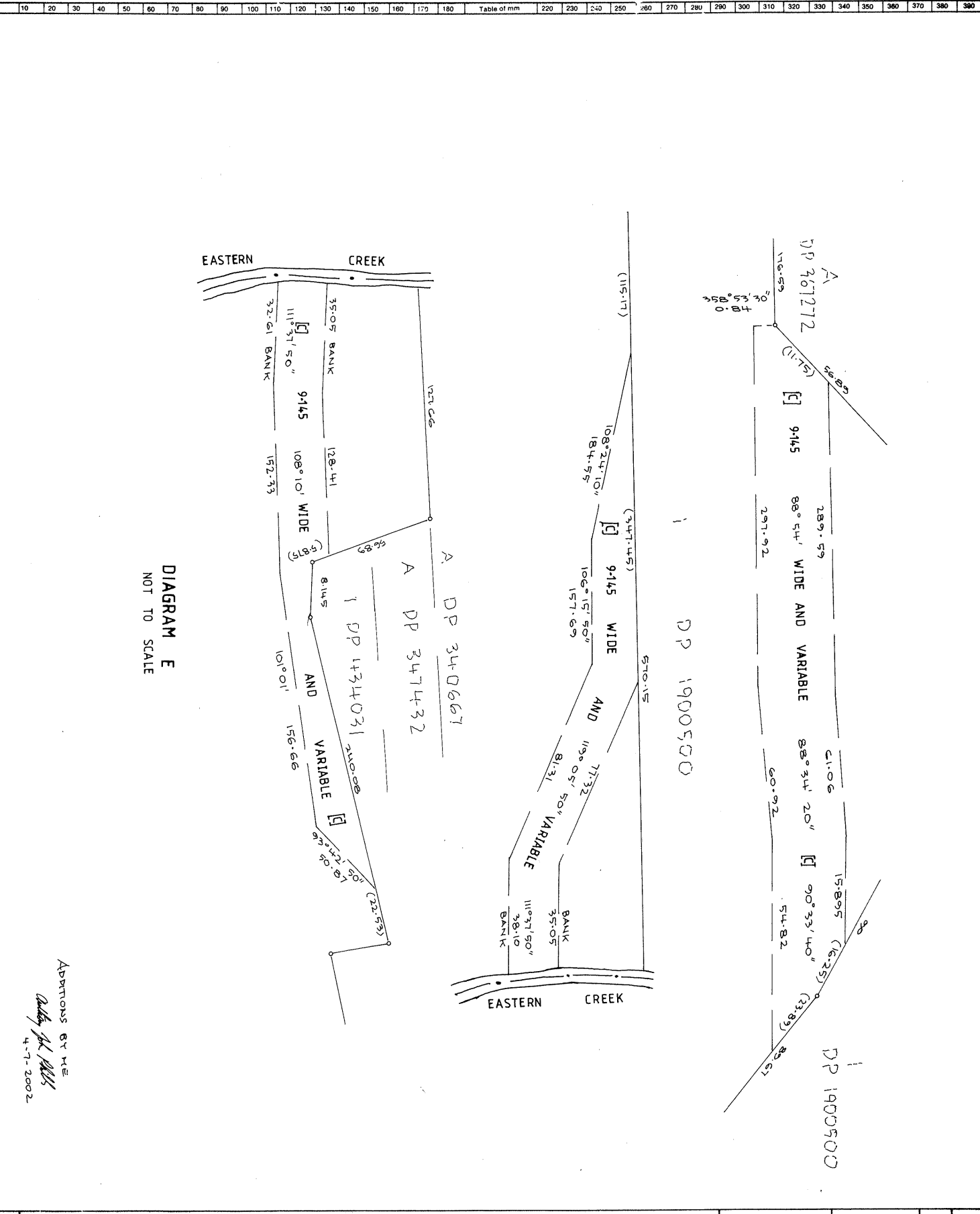


DIAGRAM E
NOT TO SCALE

ADDITIONS BY ME
Cathy J. M. M.
4-7-2002

CERTIFICATE ORDER SUMMARY

Transaction Details

Date: 04/10/2018 09:58
Order No. 53523315
Certificate No: 83741031
Your Reference: 3286582
Certificate Ordered: NSW LRS - Copy of Plan - Deposited Plan 1059698
Available: Y
Size (KB): 383
Number of Pages: 5
Scan Date and Time: 15/10/2003 22:42

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DP1059698

Registered: 15-10-2003

This is sheet 2 of my plan in 4 sheets

SEE SIGNATURES FORM

Surveyor registered under the Surveyors Act, 1929

This is sheet of my plan of sheets covered by subdivision certificate No. of

Autographed Person/General Manager/ Accredited Officer

L. G. A. BLACKTOWN CITY AND FAIRFIELD CITY
Locality: EASTERN CREEK / HORSLEY PARK

Parish: MELVILLE

County: CUMBERLAND

For use where space is insufficient in any panel on Plan Form 2.

LOTS 1, 15 & 17
LOT 2, D.P. 7783564
CT 2/778564
LOTS 2 & 16
LOT 19, D.P. 15143435
CT 10/1048435

SURVEY PRACTICE REGULATION 2001 CLAUSE 32 (2)				
MARK	M.C.A. CO-ORDINATES	ZONE	CLASS	ORDER
	EASTING	NORTHING		
PM 53653	301 744.766	6 255 830.362	56	B 2
SSM 3743	301 246.002	6 255 631.003	56	B 2
SSM 17360	301 246.002	6 255 603.453	56	B 2
SSM 17361	301 794.332	6 255 570.227	56	B 2
PM 53652	301 572.298	6 254 843.279	56	B 2
PM 53651	301 571.954	6 254 677.589	56	B 2
TS 10393	300 073.022	6 257 793.506	56	B 2

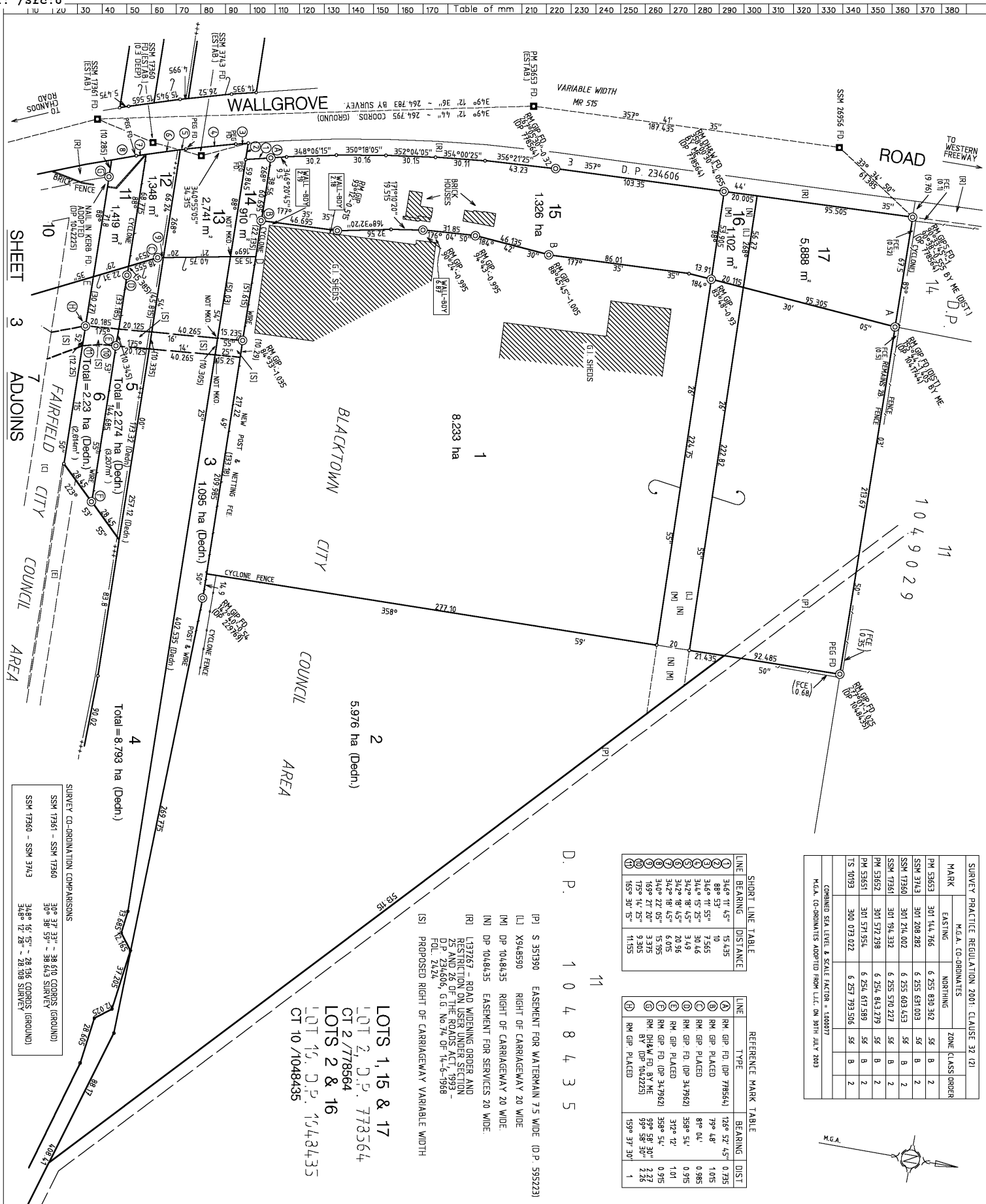


SHORT LINE TABLE		
LINE	BEARING	DISTANCE
1	346° 11' 45"	15.435
2	88° 53'	10
3	346° 11' 55"	7.565
4	346° 15' 25"	30.446
5	342° 18' 45"	3.49
6	342° 18' 45"	20.96
7	342° 18' 45"	6.005
8	342° 22' 05"	15.995
9	189° 21' 20"	3.375
10	175° 14' 23"	3.375
11	185° 30' 15"	11.555

REFERENCE MARK TABLE		
LINE	TYPE	BEARING DIST
A	RM GP. FD. (DP 778564)	126° 52' 45" 0.735
B	RM GP. PLACED	79° 48' 1.015
C	RM GP. PLACED	8° 04' 0.985
D	RM GP. FD. (DP 347952)	358° 54' 0.915
E	RM GP. PLACED	372° 42' 1.01
F	RM GP. FD. (DP 347962)	358° 54' 0.915
G	RM GP. FD. BY ME	99° 58' 30" 2.73
H	RM GP. PLACED	159° 37' 30" 1

D. P. 1 0 4 8 4 3 5

- [P] S 357390 EASEMENT FOR WATERMAIN 7.5 WIDE (D.P. 555223)
- [L] X918590 RIGHT OF CARRIAGEWAY 20 WIDE
- [M] DP 1048435 RIGHT OF CARRIAGEWAY 20 WIDE
- [N] DP 1048435 EASEMENT FOR SERVICES 20 WIDE
- [R] L137267 - ROAD WIDENING ORDER AND RESTRICTION ON USER UNDER SECTION 28 OF THE ROADS ACT, 1958 - DP 15143435, G.O. NO 74 OF 14-6-1988 - FOL. 21/24
- [S] PROPOSED RIGHT OF CARRIAGEWAY VARIABLE WIDTH



SURVEY CO-ORDINATE COMPARISONS		
SSM 17361 - SSM 17360	30° 37' 33" - 38 610 COORDS (GROUND)	
SSM 17360 - SSM 3743	34° 06' 15" - 28 135 COORDS (GROUND)	
	34° 06' 15" - 28 108 SURVEY	

CERTIFICATES, SIGNATURES AND SEALS

Sheet 1 of 1 sheet(s)

**PLAN OF LAND TO BE ACQUIRED FOR THE
PURPOSES OF THE ROADS ACT, 1993.**

DP1059698

Registered:

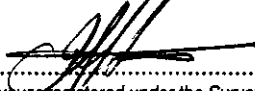


15-10-2003

Surveying Regulation 2001

I, GARY JOHN SKOW.....
of HAMMOND SMEALLIE & CO. P/L, HORNSBY...
a surveyor registered under the *Surveying Act 2002*, certify that the
survey represented in this plan is accurate, has been made in
accordance with the *Surveying Regulation 2001* and was completed
on:..22-07-2003.....

The survey relates to LOTS 1 AND 9 TO 17 INCLUSIVE,
PROPOSED RIGHT OF CARRIAGEWAY & CONNECTIONS.....
(specify the land actually surveyed or specify any land shown in the
plan that is not the subject of the survey)

Signature  Dated: **22ND JULY 2003**
Surveyor registered under the *Surveying Act 2002*

Datum Line: "X"- "Y".....
Type: ~~Urban~~ Rural

**SIGNATURES, SEALS and STATEMENTS of intention
to dedicate public roads or to create public reserves
and drainage reserves.**

Department of Lands Approval

I.....in approving this plan certify
(Authorised Officer)
that all necessary approvals in regard to the allocation of the land
shown hereon have been given

Signature:.....
Date:.....
File Number:.....
Office:.....

Subdivision Certificate

I certify that the provisions of s.109J of the Environmental Planning
and Assessment Act 1979 have been satisfied in relation to:

the proposed..... set out herein
(insert 'subdivision' or 'new road')

* Authorised Person/General Manager/Accredited Certifier

Consent Authority:
Date of Endorsement:
Accreditation no:
Subdivision Certificate no:
File no:

Note:
When the plan is to be lodged electronically in Land and Property
Information, it should include a signature in an electronic or digital
format approved by the Registrar-General.

* Delete whichever is inapplicable.

**THIS PLAN IS EXEMPT FROM SUBDIVISION
CERTIFICATION PURSUANT TO A DECISION
BETWEEN DUAP, RTA & LPI NSW - SEE 1997
M6 (Item 2). LAND IN THIS PLAN COMPRISES
ONLY ROAD OR ROAD AND RESIDUE.**


**AUTHORISED OFFICER
ROADS AND TRAFFIC AUTHORITY, NSW**

APPROVED:


**MANAGER, SURVEY SERVICES
OPERATIONS
ROADS AND TRAFFIC AUTHORITY, NSW**

Use PLAN FORM 6A for additional
certificates, signatures and seals

CERTIFICATE ORDER SUMMARY

Transaction Details

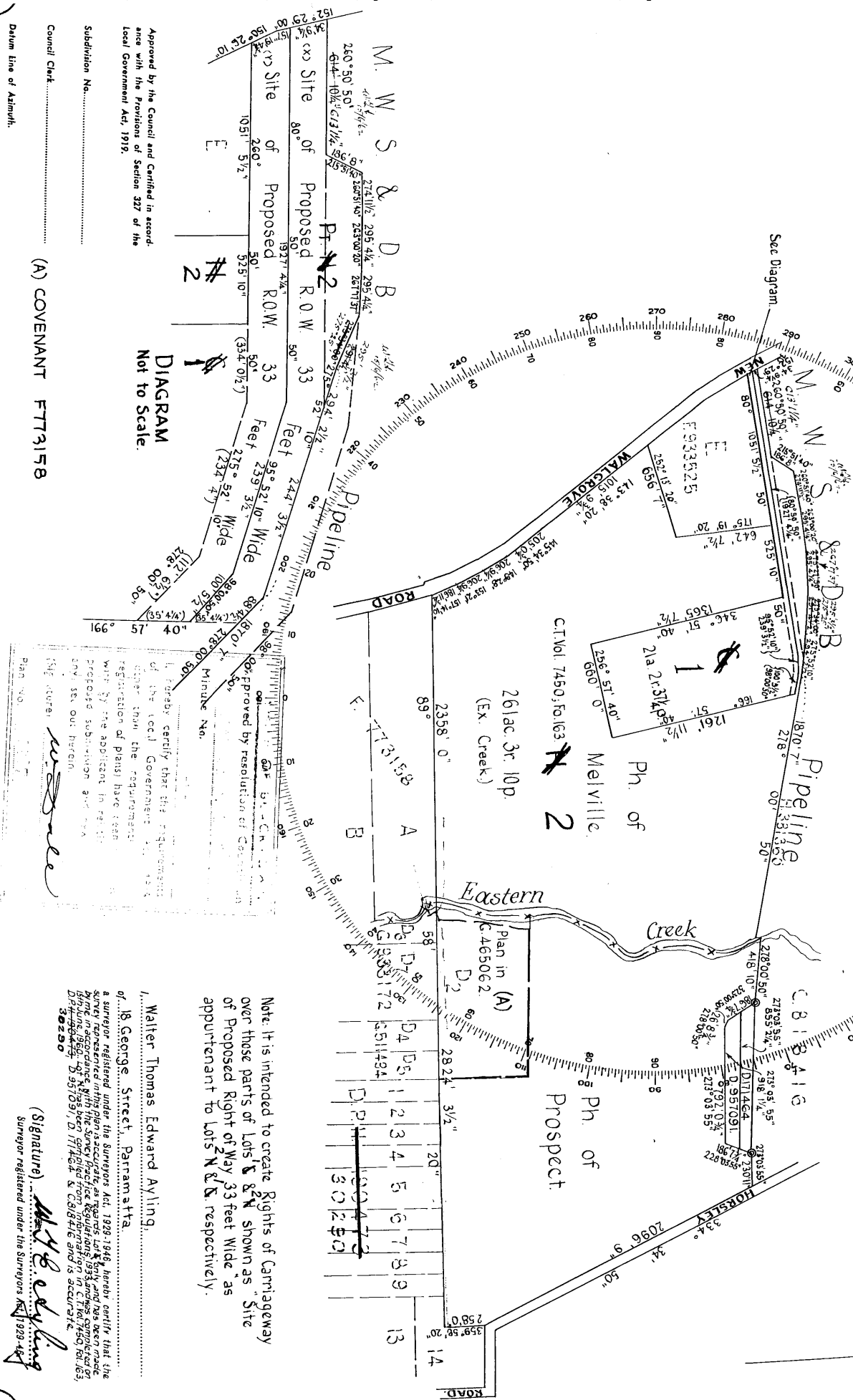
Date: 04/10/2018 11:47
Order No. 53527364
Certificate No: 83746685
Your Reference: 3286582
Certificate Ordered: NSW LRS - Copy of Plan - Deposited Plan 206617
Available: Y
Size (KB): 387
Number of Pages: 4
Scan Date and Time: 28/07/1997 16:51

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DP 206617 sh.1/2 E

Title System:	Torrens
Purpose:	Subdivision
Ref. Map:	Parishes #
Last Plan:	G 465062



Approved by the Council and Certified in accordance with the Provisions of Section 327 of the Local Government Act, 1919.

Subdivision No.

Council Clerk:

Datum line of Admoph.

(A) COVENANT FTT3158

I, the Surveyor, certify that the requirements of the Local Government Act, 1919, have been complied with by the applicant in respect of the proposed subdivision and that the same are set out herein.

(Signature) *Walter Thomas Edward Ayling*

Surveyor registered under the Surveyors Act, 1929-40

Note: It is intended to create Rights of Carriageway over those parts of Lots 1 & 2 shown as "Site of Proposed Right of Way 33 feet Wide" as appurtenant to Lots 1 & 2 respectively.

Walter Thomas Edward Ayling

18 George Street, Parramatta

a surveyor registered under the Surveyors Act, 1929-40, hereby certify that the survey represented in this plan is accurate, as regards lot & boundary and has been made by me in accordance with the Survey Practice Regulations, 1933, and has been completed on the 28th day of July 1997, at Parramatta, New South Wales, in accordance with the provisions of the Surveyors Act, 1929-40, and is accurate.

30250

(Signature) *Walter Thomas Edward Ayling*

Surveyor registered under the Surveyors Act, 1929-40

*Strike out either (1) or (2). Insert date of Survey.

This is the plan marked " " referred to in.....

Dated.....

Signatures of parties

Walter Thomas Edward Ayling

Walter Thomas Edward Ayling

Walter Thomas Edward Ayling

Plan Form No 617, Unamended, Standard
Municipality of Blacktown,
Shire of

DP206617

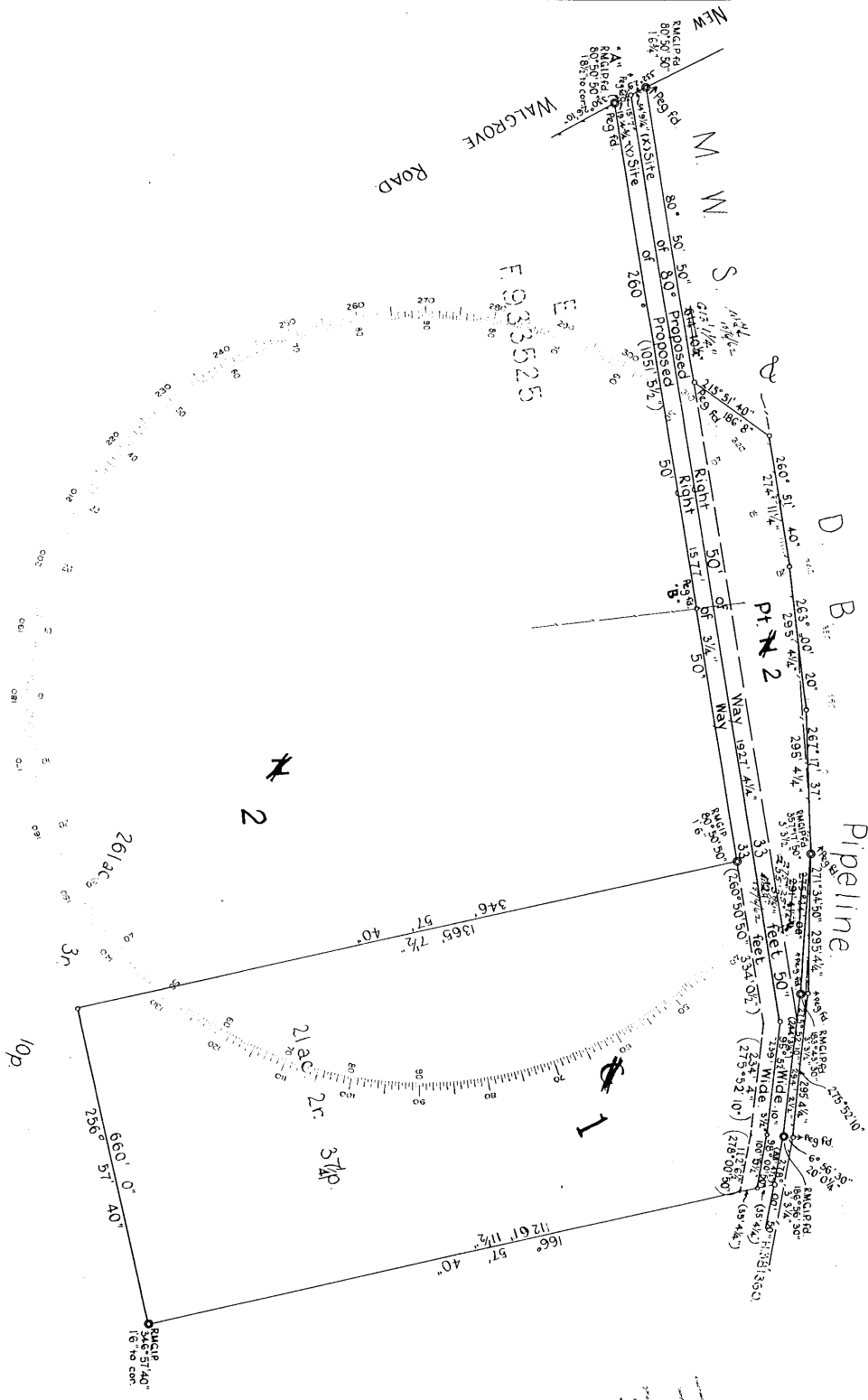
PLAN

of subdivision of part of the land comprised in C.I. Volume 1450, Fol 163.

Parish of Melville, County of Cumberland.

Sheet 2 of 2 sheets

Sh. 2 of 2 Sheets
D P 206617 (E)
Registered 23.8.62



This is the plan marked " " referred to in

Dated

Signature of parties to be made in this margin.

CONVERSION TABLE ADDED IN REGISTRAR GENERAL'S DEPARTMENT			
DP 206617 SH 2/2			
FEET INCHES		METRES	
1	3 1/2	0.089	
1	6 3/4	0.437	
1	6 1/2	0.457	
3	5 1/4	0.927	
5	4 1/4	1.003	
11	4 1/2	1.532	
12	6 3/4	2.953	
12	5 1/2	3.023	
12	4 1/2	4.790	
12	3 1/4	5.912	
12	2 1/4	6.082	
33	0 1/4	10.598	
35	9 1/4	10.776	
35	4 1/4	15.840	
68	4 1/2	26.937	
100	5 1/2	30.620	
100	6 1/2	34.303	
126	8	56.896	
134	2	71.374	
239	3 1/2	71.425	
244	3 1/4	72.426	
274	11 1/4	63.801	
295	3 1/2	90.005	
295	4 1/4	90.024	
334	0 1/2	101.816	
613	1 1/4	186.874	
650	1 1/2	201.168	
1050	1 1/2	320.465	
1261	11 1/2	437.243	
1365	3 1/4	460.732	
1577	3 1/4	587.456	
1957	4 1/4	699.624	
2295	4 1/4	1016.216	
3334	11 1/2	3432.645	
AC RD P	HA		
21 2 37 1/4	8.735		

Approved by the Council and Certified in
accordance with the Provisions of Section
327 of the Local Government Act 1919.
Subdivision No.
Council Clerk
Datum line of Azimuth-A-B.

I, Walter Thomas Edward Ayling
of 18 George Street, Parramatta
a surveyor registered under the Survey Act, 1920-1946, hereby certify that the
survey represented in this plan is correct and has been made (1) by me (2)
under the provisions of the Survey Act, 1920-1946
and was completed on 18th June, 1960.
Signature W. T. E. Ayling
Surveyor registered under the Survey Act, 1920-1946.

*Strike out where (1) or (2).

Timber date of Survey.

DP206617

Sh. 2 of 2 Sheets

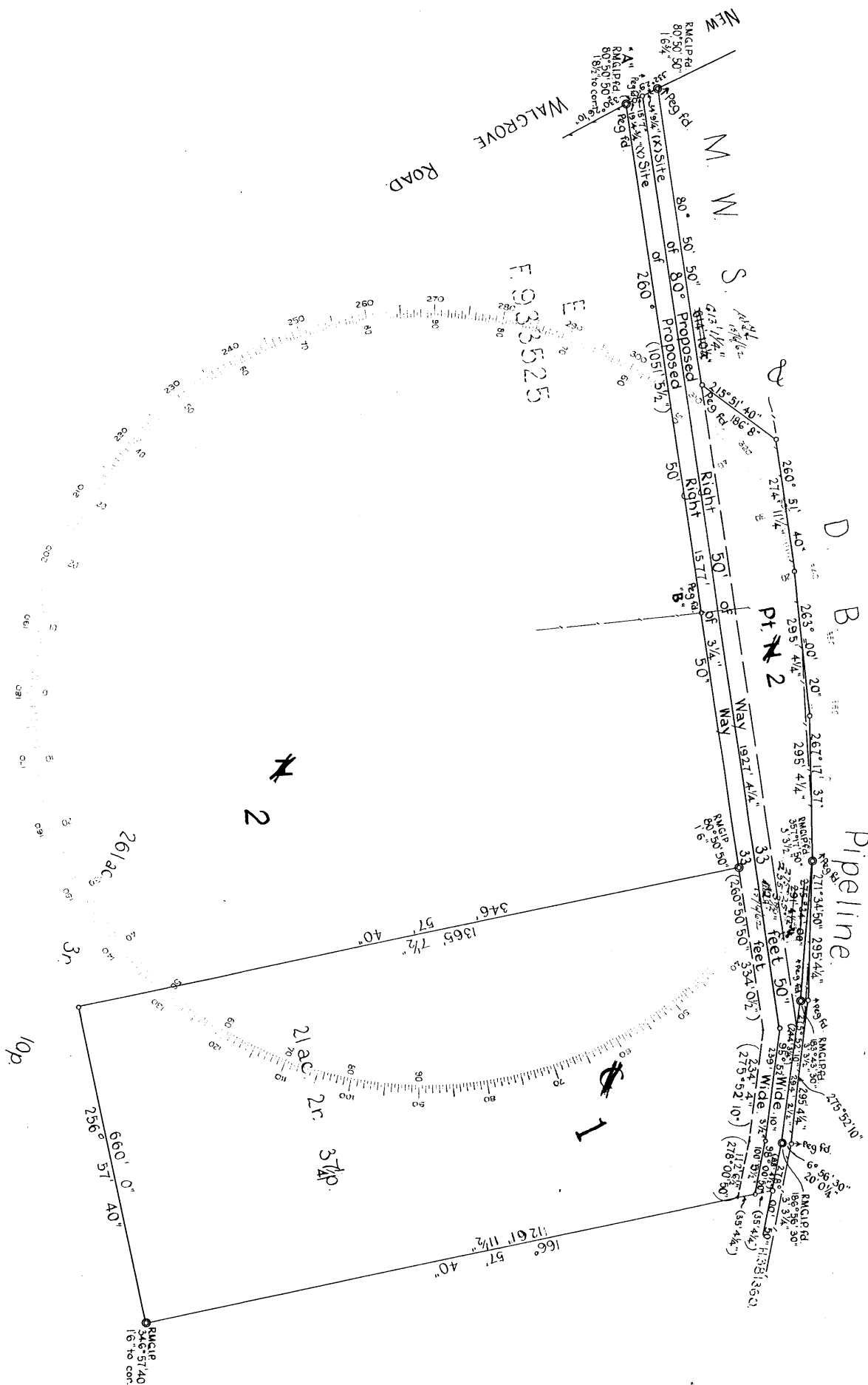
D P 206617 (E)

Registered 23.8.62

Scale 200 feet to an inch
Sheet 2 of 2 sheets.

of subdivision of part of the land comprised in C.T. Volume 1450, Fol. 163.
Parish of Melville, County of Cumberland.

PLAN



the plan marked " " referred to in
Dated

Signatures of parties to be made in this margin.

CERTIFICATE ORDER SUMMARY

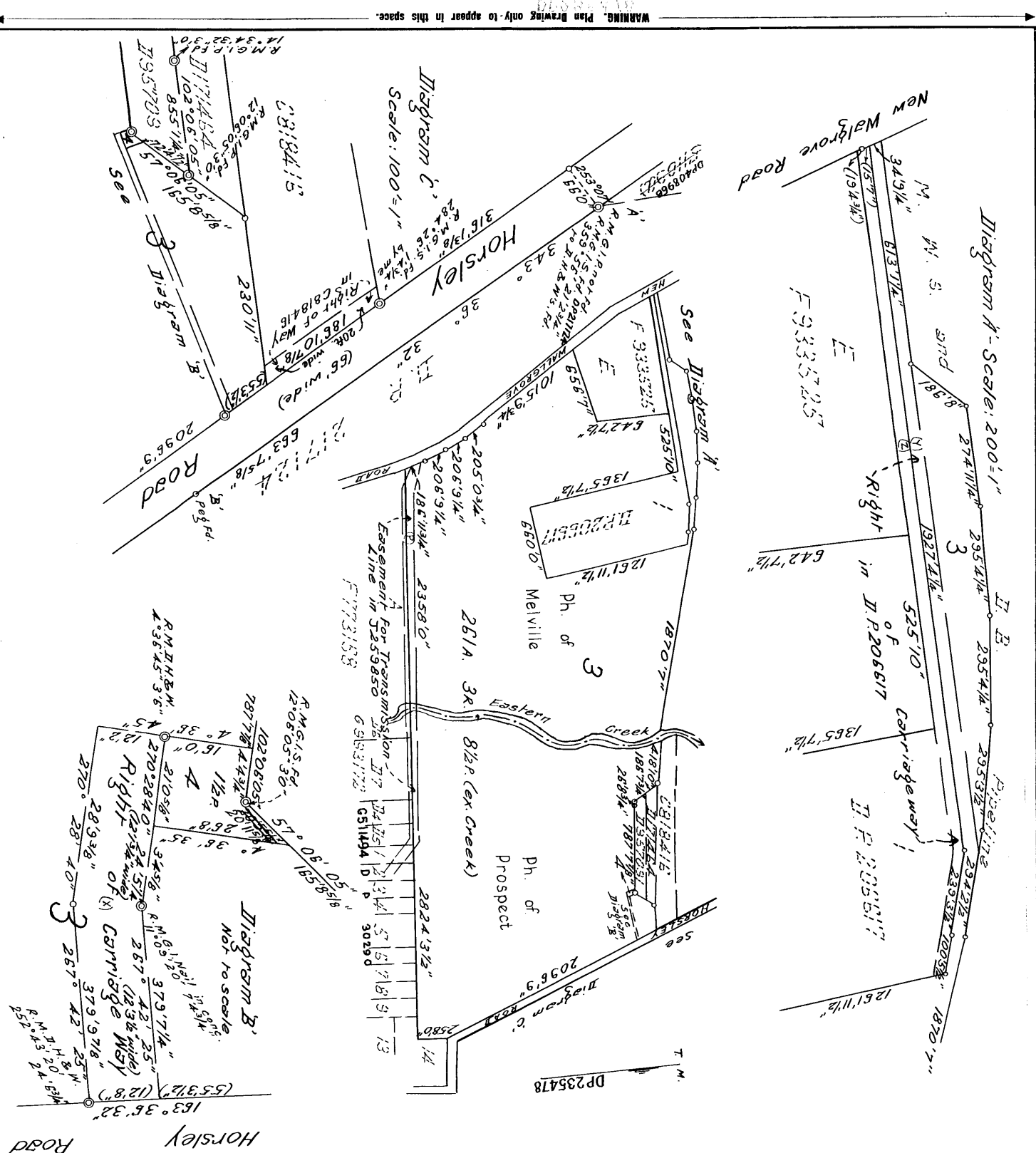
Transaction Details

Date: 04/10/2018 11:47
Order No. 53527364
Certificate No: 83746684
Your Reference: 3286582
Certificate Ordered: NSW LRS - Copy of Plan - Deposited Plan 235478
Available: Y
Size (KB): 193
Number of Pages: 2
Scan Date and Time: 29/07/1997 12:05

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Plan Form 3 - TO BE USED WHERE IT IS INTENDED TO DEDICATE PUBLIC ROADS OR PUBLIC RESERVES OR CREATE DRAINAGE RESERVES, EASEMENTS, OR RESTRICTIONS AS TO USER.



DP235478 (E)	
Registered	3988 of 20.4.1966
Title System	Torrens
Purpose	Subdivision
Ref. Map	Parishes
Last Plan	DP206617 * DP234606 (DP206617)
PLAN OF Subdivision of Lot 2 in DP206617	
Scale: 10 chains to an inch	
Man/Share	Blackdown
Locality	Walgrove
Parish	Melville and Prospect
County	Camden
I, Patrick Kenneth Haining , of H. E. Busby & Co. (Surveyors) , a surveyor registered under the Survey Act, 1933, do hereby certify that the survey represented in this plan is a partial lot 3 as compiled, it is accurate and has been made (1) by me (2) under my supervision, in accordance with the Survey Practice Regulations, 1933, and was completed on 10.10.1965.	
Signature: P. K. Haining Surveyor registered under the Survey Act, 1933, on the 10th day of October, 1965, at the office of the Surveyor-General, New South Wales.	
Statements of intention to dedicate public roads or public reserves or create drainage reserves, easements, or restrictions as to user, (Signatures and Seals to appear in panel provided.)	
Pursuant to Section 88A of the Conveyancing Act 1919-1964 it is intended to create a Right of Carriage Way 12'3 1/2" and 31'2 1/2" Wide.	
* Instrument filed as K 920896	

WARNING: Plan Drawing only to appear in this space.

* Strike out where (1) or (2). † Insert date of survey.
6548.

DP235478 E

Registered  11-1-1968

CA 3988 of 20-A-1966

Title System: Torrens

Purpose: Subdivision

Ref. Map: Parishes

Last Plan DP206617 # DP206617 DP234606 DP206617

PLAN OF Subdivision of Lot 2 in DP206617

Scale: 10 chains to an inch

Urban, Shire: Blacktown

Locality: Maysmore

Parish: Melville and Prospect

County: Cumberland

of H.E. Busby & Co. Surveyors

of H.E. Busby & Co. Surveyors

of H.E. Busby & Co. Surveyors

of H.E. Busby & Co. Surveyors

of H.E. Busby & Co. Surveyors

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of H.E. Busby & Co. Surveyors

of H.E. Busby & Co. Surveyors

OFFICE USE ONLY.

WARNING: CREASING OR FOLDING WILL LEAD TO REJECTION.

SIGNATURES AND SEALS ONLY.

THE COMMON SEAL OF THE AUSTRAL BRICK COMPANY PROPRIETARY LIMITED was hereunto affixed by order of the Board in the presence of:

Secretary

DP235478

CONVERSION TABLE ADDED IN REGISTRAR GENERAL'S DEPARTMENT

CONVERSION TABLE ADDED IN REGISTRAR GENERAL'S DEPARTMENT

FEET INCHES		METRES	
1	4 3/4	0.425	
2	1 3/4	0.610	
3	4 3/8	0.914	
4	3 3/8	1.026	
5	4 3/4	1.067	
6	3 3/4	1.380	
7	4 3/4	1.653	
8	3 1/2	2.284	
9	3 1/2	2.654	
10	3 1/2	3.042	
11	3 1/4	3.102	
12	3 1/2	3.747	
13	3 1/2	3.661	
14	3 1/2	4.750	
15	3 3/4	4.677	
16	3 3/4	5.912	
17	3 3/4	6.096	
18	3 3/4	6.591	
19	3 3/4	6.417	
20	3 3/4	6.471	
21	3 3/4	7.449	
22	3 3/4	7.449	
23	3 3/4	8.125	
24	3 3/4	8.147	
25	3 3/4	8.775	
26	3 3/4	10.596	
27	3 1/4	16.855	
28	3 1/2	20.025	
29	3 1/2	20.117	
30	3 1/2	22.060	
31	3 1/2	22.092	
32	3 1/2	22.095	
33	3 1/2	22.841	
34	3 1/2	29.064	
35	3 1/2	30.620	
36	3 1/2	50.511	
37	3 1/2	55.696	
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CERTIFICATE ORDER SUMMARY

Transaction Details

Date: 04/10/2018 11:47
Order No. 53527364
Certificate No: 83746686
Your Reference: 3286582
Certificate Ordered: NSW LRS - Copy of Plan - Deposited Plan 384514
Available: Y
Size (KB): 76
Number of Pages: 1
Scan Date and Time: 11/11/1992 09:39

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Survey Division to the within plan map

F933525

Plan of Survey of
Shire of Blacktown

of survey of part of land in CT 16/6338-1087
Parish of Melville County of Cumberland
Scale: 200 Feet to an inch

PLAN F933525

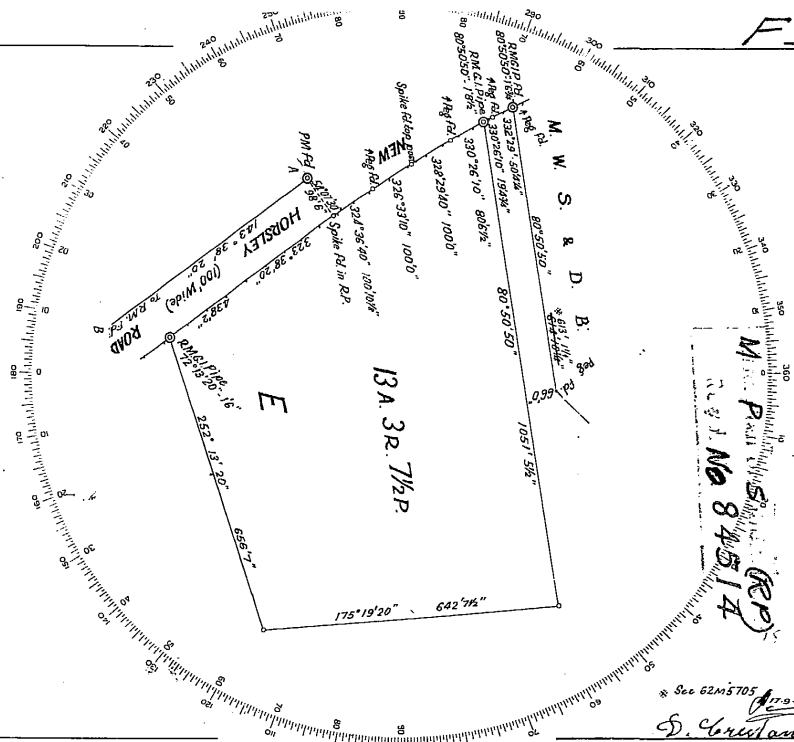
F933525

M. W. S. & D. B.
P. 16/6338-1087
No 84514

See 62M5705
D. G. G. G.

Signatures of parties to be made in this margin.

Commissioner



This is the plan marked "A" referred to in Transfer

Dated 1st July 1992

Approved by Council and consented by Council
Deputy Clerk
No. 51 of 32
1992
Submitted for registration under the Survey Act, 1958, on 1st July 1992
by virtue of the provisions of the Survey Act, 1958,
I, William Macpherson, of Parramatta
a Surveyor registered under the Survey Act, 1958, do hereby solemnly and sincerely
declare (a) that all boundaries and measurements shown on this plan are correct,
(b) that all survey marks found and retained, physical objects on or adjacent to the
land surveyed, and all other matters shown on this plan are correct,
(c) that the whole of the land surveyed is correctly represented in this plan,
(d) that the survey represented in this plan has been made
in accordance with the Survey Practice Regulations, 1938 (1) by me (personally
supervised the survey and signed the plan) or by a person acting under my authority
and was completed on 1st July 1992, and the reference
to the Survey Act, 1958, in the plan is correct.
I make this solemn declaration conscientiously believing the same to be true, and
by virtue of the provisions of the Survey Act, 1958,
(Signature) W. Macpherson
Surveyor registered under the Survey Act, 1958.

1992
1st July 1992

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Background

We understand the relevant facts to be as follows, based on the documentation provided and correspondence received:

- The Austral Brick Company Pty Ltd owns land known as 780 Wallgrove Road, Horsley Park (Lot 7 DP1059698).
- Austral, through associated and related entities, has operated the business of brick manufacturing and the extractive industry required to facilitate that operation on the Site since at least 1962.
- Austral proposes to upgrade the existing plant and machinery on the site and intends to submit a request for State Environmental Assessment Requirements (**SEARs**) to the Department of Planning and Environment as a preliminary step to the submission of a development application for consent to upgrade the existing facilities on the Site.
- As part of the initial SEARS consultation, the Department of Planning and Environment has requested confirmation that the Development Consent in fact applies to the land on which the current operation is undertaken and clarification in respect of the scope of the Development Consent, if it applies. .
- You have asked us (Mills Oakley) to advise on the land to which the Development Consent applies. You have also asked that we provide advice on the scope of the existing consent, including an interpretation of the activities which it authorises and may lawfully be carried out on the site pursuant to the consent.

Detailed Advice

1. 780 Wallgrove Road, Horsley Park – The Site history

1. In response to our brief and your instructions we have undertaken a set of comprehensive inquiries of the LRS system to obtain the historical title searches and documentation relating to the previous ownership and allotment structure of the Site as it is currently composed.
2. The Development Consent related to an application made in respect of the following parcels of land:
 - a) Pt. Portion 36-39, New Horsley Road; and
 - b) Pt. Portions 79 and 22, Parish of Prospect
3. Copies of the historical title documents are enclosed with this advice at Annexure A.
4. We have cross checked copies of the above historic title documents against the relevant date of the Development Consent and the title boundaries of the Site as it currently exists.
5. Fortunately, the Site is bounded on three sides by road reserves (and has been since the date on which the Development Consent was approved) and is divided through the middle by the creek reserve known as “Eastern Creek”. These physical boundaries make identification of the lots which previously existed on the Site a relatively simple task, by reference to the location of the existing roads and creek reserve.
6. The historical title documents at Annexure A clearly depict the allotments referenced by the Development Consent, the boundaries of which align with the boundaries of the current site and

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Deposited Plan references.

7. In our view, it is clear that the boundaries of the Site align with the lot boundaries of the lots nominated by, and the subject of, the Development Consent.
8. For completeness, the Development Consent, at the time of issue, applied to an area of land currently known as Lot 8 DP1059698 (**Lot 8**). We are informed that Lot 8 has been exhausted in terms of extraction and been subsequently subdivided and is now subject to a separate Development Consent for the resource recovery and waste facility which is operated by Veolia.
9. In summary, our investigations have confirmed that the allotments identified by the Development Consent now form part of the Site.
10. Accordingly, the development consent clearly applies to the Site.

2. What is the status of the 1960 Planning Approval and 1961 Building Approval?

11. By their own terms the 1960 Planning Approval and 1961 Building Approval (both numbered 145/20/33) were granted pursuant to the *Local Government Act 1919* (**Local Government Act**) and Ordinances authorised by it.
12. Both approvals were granted subject to conditions enumerated in the respective documents.
13. The Planning Approval dated 17 November 1960 approved the application for development of the Site for “the manufacture of bricks and the extraction of clay and shale” subject to conditions (1)-(8) contained in the document and the submission of plans and specifications for approval of the building and structures on the Site. .
14. The procedure during the period in which the consents were granted required the submission of a planning application and once approved, the submission of detailed building plans for a proposal.
15. Following submission of detailed plans (presumably in accordance with the Planning Approval conditions) a Building Approval was issued on 23 June 1961 pursuant to the County of Cumberland Planning Scheme Ordinance. The Building Approval authorised the erection of a range of structures, the planting of landscaping and imposed further conditions on the location of operations and operational characteristics of the use of the premises.
16. Through a series of transitional and deeming provisions, both the Planning Approval and Building Approval satisfy the definition of a Development Consent, as that term is defined by the *Environmental Planning and Assessment Act 1979* and continue to operate in full force and effect accordance with their terms. We set out a summary of the relevant provisions below.

The legal framework

17. The legislative scheme which governed the erection of buildings in 1960 and 1961 was found in Part X1 of the Local Government Act.
18. The Cumberland County Planning Scheme Ordinance (**CCPSO**) was made as a schedule to *the Local Government (Amendment) Act 1951*.
19. The CCPSO was deemed to be an Ordinance under Part X1A of the Act, and applied until such time as local councils within the Cumberland County district adopted their own planning scheme ordinances.
20. In the Blacktown Local Government Area The CCPSO was superseded by the Blacktown Planning Scheme Ordinance (**BPSO**) which was notified in the New South Wales Government

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Gazette on 26 April 1968. Accordingly, at the time of the grant of both approvals the relevant Ordinance was the CCPSO.

21. Part VI of the CCPSO dealt with “Consents”, and cl 41 provided as follows:

- (1) *Any application for the consent of the responsible authority under the provisions of this Ordinance shall be made in writing to the responsible authority by the owner or his representative appointed in writing and shall be accompanied by the following plans and particulars: –*
 - (a) *if the application is for consent to the use of a building or work or to the use of land, a plan in triplicate sufficient to identify the land to which the application relates and particulars in writing in triplicate of the purpose for which the building, work or land is used at the date of the application and the purpose for which consent is sought;*
 - (b) *if the application is for consent to the erection of a building or the carrying out of a work, a plan in triplicate sufficient to identify the land to which the application relates and particulars, illustrated by maps and drawings in triplicate, sufficient to describe the building or work, its location on the site and the purpose for which it is to be used:...*
- (3)
 - (a) *The responsible authority may grant the application unconditionally or subject to such conditions as it may think proper to impose or refuse to grant such application.*
 - (b) *The responsible authority shall cause notice to be given to the applicant of its decision and in the case of a consent given subject to conditions or of a refusal, the reasons therefor shall be indicated in the notice.*

22. The CCPSO made express provision for the approval of applications and both the Planning Approval and Building Approval were granted pursuant to these provisions.

23. Some time after the grant of the approvals, and construction of the premises, the *Environmental Planning and Assessment Act 1979 (the Act)* came into force on 1 September 1980.

24. The Act reconceived the way in which Planning was undertaken in NSW and provided for procedures for the assessment of development and the grant of approvals and the concept of what is now known as, development consent.

25. As part of this change, the *Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 (the Planning Repeal Act)* provided for a range of provisions which addressed the transition from the Local Government Act and Cumberland County Scheme Ordinance to the operation of the *Environmental Planning and Assessment Act 1979*.

26. Schedule 3 of the Planning Repeal Act addresses savings and transitional provisions and provides at clause 2 for Planning Scheme Ordinances made under the Local Government Act (including the CCPSO) to be classified as “former planning instruments”.

27. Relevantly, Clause 7 of Schedule 3 of *The Miscellaneous Acts (Planning) Repeal and Amendment Act 1979* provides:

“7 Consents, approvals and permissions

- (1) Any consent, approval or permission granted in respect of an application made under a former planning instrument, and in force immediately before the appointed day, shall, subject to subclause (2), continue in full force and effect subject to:

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- (a) the operation of any provision of that instrument or any term or condition of that consent, approval or permission governing or relating to the currency, duration or continuing legal effect of that consent, approval or permission, and
- (b) the operation of any condition (other than that referred to in paragraph (a)), restriction or limitation, subject to which that consent, approval or permission was granted...

(4) A consent, approval or permission referred to in subclause (1) is taken to be a development consent within the meaning of the Environmental Planning and Assessment Act 1979."

- 28. The Planning Approval and subsequent Building Approval issued by Blacktown Council were granted pursuant to the Local Government Act and terms of the CCPSO and constituted an approval granted under a former planning instrument for the purposes of Clause 7, above.
- 29. Clause 7 of the *Miscellaneous Acts (Planning) Repeal and Amendment Act 1979* operates to ensure that those approvals continue to remain in force, and are taken to be, development consent for the purpose of the *Environmental Planning and Assessment Act 1979*.
- 30. Accordingly, the instrument of approval of both the planning approval and building approval are to be construed as Development Consents for the purpose of the Act and must be interpreted in accordance with the principles of construction developed by the Court.

3. Construing the Development Consent – What do they authorise?

- 31. The way in which a development consent, and its conditions, are construed is a task which the Land and Environment Court and Court of Appeal have been asked to undertake on numerous occasions.
- 32. The Courts in a number of matters have developed clear and defined principles about the way in which development consents are to be interpreted and any exercise in interpretation is required to apply these to the circumstances of each case.
- 33. The starting point for any exercise of construction is an understanding of the nature and function of a Development Consent as a public document to be relied upon. In this regard, Spiegelman CJ identified the principle clearly in *Winn v Director National Parks and Wildlife* (2001) 130 LGERA 508 at [4] in which he noted:

*"A public document, such as a development consent, constitutes a unilateral act on the part of the consent authority expressed in a formal manner, required and **intended to operate in accordance with its own terms**. It has, as Stein JA points out, an inherent quality that it will be used to the benefit of subsequent owners and occupiers. It is also a document intended to be relied upon by many persons dealing with the original grantee, or assignees of the grantee, in such contexts as the provision of security. In some respects it is equivalent to a document of title. It must be construed in accordance with its enduring functions".*

- 34. The Court's decision in *Winn* built on a decision of the Court of Appeal in *House of Peace Pty Ltd v Bankstown City Council* [2000] NSWCA 44 which confirmed that a use permitted by a development consent should be construed broadly and given a "fair but liberal reading of the rights it confers" at [41].
- 35. This approach was confirmed by Preston CJ in the case of *Ulan Coal Mines Limited v Minister for Planning and Moolarben Coal Mines Pty Limited* [2008] NSWLEC 185 in which the question of construction of a consent was raised, and his honour turned to the terms of the consent itself for assistance in relation to its meaning and the scope of the consent's operation.

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36. This principle was endorsed and extended by the Court of Appeal in *Allandale Blue Metal Pty Ltd v Roads and Maritime Services* [2013] NSWCA 103 at [42] in which Meagher JA observed:

The consent is not the result of a bargaining process between two or more parties, and is not personal to the applicant but ensures for the benefit of subsequent owners and occupiers. Its meaning must be determined objectively, having regard to these matters which do not focus on the circumstances in which the consent was given by reference to what was known both to the applicant and the consent authority. To that extent, the principles of construction appropriate to contracts, which provide that in the case of ambiguity or uncertainty reference may be made to surrounding circumstances known to the relevant parties, do not apply: cf Codelfa Construction Pty Ltd v State Rail Authority of NSW [1982] HCA 24; 149 CLR 337 at 352; Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; 219 CLR 165 at [40], [41].

37. In relation to the interpretation of consents and their conditions, the Court has confirmed, on numerous occasions, that ambiguity or uncertainty does not lead to invalidity of a condition and that **the court's will seek to avoid uncertainty by adopting a construction which gives statutory instruments and decisions practical effect**: see, for example, *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2006] NSWCA 245 (8 September 2006) at [36]-[40] (special leave to appeal was refused but with a qualification on proper approach to construction of conditions: *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA Trans 367 (1 August 2007), p 23), *Anderson v Minister for Infrastructure, Planning and Natural Resources* (2006) 151 LGERA 229 at 258 [82]
38. The final point to note, is that the Court has found that in circumstances of uncertainty or ambiguity within a development consent, it should be construed against the interests of the Council (consent authority) rather than the interests of the developer (*Ryde Municipal Council v The Royal Ryde Homes and Another* (1970) 19 LGRA 321 at 324 and *Matijesevic v Logan City Council* (No. 2) (1983) 51 LGRA 51 at 57).
39. When interpreting consents, the Court has indicated clearly, that an interpretation should be adopted that gives practical effect to the terms of the development consent itself, and adopts a liberal interpretation of the rights provided by it.
40. In undertaking our assessment of the Development Consent, and specifically the rights which it operates to permit on the Site we have had regard to the above principles.
41. The relatively short and concise nature of the Development Consent has assisted in our assessment however, the lack of detail (which may be expected from a more contemporary consent) requires that an interpretation be adopted which reflects a liberal reading of the rights conferred and uses permitted by the terms of the Instruments of approval.
42. In our view, the scope of the consent is clear and a plain reading of it's terms is sufficient to give practical effect to the authorisation which it provides.
43. Applying the above principles to the Development Consent it expressly authorises a number of activities to be carried out on the Site.
44. The Development Consent by its own terms expressly authorises the use of the Site for:
- a. The manufacture of bricks;
 - b. The extraction of clay; and
 - c. The extraction of shale.
45. In the absence of detailed conditions or provisions which address the way in which those processes are to be carried out, in our view, the Development Consent also authorises processes and activities reasonably necessary to undertake the expressly authorised uses of the Site.

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46. In this regard, activities such as stockpiling, loading, storage and grading of material are activities contemplated and necessarily implied by the terms of the Development Consent. This interpretation accords with the court's approach in *House of Peace* and also the principles identified in *Westfield* and *Royal Ryde Homes*.
47. Clearly, the processes associated with the manufacture of bricks and extraction of material required for that purpose have developed and evolved over time. The manner in which these processes occur is not something which is restricted by the Development Consent and is something which is expressly contemplated by a number of authorities including *Grace v Thomas Street Café Pty Ltd* (2007) 159 LGERA 57 at [56]-[69].
48. Accordingly, we are of the view that the method of manufacturing and extraction is not specifically constrained by the Development Consent beyond the physical specifications provided for by the terms of the Building Authorisation and subsequent consents for constructions of structures on the Site.
49. The operation of the premises has, as expected, evolved to meet the contemporary standards and processes associated with the manufacture of bricks, which is expressly authorised and permitted by the Development Consent.
50. In terms of structures, the physical requirements for the site and location of plant are expressly dealt with by the Development Consent and specifically conditions (a) through (f) of the Building Approval dated 23 June 1961.
51. We understand subsequent approvals have been obtained by Austral for other structures on site however, the general layout and areas of use are defined and continue to operate as defined by the Development Consent.
52. In our view, the terms of the Development Consent are clear and expressly authorise the use of the Site for processes required for and associated with the manufacturing of bricks and extraction of clay and shale material at the Site. Although less detailed than a contemporary consent, a simple application of the principles of construction developed by the Court allow the Development Consent to operate with practical and ongoing effect.

Summary

53. In our view, the Development Consent clearly operates to permit the manufacture of bricks, the extraction of clay and shale material and processes and activities associated with the extraction and manufacturing which is to occur on Site.
54. The only limits provided on the use of the Site are contained within the Development Consent itself and prescribe expressly the areas on which extraction and manufacture are not to be undertaken, such as areas within 100 ft of the Water Pipeline and 50 feet of the road.
55. The Development Consent applies to the Site and may lawfully be relied upon to undertake manufacturing and extraction in accordance with its terms. In this regard, the processes to carry out the manufacture and extraction are not restricted by the Development Consent and are to be read liberally to give practical effect to the Development Consent, which may include the use of more contemporary processes for manufacturing not contemplated at the time the Development Consent was granted. .

If you have any questions or require further information please do not hesitate to contact Matt Sonter on +61 2 8035 7850 or msonter@millsoakley.com.au

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Yours sincerely



Matt Sonter
Partner

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