

11.2 1700 Main South Road, O'Halloran Hill

Report Reference	GC240625F11.2
Originating Officer	General Manager City Development – Tony Lines
Corporate Manager	N/A
General Manager	General Manager City Development – Tony Lines

CONFIDENTIAL MOTION

1. Pursuant to Section 90(2) and (3)(h) of the *Local Government Act 1999*, the Council orders that the public be excluded from attendance at that part of this meeting relating to Agenda Item GC240625F11.2 1700 Main South Road, O'Halloran Hill, except the following persons: Chief Executive Officer, Manager Office of CEO, General Manager City Development, General Manager City Services, Chief Financial Officer, General Manager Corporate Services, Manager Development and Regulatory Services, Unit Manager Planning and Development, Unit Manager Governance and Council Support and Governance Officer, to enable the Council to consider the Item in confidence on the basis the Council considers it necessary and appropriate to act in a meeting closed to the public (excepting those persons listed above) in order to receive, discuss or consider in confidence the following information or matter relating to the Item GC240625F11.2 as its disclosure of information could reasonably be expected to prejudice the confidence of Council whilst in the process of seeking legal advice.
2. Determines, on this basis, the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep consideration of the information or matter confidential.

REPORT HISTORY

Report Reference	Report Title
GC231024R15.1	1700 South Road O'Halloran Hill

REPORT OBJECTIVE

To consider any liability that the City of Marion may have for costs incurred as a result of the insolvency of Felmeri Builders and Developers Pty Ltd.

EXECUTIVE SUMMARY

In 2015 Council granted approval to Felmeri Group to divide the land at 1700-1704 Main South Road, O'Halloran Hill into 23 allotments as part of a Community Title development. The developer chose to lodge a Community Titled land division (which will leave the driveway and associated infrastructure in private ownership) in lieu of a Torrens Titled land division (which would have vested future roads and infrastructure to Council). The community title process was adopted by the developer to minimise costs.

A required condition of this approval was the completion of a private driveway by Felmeri Group before commencement of the dwellings. Council now knows that there was no way to enforce the construction sequence of the development (i.e. whether the driveway was completed prior to issue of titles or by practical completion) – even though such a condition may have implied the ability to

enforce. Local government also has no ability to enforce a Development Contract entered into pursuant to the requirements of the *Community Titles Act*. Any issues which arise in this regard are primarily civil considerations between the community corporation (i.e. the owners), community lot owners or occupiers and the developer.

The developer then asked that titles be issued prior to construction of the driveway so that future homeowners could secure finance. It is common for driveways/roads to have the final seal applied after completion of the buildings as the driveway/road is often damaged during development works.

The change to have the driveway completed before practical completion was specified in the Scheme Description and became a requirement between the developer and homeowners. It was also specified in an updated approval condition, although Council later found that this method used frequently in Local Government could not be enforced.

The developer went into liquidation in July 2023 and could not complete the works – leaving dwellings and infrastructure owned by the community corporation unfinished.

In August 2023 the State Government committed to provide assistance to the impacted homeowners by completing the private driveway and associated works at the site. The Department for Infrastructure and Transport has written to Council (refer **Attachment 1**) requesting that Council reimburse the full \$4.2 million cost associated with completing the common property and access works.

Council should not reimburse the Department given that it has no liability for the costs incurred and its ratepayers and auditors would not approve of spending money to improve private property.

Council has made a number of recommendations to the State Government to improve relevant Acts and thereby protecting future homeowners from similar hardships and promoting responsible practices within the construction industry.

RECOMMENDATION

That Council:

1. **Notes that it does not have any liability for costs incurred at the 1700-1704 Main South Road development following Felmeri Builders and Developers Pty Ltd (formerly known as Felmeri Homes) entering into liquidation.**
2. **Authorises the Chief Executive Officer to forward this report, all attachments, and the minutes to the Chief Executive Officer of the Department for Infrastructure and Transport in response to his letter of 20 May 2024.**

GENERAL ANALYSIS

Background

Council granted approval to Felmeri Group to divide the land at 1700-1704 Main South Road, O'Halloran Hill into 23 allotments as part of a Community Title development in 2015. A required condition of this approval was the completion of a private driveway by Felmeri Group before commencement of the dwellings.

In Community Title developments, private driveways are jointly owned and maintained by landowners through a Community Corporation. Unlike public roads, these are not the responsibility of the Council or State Government.

Council's decision-making process is guided by State legislation, including the *Planning,*

Development and Infrastructure Act 2016 and, in this case, the *Community Titles Act 1996*. This legislation provides 'security for owners' through the provision of Scheme Descriptions and Development Contracts, which define the on-site responsibilities for private infrastructure (e.g. driveways).

Council ensured that both a Scheme Description and a Development Contract were in place for this development. These contracts explicitly tasked Felmeri Group with completing the required works, notwithstanding the liquidation of Felmeri Homes, a company within Felmeri Group.

This history has been summarised in **Attachment 2**, and it can be concluded that:

1. The development was lodged with Council in 2013 as a community titled land division. The developer elected to do this to avoid complying with Council's specified road and infrastructure requirements.
2. Development Approval was granted in 2015 based on 23 future dwelling allotments and associated infrastructure, including a private driveway and private stormwater system.
3. Council now knows that there was no way to enforce the construction sequence of the development (i.e. whether the driveway was completed prior to issue of titles or by practical completion) – even though such a condition may have implied the ability to enforce.
4. Notwithstanding the above, Council specified under Land Division Condition 3 that the driveway be completed before the issuing of titles.
5. The developer asked that titles be issued prior to construction of the driveway so that future homeowners could secure finance. It is common for driveways/roads to have the final seal applied after completion of the buildings as the driveway/road is often damaged during development works.
6. The change to have the driveway completed before practical completion was specified in the Scheme Description. This became a requirement between the developer and homeowners.
7. Council officers visited the site during initial construction of the dwellings but were not obligated under Council's then Inspections Policy to inspect all dwellings.
8. The developer constructed the main collection stormwater pipe. Subsequently the developer amended the development to replace three houses with a childcare centre. This resulted in a small increase in the total stormwater design flow and resulted in a slight under capacity in the constructed stormwater pipes.
9. Council required that the developer enter into a Land Management Agreement (LMA) to accept responsibility for any potential stormwater overflow in lieu of replacing the previously constructed stormwater system.
10. The stormwater system was private infrastructure and Council was not obligated to inspect its construction.
11. The developer became insolvent and could not complete the works.
12. Council received legal advice that:
 - a. Felmeri Group of companies (i.e. Marcalek P/L) was still responsible for completing all works through civil enforcement by owners of the Development Contract.
 - b. If Council chose to enforce completion of the driveway, Council would need to force the common owners to complete the work rather than the developer (because the works were substantially complete). Council later determined that it was not in the public interest to pursue the owners for incomplete works at this time.
 - c. Dwellings were likely to be completed under building indemnity insurance program through QBE / State Government. The insurance however would not cover the ancillary works like the common driveway.

Council released various media releases about this in 2023 (refer **Attachment 3**).

Council could not request a bond or security from Felmeri Group to ensure the completion of a private driveway. Council has written to the Planning Minister to request changes in the law to enable this.

Council also wrote to the Minister for Consumer and Business Affairs (refer **Attachment 4**) recommending that:

- the *Building Work Contractors Act 1995* be reviewed to ensure that:
 - common private infrastructure on Community Title allotments is clearly captured within building indemnity insurance policies. This would assist in protecting future homeowners from similar hardships and promote responsible practices within the construction industry.
 - building indemnity insurance certificates be submitted to CBS in addition to councils. The SA Planning Portal could be easily modified to provide CBS with access so that both councils and CBS can work together to validate certificates and share information, particularly where there are unique contractual arrangements.
 - licensed builders be required to submit copies of all building work contracts to the SA Planning Portal which can then be viewed by CBS. This would allow CBS to be able to audit individual builders to ensure compliance with the *Building Work Contractors Act*.
 - there are appropriate enforcement provisions to facilitate penalties against builders for breaching insurance requirements or acting outside the scope of their licence.
 - CBS implement an ongoing audit process of building work contracts and indemnity insurance.
 - Owner builders obtain consent from CBS before commencement of work. Council often encounters licensed trades people wishing to be owner builders who are not aware their licence prevents them from being owner builders on their own land. We also encounter unlicensed landowners who do not understand the need for a licensed building work supervisor or building indemnity insurance in some cases.
- the *Community Titles Act* be reviewed to ensure that:
 - infrastructure (private and public) is clearly designated within the Act and that responsibilities and completions are clearly spelt out.
 - the Act be simplified and better integrated with the development approval system and the Consumer Affairs powers of the State Government via increased enforcement provisions.
 - Councils are able to seek security or bonding for common infrastructure that may affect the ability of the development to proceed.
- the \$150,000 limit on building indemnity insurance claims and the \$12,000 figure to trigger residential building indemnity insurance be reviewed to factor in CPI and increased construction costs.

The Department for Infrastructure and Transport has written to Council (refer **Attachment 1**) requesting that Council reimburse it for the full cost associated with completing the common property and access works, namely \$4.2 million. Council should not reimburse the Department given that it has no liability for the costs incurred and its ratepayers and auditors would not approve of spending money to improve private property.

ATTACHMENTS

1. Attachment 1 - Letter from Mr Jon Whelan, Chief Executive, Department for Infrastructure and Transpo [**11.2.1** - 3 pages]
2. Attachment 2 - CoM Summary of Felmeri development [**11.2.2** - 8 pages]
3. Attachment 3 - CoM Media Releases regarding 1700-1704 Main South Road [**11.2.3** - 2 pages]
4. Attachment 4 - CoM Letter to Hon Andrea Michaels MP 29.8.23 [**11.2.4** - 4 pages]

RELEASED IN FULL

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In reply please quote #21482517

Enquiries to dit.officeofthechiefexecutive@sa.gov.au



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of South Australia
Department for Infrastructure
and Transport

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**Build. Move.
Connect.**

Mr Tony Harrison
Chief Executive
City of Marion
PO Box 21
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Email: ceoea@marion.sa.gov.au

Dear Tony

O'Halloran Hill Development

As you are aware, the Department for Infrastructure and Transport (the Department) has undertaken works at the former Felmeri Homes development site at 1700, 1702, and 1704 Main South Road at O'Halloran Hill, following Felmeri Builders and Developers Pty Ltd (formerly known as Felmeri Homes) entering into liquidation.

In August 2023, the State Government committed to providing urgent relief to the impacted families and homeowners, by examining cost recovery and providing an infrastructure solution to facilitate the completion of the roadway and associated works at the site.

The Department's work has included completion of the common property's internal roadway and access to Main South Road. These works have involved rectification, design and construction of infrastructure and installation services to a suitable quality and safe standard for homeowners to occupy their properties.

These works have also included site clean-up, investigations, pavement, kerb and gutter, initial minor works to the internal roadway providing safe access for builders, and other associated civil works. Other common services requiring installation or completion include sewerage, gas, electrical, telecommunications, and stormwater. A significant part of the works has required removal and replacement of common infrastructure and services that were either partially installed, not installed, or installed to poor quality standards. Photographs of the site and works are attached (Attachment 1). The significant underground stormwater detention system required full replacement, due to its poor construction and undercapacity.

I thank your Council officers, for their cooperation and responsiveness in working together with the Department regarding technical advice, civil design, and stormwater system approvals during the works.

The Department and Council have previously discussed the issues at this site, where the Department sought a joint contribution to the works. As you are aware, this was not supported by Council at that time.

Reference number: #21482517

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Since then, the State Government has further investigated Council's decisions regarding the O'Halloran Hill development.

With the information available to State Government, it was difficult to understand the course of action and decisions made by Council regarding the development approvals. Council initially had a condition on the development approval that required the common roadway to be constructed, installed, and completed prior to the subdivision of land, which would have prevented this issue occurring. Council then amended its development approval, varying this condition and requiring construction to be completed within 12 months from the date the approval was granted.

The State Government is of the view that the Council's actions and development decisions were the contributing factor to this matter, as Council removed the development approval condition requiring the common infrastructure to be completed prior to the subdivision of the land. Further, Council has not sought to enforce the latter condition, that the common infrastructure was to be completed within 12 months of the approval granted in 2020.

It is considered that due to the involvement and impact of Council's actions, the Department is seeking reimbursement from Council for the full cost associated with the common property and access works that have resulted from the planning and development processes. The cost for the full works is \$4.2 million. A full breakdown the costs can be provided at your request.

If you would like to discuss this matter, please contact Mr Graeme Jackson, Executive Director, People and Corporate Services, on mobile 0459 801 804 or email Graeme.Jackson@sa.gov.au

I look forward to Council's co-operation with this matter.

Yours sincerely



Jon Whelan
Chief Executive

20 May 2024

Attachments:

1. Photographs of the site and works

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ATTACHMENT 1: PHOTOGRAPHS OF THE SITE AND WORKS

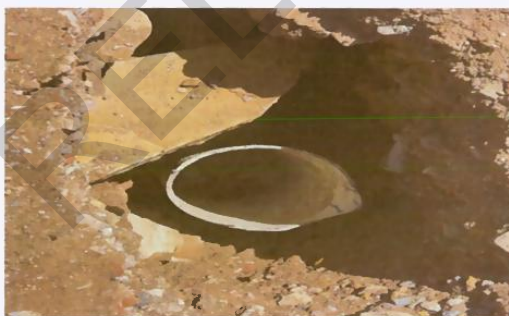
Example photographs of developer poor standard works requiring redesign, rectification and replacements.



Internal roadway – before and after completion



Underground stormwater detention system – replaced fully – original system was incorrectly installed, inadequate capacity.



Sewer IO backfilled with Rock and broken joint



Electrical conduit showing incorrect non-standard cable

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Summary of Council processes as part of the Felmeri development at 1700-1704 Main South Road, O'Halloran Hill

25 June 2024

1. Background

A development application was lodged with Council in August 2013 seeking the establishment of 23 community titled allotments at 1700-1704 Main South Road, O'Halloran Hill. This application included ancillary works such as retaining walls, earthworks, fencing and the provision of a 'common driveway' to service future allotments. An accompanying application proposing dwellings for each allotment was also lodged.

Preliminary discussions between Council and the developer had occurred prior to lodgement. The various schemes proposed by the developer did not meet Council's road and stormwater infrastructure requirements (e.g. space for a cul-de-sac road design). The community title process was adopted by the developer to minimise costs.

The developer chose to lodge a Community Titled land division (which will leave the driveway and associated infrastructure in private ownership) in lieu of a Torrens Titled land division (which would have vested future roads and infrastructure to Council).

2. Development Application Process

Assessment of the land division application occurred during 2013 and 2014, with various designs/proposals considered.

In late 2014 the application was refused as sufficient documentation, including information regarding a future common driveway, stormwater management / design calculations, and noise design requirements had not been provided.

The refusal was appealed and a compromise, overseen by the ERD Court, was negotiated between Council and the developer.

Council issued the Development Plan and Land Division Consent on 8 January 2015. The consent was subject to various conditions – with Condition 3 being relevant to the issues recently raised by DIT. Condition 3 stated:

Construction of the front fence common driveway retaining walls and landscaping (of common land - trees and groundcovers adjacent the common driveway and front fence) shall be constructed, installed and completed prior to the Council advising the Development Assessment Commission that it has no objection to the issue of a certificate pursuant to Section 51 of the Development Act.

Condition 3 therefore stated that elements, including the driveway, were to be completed prior to individual titles being issued.

In November 2016, as prospective homeowners were unable to secure finance without individual titles, the applicant's planning consultant sought individual titles be issued prior to the commencement of infrastructure works.

In lieu of amending the original condition, Council requested the applicant amend the Community Title 'Scheme Description' to include wording seeking the internal driveway be constructed / sealed prior to dwelling completion or by 30 March 2018, whichever occurred first.

The amendment occurred and Council advised the Development Assessment Commission to commence the process to issue individual titles.

2.1 Validity of Condition 3

It has since been established that Condition 3 was not a condition that could be validly imposed on a Development Plan consent as it sought to control the timing of certain actions that were beyond the scope of the condition-making power provided for in the *Development Act 1993*.

Whilst a common process at the Council at the time of the approval (2015), Council's planning staff were unaware that such a condition was 'ultra vires' (i.e. beyond our scope/powers) as it lacked a proper planning purpose and also failed the "reasonableness" test in light of the regulatory scheme provided for in the Community Titles Act 1996.

2.2 Why wasn't Condition 3 enforced?

Whilst the timing for the completion of the driveway was included in the scheme description, technically Condition 3 in the land division consent was never succeeded and therefore remained valid.

The condition however was not enforced because:

- The scheme description had been amended to reflect a new completion date
- Infrastructure works on site had commenced (providing a level of comfort that the project was underway)
- The development scope and outcomes continued to evolve (e.g. an easement from the site, through private land, to dispose of stormwater on Council land was being negotiated).

Condition 3 was amended in January 2020 to allow a further 24 months to complete the driveway and other associated works.

As of early 2020 construction of the dwellings had yet to commence. Council observed that stormwater and other infrastructure had been installed and was satisfied that an extension would enable completion of the dwellings prior to the driveway being sealed (and avoid the home owners having to pay for driveway repairs resulting from construction activities).

It has since been established that Condition 3 was not a valid condition to start with and therefore could not be enforced.

2.3 Why wasn't the Scheme Description enforced?

A 'scheme description' gives the owner or prospective purchaser an overall view of how the scheme is proposed to be developed and finished. Except in the case of a small scheme, the original owner of a community parcel is required to lodge a scheme description for the division, development & administration of the community parcel. The scheme description is filed with the community plan of division by the Registrar General when depositing the plan at the LTO. The purpose is to provide a brief description of the nature of the scheme to which the relevant development authority has given its consent for the benefit of persons considering purchasing or entering into any other dealing with a lot created by the scheme.

Where a scheme description indicates that a developer proposes to make improvements on the common property or a development lot, the *Community Titles Act 1996* also requires a developer to enter into a "Development Contract". The purpose of a development contract is to place a developer under a binding obligation to develop a development lot &/or the common property in accordance with the scheme description.

Scheme descriptions and development contracts sit under the *Community Titles Act*. It is only a community corporation (comprising the landowners) or an owner or occupier of a community lot who is entitled to take proceedings for the enforcement of a development contract for the failure to develop common property as contemplated in the associated scheme description.

Where it has no proprietary interest in a community title division, local government has no ability to enforce a development contract entered into pursuant to the requirements of the Community Titles Act. Any issues which arise in this regard are primarily civil considerations between the community corporation (i.e. the owners), community lot owners or occupiers and the developer.

2. 4 Why was Condition 3 used if it is invalid?

It is understood that the inclusion of such a condition (the request to complete certain requirements prior to the issuing of titles) was a common practice adopted by many local governments. Satisfying such a condition was usually not problematic (noting however many development applications were much less complex than this one) and were prevalent at a time when the housing industry was not

as highly leveraged, construction costs were lower, and bank financing was not as strict (i.e. development could occur quicker and with less costs).

Over the past decade, coinciding with the dilution of localised planning policy and the shift to more standardised planning criteria, there has been a considerable increase in court appeals (ERD and Supreme Court) considering procedural aspects of an application, rather than its merits. This has inevitably led to more court judgements which challenge or change the interpretation, assumptions and application of the legislation (such as conditions).

To this end, a Practice Direction providing guidance on what constitutes a 'valid' condition was introduced to assist the planning industry as part of the *Planning, Development & Infrastructure Act 2016* (operational from March 2021).

Staff had begun to suspect that the then-used method to condition the completion of certain elements prior to the issuing of titles may not be valid and the new Practice Direction confirmed this.

3. Council's Building Inspection Regime

The construction of these dwellings was covered by the *City of Marion Building and Swimming Pool Inspection Policy*.

The Policy required that at least 66% of building development be inspected (commercial, residential and industrial, but with the exception of swimming pools where 100% was required and where building roof framing was undertaken by an owner builder where 90% was required).

The Policy provided an 'inspection criteria' which ranked the types of inspections in order of importance. This ranking was based on the proposed use, safety concerns, type of notification / construction activity occurring etc. The 66% figure means that some developments may not have been inspected at any stage of construction. Different stages include commencement, footings, framing, roof truss, masonry, wet areas and final completion.

Council was formally notified of the 'commencement' and 'footings' stage of construction (of 1 or more dwellings) in May 2021 but no further notifications were received. These dwellings were not specifically targeted for an inspection as commercial and high-risk construction were generally prioritised over residential inspections.

A general walk through of the development site was undertaken on 27 March 2023 following a complaint by a homeowner. Council was not obligated to inspect the construction of the stormwater system.

4. Land Management Agreement (LMA)

The Development Approval was for the establishment of 23 community titled allotments, as well as ancillary works such as retaining walls, earthworks, fencing and the provision of a 'common driveway' to service future allotments.

Some stormwater pipework was then installed. Subsequently, in 2017 an application was lodged for a childcare centre which resulted in the reduction of the number of residential lots from 23 to 20. This meant that the installed stormwater pipes were not of sufficient size to accommodate both the approved residential development and the newly proposed childcare centre (constructed in lieu of dwellings 1 to 3).

In late 2018 Council sought that the developer enter into an LMA. The LMA sought to:

- Confirm that the stormwater system would facilitate stormwater discharge from both the residential component and proposed childcare centre site (required through the residential site).
- Outline the developer's legal responsibilities to deliver on the Development Approval and provide for ongoing maintenance of private infrastructure.
- Outline the private ownership and maintenance obligations.

- Reiterate that Council would not own any part of the proposed stormwater system (as all components, aside from the discharge point were on private land).
- Confirm that the approved stormwater system may now not be adequate for its intended purpose, and may result in flooding of the subject land in a major storm event.

The LMA intended to ensure that Council was protected against any future claims associated with the private system and protect the future property owners should the developer fail to deliver on the required works.

An LMA is an agreement recognised by statute and enforceable under the PDI Act. A breach of the Act is defined to include a breach of an obligation imposed by an LMA. Where an LMA is noted against the relevant instrument of title, the LMA is binding on the current owner of the land whether or not the owner was the person with whom the agreement was originally made. That is to say, when noted on a certificate of title it will bind subsequent purchasers.

The LMA was between City of Marion, Felmeri Holdings Pty Ltd and Marcalek Pty Ltd and signed by Council on 11 July 2019. The LMA reference number is noted on the Certificate of Title. As part of the Section 7 of the *Land and Business (Sale and Conveyancing) Act 1994* requirements a copy of the Certificate of Title and LMA would have been provided to the property owner (likely their conveyancer) before settlement.

5. Timeline

2013

1. 20/08/2013 – Application lodged (Land Division - Residential Community Title 3 into 23 allotments).

2014

2. Application refused for reasons relating to: noise adjacent South Road, site works / retaining and stormwater management unresolved, failing to provide common driveway details, design and layout considerations, lack of information to resolve the impact on significant trees on-site and insufficient stormwater details or stormwater management plan not provide.
3. ERD Court appeal.
4. Compromise plans submitted to Court and Council.

2015

5. 8/01/2015 – Development Plan Consent and Land Division Consent issued

“Land Division Residential Community Title 3 into 23 allotments (creation of 20 new allotments), the removal of four regulated trees, (2 Almond Trees (Prunus dulcis) and 2 River Red Gums (Eucalyptus camaldulensis)) and construction of the common driveway, front masonry fence, site works, retaining walls and landscaping.”

Condition 3: Construction of the front fence common driveway retaining walls and landscaping (of common land - trees and groundcovers adjacent the common driveway and front fence) shall be constructed, installed and completed prior to the Council advising the Development Assessment Commission that it has no objection to the issue of a certificate pursuant to Section 51 of the Development Act.

2016

6. 29/11/2016 – Applicant's planning consultant sought (via email) to vary the Conditions of Consent to enable titles to be issued prior to all works being undertaken. This was sought as prospective homeowners were unable to secure finance without land titles.
7. 7/12/2016 – Council made aware of sections of the masonry wall had collapsed. The eastern property boundary wall was required to be demolished by council staff.

2017

8. Council requested the 'Scheme Description' be amended to include provision for driveway completion:
 - Clause 5.1: *The developer will construct an all-weather sealed internal driveway and associated landscaping on the common property, a masonry front fence, retaining walls and shall install the service infrastructure in accordance with the planning approval conditions referred to in clause 4.1.*
 - Clause 5.3: *The internal driveway shall be constructed/sealed and the associated landscaping shall be planted and connected to an irrigation system prior to practical completion of the twenty three (23) single storey group dwellings or by no later than 30 March 2018, whichever occurs first.*
9. 12/01/2017 – Council advised DAC it was satisfied the clearance conditions were met and Section 51 clearance could be issued.
10. 02/02/2017 – Section 51 Clearance issued by DAC (allowing the sale of allotments to proceed).
11. Council met with Developer to confirm stormwater pipes were connected through the common areas of the site.
12. 25/07/2017 – application lodged for childcare centre.
13. 18/10/2017 – application lodged for a second land division application (lapsed in 2020 – incorporated into the 'minor amendment' to the original DA).
14. 25/10/2017 – application lodged to create separate allotments for childcare centre and residential development component.

2018

15. 23/7/2018 – Land Division application timeframes lapsed (extension later issued).

2019

16. 11/07/2019 – LMA (between City of Marion, Felmeri Holdings Pty Ltd and Marcalek Pty Ltd) executed.
17. 24/07/2019 – Childcare Centre application approved.
18. 3/09/2019 – Council staff initially inspected the site on and confirmed the stormwater infrastructure had been installed, but driveway kerbing had not been installed.
19. October 2019 - February 2020 – Driveway kerbing and associated infrastructure believed to be installed (based on aerial imaging).
20. 29/11/2019 – Kerbing installed. DPTI provided confirmation that the applicant had entered into a binding agreement for the installation of the driveway crossover.

2020

21. Request for a Regulation 47A 'Minor Amendment' to alter the number of allotments 23 to 20 and change in Conditions of Consent.
22. 31/01/2020 – Regulation 47A 'Minor Amendment' issued (via email) with the following changes to the proposal and Decision:
 - Reduction in total allotment number from 23 to 20
 - Change to Condition 3 (timeframes for completion of driveway)

Construction of the front fence, common driveway over land marked C/D and D, retaining walls and landscaping (of common land – trees and ground covers adjacent common driveway and front fence) shall be constructed, installed and completed within 24 months from the date of approval.

- Condition 5 on the Decision changed (number of allotments reduced – no open space contribution fee required – condition changed to this effect).
- Amended stormwater design (inclusion of new pipe to the centre of the internal driveway servicing Lot 2 (future childcare centre)).
- An amended 'Scheme Description' was sent to the applicant with the following proposed changes to Clauses 5.1 & 5.3:

Clause 5.1: The developer will construct an all-weather sealed ~~roadway~~ internal driveway and associated landscaping on the common property, a masonry front fence and retaining walls and shall install the service infrastructure in accordance with the Planning Approval Conditions referred to in clause 4.1.

Clause 5.3: The internal driveway shall be constructed/-sealed and the associated landscaping shall be planted and connected to an irrigation system prior to practical completion of the twenty (20) single storey group dwellings, or by no later than 30 June 2023, whichever occurs ~~approved by the City of Marion in DA 100/1071/2014 on 27 August 2015 first.~~

There is no record on any Council files or the state government's EDALA system that this Scheme Description was signed or endorsed by the applicant.

23. 04/08/2020 – Application to vary the previous dwelling application lodged (reduction in total number of dwellings from 23 to 20) – this application reflected the previously approved reduction in allotment numbers (from 23 to 20).
24. 01/10/2020 – Application to reduce the total number of dwellings (23 to 20) received Development Approval.
25. 09/12/2020 – Council advised the Development Assessment Commission that Section 51 Clearance could be issued. This second clearance was issued to reflect the reduction in the total number of allotments. At the time clearance was issued, the common driveway kerbing had been completed and the main stormwater / drainage pipework had also been installed – the driveway was considered trafficable.

2021

26. 21/01/2021 – Council received email from Oak Law, acting on behalf of Felmeri, to review a proposed amended 'Scheme Description' and 'Development Contract', and if acceptable be signed by Council. In relation to the proposed common driveway, Clause 5.1.1 outlined the developer will:
 - “construct a weather sealed internal driveway, car parking areas and maneuvering areas will be constructed in accordance with recognised engineering principles within 12 months from the date full approval is granted and where the driveway crosses the front boundary the finished ground level shall be between 50mm and 150mm above the top of the kerb.”

Note: The development application referred to in the Scheme Description received Development Approval on 01/10/2020. Therefore the 12-month requirement to complete the driveway would be 01/10/2021.

27. 2/02/2021 – Amended Scheme Description signed by Council staff.
28. 05/02/2021 – Review of Scheme Description shows the document was signed by Oak Law (on behalf of Felmeri).
29. 9/02/2021 – Scheme Description signed by Registrar-General.
30. 11/05/2021 – Council notified of commencement of construction of dwellings.
31. 27/05/2021 – Council notified of commencement of footings.

2022

32. Council compliance team was contacted August 2022 by Felmeri Homes to consider the retaining over the rear section of the land for the 6 rear allotments / dwellings (only).
33. The retaining and fill levels through the rear yard were at variance to the approval, although the departure was of a low severity, so no further action was taken. In making this determination, it was acknowledged that the retaining does not exceed 1.0m in height above ground, so it did not require a separate approval or engineering.
34. At the time, there was no indication of the impending insolvency and the common driveway was still trafficable.

2023

35. February – future homeowners raised concerns to Council of potential unfinished building works.
36. Council confirmed the dwelling applications were still valid and wrote to the developer informing them that the driveway works associated with the land division application would not be achieved within the statutory timeframe and requested meeting to discuss.
37. 5/04/2023 – Council considers/grants extension of time to 12 July 2023 for the land division only, which includes completion of the common driveway and ancillary works.
38. May – Council inspects site and noticed new trenching had taken place that had also exposed parts of the existing stormwater. As a result, the driveway was no longer trafficable.
39. June – Council notified of insolvency process.
40. July – Felmeri Homes declared insolvent.
41. July-August – Council working with liquidator and state agencies to provide require information and to assist with insurance claims.
42. Council has legal advice that confirms:
 - Felmeri Group of companies (i.e. Marcalek P/L) are still responsible for completing all works through civil enforcement by owners of development contract.
 - If Council chose to enforce completion of the driveway, Council would need to force the common owners to complete the work rather than the developer (because the works were substantially complete).
 - Dwellings are likely to be completed under building indemnity insurance program through QBE/State Gov. The insurance however would not cover the associated works like the common driveway.
43. Council confirmed under its enforcement policy that it was not in the public interest to pursue the owners for incomplete works at this time.
44. State Government stepped in to make driveway serviceable again (council inspected and confirmed this on Friday 1 September 2023).
45. The Administrator appointed for Felmeri Homes is Council's current primary contact representing all residential owners.
46. Recommencement of building work occurred. Council assisted nominated building companies in relation to building inspections and known defects.

2024

47. Completion of internal driveway and replacement of services by DIT.

6. Summary

1. The development was lodged with Council in 2013 as a community titled land division. The developer elected to do this to avoid complying with Council's specified road and infrastructure requirements.

2. Development Approval was granted in 2015 based on 23 future dwelling allotments and associated infrastructure, including a private driveway and private stormwater system.
3. Council now knows that there was no way to enforce the construction sequence of the development (i.e. whether the driveway was completed prior to issue of titles or by practical completion) – even though such a condition may have implied the ability to enforce.
4. Notwithstanding the above, Council specified under Land Division Condition 3 that the driveway be completed before the issuing of titles.
5. The developer asked that titles be issued prior to construction of the driveway so that future homeowners could secure finance.
6. The change to have the driveway completed before practical completion was specified in the Scheme Description. This became a requirement between the developer and homeowners.
7. Council officers visited the site during initial construction of the dwellings but were not obligated under Council's then Inspections policy to inspect all dwellings.
8. The developer constructed the main collection stormwater pipe. Subsequently the developer amended the development to replace three houses with a childcare centre. This resulted in a small increase in the total stormwater flow and resulted in a slight under capacity.
9. Council required the developer enter into a Land Management Agreement to accept responsibility for any potential stormwater overflow in lieu of replacing the previously constructed stormwater system.
10. The stormwater system was private infrastructure and Council was not obligated to inspect its construction.
11. The developer became insolvent and could not completed the works.

City of Marion Media Releases regarding 1700-1704 Main South Road

This was sent to ABC on 5 September 2023:

Please attribute to the Mayor of Marion, Kris Hanna:

Marion Council granted approval to Felmeri Group to divide the land into 20 allotments as part of a Community Title development. A required condition of this approval was the completion of a private driveway by Felmeri Group.

In Community Title developments, private driveways are jointly owned and maintained by landowners through a Community Corporation. Unlike public roads, these are not the responsibility of the Council or State Government.

Felmeri Group requested an extension for completing the work due to delays in material supplies. Marion Council evaluates such requests individually and concluded that granting the extension was in the best interest of the homeowners. The alternative would have been legal action, which would have disadvantaged the homeowners.

Marion Council's decision-making process is guided by State legislation, including the Planning, Development and Infrastructure Act 2016 and, in this case, the Community Titles Act 1996. This legislation provides "security for owners" through the provision of "Scheme Descriptions" and "Development Contracts," which define the on-site responsibilities for private infrastructure (e.g. driveways).

Marion Council ensured that both a Scheme Description and a Development Contract are in place for this development. These contracts explicitly tasked Felmeri Group with completing the required works, notwithstanding the liquidation of Felmeri Homes, a company within Felmeri Group.

Regarding the inability to request a bond or security from Felmeri Group, I have written to the Planning Minister to request changes in the law. This would allow Marion Council to hold a bond to ensure the completion of a private driveway, even if the developer cannot finish the entire development.

State Government did ask us to give 50% of driveway costs (about \$500,000) for the benefit of the 20 families involved but it is unlikely that Marion ratepayers (or our auditors) would approve of spending half a million dollars to improve someone's private property.

We continue to support ratepayers who experience hardship through our Hardship Policy. We understand that some ratepayers may face difficulties in meeting standard rate payment arrangements. In such cases, we encourage ratepayers to contact Marion Council to discuss options for assistance. We are committed to working with and supporting our ratepayers.

This was sent to the Advertiser on 24 September 2023:

Please attribute the following to a City of Marion spokesperson:

Marion Council granted approval to Felmeri Group to divide the land - at 1700 South Road, O'Halloran Hill - into 23 allotments as part of a Community Title development in 2015. A required condition of this approval was the completion of a private driveway by Felmeri Group before commencement of the dwellings.

In 2017, Felmeri requested multiple changes to the development application. The changes included adding a childcare centre allotment and reducing the number of residential allotments. They also requested a change to the clause relating to the completion of the common driveway, giving 2 years to complete the driveway so the allotment titles could be released and sold by the developer. It is common for driveways/roads to have a final seal following completion of the buildings, this helps to reduce damage from large building trucks over the course of the build.

At the time of approval, the common driveway kerbing had been completed and main stormwater pipework had also been installed. The driveway was trafficable. The site was regularly inspected during development and the driveway remained trafficable until May 2023.

Felmeri Group requested an extension for completing the work in March 2023. Marion Council evaluates such requests individually and concluded that granting the extension was in the best interest of the homeowners. The alternative was legal action, which would have disadvantaged the homeowners.

Following this extension, new trenching was undertaken that exposed parts of the existing stormwater at the O'Halloran Hill site. Council inspected the site in May 2023 and the driveway was no longer trafficable.

Marion Council did not change the rules. The original condition was included at Council's discretion and is not a standard clause in land division applications. Legal variations and extensions were granted thereafter.

This issue is a case of mismanagement by the building company responsible and exacerbated by the State development system which doesn't have adequate consumer protection in place. Council has since written to the Planning Minister to request changes in the law that would allow councils to request bonds from developers. This would have allowed Marion Council to hold a bond to ensure the completion of a private driveway, even if the developer cannot finish the entire development.

Council always endeavoured to make decisions in the best interests of the homeowners. We have remained honest throughout the entire process and are committed to assisting relevant companies and authorities to get these homes finished. It is only at the insistence of council that a coordination group has been established with relevant state government agencies to make that happen.

OFFICE OF THE MAYOR



29 August 2023

Hon Andrea Michaels MP
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Dear Ms Michaels

I write to you in relation to the incomplete housing development by Felmeri Homes at 1700 Main South Road O'Halloran Hill.

The City of Marion understands that the State Government has stepped in to complete the unfinished private driveway and will investigate cost recovery options. Council then resolved on 22 August 2023 that we write to the State Government and industry bodies with our recommendations on how this situation can be avoided in the future.

Felmeri Builders & Developers trading as Felmeri Homes was responsible for the above Community Title development involving dwellings and associated infrastructure including private driveways. Unfortunately, Felmeri Builders & Developers are now in administration casting doubt on the completion of the homes and the infrastructure.

The lack of insurance coverage for the essential infrastructure, including the driveway, has added to the financial burden and uncertainty faced by homeowners. Under contractual obligations, it is understood that, should the homes be completed first, people are only able to move in once the driveway infrastructure is complete. This means that if the houses are completed first, people will not be allowed to move in, thereby leaving them in a state of limbo with no precise end date for completion of the entire development.

The construction delays have led to owners being affected by increasing interest rates on construction loans. These additional expenses, on top of their regular living costs, increased rents, double loans, and some people moving in with family members, are further exacerbated by the lack of completion and insurance coverage for the infrastructure. The result is that residents, many of whom have young children, have struggled to cope with the financial strain.

The lack of insurance coverage has left many homes unprotected and vulnerable to defects and damage, particularly during the wet winter months. The driveway leading into the development remains incomplete, and an open trench down its centre poses safety hazards, causing multiple cracks and broken pipes, and necessitating extensive repairs. The properties have to date been unoccupied some for upwards of three years.

In addition to the stress caused to our future residents, this situation also highlights several systemic issues that need to be addressed to prevent similar situations in future; specifically:

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Inclusion of common private infrastructure within building indemnity insurance

Domestic building work is defined in the *Building Work Contractors Regulations 2011* to include, amongst other terms, 'any other building work carried out within the curtilage of a house or on the boundary of the curtilage of a house.'

In the context of a private dwelling on a Torrens Titled allotment we understand this can include essential infrastructure such as a driveway. However, for Community Titled developments the Regulations are ambiguous with respect to whether this includes common infrastructure. We also understand that insurers can exclude non-residential parts of buildings unless they adversely affect the structure of the residential part of the building or the access to the building.

The City of Marion recommends that the *Building Work Contractors Act 1995* be reviewed, specifically for common private infrastructure on Community Title allotments to be clearly captured within building indemnity insurance policies. This will assist in protecting future homeowners from similar hardships and promote responsible practices within the construction industry.

The City of Marion also recommends that a review of the *Community Titles Act* be implemented by the State Government to ensure:

- that infrastructure (private and public) is clearly designated within the Act and that responsibilities and completions are clearly spelt out;
- that the Act be simplified and better integrated with the development approval system and the Consumer Affairs powers of the State Government via increased enforcement provisions; and
- that Councils are able to seek security or bonding for common infrastructure that may affect the ability of the development to proceed.

Increased limit on building indemnity insurance

The cover for building indemnity insurance protects homeowners against losses of up to \$150,000. We understand that this threshold was brought in some years ago when the State Government became the underwriter for insurance policies. Whilst it is appropriate that the Government continues to offer this protection, we note that the \$150,000 threshold was never indexed and has not changed over time, leaving owners to accept all risk above \$150,000. With increased construction costs, rising interest rates and cost of living pressures faced by our residents it is time that this be reviewed and adjusted upwards.

The City of Marion recommends the \$150,000 limit on building indemnity insurance claims be reviewed with a view to upwards and ongoing CPI adjustment. In addition, the \$12,000 figure to trigger residential building indemnity insurance could also be reviewed to factor in CPI and increased construction costs.

Need for increased regulatory oversight of licensed building practitioners

This unfortunate situation, combined with the considerable and well documented volume of Australian building company collapses, highlights the need to review the level of regulatory oversight of licensed building practitioners, particularly with respect to insurance coverage and financial viability.

I draw your attention to three recommendations in the *Shergold Weir Building Confidence Report* commissioned by the National Building Ministers Forum (February 2018):

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Recommendations 1&2 – Nationally consistent requirements for registration:

The report discusses the need for certificated training, additional competency and experience requirements, compulsory insurance, together with financial viability requirements and evidence of practitioner integrity.

The situation with Felmeri Homes highlights the consumer benefits if licensed builders were to undergo regular third party auditing (similar to other building practitioners) to ensure, amongst other things, ongoing financial viability and insurance requirements. Such a system could be simply implemented and require home builders to regularly demonstrate their financial viability through annual declarations, audits or provision of certificates/evidence/guarantees from finance professionals and/or institutions.

Mandatory registration with approved industry bodies may also be a viable option. Such bodies could then provide this oversight via annual accreditation programs - provided such programs contain minimum competencies (identified above) as agreed benchmarks.

Recommendation 5 - That each state establishes formal mechanisms for a more collaborative and effective partnership between those with responsibility for regulatory oversight, including relevant state government bodies, local governments and private building surveyors (if they have an enforcement role).

The report discusses the fragmented building regulation system in most states involving multiple state government bodies, local councils and private practitioners. This results in a disjointed system of regulatory oversight which is prone to duplication, confusion, unclear lines of responsibility and a lack of information sharing. The report states that this 'can be exacerbated in cases if some authorities believe that they have received inadequate funding. To the public, especially when things go wrong, this often looks like a game of buck-passing.'

The situation with Felmeri Homes unfortunately validates many of the above points. It also highlights the need for local and state government to work together to increase collaboration, have clear lines of responsibility, share information and most importantly, restore public faith in our regulatory system. In consideration of the above as it relates to building indemnity insurance, the City of Marion recommends the *Building Work Contractors Act* be better integrated with the development approval system, specifically:

- That building indemnity insurance certificates be submitted to CBS in addition to councils. The SA Planning Portal could be easily modified to provide CBS with access so that both councils and CBS can work together to validate certificates and share information, particularly where there are unique contractual arrangements.
- That licensed builders be required to submit copies of all building work contracts to the SA Planning Portal which can then be viewed by CBS. This would allow CBS to be able to audit individual builders to ensure compliance with the *Building Work Contractors Act*.
- The enforcement provisions of the *Building Work Contractors Act* and *PDI Act* be reviewed to facilitate penalties against builders for breaching insurance requirements or acting outside the scope of their licence.
- With free access to the above information via the SA Planning Portal, that CBS implement an ongoing audit process of building work contracts and indemnity insurance.
- Owner builders must obtain consent from CBS before commencement of work. Council often encounters licensed trades people wishing to be owner builders who are not aware their licence prevents them from being owner builders on their own land. In

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addition, we also encounter unlicensed landowners who do not understand the need for a licensed building work supervisor or building indemnity insurance in some cases.

In closing, whilst the situation with Felmeri Homes is terribly unfortunate, it serves as an opportunity to streamline our fragmented building regulatory system in a manner where local and state government, as well as industry, work together to restore consumer faith in the system and increase consumer protection.

Yours sincerely



Kris Hanna

Mayor, City of Marion

cc: Hon Nick Champion MP, Minister for Planning
Housing Industry Association – SA office
Property Council
Australian Institute of Building
Australian Institute of Building Surveyors – National Office
Master Builders Association – SA office

RELEASED IN FULL

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