



# NOTES

## June Council Agenda Briefing Held in the Council Chamber Tuesday 17 June 2008 commencing at 5.30pm

### Present:

Mayor J Best                      Chairman

### Councillors:

|                |                            |
|----------------|----------------------------|
| G W Gleeson    | Civic Ward (from 5.37pm)   |
| I Hasleby      | Civic Ward                 |
| P Best         | Como Beach Ward            |
| T Burrows      | Manning Ward (from 5.46pm) |
| L P Ozsdolay   | Manning Ward               |
| C A Cala       | McDougall Ward             |
| R Wells, JP    | McDougall Ward             |
| R Grayden      | Mill Point Ward            |
| D Smith        | Mill Point Ward            |
| K R Trent, RFD | Moresby Ward               |
| S Doherty      | Moresby Ward               |

### Officers:

|                 |  |
|-----------------|--|
| Mr C Frewing    | Chief Executive Officer                              |
| Mr S Cope       | Director Development and Community Services          |
| Mr L Croxford   | Acting Director Infrastructure                       |
| Ms D Gray       | Acting Director Financial and Information Services   |
| Mr S Camillo    | Manager Environmental Health Services (until 6.22pm) |
| Mr R Kapur      | Acting Manager Development Assessment                |
| Mr M Taylor     | Manager City Environment (until 6.42pm)              |
| Mr R Bercov     | Strategic Urban Planning Adviser                     |
| Mr S McLaughlin | Legal and Governance Officer                         |
| Miss J Jumayao  | Legal and Governance Research Officer                |
| Mrs K Russell   | Minute Secretary                                     |

### Apologies

|             |   |
|-------------|---|
| Cr B Hearne | Como Beach Ward                                     |
| Mr M J Kent | Director Financial and Information Services - leave |

### Gallery

There were 12 members of the public and 1 member of the press present

### OPENING

The Mayor opened the Agenda Briefing at 5.30pm, welcomed everyone in attendance and advised on the format of the Briefing stating that Deputations would be heard first followed by any questions on the

Deputation items and then the June Council Agenda reports would be presented by the Chief Executive Officer.

### DEPUTATIONS

The Mayor opened Deputation at 5.33pm

|  |
|--|
| <b>Keith Fisher, 151 Lockhart Street, Como (applicant) .....Agenda Item 10.0.2</b> |
|--|

Mr Fisher, also representing 37 other residents in the area the subject of the proposal, spoke in support of the officer recommendation that no further action be taken toward closure of the surplus portion of the Wooltana Street road reserve and commended Council officers and Elected Members for their interest and support in relation to this matter.

|  |
|--|
| <b>Estelle Kernott, 12 Wandarra Close, Karawara (applicant) ... Agenda Item 10.3.3</b> |
|--|

Ms Kernott spoke against the officer recommendation and gave a power point presentation on the following points:

- visual amenity of the greenway / greenway not well maintained
- setbacks
- patio of 2m not an adequate size
- other properties abutting greenways have structures close to back fence
- ask Council support patio application as proposed

**Note:** Cr Gleeson arrived at 5.37pm

|   |
|---|
| <b>Peter Beyer Architect, representing Jim Holbrook, 32 Elizabeth Street, South Perth .....Agenda Item 10.3.4</b> |
|---|

Mr Beyer spoke against the officer recommendation and gave a power point presentation on the following points:

- design responding to site / limited frontage
- boundary walls
- carport proposal
- setbacks
- existing streetscape character / focus area
- scheme objectives
- seeking approval for low scale design that suits the site

**Note:** Cr Burrows arrived at 5.46pm

### CLOSE OF DEPUTATIONS

Deputations concluded at 6.05pm. The Mayor thanked everyone for their comments.

### JUNE COUNCIL AGENDA REPORTS

The Chief Executive Officer presented the June Council Reports and provided a brief summary of each, as follows. Questions and points of clarification were raised by Members and responded to by the officers.

#### **10.0.1 Policy P350 'Residential Design Policy Manual.'**

This report presents Part 1 of the revised residential design policies for endorsement to implement public consultation.

#### **10.0.2 Wooltana Street Road Reserves, Como (Deputation)**

This report considers submissions on the proposed partial closure of a surplus portion of the Wooltana Street road reserve.

**10.0.3 CEO Evaluation Committee**

Following on from the May resolution, Council is now required to appoint a member of the Como Beach Ward to the CEO Evaluation Committee.

**10.2.1 Red Bull Air Race 2008**

This report considers an application by Shani Wood Events for the use of Sir James Mitchell Park to hold a Red Bull Air Race in November 2008 and to approve the road closures for the event.

**10.3.1 Gwentyfred Road Reserve**

Following a community comment period, this report presents the draft Landscape Design plan for the Gwentyfred Road Reserve for adoption.

**10.3.2 No. 64 Brandon Street, Kensington: *Application withdrawn by written request of the applicant received Tuesday 17 June 2008***

This application proposes a Two Storey Single House that is in conflict with the provisions of the Residential Design Codes 2008 and the City's Town Planning Policy.

**Note:** Manager Environmental Health Services retired from the meeting at 6.22pm

**10.3.3 Patio Addition to Single House. (*Deputation*)**

This application for a patio addition at No. 12 Wandarra Close, Karawarra which has a 1.0 metre setback from the greenway has been slightly modified to ensure it conforms with TPS6 provisions.

**10.3.4 Proposed Additions to an Existing Single House (*Deputation*)**

This application for additions at 32 Elizabeth Street conflicts with the requirements of the "Residential Design Codes" and is seen to be incompatible to the existing Elizabeth Street streetscape.

**10.4.1 National State Road Safety BlackSpot Program Submission 2009-2010**

This report seeks endorsement of the schedule of projects for forwarding to MRWA for BlackSpot funding.

**10.5.1 Planning Applications Determined Under Delegated Authority.**

The purpose of this report is to advise Council of applications for planning approval determined under delegated authority during the month of May 2008.

**10.5.2 Use of the Common Seal**

this report provides details on the use of the Common Seal for May 2008.

**10.5.3 Constitutional Recognition of Local Government**

This report deals with a request from WALGA urging all local governments in the State to consider its position on the question of constitutional recognition and the form that recognition may take.

**10.5.4 Collier Park Golf Course Lease**

This report reviews the outcome of public consultation relating to the proposed two year extension of the Collier Park Golf Course lease with the existing, long term tenant, Rosetta Holdings Pty Ltd.

**Note:** Manager City Environment retired from the meeting at 6.42pm

**10.6.1 Monthly Financial Management Accounts - May 2008**

This report presents the management account summaries for May.

**10.6.2 Monthly Statement of Funds, Investments and Debtors at 31 May 2008.**

This report presents to Council a statement summarising the effectiveness of treasury management for the month.

**10.6.3 Warrant of Payments**

This report presents a list of accounts paid under delegated authority for May 2008.

**Note:** The presentation of the June Council reports concluded at 6.45pm following which a 15 minute informal question / answer session was held with Elected Members.

**Closure**

The Mayor closed to Agenda Briefing at 7:00 pm and thanked everyone for their attendance.



# NOTES

## CONCEPT FORUM

Swan and Canning River Foreshore

**Held in the Council Chamber**

**Wednesday 18 June 2008**

**Commencing at 5.30pm**

Present

Mayor J Best

Chairman

Councillors:

G W Gleeson

Civic Ward

P Best

Como Beach Ward

T Burrows

Manning Ward

L P Ozsdolay

Manning Ward

C A Cala

McDougall Ward

R Wells, JP

McDougall Ward

R Grayden

Mill Point Ward (until 6.40pm)

D Smith

Mill Point Ward

K R Trent, RFD

Moresby Ward (from 6.10pm)

Officers:

Mr C Frewing

Chief Executive Officer

Mr L Croxford

Acting Director Infrastructure Services

Mr M Taylor

Manager City Environment

Apologies

Cr I Hasleby

Civic Ward

Cr B Hearne

Como Beach Ward

Cr S Doherty

Moresby Ward

Cr K R Trent, RFD

Moresby Ward - anticipated late arrival

OPENING

The Mayor opened the Agenda Briefing at 5.30pm and welcomed everyone in attendance.

The Chief Executive Officer advised that the purpose of the Forum was to provide an update on the current state of the river walls in light of further Swan River Trust funding rounds due to commence in July 2008 and the City's anticipated participation in this funding program.

**1. Swan and Canning River Foreshore**

The Manager City Environment gave a power point presentation covering the following topics

**Background**

- City of South Perth – surrounded by river on three of its four boundaries.
- Total river perimeter ~ 18.5 km.
- River foreshores managed for major and minor passive recreation and for conservation.

- A number of agencies involved – Main Roads WA, Swan River Trust, Department for Planning and Infrastructure, Department for Environment and Conservation and the City.
- Five jetties (two managed by CoSP) and 5 boat ramps (two informal).
- River wall replacement value is somewhere between \$2,500 to \$3,000 per metre.
- A myriad of management issues.....

## **Regulatory Framework**

### State Legislation

- Swan and Canning Rivers Management Act 2006 (Swan River Trust)
- Conservation and Land Management Act 1984 (Dept for Cons. & Env.)

### State Planning Framework

- Swan and Canning Rivers Foreshore Assessment and Management Strategy (2008)
- Swan Estuary Marine Park and Adjacent Nature Reserves Management Plan (1999-2009)

### City of South Perth Management Planning Framework

- Sir James Mitchell Park Foreshore Management Plan (2001)
- Western Foreshore Management Plan (1993 - under review)
- Mount Henry Foreshore Management Plan (2004)
- Salter Point / Waterford Foreshore Management Plan (2000)
- Clontarf Foreshore Management Plan (1993)
- Cygnia Cove (East Clontarf) Foreshore Management Plan (in draft)

**Note:** Cr Trent arrived 6.10.pm

## **Climate Change**

The Swan River Trust has released a report on 'Potential Impacts of Climate Change on the Swan and Canning Rivers (2007)'. The report discusses the existing and potential impacts on the Swan and Canning Rivers, the existing scientific modelling and proposes a regime of adapted management to cope with the challenges over the next 20 – 70 years.

The most recent scientific information derived from current climate observations, predictive modelling and expert opinion suggests that in the future the Swan Canning river system will experience:

- Continued increases in atmospheric and water temperatures;
- An acceleration in sea and river-system water level rise;
- Decreases in winter rainfall and stream flow;
- Decreases in groundwater levels and consequent flows to drains and streams; and
- Increases in warm spells and heat wave frequency.

*“Adaptive management will ensure the Swan River Trust and wider community are in the best possible position to deal with the impacts of climate change and maintain the valuable ecosystem integrity of the Swan Canning river system.”*

Two key adaptation strategies for the Swan Canning river system in regard to foreshore infrastructure are as follows:

- Protecting infrastructure by incorporating sea level rises of 0.1 – 0.3 m into the design, maintenance or replacement of roads, river jetties, boat pens and ramps, sea walls and groynes.
- Assessment of the vulnerability of foreshore areas to provide a sound basis for determining future planning setbacks, managing foreshore vegetation and erosion, and designing erosion control measures.

## **FORESHORE RENOVATION PLAN**

### **Northern Boundary (Sir James Mitchell Park)**

- Ellam Street to Coode Street
- Ellam Street to the Narrows Bridge
- Coode Street to South Perth Esplanade
- SJMP Beach Creation Project
- Proposed separation of Pathways
- South Perth Esplanade Car Park to Mends Street jetty
- Proposed foreshore walk Option 1 / Option 2
- Mends Street jetty to Queen Street jetty
- Proposed pedestrian boulevard
- Queen Street jetty to Narrows Bridge

### **Western Boundary (1) - Narrows to Cloister Reserve Boat Ramp**

- CoSP Planning Framework
- Western Foreshore Management Plan 1993 (under review)
- Management Agreement with MRWA for river wall maintenance (to be finalised)
- Narrows / Groynes
- Milyu Nature Reserve
- Palms
- Como Beach

### **Western Boundary (2) (Swan River) - Narrows to Cloister Reserve Boat Ramp**

- Narrows - Gentilli Way Boat Ramp
- Narrows to Cloister Reserve Boat Ramp
- Como Beach -
- Scouts - jetty/building/shoreline - management
- North Canning (section south of Como Sea Scouts to Canning Bridge)
- South Canning (looking north to Canning Bridge)

### **Lower Western & Southern Boundary (3) - Mt Henry to Redmond Reserve**

- Length of Foreshore
- City of South Perth Planning Framework
- Mount Henry Peninsula Foreshore Management Plan 2004
- Cloister Reserve
- Infill - Planned foreshore restoration works in conjunction with MRWA
- Mt Henry Spit

### **Southern Boundary (4) - Redmond Reserve to Clontarf College**

- Length of Foreshore
- City of South Perth Planning Framework
- Salter Point / Waterford Foreshore Management Plan 2000
- Salter Point Masterplan
- Aquinas Bay
- Salter Point Lagoon
- Sandon Park
- Andrew Thompson Conservation Reserve

**Note:** Cr Grayden retired from the meeting at 6.40pm



**Southern Boundary (5) - Clontarf College to East Clontarf**

- Length of Foreshore = ~0.6 km
- Planning Framework
- Clontarf Foreshore Management Plan 2003
- Foreshore Management Plan (being prepared by Cygnia Cove (East Clontarf) Developer
- Clontarf College Foreshore - proposed path works
- Cygnia Cove Foreshore - Proposed subdivision/landscape

**Maintenance - Corrective / Maintenance Preventative**

- Como Beach

**Note:** Questions were raised by Members and responded to by officers. A copy of the power point presentation was circulated to Members not present via their satchels on 20 June 2008.

**WHERE TO FROM HERE**

**Conclusions and Proposed Actions 1:**

- Complete a maintenance agreement with MRWA re management of the western foreshore walls.
- Complete an Asset Management Plan for river wall infrastructure under the management of CoSP. This will determine required corrective and preventative maintenance budgets (budgeted).
- AMP to consider the potential impact of Climate Change on City's foreshores/structures/drainage.
- CoSP to continue to budget annually for maintenance of river walls and foreshore infrastructure

**Conclusions and Proposed Actions 2:**

- Develop a detailed design and estimate for the SJMP pedestrian boulevard (*estimated cost \$2.6 million based on 475 metres @ \$5,500 per metre*).
- Complete an application to the Swan River Trust for Riverbank funding for 2008/10
- Implement the river wall and groynes project at Como Beach (*budgeted for - 2008/09 Infrastructure Capital Works program*)
- Seek Swan River Trust Riverbank funding for the Redmond Foreshore revetment wall (est. cost \$200k).
- Ellam Street section of Sir James Mitchell Park to become the next priority area for management.

The Elected Members present enthusiastically embraced the comprehensive presentation and congratulated Mark Taylor accordingly.

The conclusions and actions as presented were supported.

**Closure**

The Mayor closed the Concept Forum at 7.35pm and thanked everyone for their attendance.



**NOTES**  
**CONCEPT FORUM**  
**Bentley Technology Precinct Update**  
**Held in the Council Chamber**  
**Wednesday 25 June 2008**  
**Commencing at 5.30pm**

Present

Mayor J Best

Chairman

Councillors:

I Hasleby

Civic Ward

P Best

Como Beach Ward

T Burrows

Manning Ward (until 6.55pm)

L P Ozsdolay

Manning Ward

C A Cala

McDougall Ward

R Grayden

Mill Point Ward (from 5.40pm)

S Doherty

Moresby Ward

Officers:

Mr C Frewing

Chief Executive Officer

Mr S Cope

Director Development and Community Services

Mr L Croxford

Manager, Engineering Services

Mr R Kapur

Acting Manager, Development Assessment

Mr R Bercov

Strategic Urban Planning Adviser

Mrs G Fraser

Strategic Senior Planning Officer

Ms N Cecchi

PA Director Development and Community Services (Notes)

Guests

Mayor Trevor Vaughan

Town of Victoria Park

Deputy Mayor Keith Hayes

Town of Victoria Park

Cr John Bissett

Town of Victoria Park

Mr Brian Callander

Town of Victoria Park - Acting Chief Executive Officer

Ms Rochelle Lavery

Town of Victoria Park - Director, Sustainable Development

Mr Chris Eaton

Town of Victoria Park - Senior Strategic Planner (from 5.48pm)

Presenters

Mr Damian Fasher

BTP Project Team - NS Projects

Mr Dan Caddy

BTP Project Team - NS Projects

Ms Lynden Prince

BTP Project Team - Creating Communities

Apologies

|                   |                                      |
|-------------------|--------------------------------------|
| Cr G W Gleeson    | Civic Ward                           |
| Cr B Hearne       | Como Beach Ward                      |
| Cr R Wells, JP    | McDougall Ward                       |
| Cr D Smith        | Mill Point Ward                      |
| Cr K R Trent, RFD | Moresby Ward                         |
| Mr Roy Chapman    | Department of Industry and Resources |

OPENING

The Mayor opened the Concept Forum at 5.30pm, welcomed everyone in attendance and advised on the format of the briefing.

**1. Bentley Technology Precinct**

The Mayor commended Hames Sharley and the BTP Team for their contribution to this project, and introduced the presenters.

Mr Damian Fasher provided the following overview of the Bentley Technology Precinct 'vision':

- Structure plan.
- Built form.
- Sub precincts.
- Special control areas.
- Kent Street narrowing.
- MRS Amendment.
- New intersections.
- Overall summary.
- Town centre.
- Street sections.
- Transport and traffic.
- Centralised public parking.
- Maximum height limit equivalent to 57 AHD.
- Development envelope studies for DAP1.
- Vision keeping.
- Alliance / Land assembly - Key stakeholder negotiations / Alliance agreement / Timing.
- Implementation programme - BTP processing of applications (draft).
- Business case - Overall positive / Need Stage 1 and 2 to be completed.

Mr Lynden Prince provided an executive summary of 'community consultation' which included opportunities for input and consultation results.

At the conclusion of the presentation, Members raised questions and points of clarification which were responded to by the presenters and City Officers.

The Mayor thanked the presenters for addressing the Concept Forum.

**Note:** Councillor Burrows left the meeting at 6.55pm.

**Closure**

The Mayor closed the Concept Forum at 7.04pm and thanked everyone for their attendance.



# NOTES

## TOWN PLANNING

### MAJOR DEVELOPMENTS CONCEPT FORUM

- 152B Mill Point Road - Six (6) multiple dwellings
- 26 Hardy Street - Mixed development

**Held in the Council Briefing Room**

**Wednesday 2 July 2008**

**Commencing at 5.30pm**

#### Present

Mayor J Best

Chairman

#### Councillors

I Haselby

Civic Ward

P Best

Como Beach Ward

L P Ozsdolay

Manning Ward

C A Cala

McDougall Ward

R Grayden

Mill Point Ward

S Doherty

Moresby Ward

#### Officers

Mr S Cope

Director Development and Community Services

Mr R Kapur

Acting Manager Development Assessment

Mr R Bercov

Strategic Urban Planning Adviser

Mr O Hightower

Planning Officer

Mr L Anderson

Planning Officer

Ms N Cecchi

PA, Director Development and Community Services (Notes)

#### Presenters

Mr Paul Kotsoglo

Planning Solutions

Mr Tayne Evershed

Planning Solutions

#### Apologies

Cr D S Smith

Mill Point Ward

Cr GW Gleeson

Civic Ward

Cr BW Hearne

Como Beach Ward

Cr R Wells, JP

McDougall Ward

Cr K R Trent, RFD

Moresby Ward

Cr T Burrows

Manning Ward (Leave of absence)

#### Gallery

There were two members of the public present.

**Note:** In response to Council resolution 10.5.3(c) of the May 2008 Council meeting:  
*“for a 6 month trial period Major Development Concept Forums be open to members of the public following which this practice be reviewed at the February 2009 Council meeting.”*

### OPENING

The Mayor opened the Concept Forum at 5.30pm and welcomed everyone in attendance.

**1. Lot 67 (No. 152B) Mill Point Road - Six (6) multiple dwellings WITHDRAWN**

The Mayor reported that an email had been received today from Mr Denis Pandevski on behalf of Manor Homes requesting that the proposal for six multiple dwellings at No. 52B Mill Point Road be withdrawn from the July Major Developments Concept Forum to allow the applicants more time to prepare their presentation.

**2. Lot 301 (No. 26) Hardy Street - Mixed development comprising office and two multiple dwellings**

The Mayor introduced the presenters who provided a brief history of the development and an overview on the following topics:

- Background;
- Aerial photo of the subject site;
- Existing and proposed elevations;
- Additional floor area / Car parking;
- Lift shaft relocation with supporting letter from a consultant;
- Plot ratio;
- Minor projection;
- Elevations indicating dormer windows;
- Setback; and
- Conclusions.

At the conclusion of the presentation, Council Members raised questions and points of clarification which were responded to by the presenters and City officers in relation to the following issues:

- Office / Lunch room modifications.
- Lift shaft.
- Mezzanine.
- Plot ratio.
- Car parking.
- Setbacks.
- Wall height.
- Overshadowing.
- Retrospective approval - City officers identified deviation from building licence following strata inspection (Officer's report yet to be finalised).
- Aligning new R-Codes and TPS6 - Scheme amendment.
- Availability of approved / amended floor plans for briefing.

**3. Closure**

The Mayor thanked the presenters for addressing the briefing and closed the Concept Forum at 6.35pm.

## DELEGATE'S REPORT

### RIVERS REGIONAL COUNCIL

This report relates to the Ordinary Council Meeting of the *Rivers Regional Council* (formerly South East Metropolitan Regional Council) held 19 June 2008 at the City of Mandurah.

The attached Table of contents was considered by the Regional Council at its meeting. This opportunity is taken to draw the following matters to the attention of Council which may be of particular interest.

If further information relating to any of the items listed on the Table of Contents is required, the complete Minutes are available on the *iCouncil* website and in the Council Lounge. An approach has been made to the Regional Council requesting that the Minutes be published on the Regional Council webpage. As Delegates to the Regional Council, we are supported by the CEO, Director Development and Community Services and Manager Environmental Health Services.

#### **1. Adoption of Budget**

The budget for the Regional Council was adopted for the year ending 30 June 2009 and included revenue from all six members for the first time. The City's proportion of contribution to the revenue of the Regional Council is 13.97% or \$132,700. Significant costs provided for in the budget relate to Legal fees (\$250,000), Tender process (\$200,000) and Planning for "Zero waste" in connection with the Regional Resource Recovery Facility.

In addition, it is appropriate to record that on Friday 6th June, 2008, a Signing ceremony was held at the City of Armadale to recognise the Establishment of Rivers Regional Council (formerly known as the South Eastern Metropolitan Regional Council). The Minister for Local Government officiated at the function and signed the agreements to create the new Regional Council.

Delegates: Mayor Best  
Cr K Trent

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## DELEGATE'S REPORT

### WALGA South East Metropolitan Zone

The attached Table of contents was considered by the South East Metropolitan Zone at its meeting held on 28 May 2008. There were no items contained on the Agenda that specifically requires the attention of Council.

If further information relating to any of the items listed on the Table of Contents is required, the complete Minutes are available on the iCouncil website and in the Council Lounge. The delegates to the South East Metropolitan Zone are supported by the Chief Executive Officer.

Delegates: Mayor James Best  
Cr Kevin Trent



## Attachment 8.4.2

### WALGA South East Metropolitan Zone

Meeting 28 May 2008

#### Table of Contents

5. State Council Agenda - Matters for Decision  
Zone Delegates to consider Matters for Decision contained in WA Local Government Association State Council Agenda and put forward resolutions to Zone Representatives on State Council.
  
6. General Business
  - 6.1 Zone Roundtable Forum 2008
  
7. Executive Member's Reports

## DELEGATE'S REPORT

### WAPC - South East District Planning Committee

The attached Table of contents was considered by the South Eastern District Planning Committee at its meeting held on 3 April 2008. There were no items contained on the Agenda that specifically requires the attention of Council.

If further information relating to any of the items listed on the Table of Contents is required, the complete Minutes are available on the iCouncil website and in the Council Lounge. The delegates to the South East District Planning Committee are supported by the Director Development and Community Services and Manager Development Assessment.

Delegate: Cr Colin Cala

## Table of Contents

### WAPC - South East District Planning Committee

#### **5 Business Arising from Minutes**

##### **5.1 South East Corridor Cemetery Site (Ex Item 7.1)**

The WAPC is in the process of finalising the purchase of the land on South Western Highway Whitby and it will then be granted to the Metropolitan Cemeteries Board for development in liaison with the City of Armadale and the Shire of Serpentine-Jarrahdale.

##### **5.2 Land Release Report (Ex Item 5.1)**

The District Planning Committee on 7 February 2008 resolved to invite Ms Thompson to provide a briefing on the Land Release Report at the April 2008 meeting of the South East District Planning Committee.

Ms Thompson to advise suitable availability.

##### **5.3 Urban Deferred Lifting - Lots 1, 2, 3, 4, 5, 6, 103 125, 126, 377, 378, 380, 381, 412, 413, 414 and 509 Maddington Road and Lots 374, 375 and 510 Alcock Street Maddington City of Gosnells (Ex Item 5.2)**

The District Planning Committee on the 7 February 2008 resolved to defer discussion of this issue pending consideration and comment by the City of Gosnells.

City of Gosnells to report on Progress

#### **6 Business before the meeting**

- 6.1 The Town of Victoria Park Proposed - MRS amendment relating to Belmont Park Racecourse site for the committees consideration.(Report attached)

#### **7 Outstanding actions**

#### **8 Reports for noting**

#### **9 Local Area Presentations**

#### **10 Reports from Representatives**

### REPORT FROM PLANNING INSTITUTE OF AUSTRALIA NATIONAL CONGRESS 2008 Overview

The Planning Institute of Australia (PIA) is recognized as the peak professional planning institute in Australia, and enjoys a deserved high reputation. The National Congress this year was held in Sydney for the first time in 6 years. The primary Congress theme was 'A Climate for Change - *things are hotting up*', which provided the basis to explore issues beyond our daily lives. The main issues for fact, debate and discussion were climate change, housing affordability, globalisation and food security. The topics of design, governance/legislation and transport were addressed via their relevance to the truly international issues. Adapting and militating against Climate Change is a major issue for all local Councils, and the City of South Perth.

Held over 2 days the Congress attracted over 500 delegates to Sydney who discussed issues of lasting significance. The conference represented the need for leadership and commitment to change. We can randomly shout and put forward our message or walk the talk and commit to making a difference. Within the context of this report, I have identified areas the Council may wish to consider for further action:

- **Recognise the value and expertise of the City's Town Planners and put in place mechanisms and structures to better support their work – e.g. electronic tracking systems for DA's, use of para-planning support staff, etc;**
- **Encourage developers to retrofit buildings/offices;**
- **Home owners to be encouraged to remodel their homes when renovating to make them more energy efficient and water-wise;**
- **Include more energy saving initiatives in planning policies;**
- **Council to undertake audits on their infrastructure – buildings, parks, etc. and make changes to show to the broader community that we are taking a lead role in energy initiatives;**
- **High rise buildings use a lot of energy, how can this be reduced?**
- **Engage groups like Millenium Kids to put in place strategies that the City can implement on changing wastefulness into resourcefulness;**
- **Encourage the use of different types of building materials in a range of constructions – more resilient materials, insulation materials, eco-bricks, etc;**
- **Lobby the State government to direct inefficient state taxes to local government where they can be used to help in responding to climate change;**
- **Explore how the City can become more pedestrian and cycle friendly;**
- **Approach health professionals and invite them to become involved in the City's Visioning process to promote better health outcomes that relate to planning ;**
- **How the City can integrate public art into the foreshore?**
- **The possibility to converting all lights to LED (light emitting diode).**

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The Congress was officially opened by **Neil Savery – PIA President** who identified this Congress as being carbon neutral. Referring to the Stern and Garnaut Reports, he emphasized the economic impacts of the reports in terms of the possibility to converting traffic lights to LED (light emitting diode) and the provision of free parking for hybrid energy efficient cars.

Stern Report:

[http://www.hm-treasury.gov.uk/independent\\_reviews/stern\\_review\\_economics\\_climate\\_change/sternreview\\_index.cfm](http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/sternreview_index.cfm)

Garnaut Report:

<http://www.garnautreview.org.au/CA25734E0016A131/pages/reports-and-papers>

**The Hon. Frank Sartor, NSW Planning Minister** one keynote speakers was overtly critical of opposition from local government to his planning changes. He believed that the draft changes addressed some of the key underlining concerns for planning nationally: promoting continued economic growth, supplying adequate housing supply, cutting the administrative burden and harmonisation of regulation across borders.

He believes there is an inherent conflict in the public's expectations of government when it comes to planning decisions. Also that people want elected government to be principled and to make decisions in the public interest – except when it affects them. Whereas the daily work of government is to reconcile competing self-interest. He described developers as aggressive and self-interested ... he expressed the viewpoint that local communities are also self-interested and, although there is an ideological layer, most players in the planning system are actually self-interested. Arguing that they might be protecting their neighbourhood and are legitimate issues, however, local interest constitutes just as legitimate a concern as a developer. While Mr Sartor said he did not have a problem listening to the views of local people about development projects, he was concerned when outside parties joined local opposition and tried to “run agendas” and play politics through local planning decisions.

He argued that the planning system was ‘log jammed’ and that average approval times were unacceptable. 97% of applications are based on capital of less than \$1m. 94% cost less than \$0.5m. There is a need to clear the small stuff as they are the ones bogging down the system. The use of planning arbitrators is proposed in the new legislation along with extending private certificate both important components of the decluttering process. Along with these he referred to introducing a Planning Commission to avoid matters going directly to the Minister, along with including the capacity for public interest appeal. He was determined to de-politicize planning decisions and suggested that leaders in local government were ‘at odds’ with planning staff. He described development contributions as an ‘uncapped tax’ and continued the line that some Councils were charging up to \$60,000 in contributions for a 3 bedroom house.

He promoted the NSW government response to Climate Change through BASIX, water energy savings fund, water recycling, Biodiversity Conservation Act etc. and referred to using regional strategies to redefine regional schemes (growth centre strategy). Mr Satori expressed his confidence that the new legislation will lead to a cultural change in planning in NSW.

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### **Helen Willoughby CEO – Outdoor Media Association**

Briefly spoke about integrating outdoor media into the environment which in turn returns benefits for Council – advertiser cleans up area, builds small infrastructure. Sustainable signs – how they are powered, wind power (sustainable). Additional suggestions presented included - solar power for lights, with grid providing power for clubrooms and fund bikes for the City through advertising.

<http://www.oma.org.au>

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### **Dr Stephen H. Schneider – Can we Define, Let Alone Fix, ‘Dangerous’ Climate Change?**

Dr Stephen H. Schneider has been an adviser to the Bush and Clinton administrations in the US and was a co-ordinating lead author with Working Group II on the Inter-governmental Panel on Climate Change (IPCC). He told delegates the time has come to make the talk walk on climate change, emphasizing the imperative to both policy makers and politicians to stop dragging the chain on climate change when they know that time is running out. Now based at Stanford University, the environmental scientist said it is critical for governments to show leadership in reaching ordinary people in their climate change planning in order for them to become more efficient in their use of energy and transport. Dr Schneider indicated there is a lot to do from the bottom up at the level of a Town Planner who's in a Council regardless of its size. He drew the analogy they would not be negotiating cap-and-trade agreements with other countries or discussing how much China is going to leap-frog over the Industrial Revolution does not [mean] they can't do an awful lot to adapt and mitigate right at home.

Dr Schneider stated if every person exempts themselves from the problem of climate change because they believe they are only a small part of it, then the problem never gets dealt with. The key points from Dr Schneider's presentation identified:

- As the climate continues to change —and in most mainstream scientific studies, change is expected to accelerate substantially during the twenty-first century— we can expect natural systems to become highly stressed.
- Citizens should make sure that the public debates take into account all knowledge available on climate change.
- In the past few centuries, atmospheric carbon dioxide has increased by more than 30 percent, and virtually all climatologists agree that the cause is human activity, predominantly the burning of fossil fuels and, to a considerable extent, land uses such as deforestation.
- Policymakers are better able to determine what is 'dangerous' and formulate effective legislation to avoid such dangers if probabilities appear alongside scientists' projected consequences.
- All people, governments, and countries should realize that 'we're in this together.'
- The decision on whether to take actions on climate change entails a value judgment on the part of the policymaker regarding what constitutes "dangerous" climate change, ideally aided by risk assessments provided by scientists.
- The most robust policy strategies are often those which provide "ancillary benefits."
- Encouraging technological change through energy policies in particular is of critical importance when addressing climate change.

<http://www.climateprotect.org>

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### **Nick Rowley: Planning for Low Emissions – An Australian Perspective**

Kinesis is a company that actively looks at businesses and what they can do to tackle the climate problem, especially in the area of measuring, verifying, reporting and reducing their emissions. Principal, Nick Rowley, was an adviser to the Blair government in the UK and he stated that agricultural economies must focus their attention on climate change, because of its already damaging impact on weather patterns and food prices. He identified that much of the agricultural sector in Australia is in the business of providing foodstuffs both for domestic consumption and, indeed, for consumption elsewhere. Following on, he suggested looking at the extent to which some of those increases in food prices are going to be affected now and into the future by the nature of the climate the globe experiences and this presents as an issue absolutely in the front and centre for anybody who's in the business of agricultural production.

Nick Rowley believes the world has a time window of about 10 to 15 years where it can respond to lower emissions, or perhaps even reverse them, but he says that window is not going to last if we don't act now. He presented 5 key messages:

1. Answers guided by robust responses, which need to be measurable, reportable and verifiable. Need to look at the uncertainties and the impact on how we respond to them.
2. What is going to happen with climate effects – e.g. increase in hailstorms?
3. Issue is front and centre of current narrative at the moment. Issue now has traction across all levels of politics. Awareness, attitudes, intentions to tackle the problem, behaviour shows that we still have a long way to go and how we respond.
4. Economic transformation – mass mobilization action.
5. Keep on referring to this as a problem not an effect (de-link energy growth from economic growth).
6. New way of developing and influencing policy, re-think the way we do things and behave.

Finally, Nick Rowley proposed that the political emphasis while currently on Kyoto, etc. (targets), the debate is skewed towards "what" instead of "how." Additionally implementation is extremely difficult, and again the "how" of balancing the economic outcomes with any decisions regarding "how" we implement decisions. Economic growth has equaled emissions however this has to change, and businesses do not

really understand how they contribute to emissions. There is much most businesses can do with emissions but the economic balance needs to be looked at. He emphasized understanding the limits of macro-analysis in relation to business at a local level, recommending approaching the problem bottom up and top down, but keeping this to the front and centre of everyone's minds. It is to do with the future of where we all live. The Report of the Climate Institute Emissions Trading is important, but not adequate a political economy of climate change is needed. Stablising greenhouse gases and maintaining economic growth are the 2 key factors and the 2 key ends, along with organising principles for all decisions are emissions and economic impact.

Nick has recently been appointed Special Advisor to the Copenhagen Climate Council (<http://www.copenhagenclimatecouncil.com/>): a global initiative working with some of the world's largest businesses and climate experts to help achieve a new global climate treaty at the UN Climate Summit in Copenhagen in December 2009. Nick is a regular commentator on climate issues in the Australian and international media and is on the Advisory Board of the Climate Group (<http://www.theclimategroup.org>)

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### **Sam Mostyn – Climate Change: The Impact on Economics**

Sam Mostyn was an adviser to former Prime Minister Paul Keating and now works as a consultant for Insurance Australia Group Limited (IAG), an international general insurer that underwrites around \$7.4 billion of premiums every year. Ms Mostyn told the conference Western developed countries, including Australia, are too quick to demonise China and India over their greenhouse gas emissions. She said the West continues to blame the two fastest growing economies in the world for adding significantly to the problem, when it is China and India, who are working hardest to implement ideas that address the problem. In her view, there is sheer dynamism in the solar power business in China where whole communities are being powered by solar hot water on every roof. Also there has been a massive amount of work done on using better sources of material to create cement [which] in some cases has reduced CO2 exposure by up to 80%.

Ms Mostyn indicated that a 2 degree rise in temperature is likely to cause a 23% increase in the number of cyclones experienced, and these will head further south affecting areas such as south-east Queensland and the south-west of WA. While a 2 degree increase in temperatures is not out of the question, research conducted by the Insurance Australia Group shows that the existing one degree increase has exposed double the number of people to flooding, making 1:1000 year floods, effectively 1:17 year events.

She referred to the climate impact statements individual states can make, and cited the example in Queensland of all paper that goes to their Parliament is in electronic format. Our aim in the next 10 years should be to focus on changing wastefulness into resourcefulness. Currently we are too focused on our own self-interest instead of the long term and future generations, we need to self sacrifice. Of major concern is how we are going to prevent damage from climate change through the use of more resilient building materials, also identify how we are going to prevent the risks to high buildings through storms, strong winds, etc. Storm surges will impact on rivers and adjacent dwellings/properties – how will this be prevented? It is by developing adaptive communities through local communities that we can show what we can do. Ms Mostyn referred to the Australian Roundtable on Climate Change.

<http://www.businessroundtable.com.au>

In concluding, Ms Mostyn emphasized the need to engage small businesses so they can see the benefits. She referred to inefficient state taxes that could be directed to local government to help them respond to climate change, while on a broader front spoke of the role of foreign policy in fostering a more effective international response to the challenge of climate change.

<http://www.lowyinstitute.org>

She flagged there will be winners and losers associated with climate change, but we need to ensure that Australia in general is a “winner.”

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### **Study Tour: Sydney Harbour – Planning Around a Changing Foreshore**

The tour lasted 3½ hours and headed up the Parramatta River while we listened to presentations from Town Planners working for local Councils and foreshore authorities who were experiencing increasing development pressure on the waterfront, and how they were endeavouring to balance these pressures with climate change implications.

While the foreshores and islands of Sydney Harbour have not survived without challenges, the pressure for high quality housing has seen a conversion of many foreshore areas to public parks, apartments and ultra rich lifestyles where former wharves and industrial areas were once homes to a busy port and shipping activities.

This tour included a stop at a residential community project called Breakfast Point, the previous site of a coal fired gas works which highlighted some of the changes that are taking place on industrial land sites. This new master planned estate, was in my view somewhat akin to an American village with medium density dwellings, a community hall and facilities, shops – an interesting concept.

<http://www.breakfastpoint.com>

In terms of maintenance of the walls of the harbour, the analogies with the South Perth river walls were minimal. With so many houses having harbour access, the individual landowner is responsible for their section of the harbour wall. In instances where the wall was part of public space, the local council is responsible for maintenance of the structure. However, the cost of restoration of the wall was in the vicinity of \$100,000/linear metre when the work was undertaken by a private contractor (Thiess) compared to the cost of \$150,000/linear metre when the work is undertaken by local councils. Different parts of the walls were in varying states of repairs being currently undertaken, to needing repair. The materials used for sections of the wall were not consistent. In the main, either concrete or stone (sandstone) from adjacent quarries were used for construction of the walls. There was no consistency of material use.

The heights of properties built on or close to the harbour, were higher at the back with height restrictions of 4 storey's the maximum height for dwellings at the front - they presented with a “tiered look” – lower at the front to higher at the back. Modern houses blended in well with the older style dwellings, with a noticeable compatibility in design between the new and the old, there appeared to be no competition between new buildings constructed alongside one another, again they were compatible. The majority of the roof lines were either low pitched or flat.

There were pockets of new development with high tower life buildings. In one situation, there were 6 towers and they each were designed by different architects but the design brief contained consistent components that all buildings were required to comply with. This made for an interesting yet not dissimilar set of towers that did harmonized in a unique yet well matched way.

There has historically been a struggle for use of the foreshore area with many plans having been put forward by a range of agencies. In response to this issue and ensure an ongoing relationship between the foreshore, development and public usage an overarching Development Planning Committee comprising of all relevant stakeholders has been established. Through the evolution of this Committee, setbacks have changed and now developers are required to ensure setbacks are greater compared to what was accepted practice during the 1980's with minimal setbacks. Access is the key to use of the waterway – access for people in boats, residential access and the ongoing challenge is how to continue the creation of a waterway with access that responds to demand.



The Sharing Sydney Harbour Access Program is a NSW government initiative to improve public access to and enhance the recreational enjoyment of Sydney Harbour and its tributaries for the people of and visitors to Sydney. The Program contributes to the priorities of the ensuring more people use parks, sporting and recreational facilities, and participate in the arts and cultural activity, also to provide recreational boating infrastructure.

Each year up to \$1.35 million is distributed on a dollar-for-dollar basis for specific capital works projects such as walking tracks, cycle paths, new public waterfront parks, jetties, pontoons and boat launching facilities. With matching funds from applicants, the program is expected to lead to at least \$30 million worth of access improvements. In 2008, the Access Program plans to consider the funding of lighting, signage and brochure projects, where it is demonstrated how these projects will provide improved access to the foreshore.

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### **Councillor John McInerney – City of Sydney**

Spoke briefly on Sydney's Visioning 2030. He referred to the process undertaken in engaging businesses (small and large); experts, professional groups. The aim of the Visioning Plan was to focus on reconnecting the city with the harbour; developing the area over the central railway; including green transformers around the city; providing sustainable transport and healing the scars of the past.

He emphasized that - *DAY TO DAY DECISIONS NEED TO BE GUIDED BY VISIONS.*

<http://www.cityofsydney.nsw.gov.au/2030/theplan>

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### **Jan Gehl – Life, Space, Buildings**

From Copenhagen, Jan Gehl talked about making great cities where spaces and places function to benefit people. (Jan Gehl was involved in *Public Spaces and Public Life in Perth* in 1994) and has provided input into the development of quality urban spaces in London, Cape Town, Oslo, Melbourne and Sydney.

In terms of sustainability, he most notably recognized that a city full of Environmentally Sustainable Designed (ESD) buildings does not necessarily mean that the city is sustainable or a great city. Jan Gehl, talked about 5 items (one stone five birds) that are the key attributes to making a great city:

1. Lively city – face-to-face connection.
2. Attractive city.
3. Safe city – interconnected, people come into the city.
4. Sustainability – a good public realm is a crucial factor for good public transport.
5. Healthy City.

These key themes were the ingredients of creating urban places that invite and welcome people to experience the space while allowing those who are impaired to similarly enjoy the area in a dignified manner.

Jan Gehl strongly believes that there is a need to change people's opinions of transport so a city becomes more pedestrian and cyclist friendly. Drawing upon his personal experience and examples from his home town of Copenhagen, he highlighted the need to become more environmentally responsible by reversing car invasion that marginalized other transport modes.

Suggestions put forward by Jan Gehl included:

- Invite people to walk or bicycle in the course of their daily doings developing this through policies;
- Bicycles become part of city life;
- Get rid of footpath obstacles which deter walking;

- Look at the why people have to apply to cross roads; and
- Taxi's to provide bike racks.

Copenhagen has led in the development of public transport and pedestrian and cyclist friendly environments to provide an alternative to the car. The policies and initiatives undertaken in Copenhagen has lead to 36% of people using a bicycle to get to work, 27% driving, 33% using public transport and 5% walking. This was achieved through an on-going commitment over the last 30 years to redesigning the public realm to achieve this.

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### **Dr Larry Frank – Promoting Health and Sustainability Through Transit and Walkable Community Design**

Dr Frank, a Canadian academic has identified a correlation between health outcomes and car usage through his study into land development patterns and its affects on health. He concluded that for every 30 minutes of car travel/day there is a 3% likelihood that the driver will become obese. Dr Frank's research demonstrated that suburbs which are based on walkable neighbourhoods, similar to those advocated in 'Livable Neighbourhoods,' would translate into people being 2.4 times more likely to get an appropriate and healthy level of physical activity in their lives. Other research identified that 33% of people who live in neighbourhoods that are far away (15 – 18 kms) from work, school, and other important destinations would rather live on smaller lots and be closer to these destinations.

He referred to the importance of government promoting matching funding models for State and local governments to promote changes to encourage walking. Need to embrace connected environments – urban plans and policies, connecting with our community. e.g. London Plan, Melbourne 2030, City of Cities, SEQ Plan. Consolidated cities offer health impacts, and there is an increase of energy use in higher densities. However one constraint is the diminished personal power when people live in close proximity to one another and this can present in increasing conflict between people.

#### CHES Principles

- Connected environments
- Healthy eating environments
- Safe environments
- Sustainable environments

<http://www.act-trans.ubc.ca>

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### **Healthy Planning: Strategic & Statutory opportunities for Planning Practice**

Healthy design guidelines – accessible, well linked, connected to other uses and transport modes. Recreation areas connected to foreshore access and public transport. Connecting ways of working – need to engage the community (medical people).

Kiama Public Health Plan – vision statement.

<http://www.kiama.nsw.gov.au/environmental-services/kiama-public-health-plan.html>

Healthy eating environments; community gardens; farmers markets; safe environments – use of CPTED; sustainable environments.

Premier's Council for Active Living – NSW

<http://www.pcal.nsw.gov.au>

### Is the Docklands the Best Transit Orientated Development

Transit Orientated Development (TOD) maximizes the use of active and public transport modes. TOD can be applied to Subi Centro (central), Rockingham (urban) and Clarkson (fringe). Height level – buildings need to be high. Integrate urban design and public art.

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#### Panel Discussion: The Roofs Over Our Heads – Who Pays and Why?

Panel members – **Saul Eslake, Nicole Gurrna, Rod Fehring, Judith Yates and Julian Disney** spoke on this topic, which identified some key issues:

- Housing affordability – causes responsibilities/accountabilities; set some priorities for the next couple of years;
- Introduce affordable housing guidelines for developers and quotas;
- Loose financial regulation;
- Exemption of capital gains on the family home;
- Change from our concept of housing from the 1970's where housing was a "shelter" to where now housing is an "asset;"
- Successive government have lost sight of the primary objective in housing policy of meeting shelter needs of the community;
- Changing aspirations of the middle-class with investments in housing seen as a safe store of value and property as a more tangible form of investment;
- 1986 change to the tax system was to attract more voters who were investing in housing. 1999 to halve capital gains tax, and give generous negative gearing – more landlords and houses for rent;
- Excessive tax exemptions for owner occupiers from capital gains, land tax and the pensions asset test have all contributed to driving up the price of houses;
- Hence housing now less affordable than at any other time, with the emphasis now not being on home ownership but in favour of home owners;
- National responsibility with leadership from federal government and resources;
- Too many regulations/governance; and.
- Development charges are too high.

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**The Federal Minister for Housing Hon. Tanya Plibersek MP** also addressed Congress on the government's national plan for more affordable and sustainable homes in Australia. In particular she foreshadowed government affordable housing initiatives including the following:

1. A half billion Housing Affordability Fund is to be created and which will be available to local government in partnership, to reduce house costs. Innovative local area projects will be sought. The proceeds of this funding must be passed on to home buyers. An information paper thereon will soon be released. Funding will first be allocated to high growth areas and one objective will be to streamline planning and development processes.
2. A "National Rental Affordability Scheme" will be implemented which will provide incentives to institutional investors to engage in provision of affordable housing with refundable tax credits as incentives. This scheme is designed to assist community housing providers, is targeted at obtaining 50,000 new homes over the first 5 years and is to be aimed at low income and social security recipients. A technical paper on the scheme is soon to be released.
3. A "National Housing Supply Council" is to be created which will have the major task of examining the adequacy of housing land supply.
4. A "First Home Saver Account" valued at \$850 million will be created and is designed to be a tax effective method of saving for a first home deposit. The scheme will be targeted at low income earners and a government contribution of 15% will be attracted to amounts saved.

### **Peter Droege – University of Newcastle, NSW - Renewable City an urban revolution unfolding**

Peter Droege believes that we cannot talk about sustainability as long as we have coal and fossil fuelled in Australia. Referring to solar panels and solar cities efforts as commendable they are also dangerous as they make us look like we did something. He believes it makes us “feel good” but its not tackling the main issue. Unless Australia tackles designing and implementing a nationwide renewable energy program designed not to meet emissions but to get rid of coal dependency we are fooling ourselves.

He referred to his book '*A Renewable City*' where he argues that the transition from fossil fuel dominated cities to an urban future marked by a radically new, renewable energy infrastructure requires entirely new tools and frames of decision-making. Peter Droege argued that this is not a time for tinkering, it's a time to think radically. Our task is not to settle for five-star ratings on washing machines, but to build renewable cities. He posed the question “Why this focus on good urban design, as opposed to just good architecture?” Because good urban design enhances a project's performance in itself as well as within its surroundings. Good architecture can mean greater longevity, better internal performance and higher symbolic and aesthetic value, but in itself cannot guarantee that the project connects well with its surroundings in the sense that it utilises the wider setting as an asset - and becomes an asset to its context in turn.

One aspect of a renewable city is living in smaller houses. They cost less to buy, less to furnish, have less space to cool and heat, and are less work to clean. Rapid urbanisation has been the key driver of escalating greenhouse gas emissions. Peter Droege, believes renewable energy needs to be central to mainstream thinking on infrastructure planning and the very design of cities.

Six cities around Australia, including Blacktown in NSW, are running experimental renewable energy projects designed to both clamp down on energy demand and supply the rest from renewable sources. These projects and others have shown mixed, but generally encouraging, results.

On the Gold Coast, an "eco-village" of 144 homes at Currumbin, residents have cut energy and water use by half in some cases, without damaging their standard of living. Each home has a touch screen, which monitors energy use down to the level of individual appliances. With an Orwellian touch, the information is also sent to a central server, so each household's performance can be checked.

Despite the technical means to introduce suburban power generation, uptake remains extremely low. Less than 10 per cent of Australia's energy is generated from renewable sources, and most of that is hydro. Solar power accounts for less than 1 per cent.

<http://www.epolis.com.au>  
<http://www.solarcity.org.bn>  
<http://www.wrcrc2009.org>

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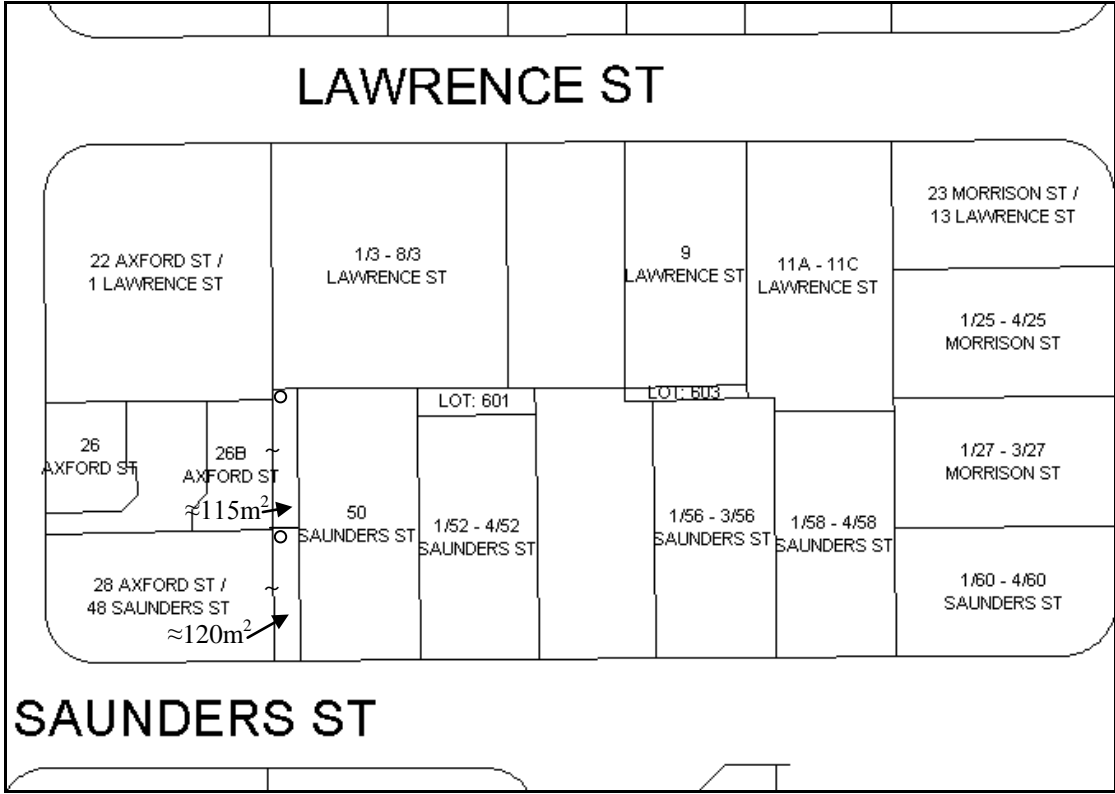
Presentations from the Congress are on the PIA website:

<http://www.planning.org.au/index.php?option=content&task=view&id=666>

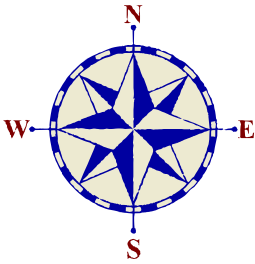
Sue Doherty  
Moresby Ward Councillor

1<sup>st</sup> July 2008

# Right of Way No. 99 Proposed Closure Plan January 2008



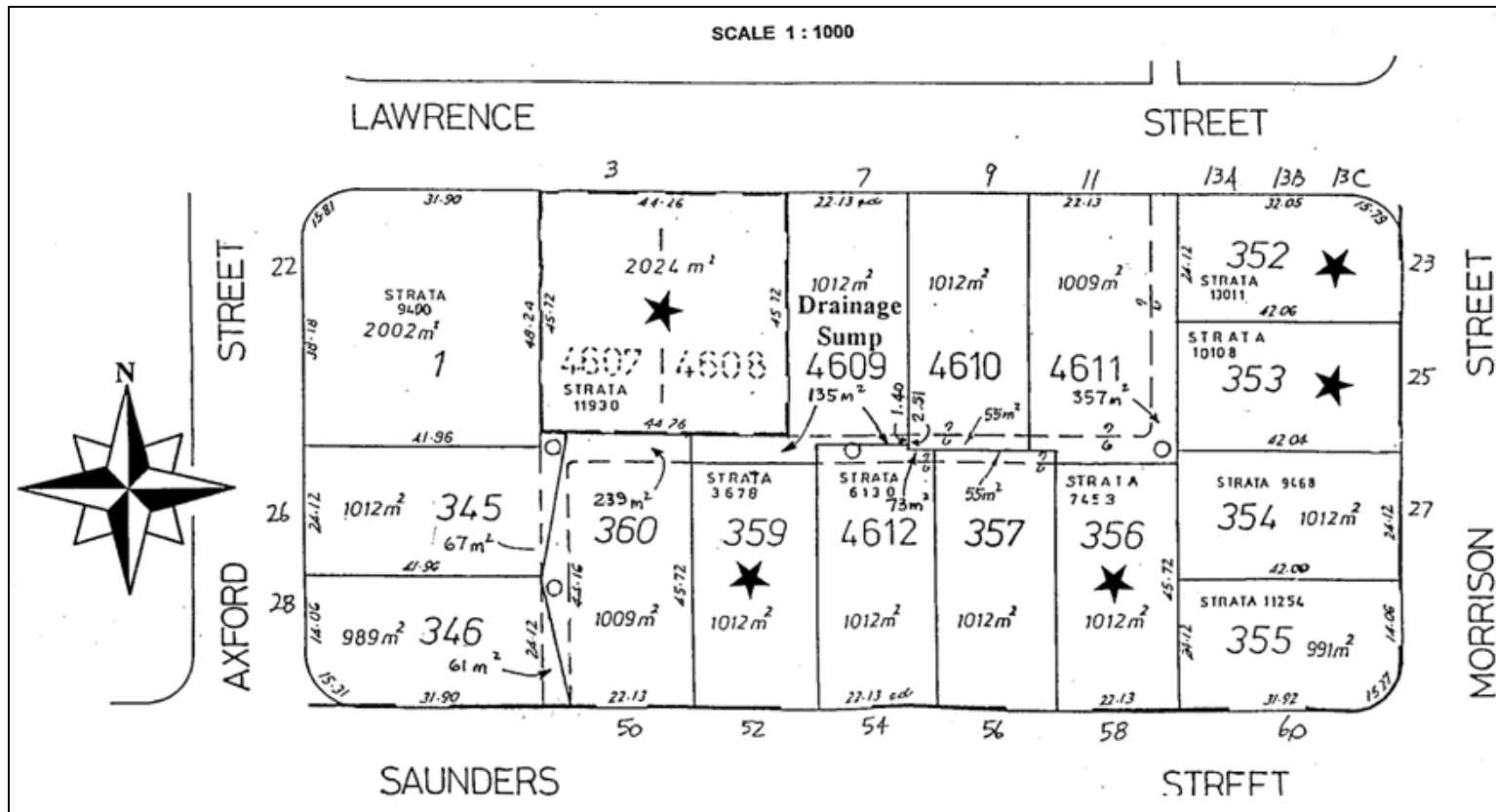
**Notes:**  
Location of Sewer manholes are approximate only.  
Land areas are approximate only.  
Scale approximate only.



# Right of Way No. 99

## Proposed Closure Plan

### March 1996



Full Closure Plan 1996

ATTACHMENT 10.2.1

**COMMUNITY DEVELOPMENT GRANTS  
ROUND 1 2008/2009**

**Summary of Applications**

|                         |  |
|-------------------------|--|
| <b>ORGANISATION</b>     | <b>Carson Street School P &amp; C</b>  |
| Location                | 19 Carson St EAST VICTORIA PARK  |
| Purpose of Org          | Carson Street School is the state's only Primary Education Support School. It caters for students whose disabilities are such that they are not able to fit into the regular system and who require extensive therapy and educational services.  |
| Request from Council    | \$2,000  |
| <b>PROJECT TITLE</b>    | <b>Summer Holiday Recreation and Respite Program</b>   |
| Description             | Provides summer holiday recreation and respite for parents of children with severe and multiple disabilities.  |
| Dates                   | 12 <sup>th</sup> - 16 <sup>th</sup> January 2009   |
| Objectives and Benefits | The children are in a familiar environment, with the appropriate level of care and supervision they need. They participate in recreational and leisure activities - suited to their conditions. Parents of these children are relieved of their stressful duties for part of the holidays. |
| Target Group            | Children with severe and multiple disabilities and their parents.  |
| Project Costs           | \$11,475   |

**COMMENT**

The City has supported this initiative which allows for support and respite for families of children with disabilities for a number of years. The need identified in the submission was for support for these families during school holidays.

**RECOMMENDATION**

To provide \$2,000 in funding to the Carson Street Summer Holiday Recreation and Respite Program.

ATTACHMENT 10.2.1

**COMMUNITY DEVELOPMENT GRANTS  
ROUND 1 2008/2009**

**Summary of Applications**

|                         |   |
|-------------------------|---|
| <b>ORGANISATION</b>     | <b>YouthCARE WA- Como District Council</b>  |
| Location                | Cnr Murray St and McNabb Loop   |
| Purpose of Org          | Provision and support of chaplaincy services at Como Secondary College. The District Council has provided this service since 1986 with the first chaplain appointed to Como Secondary in 1987.  |
| Request from Council    | \$14,000  |
| <b>PROJECT TITLE</b>    | <b>Como Youthcare Chaplaincy Program</b>  |
| Description             | Providing a supportive role (to students, parents, teachers and staff) within the Schools of Como Secondary College and South Perth Primary School.   |
| Dates                   | Ongoing   |
| Objectives and Benefits | The chaplaincy program provides the benefits of helping Staff, Students and Families work through significant issues in their lives and encouraging them in personal development and growth in the community. The service is non-denominational and has a significant impact upon the welfare of students and staff and the wider community through programs that support families. |
| Target Group            | Students, teachers, staff and families of Como Secondary College and the wider community.   |
| Project Costs           | \$46,567  |

**COMMENT**

Chaplaincies in schools are recognised as a very important strategy in providing support for the school community. The City has supported Chaplaincies at Como Secondary College and Kent St High School for many years. The request is for the same level of funding as the previous year.

**RECOMMENDATION**

To provide a \$14, 000 funding for Como District Council.



ATTACHMENT 10.2.1

**COMMUNITY DEVELOPMENT GRANTS  
ROUND 1 2008/2009**

**Summary of Applications**

**ORGANISATION**                      **Churches Commission on Education on behalf of the Kent St District Council**

Location                                      Kent Street Senior High School

Purpose of Org                              To ensure a chaplain is available to the students, staff and their families attending the Kent Street Senior High School.

Request from Council                      \$4,500

**PROJECT TITLE**                      **Chaplaincy program at the Kent St High School**

Description                                      Provision of a chaplain at the Kent Street High School.

Dates    Ongoing

Objectives and Benefits                      To provide a caring Christian presence in the school and provide a supporting role to the school community to ensure all students maximise their learning opportunities through counselling, support and activities

Target Group                                      800 students and 80 staff and their families. Approximately 48 students reside in the City of South Perth

**COMMENT**

As with the Como Secondary College Chaplaincy, this valuable service has been supported by the City for many years. Historically a lesser amount has been provided to Kent St High as the school is located outside the City and has significantly fewer students who are residents of the City. In 2007 the City provided \$3,675. The recommended amount represents a modest increase in that figure.

**RECOMMENDATION**

To provide \$4,000 in funding to the Kent St District Council.

ATTACHMENT 10.2.1

**COMMUNITY DEVELOPMENT GRANTS  
ROUND 1 2008/2009**

**Summary of Applications**

|                      |  |
|----------------------|--|
| <b>ORGANISATION</b>  | <b>Manning Senior Citizens Centre</b>  |
| Location             | 3 Downey Drive MANNING   |
| Purpose of Org       | Contributes towards creating a vital and enriched centre by responding to the needs of seniors in the community through the areas of recreation and community development. |
| Request from Council | \$6,000  |

**PROJECT TITLE**

|                         |   |
|-------------------------|---|
| Description             | Providing a Christmas party for all members and volunteers.<br><br>25 <sup>th</sup> Anniversary will bring together all members in celebration of 25 years of the Manning Senior Citizens Centre.<br><br>Computer Programs are to build rapport with the students of Aquinas College by providing computer classes one on one lessons with seniors. |
| Dates                   | September 2008 - December 2008  |
| Objectives and Benefits | To provide an opportunity for all members and volunteers to celebrate the year's achievements. To share the Christmas spirit with other seniors in the community.   |
| Target Group            | Senior citizens 55 years and older  |
| Project Costs           | \$8,000   |

**COMMENT**

Historically the City has supported Christmas Celebrations at both seniors centres. For the 2008 Christmas Celebrations the Manning Centre is planning a more substantial celebration as it coincides with the Centre's 25<sup>th</sup> anniversary. This application also includes, however a new initiative which is a computer based initiative involving students from Aquinas College. This aspect of the application is not supported in the recommendation as it was not well developed with alternate sources of funding not investigated.

**RECOMMENDATION**

To provide \$1,000 in funding towards the Manning Seniors Christmas and 25<sup>th</sup> anniversary celebrations.

ATTACHMENT 10.2.1

**COMMUNITY DEVELOPMENT GRANTS  
ROUND 1 2008/2009**

**Summary of Applications**

|                         |   |
|-------------------------|---|
| <b>ORGANISATION</b>     | <b>South Perth Senior Citizens Centre (Inc)</b>   |
| Location                | 53 Coode Street SOUTH PERTH   |
| Purpose of Org          | Providing a centre for activities, friendship and congeniality.   |
| Request from Council    | \$680   |
| <b>PROJECT TITLE</b>    | <b>Christmas Luncheon</b>   |
| Description             | Providing a Christmas luncheon for all members and volunteers.  |
| Date                    | 2nd December 2008   |
| Objectives and Benefits | To provide an opportunity for all members and volunteers to celebrate the year's achievements. To share the Christmas spirit with other seniors in the community. |
| Target Group            | Senior citizens 55 years and older  |
| Project Costs           | \$4,160   |

**COMMENT**

The City has supported for many years Christmas Celebrations at both seniors centres. These types of activities are anticipated eagerly by members as they provide opportunities for seniors to socialise at an important time of year.

**RECOMMENDATION**

To provide \$680 in funding for the South Perth senior Citizens Centre Christmas Luncheon.

ATTACHMENT 10.2.1

**COMMUNITY DEVELOPMENT GRANTS  
ROUND 1 2008/2009**

**Summary of Applications**

|                         |  |
|-------------------------|--|
| <b>ORGANISATION</b>     | <b>VIP Plus@Communicare Inc (Get Up &amp; Go!)</b>   |
| Location                | Kent St - Victoria Park  |
| Purpose of Org          | To provide an alternative education program and support services for seriously at risk young people.   |
| Request from Council    | \$14,000   |
| <b>PROJECT TITLE</b>    | <b>Get up and Go!</b>  |
| Description             | Get up and Go is an intensive high support project focusing on disengaged young people in the South East Corridor. The program assists with the transition from study to traineeships, apprenticeships and eventually to work. |
| Dates                   | Ongoing  |
| Objectives and Benefits | To provide an integrated holistic education program for at risk young people, to an equivalent of a Year 10 pass. Many successfully continue on to complete TAFE and university studies.                                       |
| Target Group            | At risk and disconnected young people from the City of South Perth and surrounding areas.  |
| Project Costs           | \$311,000.00   |

**COMMENT**

An excellent program for seriously at risk young people. There are many flow on benefits to the participants as well as the wider community. The City provided the same level of funding in 2007 as that requested in this round.

**RECOMMENDATION**

To provide \$14,000 in funding to the VIP Plus Get up and Go! program @Communicare.

ATTACHMENT 10.2.1

**COMMUNITY DEVELOPMENT GRANTS  
ROUND 1 2008/2009**

**Summary of Applications**

|                         |   |
|-------------------------|---|
| <b>ORGANISATION</b>     | <b>Kensington Primary School P&amp;C Association</b>  |
| Location                | 73 Banksia Terrace, Kensington 6151   |
| Purpose of Org          | To support to students and staff of South Perth Primary School  |
| Request from Council    | \$2,620   |
| <b>PROJECT TITLE</b>    | <b>Aspects of Our Swan River -</b>  |
| Description             | A collaborative tile mural by Kensington Primary School students and teachers   |
| Dates                   | Term 3, 2008 (22 July 2008) - end of Term 4 (18 December 2008)  |
| Objectives and Benefits | Involving students and teachers in a contemporary cultural activity in a project unable to be provided by the school. |
| Target Group            | Primary aged children predominantly from the City.  |
| Project Costs           | \$13,020  |

**COMMENT**

The City has funded a number of Artist in Residence projects through various P&C groups in recent years. This is an excellent way of involving primary aged students in these activities at schools that cannot include arts projects of this type in their regular programs.

**RECOMMENDATION**

To provide \$2,620 in funding to the Kensington Primary School P&C Association.

ATTACHMENT 10.2.1

**COMMUNITY DEVELOPMENT GRANTS  
ROUND 1 2008/2009**

**Summary of Applications**

|                         |  |
|-------------------------|--|
| <b>ORGANISATION</b>     | <b>West Australian Music Industry Association</b>  |
| Location                | Schools in the City of South Perth   |
| Purpose of Organisation | To provide school children a program of song writing workshops, recording workshops and professional learning for teachers.  |
| Request from Council    | \$3,000  |
| <b>PROJECT</b>          | <b>WAM's school program</b>  |
| Description             | A series of five contemporary music concert and workshop incursions at schools in the City of South Perth including primary, secondary and public and private schools. |
| Dates                   | Term 3 2008 (22 July 2008) to end of Term 4 (18 December 2008)   |
| Objectives              | WAM aims to help develop the WA Music Industry by engaging young people in contemporary music activity.  |
| Target Group            | Primary and Secondary age children   |
| Project Expenditure     | \$13,020   |

**COMMENT**

In 2007 WAM submitted a poorly developed application for a similar project, In particular no schools had been consulted. For the 2008 submission the need for the program and support from three schools was identified. The requested amount allows for visits to five schools with two yet to be determined. The recommendation allows for concerts and workshops at the three schools that support this submission. If endorsed this will be the first year that the program has been supported by the City. With this in mind officers will be monitoring with interest the outcomes of the project.

**RECOMMENDATION**

To provide \$1,800 in funding to the West Australian Music Association.

ATTACHMENT 10.2.1

**COMMUNITY DEVELOPMENT GRANTS  
ROUND 1 2008/2009**

**Summary of Applications**

|                         |  |
|-------------------------|--|
| <b>ORGANISATION</b>     | <b>Southside Penrhos Wesley Swimming Club</b>  |
| Location                | Wesley Sports Club   |
| Purpose of Organisation | To develop, encourage, support and promote the sport of swimming for all age groups from beginners to elite. |
| Request from Council    | \$2,000  |

|                     |   |
|---------------------|---|
| <b>PROJECT</b>      | <b>Schools Challenge</b>  |
| Description         | Swimming Carnival including St Pius, Penrhos, Wesley, St Columbas, Kensington and South Perth                 |
| Dates               | 1 September 2008 - 14 November 2008   |
| Objectives          | Schools Challenge is about participation of swimming in school teams to assist in promotion of school spirit. |
| Target Group        | Primary age children  |
| Project Expenditure | \$9,500   |

**COMMENT**

An excellent program for primary aged children to participate in "School Challenge". There are flow on benefits to the participants as well as the wider community. The City has supported this project for a number of years.

**RECOMMENDATION**

To provide \$2,000 in funding to the Southside Penrhos Wesley Swimming Club.

**COPY**City of  
**SouthPerth**Serial No. 11/5163  
ID No. 3420  
File Ref:HE5.11  
Council Min 50389 Dec 2000SCHEDULE F  
CITY OF SOUTH PERTH TOWN PLANNING SCHEME No. 5**GRANT OF PLANNING CONSENT**

|  |  |
|--|--|
| Owner of Land to which application refers: | OWNER : <b>Bele-Mikázo Pty Ltd</b>                           |
|  | APPLICANT : <b>CMP ARCHITECTS</b>                            |
|  | ADDRESS FOR CORRESPONDENCE : <b>PO BOX Z5389</b>             |
|  | PLANNING CONSENT FOR PROPOSED : <b>MULTIPLE DWELLING(S)</b>  |
|  | PROPERTY TITLE : <b>LOT: 38</b>                              |
|  | PROPERTY ADDRESS : <b>11 Heppingstone Street SOUTH PERTH</b> |
|  | APPLICATION DATED : <b>1 December 2000</b>                   |
|  | PLANNING CONSENT DATED: <b>08 January 2001</b>               |

Pursuant to the provisions of the City of South Perth Town Planning Scheme No. 5 and the Metropolitan Region Scheme, Planning Consent, in accordance with the application for Planning Consent, and attached plans, is **granted**, subject to the following conditions:

- (1) The existing boundary fencing shall not be removed, unless it is to be replaced immediately with a new fence.
- (2) In order to demonstrate design compatibility as required by Council's Planning Policy No. P33 "General Design Guidelines for Residential Development", details of the proposed colours of the external materials shall be submitted for approval by the Manager, City Planning.
- (3) No street trees shall be removed, pruned or disturbed in any way.
- (4) The applicant shall obtain street alignment levels and details of the necessary crossover construction from Council's Works Division for inclusion in the working drawings.
- (5) The surface of the boundary walls on the eastern and southern sides of the lot shall be finished to the satisfaction of the adjoining neighbour or in the case of a dispute to the satisfaction of the Manager, City Planning.
- (6) The building shall be modified to comply with the 0.66 maximum plot ratio prescribed by Table 1 of the Residential Planning Codes for the type of development concerned.
- (7) The designated visitor parking bays shall be clearly identified on site by means of a sign bearing the words "Visitors' Parking Only".
- (8) In accordance with the requirements of Clause 73 of the No 5 Scheme Text, no person shall occupy or use the land or any building the subject of this consent for the purpose for which this consent is given unless and until:
  - (a) Council has approved a landscaping plan; and
  - (b) the landscaped areas have been developed and completed in accordance with the plan approved by the Council.
- (9) The south-western facing terraces on Levels 2 and 3 shall be set back 3.0 metres from the lot boundaries as shown marked in red on the approved plans;
- (10) Prior to issue of a Building Licence the applicant shall lodge detailed costing estimates as justification for the proposed 20% plot ratio bonus to the satisfaction of the Manager, City Planning;



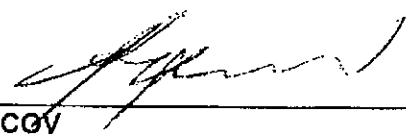
SCHEDULE F  
CITY OF SOUTH PERTH  
TOWN PLANNING SCHEME No. 5  
**GRANT OF PLANNING CONSENT**

- (11) The parapet projection forming part of the boundary walls to the southern and eastern boundaries shall be no higher than one brick course above the highest point of the guttering;
- (12) The height of the boundary walls shall be reduced no higher than 2.1 metres above the ground floor finished floor level;
- (13) The finished floor level shall be no higher than 9.4 metres relative to the datum shown on the site plan;
- (14) Terraces and portions of terraces marked in red on the approved plans shall be deleted;
- (15) The nib walls to the terraces facing Heppingstone Street on Levels 2 and 3 located between the 'Family Room' and 'Kitchen' shall be deleted as shown marked in red on the approved plans;
- (16) The applicant shall lodge revised plans prior to Building Licence stage showing the redesign of the secondary bedrooms on levels 2 and 3 located adjacent to the internal stairs. The redesign shall incorporate the deletion of the terraces as required in Condition (vi) and realignment of the window and reduction of the length of screen wall to the satisfaction of the Manager, City Planning;
- (17) The location of the 'Visitor' car parking bays and the landscaping strip adjacent to the proposed garage shall be interchanged so that the car parking bays are separated from the secondary street boundary by a 1.5 metre wide landscaping strip;
- (18) The eastern facing windows on Levels 2 and 3 to the 'Ensuite' and 'Bathroom' shall be of obscured glass or glass block construction;
- (19) The validity of this approval shall cease if construction is not substantially commenced within 12 months of the date of grant of Planning Consent.
- (20) The dwellings shall not be occupied until an inspection has been carried out by a Council officer and the Manager, City Planning, is satisfied the development has been completed in accordance with the approved plans and conditions of Planning Consent.



**IMPORTANT NOTE:**

This Planning Consent is **NOT** an authorisation to commence construction. **A BUILDING LICENCE MUST BE OBTAINED** from Council's Building Services Department prior to commencing any work of a structural nature.

SIGNED   
R H BERCOV  
MANAGER, CITY PLANNING

DATED: 08 January 2001

CITY OF SOUTH PERTH

**MEETING** : COUNCIL

**MEETING DATE** : 19 DECEMBER 2000

**AGENDA ITEM** : 5(b)(v)(B) PROPOSED TWO MULTIPLE DWELLINGS. LOT 38 (NO 11) HEPPINGSTONE STREET, CNR LAMB STREET, SOUTH PERTH. APPLICANT: CMP ARCHITECTS. OWNER: M & B PRITCHARD. (SERIAL NO. 11/5163 : 11.9.2000).

**FROM** : STRATEGIC DEVELOPMENT AND URBAN PLANNING

**REPORT DATE** : 5 DECEMBER 2000

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To: Commissioners.

**1. ISSUE**

To consider an application for Planning Consent for the construction of two Multiple Dwelling units on Lot 38 (No. 11) Heppingstone Street, South Perth.

**2. BACKGROUND**

The proposed structure, located on the corner of Lamb Street overlooking the Swan River and foreshore reserve, is four storeys high. It will replace an existing two storey brick and tile Single House.

**3. FINANCIAL IMPLICATIONS**

The proposal has no impact on this area.

**4. POLICY IMPLICATIONS**

The proposed development has implications with respect to the following Planning Policies:

- |         |  |
|---------|--|
| No. P4  | Design Advisory Consultants;   |
| No. P8  | Residential Boundary Walls;  |
| No. P20 | Visitor Car Parking Requirements for Grouped and Multiple Dwellings;                   |
| No. P23 | Proposed Building Setback Variations requiring Consultation with Adjoining Neighbours; |
| No. P29 | Views;   |
| No. P31 | Visual Privacy; and  |
| No. P33 | General Design Guidelines for Residential Development.                                 |

**5. STRATEGIC IMPLICATIONS**

The proposed development has no impact on this area.

**6. COMMENTS**

The proposed Multiple Dwelling development requires determination by the Commissioners as the building is more than three storeys in height. This is in accordance with Council's current Delegation of Authority to Various Planning Officers No. C35.

The original plans lodged on 12 September 2000 have been significantly redesigned as depicted on amended plans dated 27 November 2000. The applicant chose to revise the original plans following consultation with the Planning Department and after initial advertising of the application to affected adjoining neighbours. A number of significant concerns were raised relating to incompatibility with streetscape, significant setback variations and objections to proposed boundary walls and general design character among others.

SPECIAL REPORT OF THE MANAGER DATED 5 DECEMBER 2000 PROPOSED TWO MULTIPLE DWELLINGS. LOT 38 (NO 11) HEPPINGSTONE STREET, CNR LAMB STREET, SOUTH PERTH. APPLICANT: CMP ARCHITECTS. OWNER: M & B PRITCHARD. (SERIAL NO. 11/5163 : 11.9.2000)

The amended plans show a far more sympathetic facade with colour, design and texture elements that enable the proposed building to achieve greater compatibility with some of the more traditional surrounding residential dwellings.

The proposed development incorporates a large number of terraces. Many of the smaller terraces on the eastern side of the building are considered to be superfluous and create unnecessary overlooking and visual privacy concerns. The applicant has been advised that a number of these terraces should be deleted as they serve no useful purpose and create amenity problems for neighbouring development.

### 6.1 Neighbour Notification

The original proposed development was advertised to adjoining and nearby landowners for a three week period commencing 15 September 2000. The three week (21 day) period is required under Clause 4.7.6 of the Residential Planning Codes with respect to the proposed 20% plot ratio bonus being sought by the applicant.

Two submissions were received during the advertising period. These are listed below followed by the Planning Officer's comments.

**Objection No. 1** The owners of Lot 39 (No. 9) Heppingstone Street objected to the proposed development on the following grounds:

- 1) *"The proposed development is very much higher than the existing neighbouring residence, both on Lamb Street and Heppingstone/Scenic Crescent. The proposed building will have a fourth floor which will be used as outdoor activities. Anyone at the fourth floor will be able to look into the surrounding residences' backyards and into their bedrooms. How would they protect their privacy?"*

*The plot ratio bonus is being exploited by the developer to be able to construct the fourth floor. If the Council permit, it will be detrimental to the neighbouring residences and at the expense of their privacy.*

- 2) *The facade of the development gives viewers the impression of a commercial/office development and is out of character of the existing surrounding developments along Lamb Street and Heppingstone Street.*

*We would also like to record our objection to the two boundary walls being built to a height of 3.5 metres. This will reinforce the view that the development is a commercial proposition."*

### Planning Officer's Comments

- 1) The proposed development, subject to a minor alteration to the finished floor level, complies with the building height limit of 10.5 metres specified under Town Planning Scheme No. 5.

The fourth floor terrace / balcony is oriented toward the Heppingstone and Lamb street frontages and does not conflict with either the setback requirements of the Residential Planning Codes or Council's Planning Policy No. P31 "Visual Privacy". The proposed development is not considered to compromise the privacy of surrounding residences as the appropriate and relevant requirements have been met. Neighbouring back yards should not be visible from the proposed terrace.

SPECIAL REPORT OF THE MANAGER DATED 5 DECEMBER 2000 PROPOSED TWO MULTIPLE DWELLINGS. LOT 38 (NO 11) HEPPINGSTONE STREET, CNR LAMB STREET, SOUTH PERTH. APPLICANT: CMP ARCHITECTS. OWNER: M & B PRITCHARD. (SERIAL NO. 11/5163 : 11.9.2000)

The plot ratio bonus does not affect building height. With or without the plot ratio bonus any building in the 10.5 metre Building Height Zone may achieve a fourth floor subject to compliance with the definition of "building height" in Town Planning Scheme No. 5.

- 2) The originally proposed development was considered to be substantially out of character with the surrounding residential development, and following consultation with the Planning Services Department, the applicant chose to lodge amended plans to address concerns such as streetscape character and setbacks, among others. The amended plans are more sympathetic to, and have elements which integrate with the adjoining and nearby residential development. The facade of the building has been softened through changes in colours, materials and design and setting of the bulk of the building off the side boundary. The amended plans are considered acceptable with respect to compatibility with the character of surrounding residential development. The streetscape and character issue was considered by the Council's Design Advisory Consultants and the amended proposal was recommended for approval.

The amended plans have deleted the originally proposed three storey boundary walls. This concern has been addressed.

**Objection No. 2** The owners of Lot 39 (No. 3) Lamb Street objected to the proposed development on the following grounds:

*"The owners object to the setback variation and development of the proposed multiple dwellings with plot ratio bonus on the above mentioned adjoining property."*

#### **Planning Officer's Comments**

The adjoining property owners through their architects – CCJ DesignInc, objected to the originally proposed three storey boundary wall adjoining their property. The amended plans have set the bulk of the second, third and fourth floors of the building between 1.1 and 2.7 metres off the boundary. Subject to compliance with normal setback requirements, the amended plans are considered to have addressed the concerns of the adjoining landowners.

The maximum plot ratio bonus allowable under the Residential Planning Codes is 20% which is being sought by the applicant. In consideration of the objections received regarding setback variations, the proposal has been modified to reduce the effect of the bulk and scale of the proposed structure on neighbouring residences. The neighbours' concern in this respect will be adequately addressed when the plans have been further amended to comply with the relevant setback requirements.

#### **6.2 No. 5 Scheme Requirement**

The proposed development complies with the following R60 Multiple Dwelling requirements:

- Open Space: 50%, the actual provision on site being 50.25%;
- Communal Open Space: 20%, the actual provision on site being 25%;
- Front setback: 6 metres;
- Secondary street setback: 3 metres; and
- Car parking: 4 private and 2 visitor car parking bays, the actual provision on site being 6 private and 2 visitor bays.

SPECIAL REPORT OF THE MANAGER DATED 5 DECEMBER 2000 PROPOSED TWO MULTIPLE DWELLINGS. LOT 38 (NO 11) HEPPINGSTONE STREET, CNR LAMB STREET, SOUTH PERTH. APPLICANT: CMP ARCHITECTS. OWNER: M & B PRITCHARD. (SERIAL NO. 11/5163 : 11.9.2000)

The proposed development raises concerns regarding boundary walls to the southern and eastern boundaries; potential overlooking of neighbouring properties; and compliance with setback and plot ratio requirements.

**Plot Ratio**

The proposed development has a plot ratio of 0.6936. This exceeds the 0.66 maximum plot ratio inclusive of the 20% bonus applicable under the Residential Planning Codes. The base plot ratio limit for R60 development is 0.55. The proposed development is eligible for the 20% plot ratio bonus by way of the provision of significant communal facilities incorporating a terraced entertaining area and kitchen, gymnasium, sauna, internal landscaped garden, and indoor lap pool. The applicant is required to justify the cost of the communal facilities in relation to the value of the 20% plot ratio bonus.

The proposed development exceeds the maximum plot ratio by 1.3% or 5.5 sq. metres. During the advertising period, the adjoining land owners objected to the bulk and scale of the proposed development. Clause 4.7.6 of the Residential Planning Codes specifies the constraints that apply to the granting of a plot ratio bonus for Multiple Dwellings. The proposed development is considered to comply with those constraints. The minimal (5.5 sq. metre) excess plot ratio is considered to be accounted for within measuring and drafting error. Although the proposed development slightly exceeds the maximum allowable plot ratio, only minor amendments are necessary to bring the floor space down to the maximum permitted. This will be addressed by way of a condition of Planning Consent.

**Building Height**

The proposed development is located in Building Height Zone 3 with a specified maximum building height of 10.5 metres. The proposed development has a building height of 10.67 metres above natural ground level. The finished floor level of the development is required to be reduced by 170mm to comply with the Town Planning Scheme No. 5 definition of building height.

**Boundary Walls**

The proposed development incorporates boundary walls to the southern and eastern boundaries. Both walls are single storey in height. The southern boundary wall is 14 metres long with a height of 2.3 metres. The height of the wall may be further reduced through the deletion of the parapet projection above the gutter line of the wall. This will reduce the height to 2.1 metres. The floor level of the building is to be reduced by 170mm, further reducing any impact of the boundary wall.

The proposed boundary wall adjoins an 8 metre long and 3.2 metre high boundary wall to a garage on Lot 39 (No. 9) Heppingstone Street. Due to the presence of the adjoining boundary wall set back the same distance from the street frontage, and in light of the fact that the proposed boundary wall height may be reduced to 2.1 metres or less, the combination of these factors mitigates any adverse impact. The Residential Planning Codes Manual on Page 106 points out that where a plot ratio bonus has been granted (as would be the case with this application) the normal requirements relating to car parking, boundary setbacks and open space may be reduced, in some cases to nil.

SPECIAL REPORT OF THE MANAGER DATED 5 DECEMBER 2000 PROPOSED TWO MULTIPLE DWELLINGS. LOT 38 (NO 11) HEPPINGSTONE STREET, CNR LAMB STREET, SOUTH PERTH. APPLICANT: CMP ARCHITECTS. OWNER: M & B PRITCHARD. (SERIAL NO. 11/5163 : 11.9.2000)

Clause 1.5.8(f) of the Residential Planning Codes states that, subject to the required advertising procedures *the setback from a side boundary may be reduced to nil provided generally that the length of any such wall in relation to its height shall not be more than the following:*

- *Walls not exceeding 2.0m average height – no limit;*
- *Walls not exceeding 2.5 metres average and 3.5 metres maximum height – 2/3 of the length of any common boundary;*

The wall abutting the southern boundary is proposed to have an average and maximum height of 2.1 metres and a length of 3/4 of the boundary. It is considered that the proposed wall abutting the courtyard on Lot 39 (No. 9) Heppingstone Street should be reduced to no more than 2 metres above the existing ground level of that courtyard. This may be achieved by lowering the parapet projection or dropping the floor level of the parking area where appropriate.

The proposed eastern boundary wall may be reduced to a similar height of 2.1 metres. This wall, which is 17.3 metres long or 2/5 of the length of the eastern boundary, abuts the side boundary of Lot 39 (No. 3) Lamb Street. The existing residence at No. 3 Lamb Street is set back 1 to 1.5 metres from the side boundary. The proposed boundary wall will not adversely affect the amenity of the neighbouring development.

It is considered that the proposed boundary walls generally comply with the provisions of Clause 1.5.8(f) of the Residential Planning Codes and that they will not adversely affect the amenity of adjoining residential development. Accordingly, subject to height reductions identified in the relevant conditions of Planning Consent, these walls are supported.

#### **Setback Requirements – Primary and Secondary Streets and Balconies**

The proposed development complies with the 6 metre front setback requirement applicable under the R60 density code. The proposed development complies with the secondary street setback requirement of 1.5 metres specified under the Residential Planning Codes but not with the Planning Services Department working practice of 3 metres. While the footings and main bulk of the structure are set back 3 metres, the western facing terraces or balconies are set back only 1.5 metres from the Heppingstone Street boundary.

Approval of the proposal requires a variation from Clause 4.5.3 of the Residential Planning Codes which states:

*Notwithstanding the provisions of Clause 1.5.8 a balcony may project into the required minimum setback by a maximum of 1.5m but shall in no case be less than 3m from the boundary.*

The proposed terraces to the western boundary are set back less than 3 metres being approximately 1.5 metres from the secondary street boundary. The terraces to the south-western corner of the second and third levels are considered to restrict established views from the front first floor balconies to the adjoining development at No. 9 Heppingstone Street. Planning Policy No. P29 "Views" states that, where a variation to a setback or other requirement is likely to affect the established views from neighbouring development, no variation will be granted. In light of the required balcony setbacks and the Policy No. P29 requirements concerning protection of views, the terraces to the south-western corner of the proposed development should be set back 3 metres from the boundary.

The adjoining terraces to the 'Family Rooms' on Levels 2 and 3 fronting Heppingstone Street are not considered to restrict the views of any adjoining or nearby development. The subject terraces are set back on an angle between 1.5 and 3 metres from the boundary and it is considered that a variation to the required setback may be supported.

SPECIAL REPORT OF THE MANAGER DATED 5 DECEMBER 2000 PROPOSED TWO MULTIPLE DWELLINGS. LOT 38 (NO 11) HEPPISTONE STREET, CNR LAMB STREET, SOUTH PERTH. APPLICANT: CMP ARCHITECTS. OWNER: M & B PRITCHARD. (SERIAL NO. 11/5163 : 11.9.2000)

The majority of the terraces to the eastern boundary should be deleted as recommended by the Design Advisory Consultants.

The southern facing terraces to Levels 2 and 3 are set back from the boundary 2.5 metres which is a variation from the 3 metre setback requirement of the Residential Planning Codes. The terrace to Level 3 is considered to be "open" and does not form part of the plot ratio calculations. The terrace is required to comply with the 3 metre setback requirement from the southern boundary.

The southern facing terrace to Level 2 is also set back 2.5 metres from the southern boundary and is required to be altered to meet the 3 metre requirement. The large 3.75 metre x 6 metre portion of terrace abutting the south-eastern bathroom and 'Gallery' should be deleted. The applicant has been advised of this during discussions with the Planning Services Department. The remaining terrace will match the alterations to the third level terrace directly above.

### **Wall Setbacks - General**

#### **Setback requirements to the Southern boundary**

The concerns regarding the ground floor boundary wall and terraces to Levels 2 and 3 have been addressed above.

The second and third floor setbacks comply with the relevant requirements of the Residential Planning Codes and Town Planning Scheme No.5.

#### **Setback requirements to the Eastern boundary**

The concerns regarding the ground floor boundary wall have been addressed above.

The remaining ground floor wall is set back between 1.9 to 2.3 metres and complies with Table 2 of the Residential Planning Codes which specifies a setback requirement of 1.5 metres.

The upper floors of the proposed development along the eastern boundary comply with the requirements of the Residential Planning Codes.

### **6.3 Design Advisory Consultants' Comments**

The amended plans were reconsidered at the December meeting of the Design Advisory Consultants. The Advisory Architects generally supported the amended design which addressed their previous concern regarding incompatibility with established streetscape and the 'commercial' character of the original design. The original application was considered at the September meeting of the Design Advisory Consultants.

The Advisory Architects made the following comments at their December meeting:

- Unsightly screen adjacent to secondary bedroom on Levels 2 and 3. Also query setback compliance in relation to this screen.

#### **Officer's Comment**

The terrace to the secondary bedrooms on Levels 2 and 3 are to be deleted and a minor alteration to the window is to be made to reduce the size and impact of the screen wall.

- Recommend that the terrace to the secondary bedroom be deleted as it offers very limited view and creates excessive visual privacy problems.

#### **Officer's Comment**

As above

SPECIAL REPORT OF THE MANAGER DATED 5 DECEMBER 2000 PROPOSED TWO MULTIPLE DWELLINGS. LOT 38 (NO 11) HEPPINGSTONE STREET, CNR LAMB STREET, SOUTH PERTH. APPLICANT: CMP ARCHITECTS. OWNER: M & B PRITCHARD. (SERIAL NO. 11/5163 : 11.9.2000)

- Communal facilities / amenities appear to be satisfactory.

**Officer's Comment**

As a condition of Planning Consent the applicant is to provide detailed costing justification for the proposed plot ratio bonus.

- Terrace off rear lobby serves no useful purpose. Recommend deletion of rear lobby terraces and terraces off gallery on Levels 2 and 3.

**Officer's Comment**

The applicant has been advised of these concerns and has agreed to the deletion of these six terraces.

- Revised drawings have improved elevations.
- Design Advisory Consultants recommend approval of the amended design.

**6.4 Conclusion**

Having regard to the preceding comments, it is considered that **the application should be conditionally approved.**

**7. RECOMMENDATION**

IT IS RECOMMENDED that ....

- (a) pursuant to the provisions of the City of South Perth Town Planning Scheme No. 5 and the Metropolitan Region Scheme, the application for proposed two Multiple Dwellings. Lot 38 (No. 11) Heppingstone Street, cnr Lamb Street, South Perth be approved subject to the following:

**Standard Conditions**

9A, 11C, 14B, 15D, 23, 36A, 68, 113A, 114, 151 and 155.

**FOOTNOTE:**

A full list of standard conditions is attached to Planning Policy No. P24 – Standard Conditions of Planning Consent, Use of Code Numbers – which is included in the Council's Policy Manual. This document is available for inspection at the Council Offices during normal business hours.

**Special Conditions**

- (i) The south-western facing terraces on Levels 2 and 3 shall be set back 3.0 metres from the lot boundaries as shown marked in red on the approved plans;
- (ii) Prior to issue of a Building Licence the applicant shall lodge detailed costing estimates as justification for the proposed 20% plot ratio bonus to the satisfaction of the Manager, City Planning;
- (iii) The parapet projection forming part of the boundary walls to the southern and eastern boundaries shall be no higher than one brick course above the highest point of the guttering;
- (iv) The height of the boundary walls shall be reduced no higher than 2.1 metres above the ground floor finished floor level;
- (v) The finished floor level shall be no higher than 9.4 metres relative to the datum shown on the site plan;
- (vi) Terraces and portions of terraces marked in red on the approved plans shall be deleted;
- (vii) The nib walls to the terraces facing Heppingstone Street on Levels 2 and 3 located between the 'Family Room' and 'Kitchen' shall be deleted as shown marked in red on the approved plans;



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SPECIAL REPORT OF THE MANAGER DATED 5 DECEMBER 2000 PROPOSED TWO MULTIPLE DWELLINGS, LOT 38 (NO 11) HEPPINGSTONE STREET, CNR LAMB STREET, SOUTH PERTH. APPLICANT: CMP ARCHITECTS. OWNER: M & B PRITCHARD. (SERIAL NO. 11/5163 : 11.9.2000)

- (viii) The applicant shall lodge revised plans prior to Building Licence stage showing the redesign of the secondary bedrooms on levels 2 and 3 located adjacent to the internal stairs. The redesign shall incorporate the deletion of the terrace as required in Condition (vi) and realignment of the window and reduction of the length of screen wall to the satisfaction of the Manager, City Planning;
  - (ix) The location of the 'Visitor' car parking bays and the landscaping strip adjacent to the proposed garage shall be interchanged so that the car parking bays are separated from the secondary street boundary by a 1.5 metre wide landscaping strip;
  - (x) The eastern facing windows on Levels 2 and 3 to the 'Ensuite' and 'Bathroom' shall be of obscured glass or glass block construction.
- (b) the Special Report of the Manager, City Planning, dated 5 December 2000 be received.

R H BERCOV  
MANAGER, CITY PLANNING

RE. PROPOSED TWO MULTIPLE DWELLINGS LOT 38 (NO 11) HEPPINGSTONE STREET, CNR LAMB STREET, SOUTH PERTH. APPLICANT: CMP ARCHITECTS. (SERIAL NO. 11/5163 : 11.9.2000) AND SPECIAL REPORT OF THE MANAGER, CITY PLANNING DATED 5.12.2000 (ITEM 5(b)(v)(B) AGENDA)

Moved Cmr Smith, Sec Cmr Donaldson -

RESOLVED MIN : 50389 "That....

- (a) pursuant to the provisions of the City of South Perth Town Planning Scheme No. 5 and the Metropolitan Region Scheme, the application for proposed two Multiple Dwellings. Lot 38 (No. 11) Heppingstone Street, cnr Lamb Street, South Perth be approved subject to the following:
- Standard Conditions**  
9A, 11C, 14B, 15D, 23, 36A, 68, 113A, 114, 151 and 155.
- FOOTNOTE:**  
A full list of standard conditions is attached to Planning Policy No. P24 – Standard Conditions of Planning Consent, Use of Code Numbers – which is included in the Council's Policy Manual. This document is available for inspection at the Council Offices during normal business hours.
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- (i) The south-western facing terraces on Levels 2 and 3 shall be set back 3.0 metres from the lot boundaries as shown marked in red on the approved plans;
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  - (iii) The parapet projection forming part of the boundary walls to the southern and eastern boundaries shall be no higher than one brick course above the highest point of the guttering;
  - (iv) The height of the boundary walls shall be reduced no higher than 2.1 metres above the ground floor finished floor level;
  - (v) The finished floor level shall be no higher than 9.4 metres relative to the datum shown on the site plan;
  - (vi) Terraces and portions of terraces marked in red on the approved plans shall be deleted;
  - (vii) The nib walls to the terraces facing Heppingstone Street on Levels 2 and 3 located between the 'Family Room' and 'Kitchen' shall be deleted as shown marked in red on the approved plans;
  - (viii) The applicant shall lodge revised plans prior to Building Licence stage showing the redesign of the secondary bedrooms on levels 2 and 3 located adjacent to the internal stairs. The redesign shall incorporate the deletion of the terrace as required in Condition (vi) and realignment of the window and reduction of the length of screen wall to the satisfaction of the Manager, City Planning;
  - (ix) The location of the 'Visitor' car parking bays and the landscaping strip adjacent to the proposed garage shall be interchanged so that the car parking bays are separated from the secondary street boundary by a 1.5 metre wide landscaping strip;
  - (x) The eastern facing windows on Levels 2 and 3 to the 'Ensuite' and 'Bathroom' shall be of obscured glass or glass block construction; and
- (b) the Special Report of the Manager, City Planning, dated 5 December 2000 be received."

CARRIED (3/0)

**9.3.6 Complaint regarding various “Planning” matters associated with two Multiple Dwellings. No. 11 Heppingstone Street cnr Lamb Street, South Perth**

Location: Lot 38 (No. 11) Heppingstone St cnr Lamb Street, South Perth  
 Applicant: N/A  
 File Ref: HE5.11 - 11/5163  
 Date: 3 March 2004  
 Author: Christian Buttle, Team Leader, Planning Services  
 Reporting Officer: Ross Povey, Director, Strategic and Regulatory Services

**Summary**

To respond to a report concerning a completed development at No. 11 Heppingstone Street, South Perth. The report was prepared by Planning Consultant, Ken Adam and submitted to the Council by adjacent property owner, Mr Barrie Drake. The report claims that the development does not comply with certain non-discretionary provisions of the No. 5 Town Planning Scheme, which was operative when the development was approved.

The report now being presented has been prompted by numerous questions asked by Mr Drake during Public Open Question Time at Council meetings.

**Background**

At the December 2003 Council meeting, Mr Drake asked two questions relating to the building at No. 11 Heppingstone Street. The questions, and the associated replies are set out below:

“Summary of Question

*Mr Drake stated that to date he had asked a number of specific questions relating to the building at No. 11 Heppingstone Street and that on each occasion he had not received a single satisfactory honest answer and would continue to ask these questions until they were answered correctly and honestly. He then asked:*

*Would the elected Council of the City of South Perth please inspect the building at No. 11 Heppingstone Street on the corner of Lamb Street?*

Summary of Response

*The Mayor stated that the request had been noted.*

Summary of Question

*At the last Council meeting I tabled a copy of an independent report prepared by Ken Adam on No. 11 Heppingstone Street - Has the Chief Executive read that report?*

Summary of Response

*The Chief Executive responded: “Yes.”*

Mr Drake had previously asked more specific questions about “compliance” issues concerning the Heppingstone Street building, at the November 2002, October 2003 and November 2003 Council meetings.

The development at No. 11 Heppingstone Street comprises two Multiple Dwellings contained within a three storey building that was approved at the December 2000 Council meeting. A building licence was subsequently issued by the Manager, Building Services, under Delegated Authority during February 2002.

**Comment**

Mr Drake first expressed concerns regarding the building during Public Open Question Time at the November 2002 Council meeting. The building was under construction at that time.

At the November 2003 Council meeting, Mr Drake tabled a report he had commissioned, which was prepared by Planning Consultant, Mr Ken Adam. The report identifies a number of areas where the building is said not to comply with the provisions of Town Planning Scheme No. 5, incorporating the Residential Planning Codes. Mr Adam's report is **Attachment 9.3.6**. After carefully reviewing all of Mr Adam's comments, the Council Officers disagree with most of his findings. Each of the areas of dispute is discussed in detail below:

#### Plot Ratio

Mr Adam suggests that the following portions of the building were incorrectly excluded from plot ratio calculations:

1. Terrace 16 on Levels 2 and 3;
2. Terrace 12 on Level 2;
3. The northern part of Terrace 13 on Level 2;
4. Terrace 27 on Levels 2 and 3;
5. The northern part of Terrace 13 on Level 3; and
6. The Outdoor Kitchen 06

The 1991 Residential Planning Codes defined "plot ratio" as meaning:

*"the ratio of the gross total of the areas of all floors to the area of land within the site boundaries and in calculating the gross total of the areas of all floors to the areas shall be measured over any walls, but shall not include lift shafts, stairs or stair landings, machinery rooms, air conditioning, equipment rooms, non-habitable floor space in basements, areas used exclusively for the parking of wheeled vehicles at or below ground level, lobbies or amenities common to more than one dwelling or private open balconies"*.

Based upon this definition of "plot ratio", each of the areas referred to in Mr Adam's report was properly and correctly excluded from the calculation of plot ratio floor area.

The general principle used in the City's plot ratio calculation was that if there was a projecting platform open to the elements, then the area was exempt from the plot ratio calculations (i.e. a private **open** balcony). This methodology has been consistently applied throughout the City ever since the definition of "plot ratio" was first introduced into the original version of the Residential Planning Codes in 1985. The same methodology was also applied for many years prior to 1985 under the previous No. 2 Town Planning Scheme. It is understood that this is consistent with the practice of other Councils in the Perth Metropolitan Region. Terraces located beyond the cavity walls, and open to the external elements, have also been exempted from the calculations on the same basis. This is a critical point of difference between the City's assessment and calculations and the calculations undertaken by Mr Adam.

Contrary to Mr Adam's assertion, Officers of the City consider that the approval of the building was consistent with orderly and proper planning and the preservation of the amenities of the locality.

#### Building Height

As Mr Adam has correctly stated in his report, at the time of approval of the building, the maximum permitted building height for this site was 10.5 metres.

The permitted building height is measured above the highest natural ground level underneath the building. Mr Adam suggests that the highest point of natural ground level underneath the building is RL 3.92 which produces a maximum permitted building height at RL 14.42. The City had identified the highest point of natural ground level beneath the building as RL 4.13 which produces a maximum permitted building height at RL 14.63.

Mr Adam draws attention to the following areas :

1. Lift Shaft on the eastern side of the building;
2. Powder Room 04 adjacent to the Lift Shaft;
3. Equipment Store 05 eastern wall;
4. Study and Balustrade to the Roof Terrace 07 on the western elevation.

The Officers make the following comments with respect to these portions of the building:

1. The lift shaft shown on the original planning application was compliant with the height requirements. However, upon detailed examination of the building licence application it has been noted that the height of the shaft has varied. The top portion of the lift shaft appears to project above the permitted building height by 1.4 meters.

The lift shaft appears to project above the permitted building height by up to 1.4 metres.

- 2 & 3. Using the definition of “building height” that was in force at the time, the Powder Room and the Equipment Store comply with the maximum permitted building height, noting that the No. 5 Town Planning Scheme excluded any wall that extended higher than the main roof provided that such a wall was contained within a building envelope formed by a wall having the maximum permissible height and a hipped roof with a pitch not exceeding 25 degrees.

At the ground floor level, the building is constructed with a zero setback to the eastern property boundary. When this wall is projected to the maximum permitted wall height, and a notional hipped roof with a 25 degree pitch is then projected towards the building, the walls of the Powder Room and the Equipment Store are contained within a notional building envelope, in conformity with the (then) operational definition of “building height”.

4. The Study and Balustrade to the Roof Terrace 07 on the western elevation are contained within the permitted building height limit, contrary to the contention of Mr Adam.

Mr Adam goes on to suggest that there is “an implied vertical surface that extends above balustrade height” on the external face of Roof Terrace 07. The suggestion that the City should have calculated the height of an “implied” or “imaginary” wall, cannot be supported.

There appears to be a small degree of non-compliance with building height limit with respect to the lift shaft only. Although this design element was not shown on the initial sketch plans, it was shown on the subsequent working drawings which were the subject of the Building Licence approval.

For the purpose of viewing the lift shaft, Officers of the City have visited Mr Drake’s properties at No. 2 and Nos. 5 - 7 Scenic Crescent and are satisfied that the existence of the lift shaft does not to any extent adversely impact on the amenity of his properties or the surrounding locality.

Apart from Mr Drake’s objections, no objections have been received by the City in relation to the building.

To assist Council Members in obtaining an appreciation of how the building at No. 11 Heppingstone Street is viewed from the property at No. 2 Scenic Crescent, a number of photographs were taken on 23 January 2004. The first two photographs show the view of the subject building from the upper floor of the premises at No. 2 Scenic Crescent. The third photograph shows the view of the subject building from the ground of the premises situated at No. 2 Scenic Crescent. As can be seen, the existence of the lift shaft obscures a small portion of the view of the sky. There is no overshadowing impact.

Attachment 10.3.1(b)

Mr Drake has also expressed concern about an adverse amenity impact that the building has caused on his property at No's 5-7 Scenic Crescent. However, this property is located some distance from the property at No. 11 Heppingstone Street and such concerns can not be supported.

Upper floor view from the western side of the building at No. 2 Scenic Crescent, looking toward No. 11 Heppingstone Street



Upper floor view from the eastern side of the building at No. 2 Scenic Crescent, looking toward No. 11 Heppingstone Street



Ground floor view from the building at No. 2 Scenic Crescent, looking toward No. 11 Heppingstone Street



#### Building Setbacks

Mr Adam states that he has not carried out an assessment of the approved building setbacks, however he notes that the Council was required to exercise discretion in approving setbacks less than the standard setbacks prescribed by the Codes. This point is not disputed. The Council has the power to exercise discretion when considering setbacks, and chose to do so in the determination of the development application. In doing so, based upon the advice of the assessing Planning Officer, the Council had due regard for all relevant ‘amenity’ considerations.

Mr Adam also comments on a quote that was used in the Officer’s report with respect to the reduction in boundary setbacks. It is acknowledged that this quote was probably used out of context, because it is contained in the explanatory Codes Manual under the heading of “Inner City Apartments”. However, it also needs to be noted that the term “Inner City Apartments” was not defined by the Codes, and there were no associated statutory provisions which relate to Inner City Housing. In effect, the comments on page 106 of the Manual supporting the Codes are an advisory note which held no statutory power. Officers are satisfied that the use of this quotation would not have influenced Council to approve lesser setbacks than otherwise would have been approved.

#### **Consultation**

The owners of the two dwellings at No. 11 Heppingstone Street and Mr Drake have each been informed that this matter is listed for consideration at the March Council meeting.

The City’s legal advisers, McLeods were consulted during the preparation of this report.

#### **Policy and Legislative Implications**

There are no “Policy” implications. The legislative implications have been discussed fully in preceding sections of this report.

**Financial Implications**

In verbal discussions with a Council Officer, Mr Drake has indicated that he may seek financial compensation regarding the negative impact that he contends the development has had on his property.

**Strategic Implications**

This matter relates to Goal 3 “Environmental Management” identified within the Council’s Strategic Plan. Goal 3 is expressed in the following terms:

*To effectively manage, enhance and maintain the City’s unique natural and built environment.*

|  |
|--|
| <b>OFFICER RECOMMENDATION ITEM 9.3.6</b> |
|--|

That Mr Drake of No. 2 Scenic Crescent, South Perth be advised that:

- (a) the contents of the report prepared by Planning Consultant, Mr Ken Adam, dated October 2003, have been noted and duly considered by Council;
- (b) with respect to the matter of plot ratio, the Council is satisfied that the building has been assessed correctly, and that the building complies with the maximum allowable plot ratio;
- (c) the Council is satisfied that the “as constructed” height of the building does not detract from the amenities of the locality;
- (d) the Council is satisfied that the reference to “Inner City Apartments” did not result in the granting of a setback concession that would not otherwise have been granted; and
- (e) the Council does not intend to further pursue the matters raised regarding the property at No. 11 Heppingstone Street, South Perth.



## Apartment Building at 11 Heppingstone Street, South Perth

### Draft Report on Compliance with Town Planning Scheme No.5, Including the Residential Planning Codes

Prepared by Ken Adam FRAIA LFPIA

October 2003

#### Purpose of Report

1. This report has been prepared at the request of Mr B Drake, of Drake's Apartments, which is located at 7 Scenic Crescent, South Perth. 2 SCENIC CR SOUTH PERTH
2. The purpose of the report is to examine the planning appeal granted to the development of two multiple dwellings on Lot 38 (No.11) Heppingstone Street South Perth, by the Commissioners of City of South Perth as the meeting of the Council held on 19 December 2000.
3. No. 7 Scenic Crescent lies to the rear of No.11 Heppingstone Street. OUT.
4. This report does not examine all aspects of the appeal but focuses particularly on the issues of compliance with then current town planning scheme requirements concerning plot ratio and building heights. The further issue of building setbacks is referred to only briefly, and may be expanded upon at a later date.

#### Relevant Experience

5. I have been involved with the Residential Planning Codes since their inception. I was the principal author of the draft Codes that originated in the 1974 report of the Australian Institute of Urban Studies (AIUS) titled "Review of the Residential Codes" and subsequently became the original Residential Planning codes (1985). Subsequently, I was a member of the committee responsible for their revision in 1991. I was co-author, with Douglas Drake, of the Manual published together with the revised Codes in December 1991. These are the applicable R-Codes in the present case.
6. Subsequently I was commissioned to prepare new draft Codes, published in October 2000, leading to the current R-Codes, gazetted in October 2002.
7. I have very recently completed a commission from the WA Planning Commission to prepare a critique of the R-Codes, with recommendations for amendment to them in the light of experience.
8. A copy of my curriculum vitae is at Attachment 1.

#### Documents Viewed

9. I have perused the following documents, among others, relevant to this report:
  - Site survey plan of Lot 38, incorporated in a set of 18 drawings prepared by colliere menkens pickwell architects dated January 2001 and stamped "Received 7 February 2002" (drawing 1/18);

- other drawings from the same set similarly dated and date stamped, as follows:
    - Level 1 (Ground Floor) plan (drawing 2/18)
    - Level 2 and Level 3 plan (drawing 3/18)
    - Level 4 and Roof Plan (drawing 4/18)
    - North and West Elevators (drawing 5/18)
    - East and South Elevators (drawing 6/18)
    - Sections A, B, C, D and E (drawing 7/18)
  - report on the then proposed development, prepared by officers of the City of South Perth for the meeting of the Council held 19 December 2000;
  - extract from the Council minutes of 19 December 2000 containing the resolution of the Council to approve the application, subject to Conditions;
  - preliminary report on the plans and officers' report by Gray and ??, Urban Designers and Project Managers;
  - Town Planning Scheme No.5 of the City of South Perth, as amended at December 2002;
  - various correspondence between the City of South Perth and Mr Drake.
10. Assessment and comments therefore, relate to the approval granted by the Council on 19 December 2000, on the one hand, and to the drawings date stamped 7 February 2002, on the other. These latter are construction contract drawings (each bears a stamp carrying the drawing number referred to and including the words "This is drawing .... of .... referred to in the Agreement dated ... Etc") and were presumably prepared for the purposes of construction and the obtaining of a building licence. A copy of the drawings is at Attachment 2.
11. I have made the working assumption that these drawings fairly represent both the building licence that must have preceded construction, and the building itself as constructed. Either or both of these assumptions would require to be tested, should my conclusion be that the building, as depicted in the drawings, does not comply with the Town Planning Scheme. (In fact I do so conclude).

### **Plot Ratio**

12. The subject site has a site area of 803.4 m<sup>2</sup>, including a corner truncation, which may be included in the site area for calculation of site density and plot ratio.
13. The subject site was subject to the requirements of Town Planning Scheme No.5 (TPS5) and the Residential Planning Codes (R-Codes) as they applied at the time. The land was designated R60 and as such was subject to a plot ratio maximum of 0.55, plus a possible 20% bonus, subject to meeting certain requirements, making an effective plot ratio limit of 0.66.
14. The definition of plot ratio that applied under TPS5 is that set out in the then R-Codes, which reads as follows:

*plot ratio means the ratio of the gross total of the areas of all floors to the area of land within the site boundaries and in calculating the gross total of the areas of all floors the areas shall be measured over any walls but shall not include lift*

*shafts, stairs or stair landings, machinery rooms, air conditioning, equipment rooms, non-habitable floor space in basements, areas used exclusively for the parking of wheeled vehicles at or below ground level, lobbies or amenities common to more than one dwelling, or private open balconies;*

15. The method of measuring plot ratio floor area is set out in the definition. It is largely self-explanatory. However, because my assessment of the plot ratio of the building differs very significantly from that of the council officers, some preliminary comments and explanation are necessary.

16. In the first place it is important to understand that the purpose of plot ratio as a development control was (and is) to put a limit on building bulk. This was made explicit in the 1974 AIUS report which introduced dwelling unit density to replace plot ratio as the primary means of controlling density. The AIUS report states, at P75:

*Because of legitimate concern over the possibility of overwhelming building bulk, plot ratio is adopted as a means of secondary control ...*

17. Secondly it must be noted that the definition refers to "open balconies" as being excluded from calculation of plot ratio area. No definition of "open balcony" or "balcony" is provided in the R-Codes, but "balcony" is defined in TPS5 as follows:-

*"Balcony" means a platform outside and protruding from the main structure of a building with access from an upper floor.*

18. No separate definition of "open balcony" is provided in TPS5, leaving open to interpretation the distinction between an "open" balcony and any other kind. It is generally accepted that the characteristic of openness relates to the vertical enclosure of the space. It is common for balconies to be either roofed or to have another balcony directly above, for example. It is also generally accepted that the partial enclosure provided by a (necessary) balustrade, solid or transparent, cannot negate the quality of openness. Increasingly, too, it is a condition of approval that a balcony be screened (usually to a level of 1.65m or thereabouts) and this, too, must, in my opinion, be accepted as not, at least in most instances, negating the quality of openness, providing that the screening is the minimum required, and is different in nature to a solid wall.

19. However, where a balcony is enclosed, beyond the limits of a balustrade or minimal privacy screening, on more than about half its perimeter it cannot, in my professional opinion, be reasonably regarded as an "open" balcony.

20. Relating these criteria to the building in question I make the following observations:

(1) Terrace 16 at Levels 2 and 3 must be included in plot ratio calculations because it does not protrude from the main structure, and it is enclosed by walls on three sides.

(2) Terrace 12 at Level 2 must be included in the plot ratio calculations because

- its perimeter is almost completely solid wall, with only window-type openings to the outside, which appear little different than if they were glazed;

- consequently, it does not meet the criterion of “protruding from the main structure” either visually or physically; and
  - it contributes substantially to the perceived bulk of the building, as its external surface reads as a wall punctuated by openings.
- (3) The northern part of Terrace 13 at Level 2 ought, in my opinion, to be included in plot ratio area calculations, for the same reasons.
  - (4) Terrace 27 at levels 2 and 3 must be included, for the same reasons.
  - (5) The northern part of Terrace 13 at Level 3 ought, in my opinion, to be included in plot ratio area calculations, for the same reasons again, although I acknowledge that the degree of wall enclosure is less in this case than in the others.
  - (6) The Outdoor Kitchen 06 must also be included in plot ratio floor area because it is enclosed on three sides.
21. I note that the building comprises a single apartment at each of Levels 2 and 3, and consequently the Lobby 01, Powder 04 and Coats 28 areas must be included in plot ratio area calculations, as they are not “common to more than dwelling”.
  22. Accordingly my plot ratio calculations include all areas shown on the drawings at Levels 2, 3 and 4 with the exception of the following:-
    - Terrace 21 (Levels 2, 3)
    - Loft 03 (Levels 2, 3, 4)
    - Roof terrace 07 (Level 4)
    - Garbage chute, stair, stair laundry and void (Level 4)
    - Balcony section between Terrace 12 and Terrace 13 (Levels 2, 3)
    - Fire Stair 07 (Levels 2, 3)
  23. The whole of Level 1 is excluded from plot ratio floor area.
  24. I have made a working assumption that the Equipment Store on Level 4 is an “equipment room” and hence excluded from plot ratio calculations. This would not be the case if it were used as storage area for the dwelling. I note that it is accessible only from that dwelling.
  25. I have not attempted to assess or include the “Store area under roof” accessed from Roof Terrace 07.
  26. I have measured plot ratio areas on the above basis by scaling from the drawings provided to me.
  27. Based on these measurements it is my professional assessment that the actual plot ratio of the building as depicted in those drawings is 0.86.
  28. If the Equipment Store 05 were determined to be exclusive to the adjoining unit and not used exclusively for mechanical equipment serving the building as a whole the plot ratio would be 0.89.

29. If the Equipment Store 05 and all external spaces except Terraces 16 and 27 were excluded from the calculations, the plot ratio would be 0.76.
30. I conclude that the plot ratio of the building exceeds the maximum allowed by TPS5 and the then R-Codes by more than 30%. As far as I am aware, the Council had no discretion to grant approval to an application that exceeded the allowable plot ratio. The validity of the approval must therefore be questioned.
31. Even if the Council had had power to approve an increase in plot ratio it is my opinion that such a variation would not have been a reasonable one to permit, because of the manifestly excessive bulk of the building in relation to others in the locality and the degree of variation required. In my opinion the Council's decision was contrary to orderly and proper planning and the amenities of the locality.
32. Further, I note that the Council's approval was subject to a standard condition requiring the building to "be modified to comply with the maximum plot ratio prescribed by Table 1 of the Residential Planning Codes for the type of development concerned". Table 1 prescribes a maximum plot ratio at Column 4 for a Multiple dwelling under the R60 code of 0.55. Table 1 makes no reference to the bonus plot ratio provisions of Clause 4.7.6 of the R-Codes. The wording of the condition would seem to preclude the building being developed with a plot ratio greater than 0.55. No doubt this was an oversight on the part of the Council, but as such it does not inspire confidence in the thoroughness with which the application was assessed.

### **Building Height**

33. Under Clause 61(3)(c) of TPS5 the maximum building height permitted on the site was 10.5 metres.
34. Building height was required to be measured as set out in the definition at Clause 11. In essence, this requires measuring the vertical distance "from the highest point of natural ground level under the building to the highest point of the external wall which extends to the highest altitude". The "highest point" is qualified in various ways to take account of gable walls, dormer windows and the like.
35. Based on the survey drawing forming part of the application the highest point of natural ground level under the building appears to be RL 3.92m. The maximum permissible building level would therefore have been RL 14.42m.
36. From the drawings provided to me I note that the external wall of the lift shaft on the eastern side of the building has its highest point at RL 17.78m, some 3.36m above the limit. There is no exemption provided for the lift shaft and the subject wall would not, in my opinion, fall within the ambit of any of the four qualifying factors set out in the definition.
37. The adjoining Powder 04 has its external wall at RL 15.76, which exceeds the limit by 1.35m. Again, it is my opinion that none of the qualifying conditions applies to this wall.
38. The Equipment Store 05 east wall varies from above RL 14.95 to RL 15.9 i.e. 0.53m to 1.48m above the limit. The same comment as in paragraphs 36 and 37 applies.

39. On the western elevation of the building the external walls of the Study and the balustrade to the Roof Terrace 07 are at RL 14.7, 0.3m above the limit. Again, in my opinion there is no basis for qualifying the height.
40. The external face of Roof Terrace 07 is an implied vertical surface that extends above balustrade height. The R-Codes did not make provision for building heights and hence do not stipulate or define wall heights for the purposes of calculating building height. However, Clause 1.5.3 states "for the purpose of calculating setbacks an unroofed balcony or the like shall be deemed to have a wall height of 2.4m". In my opinion in the absence of any other guidance in TPS5 the calculation of building height for other purposes ought to have taken this clause into account. On this basis the effective height of the Roof Terrace external wall would be RL 15.99, that is, 1.57m above the height limit. It is my opinion that at least the proper application of planning principles would have required the assessment of that part of the building as being at RL 15.99 and hence not permissible.
41. It is clear that the building's height exceeds the limits provided by TPS5.
42. I note that by Clause 87(2) of TPS5 the Council had no discretion to vary any of the height limits prescribed by the Scheme. Accordingly, the validity of the Council's approval must be questioned. This is, of course, a matter for legal submissions.
43. However, from a planning perspective it is my opinion that the Council's decision to approve the excessive height of the building was significantly contrary to orderly and proper planning and the amenities of the locality.

#### **Building Setbacks**

44. I have not, as this point, carried out an assessment of the building setbacks. I do note, however, that the Council was required to exercise discretion in approving setbacks less than those prescribed by the R-Codes.
45. I note also that in doing so the officer's report, in support of a recommended relaxation to allow boundary walls quotes page 106 of the Residential Planning Codes Manual as stating that "where a plot ratio bonus has been granted . . . the normal requirements relating to car parking, boundary setbacks and open space may be reduced in some cases to nil." I am obliged to point out that the report is totally incorrect: the manual reference is to "Inner City Apartments" and bears no reference at all to the issue of plot ratio bonuses. The inaccuracy amounts to a serious misleading of the Council, that may well have led them to accept a significant relaxation of the R-Codes provisions based false information.

#### **Conclusion**

46. I conclude that the building, as depicted in the drawings provided to me, does not comply with the non-discretionary provisions of the then Town Planning Scheme No 5 and the Residential Planning Codes relating to both plot ratio and building height.

Ken Adam LFPIA FRAIA

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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**STREAM** : DEVELOPMENT & RESOURCES

**ACT** : TOWN PLANNING AND DEVELOPMENT ACT  
1928 (WA)

**CITATION** : DRAKE and CITY OF SOUTH PERTH & ANOR  
[2005] WASAT 271

**MEMBER** : MR D R PARRY (SENIOR MEMBER)

**HEARD** : 6 AND 9 SEPTEMBER 2005

**DELIVERED** : 14 OCTOBER 2005

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**FILE NO/S** : DR 327 of 2004

**BETWEEN** : BARRIE M DRAKE  
Applicant

AND

CITY OF SOUTH PERTH  
First Respondent

BENITTA PANIZZA  
Second Respondent

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*Catchwords:*

Ministerial referral of representations to Tribunal for report and recommendations under *Town Planning and Development Act 1928 (WA)* s 18(2a) - Condition of planning approval required that building be modified to comply with maximum plot ratio - Whether City failed to enforce effectively the observance of town planning scheme - Whether the building as erected complied with maximum plot ratio - Extent of breach of condition - Whether Tribunal should recommend that Minister order City to direct partial demolition of

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building - Factors for consideration in exercise of responsible authority's discretion to give direction to owner of land under *Town Planning and Development Act 1928* s 10 - Exclusion of floor areas of building not reasonably open, but in accordance with City's practice - Recommendation by Tribunal that Minister order City to direct partial demolition to ensure that terrace is open balcony, and alterations to ensure that physical characteristics of spaces within building are consistent with designations in approved plans - Words and phrases: "equipment rooms", "lobbies ... common to more than one dwelling", "private open balconies"

*Legislation:*

*Interpretation Act 1984* (WA), s 56(1)

*State Administrative Tribunal Act 2004* (WA), s 167(4)(a)

*Town Planning and Development Act 1928* (WA), s 10, s 10AA, s 10AB, s 18(2), s 18(2a), s 18(2b), s 18(2c)

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*Result:*

The Tribunal reports to the Minister:

- (a) The City has failed to enforce effectively the observance of a town planning scheme in relation to non-compliance with a condition of planning approval which requires that the building be modified to comply with a 0.66 maximum plot ratio.
- (b) Other than in relation to the well-founded allegation that the building exceeds a plot ratio of 0.66, the representations made by the applicant to the Minister fell outside the scope or ambit of s 18(2) of the *Town Planning and Development Act 1928* (WA).

The Tribunal recommends that the Minister order the City to direct the owner of the land on which the building is erected to demolish a masonry section and to carry out other alterations to the building.

*Category:* B

**Representation:**

*Counsel:*

|                   |   |                       |
|-------------------|---|-----------------------|
| Applicant         | : | Mr MJ Hardy           |
| First Respondent  | : | Mr CA Slarke          |
| Second Respondent | : | Mr J Colliere (Agent) |



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*Solicitors:*

Applicant : Hardy Bowen  
First Respondent : McLeods  
Second Respondent : Self-represented

**Case(s) referred to in decision(s):**

Drake and City of South Perth & Anor [2005] WASAT 128  
Lakes Action Group Association Incorporated and Shire of Northam [2005]  
WASAT 8  
Re Griffiths; Ex parte Homestyle Pty Ltd (2005) 139 LGERA 178  
Warringah Shire Council v Sedevcic (1987) 10 NSWLR 335  
Winn v Director-General of National Parks and Wildlife (2001) 130 LGERA  
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**Case(s) also cited:**

Nil

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**REPORT AND RECOMMENDATIONS OF THE TRIBUNAL:*****Summary of Tribunal's report and recommendations***

1 The Minister for Planning and Infrastructure, the Hon Alannah MacTiernan, referred representations by Mr BM Drake for the Tribunal's report and recommendations under s 18(2a) of the *Town Planning and Development Act 1928* (WA). The representations relevantly alleged that a building which had been erected at No 11 Heppingstone Street, South Perth had a plot ratio in excess of 0.66. In granting planning approval for the erection of the building, the City of South Perth had imposed a condition which required that the building be modified to comply with a plot ratio of 0.66.

2 The Tribunal found that the building was in breach of the condition and had a plot ratio of 0.78. The exceedence of the permitted plot ratio was principally due to three parts of the building. These were:

- (i) a terrace which was not a "private open balcony";
- (ii) two "lobby" areas which were not "common to more than one dwelling"; and
- (iii) a so-called "equipment store", which was not reasonably required for the placement or keeping of implements for the maintenance or day-to-day operation of the building and which was reasonably capable of use for other purposes.

3 The Tribunal found that the City failed to enforce, effectively or at all, the observance of the town planning scheme for which it was the responsible authority.

4 The Tribunal recommended that the Minister order the City to direct the owner to demolish part of a masonry section which enclosed the terrace, and to make other physical alterations to the "lobby" areas and to the "equipment store", within six months.

***Introduction***

5 These proceedings involve a referral, for the Tribunal's report and recommendations, of representations made by Mr BM Drake to the Minister for Planning and Infrastructure, the Hon Alannah MacTiernan. By letters dated 3 May 2004 and 13 September 2004, Mr Drake made representations to the Minister under s 18(2) of the *Town Planning and*

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*Development Act 1928 (WA)* (Act) in relation to a three to four level apartment building (building) at No 11 Heppingstone Street, South Perth (site). By letter dated 22 December 2004, the Minister referred Mr Drake's representations to the Town Planning Appeal Tribunal under s 18(2a) of the Act. In accordance with s 167(4)(a) of the *State Administrative Tribunal Act 2004 (WA)*, on 1 January 2005, these proceedings were transferred to, and are to take place before, this Tribunal.

6 Section 18 of the Act provides, in part, as follows:

- "(2) A person may make representations to the Minister if the person is aggrieved by the failure of a local government to -
- (a) enforce effectively the observance of a town planning scheme in force under this Act, or any of the provisions of the scheme; or
  - (b) execute any works, which under the scheme or this Act, the local government is required to execute.
- (2a) The Minister may determine not to take any action in response to the representations or, if the Minister considers it appropriate to do so, the Minister may refer the representations to the State Administrative Tribunal for its report and recommendations.
- (2b) For the purpose of making a report and recommendations on a referral under subsection (2a), Part V applies, with such modifications as may be necessary, as if the referral were an application for review.
- (2c) If, after holding an inquiry or receiving a report and recommendations from the State Administrative Tribunal, the Minister is satisfied that the local government has failed -
- (a) to enforce effectively the observance of a scheme or a provision of a scheme; or

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(b) to execute any works which the local government is required under a scheme or this Act to execute,

the Minister may order the local government to do all things necessary to enforce the observance of the scheme or provision or to execute the works."

7 Following the transfer of the proceedings to the Tribunal, the City of South Perth (City) made application that the matter be, in effect, summarily determined and dismissed, on the basis that Mr Drake's representations did not fall within the ambit or scope of s 18(2) of the Act: see *Drake and City of South Perth & Anor* [2005] WASAT 128. Mr Drake's representations were set out in full at [7] and [13] of the Tribunal's reasons for decision in relation to that application. They are, therefore, not repeated in this report.

8 The Tribunal accepted a part of the City's argument. It determined that Mr Drake's representations concerning the height of the building did not relate, whether expressly or implicitly, to a "failure of [the City] to enforce effectively the observance of a town planning scheme in force under [the] Act": at [41] - [42]. This aspect of the representations related only to an alleged failure by the City to properly apply *City of South Perth Town Planning Scheme No 5* (TPS 5) in its determination to grant planning approval to the erection of the building. In this respect, Mr Drake's representations, in effect, asked the Minister to look behind a planning approval in order to determine whether it had been lawfully granted: at [44]. As neither the Minister nor the Tribunal had power to undertake such a review (*Lakes Action Group Association Incorporated and Shire of Northam* [2005] WASAT 8), the Tribunal determined that part of Mr Drake's representations to the Minister were not competent representations under the terms of s 18(2) of the Act.

9 However, the Tribunal was satisfied that Mr Drake's representations did fall within the scope or ambit of the legislation, insofar as he asserted to the Minister that the building, as erected, was in breach of the maximum 0.66 plot ratio which was prescribed at the date of planning approval by the *Residential Planning Codes of Western Australia* (R-Codes). The City had granted planning approval to the erection of the building under TPS 5 and the *Metropolitan Region Scheme* subject to conditions including the following:

"The building shall be modified to comply with the 0.66 maximum plot ratio described by Table 1 of the

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Residential Planning Codes for the type of development concerned."

- 10 This condition was condition 7 in the planning consent dated 4 January 2001 which was tendered by the City at the initial hearing and was accordingly referred to as "condition 7" in the Tribunal's reasons for decision. At the final hearing, Mr CA Slarke, counsel for the City, indicated that, on 8 January 2001, the City had issued a replacement planning consent which deleted a condition and renumbered the condition in question as 6. The condition is, therefore, referred to as "condition 6" in this report.
- 11 The Tribunal determined that as the City had required by condition 6 that the development be modified to meet the specified plot ratio, the assertion in the representations that the building was erected in breach of that plot ratio implicitly related to a failure on the part of the City to ~~effectively enforce the observance of TPS 5 and/or City of South Perth Town Planning Scheme No 6 (TPS 6)~~ (TPS 6) (which revoked and replaced TPS 5 after the building was erected) in relation to that condition: at [36] - [40]. The Tribunal held that, on the proper construction of s 18(2) of the Act, it was of no consequence that Mr Drake did not appreciate that this was, in fact, the relevant failure by which he was aggrieved, nor that he mistakenly thought that the failure lay in the grant of an invalid approval.
- 12 The result of the Tribunal's earlier decision was that part of Mr Drake's representations proceeded to hearing for the purposes of a report and recommendations to the Minister. In order to facilitate the expeditious conduct of the proceedings, the Tribunal conducted a directions hearing at which it made the following orders:
- "1. By 8 July 2005, [Mrs Panizza] shall file and provide to each other party a set of professionally drawn and scaleable plans and elevations of the building as built at 11 Heppingstone Street, South Perth.
  2. By 8 July 2005, each party shall, if it intends to rely on expert evidence at the hearing, nominate a town planner and provide contact details to the Tribunal and each other party.
  3. By 5 August 2005, the town planners retained by the parties shall jointly review the as built plans and inspect the building in order to determine whether the building

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exceeds the plot ratio of 0.66 and what options are available to remedy any breach.

4. By 19 August 2005, the town planners retained by the parties shall file and provide to each party a joint statement of evidence identifying matters agreed, matters not agreed and the reasons for any disagreement in relation to:
- (1) whether the building is in breach of condition [6] of the development approval;
  - (2) what is the extent of any breach;
  - (3) what are the available options and estimated costs for remedy of any breach;

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  - (4) what are the impacts of any breach on the surrounding locality in general and [Mr Drake's] property in particular;
  - (5) what would be the internal and external effects of each of the available options in (3); and
  - (6) is the imposition of any or all of the options warranted."

13 At the directions hearing, the parties' representatives agreed that the six matters referred to in order 4 where the principal matters for consideration in the proceedings. The matter proceeded on the basis that the issue for report and recommendations is whether the City has failed to enforce effectively the observance of the provisions of a town planning scheme which require that conditions of planning approval be complied with and, if so, what action is necessary and appropriate on the part of the City to enforce the observance of the scheme.

14 In accordance with the Tribunal's orders, Mr John Colliere, the designing architect of the building, provided a set of 11 drawings of the building as built, each party nominated a town planner, and the town planners, Mr Colliere and Dr Michael Panizza, Mrs Panizza's husband, jointly inspected the building, including "all potentially contentious spaces", on 4 August 2005. The experts nominated by the parties were Mr KA Adam, a consultant town planner, architect and registered builder engaged by Mr Drake, Mr CO Buttle, a town planner employed by the

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City, and Mr PD Webb, a consultant town planner retained by Mrs Panizza. Following their inspection of the building, the experts prepared and filed a joint statement of evidence.

- 15 At the hearing, Mr Adam, Mr Buttle and Mr Webb gave evidence concurrently. Mr Colliere, who both represented and gave evidence on behalf of Mrs Panizza, responded to matters raised by the town planning witnesses and gave further oral evidence. The City also called Mr RH Bercov, who is the City's Manager, Development Services, to give evidence. Mr Bercov has been employed by the City as a planner since 1969, and, between 1984 and 2003, was Manager, City Planning with responsibility for the City's planning approval process.
- 16 In this report, the Tribunal will, at first, set out important aspects of the factual background to the representations and the proceedings, before considering whether the building is in breach of condition 6, the extent of breach, and whether the City has failed to enforce effectively the observance of its town planning scheme. Finally, the Tribunal will consider what recommendations it should make to the Minister.
- 17 For reasons set out below, the Tribunal finds that the City has failed to enforce, effectively or at all, the observance of the provisions of TPS 5 and/or TPS 6 which require that conditions of planning approval be complied with. In particular, whereas condition 6 requires that the building be modified to comply with a 0.66 maximum plot ratio, the Tribunal finds that the plot ratio of the building is 0.78, constituting a breach of the maximum plot ratio prescribed by condition 6 by 95.9 square metres or approximately 18 per cent.
- 18 Although the building is in significant breach of the maximum plot ratio imposed by condition 6, the Tribunal does not consider that, in the circumstances of this case, a proportionate part of the building should be demolished so that it is brought into compliance. This is because approximately 48 per cent of the breaching floor area of the building comprises so-called "equipment store" and "lobby" areas which were excluded by the City from the calculation of gross floor area for plot ratio purposes in accordance with an established (but mistaken) practice, the demolition proposed by Mr Drake would not result in a material reduction in apparent bulk and scale, and it would not be reasonable to require other parts of the building to be demolished. In addition, approximately 42 per cent of the breaching floor space is comprised of a terrace which does not constitute a "private open balcony", and is, therefore, not excluded from the calculation of gross floor area for plot ratio purposes,

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but which can be turned into a "private open balcony" by the demolition of a masonry section.

19 The Tribunal considers that this masonry section should be demolished so as to convert the terrace into a "private open balcony". The Tribunal also considers that alterations should be made to the building to ensure that the physical characteristics of the equipment store and lobby areas are consistent with the requirements of the City's (mistaken) practice and the designation of those areas on the approved plans. The Tribunal recommends that the Minister order the City to give Mrs Panizza a direction under s 10 of the Act to require her to cause this demolition and alterations to take place.

20 In accordance with r 63(4) of the *State Administrative Tribunal Rules 2004* (WA), after drafting a report to the Minister, but before making any recommendation to her, the Tribunal released the draft report to the parties and directed that they may comment in relation to it in writing within two weeks. Mr Drake and the City each filed written submissions in relation to the Tribunal's draft report and recommendations. Mrs Panizza did not do so.

### ***Factual background***

21 In their joint statement of evidence, the town planning experts agreed in relation to the following factual matters:

- "(1) The subject property is described on Certificate of Title Volume 1902, Folio 369 as being Portion of Swan Location 37 and being Lot 38 on Diagram 14711.
- (2) The property is situated on the south-eastern corner of Heppingstone and Lamb Streets which streets meet at right angles, to form the corner.
- (3) The property has a frontage to Heppingstone Street of 36.23m and to Lamb Street of 13.66m, with a truncation between the two of 8.53m. The property comprises a land area of 782m<sup>2</sup> (excluding any allowance for the truncation). With the truncation included the site has an area, for plot ratio calculation purposes, of 800m<sup>2</sup>.
- (4) An Application for two Multiple Dwellings was lodged on behalf of [Mrs Panizza] by CMP architects in September 2000. A subsequent submission including



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amended plans was lodged and was considered by the Commissioners of the [City] on 19 December 2000.

- (5) The Commissioners approved the application subject to a number of conditions at their meeting on 19 December 2000.
- (6) A Grant of Planning Consent form dated 8 January, 2001 was issued by the City (the Planning Consent) ...
- (7) A building licence was issued by the [City] on 26 February, 2002.
- (8) At the time of the application and its consideration by the [City], the land was subject to the (then) operative District Planning Scheme, [TPS 5].

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- ~~(9) Under TPS 5 the subject land was zoned 'Residential - R' with a designated density code of R60.~~
- (10) The development of the land was subject to the requirements and provisions of the (then) [R-Codes], subject to any variations incorporated in TPS 5.
- (11) The development of the land was subject to a plot ratio maximum, under Table 1 of the R-Codes, of 0.55.
- (12) The allowable plot ratio was further subject to a possible bonus of up to 20%, under Clause 4.7.6 of the R-Codes. This would bring the allowable plot ratio up to 0.66, provided certain conditions were met.
- (13) The [City's] administration formed the view that, in the circumstances of the application, the maximum 20% plot ratio bonus would be allowed as the proponent had provided, " ... communal facilities incorporating a terraced entertaining area and kitchen, gymnasium, sauna, internal landscaped garden, and indoor lap pool". (The Administration Report to the Commissioners also advised that, "*the applicant is required to justify the cost of the communal facilities in relation to the value of up to 20% plot ratio bonus*".) We do not dispute this conclusion, given the facilities provided.

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- (14) The relevant Processing Sheet for the Application ... states the following:
- (a) Lot area 782m<sup>2</sup> (800m<sup>2</sup> with truncation)
  - (b) Maximum allowable plot ratio 0.55 (0.66 with 20% bonus)
  - (c) Maximum allowable plot ratio area: 440m<sup>2</sup> (528m<sup>2</sup> with 20% bonus)
  - (d) Plot ratio area proposed 533.5m<sup>2</sup>
  - (e) Plot ratio proposed 0.6936.
- (15) The calculation of proposed plot ratio is incorrect: for a plot ratio area of 533.5m<sup>2</sup> the plot ratio would be 0.6669.
- 
- (16) The Administration's Report to the Joint Commissioners referred to:
- (a) a proposed plot ratio of 0.6936;
  - (b) the plot ratio exceeding the maximum by 1.3% or 5.5m<sup>2</sup> (in fact a 5.5m<sup>2</sup> excess is equivalent to 1.04%); and
  - (c) the observation that the 5.5m<sup>2</sup> excess was minimal and 'accounted for within measuring and drafting error'. ...
- (18) The reference in Condition 6 to a maximum plot ratio of 0.66 prescribed by Table 1 of the R-Codes is not correct, as Table 1 prescribes a maximum plot ratio of 0.55. We have assumed that this is an unintentional error and a plot ratio of 0.66 was intended. ...
- (20) A plot ratio of 0.66 applied to the subject site would allow a plot ratio area of 528m<sup>2</sup>.
- (21) The definition of 'plot ratio' in the 1991 R-Codes provides the relevant basis for calculation of plot ratio floor area. It states as follows:
- Plot ratio means the ratio of the gross total of the areas of all floors to the area of land within the site boundaries*

*and in calculating the gross total of the areas of all floors, the areas shall be measured over any walls but shall not include lift shafts, stairs or stair landings, machinery rooms, air conditioning, equipment rooms, non-habitable floor space in basements, areas used exclusively for the parking of wheeled vehicles at or below ground level, lobbies or amenities common to more than one dwelling, or private open balconies."*

- 22 The site is adjacent to a foreshore reserve and has uninterrupted views of the Swan River, East Perth and the City of Perth. The building, as approved by the City, and as built, comprises three to four levels. Level 1 includes an enclosed car park accessed from Heppingstone Street which comprises five car parking bays and two "store" areas. This level also contains a number of facilities which are common to the two residential units above, including entry and lobby, art garden, lounge/gym with kitchen, and swimming pool overlooking the foreshore reserve and river.
- 23 Level 2 of the building, as approved and built, comprises a self-contained, three-bedroom unit which occupies the whole floor, and terraces. There is also a "lobby" area on this level which necessarily serves the only unit. The approved plans showed the floor area of the unit as separated from the "lobby" by glass walls and double glass doors.
- 24 Levels 3 and 4 of the building, as approved and built, comprise a self-contained, four-bedroom unit and terraces. Most of the internal floor space of this unit is on level 3. The floor space on level 4 includes a lobby, study, toilet, "equipment store", "outdoor kitchen" and large roof terrace. On level 3, there is also a matching "lobby" to that shown on the approved plans for level 2. The level 3 "lobby" is also shown on the approved plans as separated from the floor area of the upper unit by glass walls and double glass doors. In addition, the building, as approved and built, includes a lift which serves each of the levels. The lift opens into the "lobby" areas on levels 2, 3 and 4.
- 25 The Administration's Report to the Joint Commissioners referred to at par (16) of the agreed facts was expressed as being a report of Mr Bercov as Manager, City Planning. However, in his evidence, Mr Bercov said that the report was prepared by Mr Greg Bowering, then a planning officer of the City. It was the City's practice at the time for planning reports to be presented in the name of the Manager, City Planning, without identifying the planning officer who prepared the

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document. Mr Bercov did not have any personal involvement in the preparation of the report or the assessment of the development. His role in connection with the report was limited to checking the report in a general way to ensure that it was in an appropriate form and dealt with the "planning" issues in a manner consistent with the City's usual approach.

26 Mr Bercov did not separately check the calculations regarding plot ratio which formed part of the report. However, he gave evidence that he could "say with confidence that the calculation of plot ratio floor area would have been carried out by Mr Bowering using a hand-held device known as a planimeter". A planimeter calculates the area of a space by the operator placing it and "clicking" at various external "corner" points of the space shown on a plan. Although use of a planimeter avoids the need to scale and undertake manual calculations, "there is necessarily a margin for error in planimeter calculations attributable to the operator not clicking precisely on the external points of a space, and by reason of the printing of the lines on the plan themselves".

27 Mr Bowering's report included the following under the heading "plot ratio":

"The minimal (5.5sq. metre) excess plot ratio is considered to be accounted for within measuring and drafting error. Although the proposed development slightly exceeds the maximum allowable plot ratio, only minor amendments are necessary to bring the floor space down to the maximum permitted. This will be addressed by way of a condition of Planning Consent."

28 Mr Bercov gave evidence that the condition referred to by Mr Bowering in his report was a standard condition imposed on development at the time, and became condition 6.

29 Mr Bercov also said that "as Greg Bowering was the officer assigned to assess the development application, he retained the responsibility for the proposal as it progressed, including undertaking a cross check between the sketch plans lodged for the purposes of the development application, and the detailed working drawings lodged at the building licence stage". Building licence plans were lodged for approval on 24 December 2001. On 10 January 2002, Mr Bowering sent a facsimile to the designing architects in which he stated that the submitted documents were inconsistent with the planning consent and could not be signed off for four reasons, including the following:

"No plot ratio calculation figures diagrams and [sic] have been provided with the working drawings as required by Condition No. 6 of the Planning Consent. The plot ratio of the plans granted planning consent was 0.693 which exceeded the maximum plot ratio of 0.66. The plot ratio calculations were based [on] a lot area of 800 sq. metres which included the street corner truncation in the total lot area. You are required to demonstrate that the working drawings comply with the maximum permitted plot ratio by way of calculations and plans showing areas included and excluded from the calculations."

30 On 27 January 2002, the designing architects submitted plot ratio calculations which, on the stated assumption of a site area of 803.4 square metres (including truncation), asserted that the proposed gross floor area of the building for plot ratio purposes was 529.1 square metres, which was 1.14 square metres less than the maximum permitted floor area of 530.24 square metres.

31 It appears that Mr Bowering undertook a fresh calculation of gross floor area for plot ratio purposes in relation to the building licence plans, and arrived at a floor area of 529.76 square metres, which was 1.76 square metres in excess of 528 square metres determined by a calculation of  $0.66 \times 800$  square metres. Mr Bowering considered this exceedence to be minor and acceptable. It appears that, as Mr Slarke submitted, Mr Bowering "literally ticked off" condition 6 on the copy of the development consent on the building licence file. As noted earlier, on 26 February 2002, the City granted a conditional building licence for the erection of the building.

32 The building was erected some time between March 2002 and October 2003. In that month, Mr Adam prepared a report for Mr Drake in relation to the compliance of the building with TPS 5 and the R-Codes. At par [26] of the report, Mr Adam said that, in his professional assessment, "the actual plot ratio of the building as depicted in [the] drawings is 0.86". Mr Drake submitted Mr Adam's report to the Minister together with his representations of 3 May 2004.

***Is the building in breach of condition 6?***

33 The town planning witnesses agreed that the answer to this question is "yes". Having each undertaken independent checks, they were satisfied that computer generated figures presented by Mr Colliere accurately showed that, leaving aside the so-called "contentious areas" which were

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the subject of debate in the proceedings, the building exceeded the maximum plot ratio permitted by condition 6 by 3.5 square metres.

- 34 However, because they disagreed about whether some of the "contentious areas" should be included in the calculation of plot ratio, the town planning witnesses disagreed as to the extent of breach. The Tribunal now turns to an examination of each of the "contentious areas".

*What is the extent of breach of condition 6?*

- 35 The expert witnesses agreed that a 4.9 square metre mezzanine space used as a library should be included in the calculation of floor area for plot ratio purposes. The mezzanine was not shown on the approved planning application plans, but appeared for the first time on the building licence plans.

- 36 Mr Adam considered that a number of other areas of the building should also be included in floor area for plot ratio purposes. These areas fall into three categories.

**"Lobby" areas on levels 2 and 3**

- 37 First, as noted earlier, there is a designated "lobby" area on each of levels 2 and 3 of the building. Each "lobby" has an area of 12.4 square metres and is surrounded by the lift entry, a coatroom, a toilet, fire stair entry leading to level 1, a fire hydrant and the floor space of the relevant residential unit. As also noted earlier, the approved plans showed glass walls and double doors as separating the "lobby" from the internal floor area of each residential unit. Mr Colliere gave evidence that, although the glass walls and doors were erected in accordance with the approved plans, to his surprise, Mrs Panizza subsequently had them removed on each of the two levels. Mr Bercov gave evidence that the City undertook an inspection of the building, although he was unclear as to whether this occurred before or after completion of the works. He was not aware of what the inspection revealed.

- 38 It is clear from the photographs in evidence that there is no partition of any sort separating the "lobby" on either level 2 or 3 from the residential unit it serves. The photographs clearly show that the "lobby" simply forms part of the floor area of each of the units. It is also to be noted that Mr Colliere included the floor space of the coatroom and the toilet adjoining the "lobby" on each of levels 2 and 3 in his calculation of gross floor area for plot ratio purposes, although one cannot get to these spaces from the residential units without crossing the "lobby".

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- 39 Mr Adam considered that the "lobby" areas on each of levels 2 and 3 were not excluded from the floor area of the building for plot ratio purposes by the words "lobbies ... common to more than one dwelling" in the definition referred to at [21 (21)] above, because "they are exclusive to the single apartments that each serves". In Mr Adam's opinion, the glass walls and doors which were shown on the approved plans, and which were apparently erected and then removed, would not alter this characterisation.
- 40 Mr Buttle and Mr Webb each agreed that, as presently constructed, the two "lobby" areas should be included in floor area for plot ratio purposes. However, Mr Buttle and Mr Webb considered that, as approved with glass partition, the "lobby" areas were properly excluded by the City from its calculation of gross floor area. Mr Buttle conceded that he could understand "that whether or not [the lobbies] should have been included in the City's plot ratio calculation is contentious", although he sought to justify their exclusion for three reasons. First, the "lobby" was designed and shown on the plans as a space that operated independently from the remainder of each of the dwellings. Second, the "lobby" is accessed by the lift and fire stair, to which each of the dwellings has access. Third, a four-unit building could have been erected on the site. In oral evidence, Mr Buttle stated that there are other examples where the City has accepted similar arrangements of glazed wall and door separation as excluding "lobby" areas from the calculation of gross floor area for plot ratio purposes. This evidence was not questioned or contradicted.
- 41 The Tribunal finds that, both as approved and as presently built, the "lobby" areas on levels 2 and 3 of the building do not constitute "lobbies ... common to more than one dwelling", and that the City's characterisation of that area in that it way was not reasonably open. Because of the physical configuration of the building, each of the lobbies on levels 2 and 3 serves only one unit, namely the unit which is also located on the corresponding level, whether or not the "lobby" is separated from the designated floor space of that unit. Neither "lobby" is "common to more than one dwelling". As Mr Adam suggested, there would be no practical purpose served in the occupants of the unit on levels 3 and 4 using the "lobby" on level 2 other than to visit the occupants of the unit on level 2 (and vice versa). The use of a lobby on a level otherwise comprising a single residential unit by the occupant of a unit on another level to visit the occupant of the first unit does not make the lobby "common to more than one dwelling".

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42 Mr Buttle's three reasons in support of the City's approach are not satisfactory. First, the physical separation of the "lobby" from the unit in the approved plans does not suggest that the two spaces operate "independently". Rather, the plans indicate that the lobby is integral to the use of the unit in providing the only access to it. Second, although the fire stair is accessed from each "lobby", as Mr Adam said, "fire stairs can be entered from the dwellings they serve, but may only be exited at the base". The plans, which show the direction of door swings, and hence of travel, demonstrate this clearly. Moreover, even if the lift is keyed or configured to permit access by the occupants of each unit to the alternative "lobby", as Mr Colliere indicated is presently the case, the only purpose for which access to the alternative "lobby" is likely to occur is to visit the occupants of the other unit. As noted earlier, this would not make the "lobby" area "common to more than one dwelling". Finally, the fact that the building could have accommodated four units, with two common lobbies serving two units each, is irrelevant. The fact is that the building has two units and that each of the lobbies on levels 2 and 3 serves only one unit.

43 In consequence, the Tribunal finds that the lobbies on each of levels 2 and 3 of the building are not excluded from gross floor area for the purposes of plot ratio under condition 6. While the City apparently had a practice of excluding such areas where they were physically separated from the floor area of the unit by glass walls and doors, it is not reasonably open to characterise a lobby on a single-unit level as "common to more than one dwelling" on the basis of such separation.

44 In its written submissions commenting on the draft report, the City stated that it "does not dispute the Tribunal's reasoning" in relation to whether the lobbies referred to at [43] and the "equipment store" referred to at [60] - [62] below are excluded for plot ratio purposes. However, it noted that "when the City excluded those areas from the plot ratio calculation, it did not have the benefit of any guiding rules such as those formulated by the Tribunal in this case". The City submitted that "in the circumstances the Tribunal's determinations ought not to be expressed in terms that the City's view was not 'reasonably open'".

45 The "guiding rules", which are assumed to be a reference to the reasoning and factors set out at [41] and [54] - [56], are simply drawn from the definition of "plot ratio" in the R-Codes. They reflect the proper construction of parts of that term. The City's practice was not reasonably open under the terms of the definition.



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**"Store" and "equipment store" areas**

46 The second category of floor area which Mr Adam considered should be included in plot ratio is storage areas. As noted earlier in this report, there are two "store" areas in the garage and an "equipment store" area on level 4.

47 The "equipment store" area on level 4 comprises two parts. The door to this space opens into an upper area of approximately 4.25 square metres including four steps down to a lower area. The principal part of the "equipment store" space has an area of approximately 16 square metres, and dimensions of approximately 4.0 metres by 4.0 metres. The area is comprised, in part, within the roof form, and has floor-to-ceiling heights ranging from 1.8 metres to 2.45 metres. There is a north-facing window which, according to the photographs in evidence, provides good natural light to this area. The photographs show that this area is tiled, has ceiling and wall lights, and presently contains a bookshelf with books, a number of desks, one with a computer and printer, and a large amount of other equipment. Mr Colliere indicated that Dr Panizza is a specialist medical practitioner undertaking research in relation to sleep apnoea, and the items of equipment in the "equipment store" are used in his practice or research.

48 Mr Adam considered that the "equipment store" "is clearly an active space, not a store of any kind".

49 Mr Buttle gave the following evidence in relation to this room:

"In accordance with the definition of plot ratio contained in the R-Codes, the Equipment Room was excluded from plot ratio calculations. The plans identify the space as an "Equipment Room", I think that the decision was correct.

The R-Codes do not provide an explanation of the type of equipment to be found within an equipment room. I do acknowledge, however, that the authors of the Codes may have expected such spaces to be occupied by equipment of a kind that would be necessarily in association with the day-to-day operation of the building, rather than storage of personal equipment. It is not clear to me though what one might expect to find in an "equipment room", or the practical reason for its exclusion from plot ratio.

An inspection of the Equipment Room demonstrated that the room is used for the storage of personal equipment rather than

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the housing of equipment associated with the use or operation of the building. It is therefore arguable that it now should technically be included in plot ratio. However to me, that would not be rational given that the use to which the room is put has no bearing on building bulk."

50 Mr Webb considered that the "equipment store" should be excluded from gross floor area for plot ratio purposes, although he frankly conceded that "this may be contentious". He gave the following evidence:

"It occurs that the nature of the 'equipment' required to be accommodated in the equipment room, is not defined. There may be some view about what this is **intended** to mean but in the absence of any definitive description, the 'equipment' used by the owner (a specialist medical practitioner who is involved in extensive medical research projects) is bona fide 'equipment'."

51 Mr Bercov gave evidence that, throughout his many years of experience as a planner employed by the City, "storerooms have always been excluded, being taken as equipment rooms".

52 The two "store" rooms on level 1 have a total area of 21 square metres. Mr Adam considered that these areas were not excluded from the calculation of gross floor area by the words "equipment rooms", because their physical location within the building is such that they could not be reasonably used for equipment associated with the management of the building, but rather are likely to be used for personal storage. He suggested that the fact that there are two separate stores supports this inference. He considered that these spaces could only reasonably be used for storage purposes.

53 Mr Buttle said that he was "comfortable that the store rooms were and would be excluded in the calculation of plot ratio", on the basis that they would be used for storage of equipment, whether or not it is private or building equipment. Mr Webb also considered that the "store" rooms on level 1 were "equipment rooms" and, therefore, excluded from the calculation of gross floor area for plot ratio purposes.

54 The meaning of the term "equipment room" was not defined in the R-Codes. It remains an undefined, express exclusion in the definition of "plot ratio" in the *Residential Design Codes of Western Australia* (Design Codes). The relevant, ordinary meaning of the noun "equipment" is "a collection of necessary implements (such as tools)" (*The Macquarie*

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*Dictionary* (Revised Third Edition) page 636). An "equipment room" is, therefore, a room for the placement or keeping of necessary implements. In the context of a definition of plot ratio of a building, necessary implements are those which are required for the maintenance and continued functioning of the building. Mr Buttle is correct in his view that the words "equipment room" relevantly contemplate "equipment of a kind that would be necessarily in association with the day-to-day operation of the building, rather than storage of personal equipment". The answer to his query as to what one might expect to find in an "equipment room" is a ladder, maintenance tools, gardening equipment, pool or pond maintenance equipment, light globes, spare paint and the like.

55 In order for a local government, or the Tribunal in planning review matters, to be satisfied that floor area of a proposed building should be excluded for plot ratio purposes on the basis that it is an "equipment room", it must necessarily consider two questions, namely:

1. Is the floor area in question reasonably required for the placement or keeping of implements for the maintenance or day-to-day operation of the building?
2. Is the floor area in question reasonably capable of use for any purpose other than the placement or keeping of implements for the maintenance or day-to-day operation of the building?

56 It is only if the answer to the first question is "yes" and the answer to the second question is "no" that the floor area in question can be reasonably characterised as an "equipment room" and, therefore, excluded for plot ratio purposes.

57 Mr MJ Hardy, counsel for Mr Drake, submitted that each of the exclusions in the definition of "plot ratio" necessarily fell within one of two categories, namely "common"-floor area or "private" floor area. He submitted that the only exclusion in the latter category is "private open balconies", while each of the other exclusions fell within the former. Mr Slarke submitted that such a neat division is not apparent from the definition.

58 The Tribunal does not accept Mr Hardy's submission. A number of the exclusions which Mr Hardy suggested were to be characterised as "common" areas could just as well be "private" areas depending on the circumstances of a particular building. For example, "stairs or stair landings" could be either "common" or "private" floor area. The building

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in question in these proceedings provides examples of both. "Areas used exclusively for the parking of wheeled vehicles" could be in the form of a "common" parking area or "private", secure garages. Similarly, "equipment rooms" could be either "common" or "private", particularly in a building such as that in issue in these proceedings, which has large areas of "common" and "private" internal and external living areas. However, even small residential units would reasonably require a small "equipment room" for a ladder, tools, light globes, paint and the like.

59 The Tribunal finds that it is reasonably open to characterise the "stores" on level 1 as "equipment rooms" in this case. These areas are reasonably required for the placement or keeping of implements for the maintenance or day-to-day operation of the building. In this regard, while, as Mr Adam said, the "stores" are not particularly proximate to the pool, there is no other designated space for pool equipment. It is common ground that these areas cannot reasonably be used for any purpose other than storage.

60 However, it is not reasonably open to characterise the "equipment store" on level 4, or at least its lower, principal part, as an "equipment room", for each of two reasons. First, it is not reasonably required for the placement or keeping of implements for the maintenance or day-to-day operation of the building. The upper unit has the benefit of an equipment room or rooms on level 1. Moreover, although some space might be reasonably required within the upper unit for maintenance-type implements, a space of the size in question is plainly not reasonably required.

61 Second, as Mr Adam said, the physical characteristics of the "equipment store", in particular its size, floor-to-ceiling height and access to natural light, are such that it is clearly capable of use for purposes other than the placement or keeping of implements for the maintenance or day-to-day operation of the building. Obvious uses of this space are as a rumpus room or home office.

62 It does not relevantly matter that, as Mr Slarke pointed out, the ceiling height of this room is less than the generally required 2.4 metres for a habitable room under the acceptable construction provision in cl 3.8.2.2 of the *Building Code of Australia*. The space is probably an "attic room", in which case the minimum ceiling height is "a height which does not unduly interfere with the proper functioning of the room or space". In any case, whether the space is technically a "habitable room" or not, it is obviously reasonably capable of use for habitable purposes.

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### Terraces

- 63 The final category of "contentious" floor space comprises eight, and possibly nine terraces, on levels 2 and 3 of the building. Under the definition of "plot ratio", these areas are to be excluded only if they constitute "private open balconies".
- 64 Terraces 9, 16 and 27, on each of levels 2 and 3 of the building, have areas of 1.5 square metres, 12.2 square metres and 7.7 square metres, respectively. Each of these terraces is enclosed by walls of the building on two-and-a-half or three sides. Each is covered by the floor of the terrace above or a roof structure. Terraces 9 and 27 on each level and terrace 16 on level 2 have solid masonry balustrades approximately 1.1 metres in height. In addition, terraces 9 and 27 on each level have obscure glazed privacy screens fitted above the masonry balustrade to a height of approximately 1.65 metres. Above the masonry balustrades and privacy screens, each of these terraces is open to the elements along the whole of its external side.
- 65 In his written evidence, Mr Adam referred to the definition of "balcony" in TPS 5, namely "a platform outside and protruding from the main structure of a building with access from an upper floor", and considered that terraces 9, 16 and 27, on each of levels 2 and 3, "must be included in plot ratio area because they are not platforms outside and protruding from the main structure and hence do not qualify as balconies under TPS 5". He considered that they were, in fact, the opposite of protruding, because they were indented, and fully enclosed on two-and-a-half or three sides. In his oral evidence, Mr Adam considered that the terraces should be included in plot ratio, irrespective of the definition of "balcony" in TPS 5.
- 66 Mr Buttle gave evidence that "there are numerous Multiple Dwelling Developments approved by the City at the time of the 1991 Codes or before which incorporate a private open balcony which is 'open' on one face only and enclosed on three other faces". In oral evidence, Mr Buttle suggested that an "open balcony" is a balcony open for at least its longest face.
- 67 Mr Webb referred to the explanatory notes of the R-Codes which advised that balconies "are in effect outdoor rooms" and considered that "almost regardless of the degree of enclosure, a balcony might also be considered to be an external space which is subject to all or some of the various climatic conditions".

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- 68 Neither the term "private open balcony" nor "balcony" was defined in the R-Codes. The relevant, ordinary meaning of the noun "balcony" is "a balustraded or raised and railed platform projecting from the wall of a building" (*The Macquarie Dictionary (supra)* page 138). The relevant, ordinary meaning of the adjective "open" is "not closed, covered, or shut up, as a house, box, drawer, etc" and "not enclosed as by barriers, as a space" (page 1341). An "open balcony" is, therefore, an unenclosed raised platform projecting from the wall of a building. As Mr Slarke observed, an assessment of whether floor area of a building is an "open balcony" necessarily involves questions of fact and degree.
- 69 The Tribunal finds that each of terraces 9, 16 and 27 at levels 2 and 3 of the building are unenclosed, raised platforms projecting from the wall of a building. A raised platform does not cease to be a "balcony" if it projects from more than one wall.
- 70 Although cl 7(1A) of TPS 5 provided that the R-Codes were to "be read as one with this Scheme", the meaning of the word "balcony" in the R-Codes cannot be construed by reference to the definition of that term in TPS 5, at least unless TPS 5 expressly varied the R-Codes definition, which was not the case. However, in any case, each of terraces 9, 16 and 27 would satisfy that definition. They are each platforms outside and protruding from the main structure of the building. Each of the walls which "enclose" these terraces forms part of the main structure. The terraces "protrude" from each wall. The definition in TPS 5 did not require that a balcony protrude forward of the building line, only that it "protrude" from the main structure.
- 71 The Tribunal considers that Mr Buttle's suggestion that a balcony is relevantly "open" if it is open above its balustrade and any necessary obscure glazed privacy screen for at least its longest face, is a useful "rule-of-thumb", subject to the specific circumstances of a case. Each of terraces 9, 16 and 27 satisfies that criterion. The Tribunal does not accept Mr Webb's evidence that openness is simply a product of exposure to climatic conditions. An assessment of openness is to be made not only from the perspective of someone within a balcony, but also from the perspective of someone viewing the balcony from the private and public domain. However, contrary to Mr Hardy's submission commenting on the draft report, the construction of the terraces does not "add to the 'footprint' of the building as it presents to and imposes upon the public domain".
- 72 Terrace 12 on level 3 is also plainly a private open balcony, being open on two sides above a masonry balustrade. However, the Tribunal

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finds that terrace 12 on level 2 could not be reasonably characterised in that way. As Mr Adam noted, the perimeter of this terrace is "almost completely solid wall with only window-scale openings to the outside". In particular, at the south-western corner of the building, this terrace presents as a solid masonry structure to Heppingstone Street, with three window-scale openings. Two window-scale openings face south to an adjoining property and one faces west to the street. In between these openings is a curved masonry section approximately 4.0 metres wide and 4.6 metres high, which, Mr Colliere candidly conceded, has a "heavy appearance on the corner". Importantly, terrace 12 does not satisfy Mr Buttle's suggestion that an "open balcony" is a balcony open along at least its longest face. Although Mr Bercov gave evidence that he had "no doubt" that each of the terraces in question were "open balconies", it is notable that the series of photographs which he provided of approved balconies in the City's local government area do not include any balcony which has the extent of masonry elements on its "open" side as terrace 12 on level 2. Contrary to Mr Slarke's submission commenting on the draft report, this terrace is not "an example at, or approaching the margin".

73 Terrace 12 on level 2 has an area of 41.2 square metres. As this area does not constitute an "open balcony", it forms part of the gross floor area of the building for plot ratio purposes.

74 Finally, Mr Adam identified three areas which he considered to be "marginal". He only gave considered evidence in relation to two of these areas, namely terrace 13 on level 2, which has an area of 19 square metres, and the "outdoor kitchen" on level 4, which has an area of 10.3 square metres. Terrace 13 has two "external" sides which are both apparent from Heppingstone Street. On its northern, narrower face, it is completely open (with a glass balustrade). On its western, longer face, it presents to Heppingstone Street with two openings separated by a solid masonry section. The openings occupy approximately 30 per cent of its western face. On balance, taking into account both its northern and western faces, the Tribunal considers that it is reasonably open to characterise terrace 13 on level 2 is an "open balcony". If its northern face were not completely open, the Tribunal is likely to have come to a different view. The outdoor kitchen area on level 4 clearly forms part of an "open balcony". Above a 1.1 metre high masonry balustrade and an obscure glazed privacy screen, this area is open along the whole of its longest side. It also has a small open section on a second side.

75 The Tribunal, therefore, considers that the following "contentious" areas, which were not included in the calculation of gross floor area by the

City, are required to be included for the purposes of condition 6 under the definition of "plot ratio" in the R-Codes:

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| • the "lobby" areas on levels 2 and 3 | 24.8 square metres        |
| • terrace 12 on level 2               | 41.2 square metres        |
| • "equipment store" on level 4        | 21.5 square metres        |
| • mezzanine bookshelf area on level 3 | <u>4.9 square metres</u>  |
| Total                                 | <u>92.4 square metres</u> |

- 76 Adding the agreed exceedence of 3.5 square metres, the Tribunal finds that the building comprises 95.9 square metres of gross floor area in excess of the maximum plot ratio of 0.66 permitted by condition 6. The actual plot ratio of the building is 0.78, which is approximately 18 per cent in excess of the maximum permitted by the condition.

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***Has the City failed to enforce effectively the observance of a town planning scheme?***

- 77 At the time when the City granted planning approval for the erection of the building, the applicable planning instrument was TPS 5. Clause 86 of TPS 5 provided as follows:

"If the Council grants planning consent for a development subject to conditions the development shall be carried out and the land shall not be used for any purpose otherwise than in accordance with those conditions."

- 78 Clause 94 of TPS 5 provided, among other things, that a person shall not erect a building or use a building unless all conditions imposed upon the grant or issue of any approval required by the Scheme have been and continue to be complied with.

- 79 Clause 1.7 of TPS 6 revoked TPS 5 after the building was apparently erected. Clause 9.2(b)(iii) of TPS 6 is in similar terms to cl 94 of TPS 5. Under cl 5 of TPS 5 and cl 1.2 of TPS 6, the City is responsible for carrying out or implementing each Scheme.

- 80 It follows from the findings at [33] above that the building is in breach of condition 6 and at [76] above as to the extent of breach, that there has been a contravention of cl 86 and cl 94 of TPS 5 and cl 9.2(b)(iii) of TPS 6.



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In addition to its power to commence a criminal prosecution for the contravention of TPS 5 and TPS 6 under s 10AB of the Act, the City has power under s 10 of the Act to direct the removal of unlawful development or the execution of works to remedy unlawful development. Section 10 provides, in part, as follows:

- "(1) For the purposes of subsections (2) and (3) a development is undertaken in contravention of a town planning scheme if the development -
- (a) is required to comply with a town planning scheme; and
  - (b) is commenced, continued or carried out otherwise than in accordance with that scheme or otherwise than in accordance with any condition imposed with respect to the development by the responsible authority pursuant to its powers under that scheme. ...
- (3) If a development has been undertaken in contravention of a town planning scheme, the responsible authority may give a written direction to the owner or any other person who undertook the development -
- (a) to remove, pull down, take up, or alter the development; or
  - (b) to restore the land as nearly as practicable to its condition immediately before the development started, to the satisfaction of the responsible authority. ...
- (6) A direction given under subsection (3) ... is to specify a time, being not less than 60 days after the service of the direction, within which the direction is to be complied with. ... "

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The City has not prosecuted Mrs Panizza under s 10AB or given her a direction under s 10 to remedy the breach of condition 6. The City has not suggested that it has sought to enforce the observance of TPS 5 and TPS 6 in any other way. In consequence, the Tribunal finds that the City has failed to enforce, effectively or at all, the observance of TPS 5 and TPS 6.

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83 Mr Slarke submitted, however, that notwithstanding the Tribunal's earlier determination that Mr Drake's representations concerning exceedence of plot ratio fell within the scope or ambit of s 18(2) of the Act, the competence of the representations, and hence of the proceedings, should be "looked at again in light of the evidence which is now before the Tribunal". In particular, Mr Slarke relied on the evidence that Mr Bowering only proposed condition 6 to address what he considered to be "the minimal (5.5 sq. metre) excess plot ratio ... accounted for within measuring and drafting error" and in the expectation that "only minor amendments are necessary to bring the floor space down to the maximum permitted". Significantly, in Mr Slarke's submission, by granting conditional planning consent, the City approved the structure and design of the building, including the "lobby" areas on levels 2 and 3, terrace 12 on level 2, and the "equipment store" on level 4. Moreover, condition 6 was intended to be capable of satisfaction "once and only once". The condition "was intended to require the developer to produce slightly modified plans which showed a compliant plot ratio, and if that was achieved the condition would receive a tick and the building could go ahead". On the evidence, this is what occurred.

84 In consequence, according to Mr Slarke's submission, "any determination made by SAT to the effect the building does not comply with the condition would be, in substance, a determination that the City exceeded its powers". As the Tribunal noted in its earlier determination in these proceedings, at [44], "the legislation in question does not permit such a review by either the Minister or this Tribunal".

85 The Tribunal rejects the City's submission. It is premised on a misconception as to the nature and function of a planning approval and a misunderstanding as to the meaning of condition 6. As Spigelman CJ observed in *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508 at [4], in a passage quoted with approval by Kirby J in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 79 ALJR 298 at [89]:

"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 ... 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 or the grantee, in such contexts as the provision of security. In

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some respects it is equivalent to a document of title. It must be construed in accordance with its enduring functions."

86 Condition 6 is to be construed according to its terms, not according to the mistaken understanding on the basis of which it was apparently imposed. As the Tribunal observed in its earlier determination, at [39], "the development approval could not have been invalid for breach of a non-discretionary standard, because the [City] explicitly addressed that standard by the imposition of condition [6]". The Tribunal's findings that the building is in breach of condition 6 and that the City's exclusion of the lobbies, terrace,12 and equipment store from plot ratio was not reasonably open, does not involve a determination that the City exceeded its power in granting planning approval. Rather, in granting planning approval subject to condition 6, the City acted within power, although on a mistaken understanding as to what consequences condition 6 involved. Moreover, on its proper construction, condition 6 remains operative notwithstanding the City's approval of the building licence plans. It was not expressed as requiring the submission of slightly modified plans, but rather as requiring modification of the building to achieve a particular standard.

87 In his written submissions commenting on this aspect of the draft report, Mr Slarke contended that condition 6:

"cannot literally mean that the building is to be modified. That must be so, as the building had not been erected when the planning consent was granted and condition 6 applied. Rather, the word 'building' must be understood to mean 'the plans showing the building' are to be modified."

88 The Tribunal does not accept this submission. Clearly, "building" is not a reference to a physical structure in existence in December 2000. Rather, it is a reference to the physical structure erected in accordance with the planning approval. The condition requires that the building as erected contain such alterations from the proposed plans as is necessary to achieve the nominated standard.

89 Although the Tribunal is satisfied that it has jurisdiction to report to the Minister that the City has failed to enforce TPS 5 and TPS 6 in relation to condition 6, the City's practice of excluding certain types of floor area from the calculation of plot ratio and its understanding of what practical consequences condition 6 involved when it imposed it, is certainly relevant in relation to what, if anything, the Tribunal should

recommend that the Minister do to enforce observance of TPS 6. The Tribunal now turns to consider this question.

***What, if anything, should be done to enforce the observance of the Scheme?***

90 Section 10 of the Act confers a discretion on the responsible authority as to whether or not to give a direction to the owner of land or any other person who undertook development in contravention of a town planning scheme and, if it decides to give a direction, as to its terms. In *Re Griffiths; Ex parte Homestyle Pty Ltd* (2005) 139 LGERA 178, McLure JA, with whom Roberts-Smith and Pullin JJA agreed, held, at [22], that s 401(1) of the *Local Government (Miscellaneous Provisions) Act 1960* (WA) confers a discretion on a local government to issue a notice to the builder or owner of a building to pull down or alter the building in specified circumstances. Her Honour set out four reasons in support of her conclusion that the section confers a discretion, the first three of which were as follows:

"Firstly, by virtue of section 56(1) of the *Interpretation Act 1984* (WA) there is a presumption that the word 'may' imports a discretion. Secondly, the power is activated by a variety of conduct which may differ significantly in nature and degree. Thirdly, there would be little need for an appeal if the City was under an obligation to issue a notice."

91 Each of these reasons is equally applicable in relation to s 10 of the Act. In this regard, s 56(1) of the *Interpretation Act* provides that "where in a written law the word 'may' is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion". Section 10AA of the Act provides that a person to whom a direction is given under s 10 may apply to the Tribunal for a review of the decision to give the direction.

92 Section 10 of the Act is silent in relation to the factors which the responsible authority should consider in determining whether to exercise its discretion to give a direction and, if it decides to give a direction, as to its terms. The factors which would guide or inform the exercise of discretion to give a direction under s 10 cannot be exhaustively stated. It would be impossible and inappropriate to attempt to do so. However, it is instructive, both for the purposes of these proceedings and the proper application of s 10 generally, to identify the following five important matters for consideration in the exercise of discretion under that section.

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93 First, it is in the public interest of the proper and orderly development and use of land that planning law should generally be complied with. It is expected that, normally, those who carry out development or subdivision, or use land, should comply with the planning legislation and any applicable approval, licence or other authorisation in relation to that activity. As Kirby P (as his Honour then was) observed, in a related context, in *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 340:

"[T]here is indicated a legislative purpose of upholding, in the normal case, the integrated and co-ordinated nature of planning law. Unless this is done, equal justice may not be secured. Private advantage may be won by a particular individual which others cannot enjoy. Damage may be done to the environment which it is the purpose of the orderly enforcement of environmental law to avoid: cf *Attorney-General v Harris* [1951] 1 QB 74 at 94; *Trimboli v Penrith City Council* (1981) 48 LGRA 323 and Deane J (dissenting) in *Lizzio v Ryde Municipal Council* (1983) 155 CLR 211."

94 Second, the impact of the contravention of the scheme on the affected locality and environment. This includes a consideration of whether "the breach complained of was a purely technical breach which was unnoticeable other than to a person well-versed in the relevant law (cf *Parramatta City Council v RA Motors Pty Ltd* (1986) 59 LGRA 121 at 125f)": *Warringah Shire Council v Sedevcic* (*supra*) per Kirby P at 339.

95 Third, the factual circumstances in which the contravention of the scheme took place.

96 Fourth, the time which has elapsed since the development was undertaken in contravention of the scheme.

97 Fifth, the expense and inconvenience which would be involved in remedying the contravention of the scheme.

98 As noted earlier, under s 18(2c) of the Act, if the Minister is satisfied that a local government has failed to enforce effectively the observance of a town planning scheme, the Minister "may order the local government to do all things necessary to enforce the observance of the scheme". An obvious and practical mechanism for enforcement of cl 9.2(b)(iii) of TPS 6 is the giving of a direction by the City under s 10 of the Act to Mrs Panizza to partially demolish or alter the building. The Tribunal

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considers that, in determining whether, under s 18(2c) of the Act, to order the City to give Mrs Panizza direction to partially demolish or alter the building, it is appropriate that the Minister take into consideration the factors which would guide or inform the City's exercise of discretion to give a direction under s 10.

99 Mr Adam considered that a proportionate part of the building should be demolished to remedy the breach of condition 6. He maintained that partial demolition is warranted for the following reasons:

- "(1) because the building as it stands does contravene non-discretionary provisions of the town planning scheme, a piece of subordinate legislation;
- (2) because the building is intrusive and detrimental to the amenity of the locality and [Mr Drake]; and
- (3) it is important for future development to not establish a precedent whereby the mandatory scheme requirements can be glossed over, with apparent impunity."

100 Mr Adam concluded that it would "be offensive to orderly and proper planning and the amenities of the locality to allow the building to stay as it is".

101 As an experienced planner, architect and builder, Mr Adam considered that discrete portions of the building could be demolished without affecting the structural or functional integrity of the remainder. In particular, he maintained that:

- (i) 54 square metres of floor space on level 4 could be removed and replaced with a shallow roof;
- (ii) terrace 12 on level 4 could be cut back, reducing plot ratio area by 41.2 square metres; and
- (iii) the eastern protruding section of the building could be cut back, halving the size of bedroom 3 on each level (15 square metres in total) or essentially removing that bedroom (26.5 square metres).

102 Mr Adam expressed the opinion that this work could be carried out "with a minimum of structural difficulty, ie there would be no requirement for complex new structural arrangements to support remaining sections of the building after removal of certain sections".

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- 103 Mr Colliere was not able to say whether Mr Adam's proposals were feasible. He indicated that an opinion would be necessary from the structural engineer who designed the building in relation to whether removal of the walls on level 4 was feasible, because the building was designed on the basis of an interconnected strategy to address the possibility of earthquake. None of the parties provided evidence as to the likely cost of partial demolition of the building.
- 104 The Tribunal is satisfied, on the evidence of Mr Adam, that it would be structurally feasible to demolish portions of the building so as to bring it into substantial compliance with a plot ratio of 0.66. However, the Tribunal infers that the cost and the inconvenience to the residents of the building would be significant.
- 105 During the hearing, the Tribunal inquired of the expert witnesses whether it would be feasible to remove the masonry wall section which ~~enclosed the south-western portion of terrace 12 on level 2 above that~~ necessary for a 1.1 metre high balustrade. Each expert indicated that this would be feasible. Mr Colliere considered that an obscure glazed privacy screen would be required to provide mutual privacy in relation to the property to the south, if this section of wall were removed.
- 106 The Tribunal finds that, in consequence of the 18 per cent exceedence of the maximum plot ratio imposed by condition 6, the building is intrusive and detrimental to the amenity of the locality and, to some extent, of Mr Drake. The building presents with considerable bulk and scale when viewed from the north-east in the foreshore reserve (where a two - three storey side wall is open to view), from the south-west in Heppingstone Street (where the 4.0 x 4.6 metre solid masonry wall which partially encloses terrace 12 on level 2 is a dominant visual element), and from properties to the south, including two properties owned by Mr Drake, (where it extends as a full three-storey building close to its rear boundary, in contrast to its neighbours which reduce to two and one storey in that section).
- 107 However, with the exception of the cutting back of terrace 12 on level 2, the partial demolition of the building proposed by Mr Adam would not result in a material reduction in bulk and scale. In particular, the demolition of level 4 would be barely, if at all, perceptible from the public domain, and the cutting back of bedroom 3 would only be apparent from a narrow angle of view on Lamb Street and the foreshore reserve at some distance.

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- 108        When viewed from properties to the south, including Mr Drake's units at No 2 and No 5 Scenic Crescent, the demolition of level 4 and the cutting back of the eastern protrusion on level 3 would reduce the bulk and scale of the building, but not to a significant extent. Particularly from No 2 Scenic Crescent, the significant bulk and scale of the building is due to its three-storey form very close to its rear boundary. As Mr Adam conceded, the demolition of level 4 would not open up water views from Mr Drake's unit at No 5 Scenic Crescent, although it would increase the sense of openness and view of buildings in the City of Perth.
- 109        Mr Slarke's principal submission on discretion was that it would be "a capricious exercise of the power of the City if it were some years later to say that although we have approved these balconies, the equipment room and agreed the plot ratio is okay, you the owner now need to make significant changes to the building". He submitted that it would not be reasonably open for the City to act in this way and that it would not, therefore, be appropriate for the Tribunal to recommend that Mrs Panizza be required to make any alteration of significance to the building, beyond replacing the glazed walls and doors to the "lobby" areas on levels 2 and 3.
- 110        The factual circumstances in which the contravention of TPS 5 and TPS 6 has taken place necessarily bears significantly on the proper exercise of discretion under s 10. The City clearly, although mistakenly, believed that the application for planning approval which it considered on 19 December 2000 involved only a minor, 5.5 square metre or 1.04 per cent, exceedence of the maximum permissible plot ratio of 0.66. It imposed condition 6 to address what it understood to be this minor exceedence. However, while Mr Bowering apparently excluded the "lobby" areas on levels 2 and 3, terrace 12 on level 2 and the "equipment store" on level 4 from his planimeter calculation of gross floor area for plot ratio purposes, his report to the Joint Commissioners of the City did not expressly address whether these areas should be excluded. The City did not, therefore, turn its corporate mind to this question.
- 111        It is also significant that Mr Bowering apparently excluded the "lobby" areas on levels 2 and 3 and the "equipment store" on level 4 from the calculation of plot ratio area in accordance with an established practice on the part of the City. It appears that the City generally considered that glazed wall and door separation of "lobby" areas from a residential unit on a single-unit level resulted in the lobby being "common to more than one dwelling", and that storage rooms were "equipment rooms" without further analysis. Although the Tribunal has found this characterisation is



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not reasonably open, it is, nevertheless, significant that the City took this view not only in this case, but in the case of other developments as well.

112 In commenting on the draft report in this respect, Mr Hardy submitted that "a mistaken practice on the part of the [City] is irrelevant in construing and applying the requirements for adherence to a planning approval". The Tribunal accepts that the City's mistaken practice is irrelevant in determining whether a condition of approval has been breached. However, the Tribunal considers that the existence of such a practice is a relevant factor in the exercise of the responsible authority's discretion under s 10(3) of the Act: see [119] - [121].

113 It does not appear that there was any material delay on the part of Mr Drake in raising the allegation that the building, as erected, exceeded a plot ratio of 0.66.

114 In all of these circumstances, the Tribunal considers that it would be an appropriate exercise of the responsible authority's discretion under s 10(3) of the Act to require Mrs Panizza to demolish a section of the large masonry wall which encloses the south-western portion of terrace 12 on level 2. Contrary to Mr Slarke's submission, this would not be a "capricious" exercise of the power. Capriciousness involves a "sudden change of mind without apparent or adequate notice" or acting on a "whim" (see *The Macquarie Dictionary (supra)* page 292). The City would certainly have an apparent and adequate motive to require this partial demolition. As Mr Adam said, one of the key planning objectives of a plot ratio control is to mitigate the apparent bulk and scale of built form. The Tribunal has found that this section of wall presents with significant bulk and scale to the public domain in Heppingstone Street. The partial demolition of this wall would result in the elimination of 41.2 square metres of floor space and, more fundamentally, a material reduction in the bulk and scale of the building to Heppingstone Street.

115 Although, as the Tribunal has acknowledged, the factual circumstances in which the contravention has taken place bear significantly on the appropriate exercise of discretion, the public interest in proper and orderly development is also a significant consideration. This is particularly the case where, as here, the breach has such a material impact on the public domain and is able to be remedied in a relatively simple fashion.

116 In his written submissions commenting on the draft report, Mr Slarke contended that "as justification for partial demolition of the masonry wall

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arises from a differing view on a matter of fact and degree, it is not an appropriate exercise of power, with respect, to require the owner to remove elements of the building which have been expressly approved". He submitted that this is "underscored" by the fact that Mrs Panizza could apply for review by the Tribunal of the decision to give a direction under s 10AA of the Act on the basis that she constructed the building "in reliance on a planning approval issued by the City".

117 As noted at [110], the City did not turn its corporate mind to the question of whether any of the "contentious areas" should be excluded from the gross floor area for plot ratio purposes. Although it approved the erection of a building, which included terrace 12 or level 2, it did not express the view when it did so that terrace 12 was excluded from plot ratio, and it granted approval subject to condition 6. Moreover, as the Tribunal found at [72], the physical characteristics of terrace 12 on level 2 are such that it could not be reasonably characterised as an "open balcony". While it is accepted that characterisation involves a question of fact and degree, in this case a "differing view" is not reasonably open.

118 If the Minister were to accept the Tribunal's recommendation that she order the City to give Mrs Panizza a direction under s 10 of the Act to demolish the enclosing, masonry section, and if Mrs Panizza were to seek review of the decision to give the direction under s 10AA of the Act, an interesting question would arise as to whether Mrs Panizza would be estopped from seeking review or whether the application would involve an abuse of the Tribunal's process, given that s 18(2b) provides that Pt V of the Act applies, with such modification as may be necessary, as if the referral were an application for review. Issues of comity and consistency would also arise. In this report, the Tribunal has identified and considered the very factors which would guide or inform the City's exercise of discretion to give a direction under s 10, which are also the factors which would guide the Tribunal's review of the City's decision.

119 The Tribunal does not consider that it would be appropriate to require further partial demolition of the building, in proportion to the floor space of the "equipment store" on level 4 and the "lobby" areas on levels 2 and 3 (which together account for approximately 90 per cent of the breaching floor space, once terrace 12 on level 2 is removed from the equation), fundamentally because of the City's established (although mistaken) practice and because the demolition of level 4 or the protrusion on the eastern side of the building would not result in a material reduction in bulk and scale. In consequence of the City's practice, to adapt Kirby P's words quoted at [93] above, "private advantage [would not be] won by a

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particular individual that others [could not] enjoy", provided that the "equipment store" and "lobby" areas were physically altered so as to accord with the requirements of the City's practice. Moreover, this is not a case where a building has been constructed contrary to approved plans (aside from the removal of the glass walls and doors from the "lobby" areas). Had that been the case, it might have been appropriate to require demolition of other parts of the building which give rise to material impacts.

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The Tribunal considers that the proper exercise of the responsible authority's discretion under s 10(3) of the Act requires that the building be altered such that the physical characteristics of the "equipment store" on level 4 and of the "lobby" on levels 2 and 3 are made consistent with the requirements of the City's practice and the designation of those spaces on the approved plans. In particular, the Tribunal considers it appropriate that a direction be issued by the City to Mrs Panizza which requires the building to be altered, in addition to the removal of the masonry section partially enclosing terrace 12 on level 2, as follows:

- (i) the window in the "equipment store" on level 4 should be removed and the window space bricked in;
- (ii) a false ceiling should be erected in the "equipment store" which reduces the floor-to-ceiling height to a maximum of 1.8 metres;
- (iii) the glass partition and doors shown on the approved plans should be erected on the western edge of the "lobby" on each of levels 2 and 3 in the position shown on the approved plans; and
- (iv) the glass partition and doors erected on the western edge of the lobby on each of levels 2 and 3 must have a fire rating and be able to be locked in the manner appropriate for the entrance door of an apartment in an apartment building.

121

The alterations described in par (i) and par (ii) would ensure that the "equipment store" could only reasonably be used as a storage room, consistently with the City's practice of excluding storage rooms as "equipment rooms" and the description of that space on the approved plans. The alterations described in par (iii) and par (iv) would ensure that the "lobby" areas would be consistent with the City's practice of excluding such areas where they are physically separated from the residential unit.

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122 Finally, the Tribunal acknowledges the strength of Mr Adam's observation that mandatory planning scheme requirements should be respected and not "glossed over". The definition of "plot ratio" in the current Design Codes excludes, among other things, "equipment rooms" and "lobbies ... common to more than one dwelling". The Tribunal expects that, from now on, the City and other local governments will apply these exclusions in accordance with the discussion of the equivalent provisions in this report.

***Tribunal's recommendations to the Minister***

123 For reasons set out in this report, the Tribunal recommends that the Minister order the City to give a direction to Mrs Panizza under s 10 of the Act to do the following, within a period of six months from the date of the direction:

- (a) demolish the curved masonry wall section on the south-west of terrace 12 on level 2 of the building erected at No 11 Heppingstone Street, South Perth (building) referred to as "masonry wall rendered & painted as spec" on drawing no A202 issue 6, dated January 2001, drawn by Colliere Menkins Pickwell Architects, printed 27 July 2005 (plan), from a height of 1.1 metres above the floor level of terrace 12 on level 2 up to the level of the ceiling of terrace 12 on level 2; and
- (b) alter the building as follows:
  - (i) install an obscure glazed privacy screen up to a maximum height of 1.65 metres above the floor level of terrace 12 on level 2 continuing from the existing privacy screen in the existing westernmost southern opening from that terrace for a distance of up to 2.0 metres to the west;
  - (ii) remove the window in the "equipment store" on level 4 and brick in, render and paint the window space so as to match existing walls of the building;
  - (iii) erect a false ceiling in the "equipment store" on level 4 which reduces the floor-to-ceiling height to a maximum of 1.8 metres; and

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- (iv) erect floor-to-ceiling glass partitions and doors which are fire-rated and able to be locked appropriately for the entrance door to an apartment in an apartment building on the western edge of the "lobby" on each of levels 2 and 3 in the position of the glass partitions and doors shown on the plan.


I certify that this and the preceding [123] paragraphs comprise the report and recommendations of the State Administrative Tribunal.



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**MR D R PARRY, SENIOR MEMBER**

I certify the foregoing to be a true and correct copy of the original



**State Administrative Tribunal**  
Date: 14 October 2005

**McLEODS****BARRISTERS &  
SOLICITORS**Local Government Law  
Environmental Planning LawStirling Law Chambers  
220-222 Stirling Highway  
Claremont WA 6010  
Tel (08) 9383 3133  
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Email:  
mcleods@mcleods.com.auDenis McLeod (Counsel)  
David Nadebaum  
Geoffrey Owen  
Peter Witkuhn  
Craig Clarke  
Fiona Grigich  
Elisabeth Stevenson (Associate)

Our Ref

McL/S8/SP-18252

Your Ref

9 January 2006

The Hon A MacTiernan  
Minister for Department of Planning and Infrastructure  
Office of the Minister for Planning and Infrastructure  
13<sup>th</sup> Floor, Dumas House  
2 Havelock Street  
WEST PERTH WA 6005

Dear Madam

**DRAKE V. CITY OF SOUTH PERTH & ANOR - REPRESENTATION UNDER SECTION 18 OF TOWN  
PLANNING AND DEVELOPMENT ACT 1928 - 11 HEPPINGSTONE STREET, SOUTH PERTH**

We act for the City of South Perth and represented the City in the State Administrative Tribunal proceedings arising from the Honourable Minister's referral to the SAT of Mr Drake's representation under Section 18 of the Town Planning and Development Act. We understand that the Tribunal has sent to the Minister a letter, together with its report and recommendations on the matter, which were delivered on 14 October 2005.

We understand further that solicitors for the owners of 11 Heppingstone Street have written to the Minister for the purpose of making further submissions before the Minister makes any decision for the purpose of Section 18(2)(c) of the Town Planning and Development Act.

We have been provided by the owner's lawyers with a copy of a letter from your office to them dated 14 November 2005, which indicates that the correspondence from the owner's lawyers was under consideration. On the assumption that the Minister is prepared to receive and consider further submissions in connection with the matter prior to making any final decision, we have been instructed by the City to make a submission to the Minister.

**FURTHER SUBMISSIONS**

The parties were given an opportunity by the Tribunal to make submissions on a draft report prepared by the Tribunal, prior to it being finalised and forwarded to the Minister for consideration. Attached herewith is a copy of the submissions of the City of South Perth in that regard.

As you will see, the City generally accepted and endorsed the views of the Tribunal as expressed in the draft report and recommendation. It remains the case that the City generally accepts and endorses the views of the Tribunal in its final report and recommendation to you.

However the City wishes to pursue the two principal issues raised by it in its submissions to the Tribunal in the draft report, as those submissions were not accepted by the Tribunal.

9 January 2006

McLeods

Office of the Minister for Planning and Infrastructure

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**DRAKE v. CITY OF SOUTH PERTH & ANOR - REPRESENTATION UNDER SECTION 18 OF TOWN PLANNING AND DEVELOPMENT ACT 1928 - 11 HEPPINGSTONE STREET, SOUTH PERTH**

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#### **TERRACE 12, LEVEL 2**

The first issue which the City raises is the view of the Tribunal that Terrace 12 Level 2 cannot be characterised as private open balcony. The City reiterates the submissions it made to the Tribunal in that connection.

Although the City accepts it was open to the Tribunal to conclude the area was not a private open balcony, a contrary view was also reasonably open. Three of the four planning witnesses expressed the opinion that Terrace 12 Level 2 is a private open balcony. As the Tribunal correctly said, the answer to the question is a matter of fact and degree. In such a case, where the justification for partial demolition of the masonry wall arises from a differing view on a matter of fact and degree, it does not seem appropriate to require the owner to modify that element of the building. That is particularly the case here, as when the development was approved initially by the Council, the design of the building, and its impact on the streetscape and visual amenity of the locality through its bulk and scale, was the subject of the report to the Council, and was expressly considered by the City's Design Advisory Consultants, a panel of prominent independent architects. The Council approved the building and the balcony structure on the basis that it was an appropriate and acceptable part of the development.

In the final analysis, even if Terrace 12, level 2 contributes to excess plot ratio, the reason it does so is predicated on a subjective determination on the 'openness' of the balcony structure. That very same 'openness' was considered by the Council, on the advice of its experts, and was determined to be acceptable in the context of its impact amenity through its effect on the streetscape, and bulk and scale impact.

As the existing design of the balcony structure has been approved on amenity grounds, any technical non-compliance with plot ratio should not lead to the result that the building must be modified.

#### **APPLICATION OF CONDITION 6**

The second issue is the more fundamental question of whether or not condition 6 of the planning approval was in fact not effectively enforced. That condition states:

"The building shall be modified to comply with the 0.66 maximum plot ratio."

As argued in the attached submissions, condition 6 was never intended to have ongoing application. All it was intended to require was the submission of modified plans by the developer. That occurred, and those modified plans were approved by the Council. The building was subsequently constructed in accordance with the plans authorised by the City.

It may be that the City made an error in calculating the plot ratio when it considered the amended plans. If it did, that error is capable of being corrected by the Supreme Court. However if the City did make an error, it cannot properly be said that it has failed to enforce effectively the observance of its scheme in the relevant sense. The error would be an error of fact or law, and not a failure to enforce the Scheme.

9 January 2006

*McLeods*

Office of the Minister for Planning and Infrastructure

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**DRAKE v. CITY OF SOUTH PERTH & ANOR - REPRESENTATION UNDER SECTION 18 OF TOWN PLANNING AND DEVELOPMENT ACT 1928 - 11 HEPPINGSTONE STREET, SOUTH PERTH**

We will be grateful if the Honourable Minister will give consideration to the matters raised in this letter and the more complete explanation in the attached submissions.

Please contact C Slarke of this office if you have any queries.

Yours faithfully

A handwritten signature in black ink, appearing to be 'm Le', written in a cursive style.

Encl.



Enquiries: Sean McLaughlin on 9474 0715  
Our Ref: HE5/11  
Doc ID: 423065

22 August 2006

The Hon. Allannah MacTiernan  
Minister for Planning and Infrastructure  
13th Floor, Dumas House  
2 Havelock Street  
West Perth WA 6005

Dear Minister

11 HEPPINGSTONE STREET, SOUTH PERTH

I refer to the above matter and to the recent meeting between the parties which you convened to discuss ways of finding an outcome to conclude the issue.

Notwithstanding a comprehensive discussion of the issues at the meeting no immediate resolution was achieved and you requested that the parties continue to explore further avenues in order to find an enduring resolution.

The City's planning officers have continued to review the matter and upon further consideration of what is a complex set of circumstances with an extensive history have reached the conclusion that the building as built is in fact compliant with the provisions of the current Town Planning Scheme No. 6 and the current Residential Design Codes.

Upon extensive review it has become apparent that with significant amendments to both the Scheme and Codes which applied to the original planning approval in 2000 (which came into operation in April 2003 and October 2002 respectively), there is no longer any conflict in relation to plot ratio. This comes about in the following manner:

Under Town Planning Scheme No. 6, the property in question has a dual density coding, being R15/40. The operative coding is determined by reference to performance criteria prescribed in the No. 6 Scheme. Unless at least 7 of the performance criteria are satisfied, the R40 coding is not applicable. In this instance, it is not possible to satisfy 7 of the performance criteria. Therefore, a lower density coding applies (R15 or R30). Under the Residential Design Codes, there is no plot ratio control for land coded R30 or lower.

As there is no longer any prescribed plot ratio for the property in question, the issue relating to plot ratio conflict has been resolved. This being the case it cannot be said, in the terms of section 211 of the *Planning and Development Act 2005*, that there is any non-compliance with the Scheme or corresponding failure by the local government to enforce observance of the Scheme.

It is the City's respectful submission that in these circumstances it would be appropriate for you to decide to take no further action in the matter. This is a course of action clearly authorised under section 211.

The City has discussed its conclusions concerning the implications of the amended Scheme and Codes with the legal representatives of the owners of the property and they are in agreement with those conclusions.

If you have any queries concerning the above please do not hesitate to contact me.

Yours faithfully

CLIFF FREWING  
CHIEF EXECUTIVE OFFICER

Cc. Mrs Panizza, c/- Minter Ellison;  
Mr Drake.

LEVEL 49 CENTRAL PARK 152-158 ST GEORGE'S TERRACE PERTH  
GPO BOX A39 PERTH WA 6837 AUSTRALIA  
DX 124 PERTH www.minterellison.com  
TELEPHONE +61 8 9429 7444 FACSIMILE +61 8 9429 7666

18 March 2008

**SCANNED**

**BY POST**

**Attention: Mr Sean McLaughlin**

City of South Perth  
Civic Centre  
Cnr Sandgate Street and South Terrace  
SOUTH PERTH WA 6151

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|---------------------------------|-------------------------------|-------------------------------|
| CITY OF SOUTH PERTH             |                               |                               |
| Doc ID No:                      | 528366                        |                               |
| File No:                        | M/E 5/11                      |                               |
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| Action <input type="checkbox"/> | Info <input type="checkbox"/> | File <input type="checkbox"/> |

Dear Sir

**Application for Review of Section 214 Direction under the Planning and Development Act 2005**

We **enclose**, by way of service, an application for review under 255(1) of the *Planning and Development Act 2005* lodged with the State Administrative Tribunal on 14 March 2008.

Please contact either Merinda Logie or Sara van den Hoogen should you have any queries.

Yours faithfully

**MINTER ELLISON**

Contact: Merinda Logie/Sara van den Hoogen - Direct: +61 8 9429 7456/455  
Email: sara.vandehoogen@minterellison.com  
Partner responsible: Glen McLeod - Direct: +61 8 9429 7587  
Our reference: GAM:SVV - 60-1272925

enclosure

PERDM01\_508107\_1

**MINTER ELLISON GROUP AND ASSOCIATED OFFICES**

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14 March 2008

**BY HAND**

COPY

State Administrative Tribunal  
Level 4, 12 St Georges Tce  
PERTH WA 6000

Dear Sirs

*Application for Review of section 214 direction under the Planning and Development Act 2005*

We act for Ms Benita Panizza.

We **enclose** an application for review made under section 255(1) of the *Planning and Development Act 2005*, together with a cheque in the amount of \$270.00 as payment for the application lodgement fee.

Please contact either Merinda Logie or Sara van den Hoogen should you have any queries.

Yours faithfully

**MINTER ELLISON**

Contact: Merinda Logie/Sara van den Hoogen Direct phone: +61 8 9429 7456/455  
Email: sara.vandehoogen@minterellison.com  
Partner responsible: Glen McLeod  
Our reference: 601272925

cc City of South Perth  
BY POST

# State Administrative Tribunal



## Application

This is an application under the Planning and Development Act 2005, s 255(1): Review of a decision to give a direction under s 214.

An Act to provide for a system of land use planning and development in the State and for related purposes.

### APPLICANT

|                              |   |
|------------------------------|---|
| What is your title?          | Ms  |
| What is your name?           | Benita Panizza                              |
| What is your postal address? | 11 Heppingstone Street, South Perth WA 6151 |

What are your day-time contact details?

|       |                        |
|-------|------------------------|
| Phone | (08) 9368 2525         |
| Fax   | (08) 9368 2727         |
| Email | mgprichard@inet.net.au |

Identification of Aborigines and Torres Strait Islanders (Optional)

|   |    |
|---|----|
| Do you identify as being of Aboriginal or Torres Strait Islander descent? | No |
|---|----|

|   |     |
|---|-----|
| Do you have a lawyer or other representative? | Yes |
|---|-----|

If Yes, please complete the following:

|  |                            |
|--|----------------------------|
| What is their name?                      | Minter Ellison Lawyers     |
| What is their postal address?            | GPO Box A39, Perth WA 6837 |
| What are their day-time contact details? |                            |
| Phone                                    | (08) 9429 7455             |
| Fax                                      | (08) 9429 7666             |

|       |                                    |
|-------|------------------------------------|
| Email | sara.vandehoogen@minterellison.com |
|-------|------------------------------------|

|                             |    |
|-----------------------------|----|
| Is there another applicant? | No |
|-----------------------------|----|

If Yes, please attach a separate sheet giving details.

**RESPONDENT**

|                      |  |
|----------------------|--|
| What is their title? |  |
|----------------------|--|

|                     |                     |
|---------------------|---------------------|
| What is their name? | City of South Perth |
|---------------------|---------------------|

|                               |  |
|-------------------------------|--|
| What is their postal address? | Civic Centre, cnr Sandgate St and South Terrace, South Perth WA 6151 |
|-------------------------------|--|

What are their day-time contact details?

|       |                            |
|-------|----------------------------|
| Phone | (08) 9474 0777             |
| Fax   | (08) 9474 2425             |
| Email | seanm@southperth.wa.gov.au |

|  |    |
|--|----|
| Do they have a lawyer or other representative? | No |
|--|----|

If Yes, please complete the following:

|                               |  |
|-------------------------------|--|
| What is their name?           |  |
| What is their postal address? |  |

What are their day-time contact details?

|       |  |
|-------|--|
| Phone |  |
| Fax   |  |
| Email |  |

|                              |    |
|------------------------------|----|
| Is there another respondent? | No |
|------------------------------|----|

If Yes, please attach a separate sheet giving details.

**DECISION SOUGHT**

What decision do you want the SAT to make?

The decision of the respondent, made on 15 February 2008, to give a direction under section 214 of the Planning and Development Act 2005, to be set aside or varied.

**GROUND**

On what grounds are you seeking review?

See Annexure 'A'

**SUPPLEMENTARY INFORMATION**

**SAFETY AND SECURITY**

Please contact the Tribunal on 9219 3111 if you wish to identify a specific safety or security issue relevant to this application.

**LODGEMENT FEES**

Application fee of \$270. Hearing fee (for each day or part of a day allocated, other than a first day) for an application by a person \$270

**SUPPORTING DOCUMENTS**

Please see Practice Note 1 - Filing Supporting Documents.

**NOTES & INSTRUCTIONS**

**PROCEDURAL REQUIREMENTS**

Signature

*Murter Ellison*

Date

*14 March 2008*



## Background

The land the subject of this application for review comprises Lot 38 on Diagram 147111 and is known as 11 Heppingstone Street, South Perth (**Land**).

### Planning approval

1. In September 2000, an application for planning consent for two multiple dwellings on the Land was lodged on behalf of the applicant by CMP Architects (**Application**). On 1 December 2000, a subsequent submission, including amended plans, was lodged with the respondent.
2. At the time of the application for, and grant of, planning consent, the applicable planning instrument was the City of South Perth *Town Planning Scheme No.5 (TPS5)*.
3. Under TPS5 the Land was zoned 'Residential-R' with a designated density code of R60.
4. The development of the Land was subject to the requirements and provisions of the (then) Residential Planning Codes, 1991 (**the R-Codes**), subject to any variations incorporated in TPS5.
5. The development of the land was subject to a plot ratio maximum, under Table 1 of the R-Codes of 0.55. The allowable plot ratio was subject to a possible bonus of up to 20% under clause 4.7.6 of the R-Codes. This brought the allowable plot ratio up to 0.66, provided certain conditions were met.
6. The respondent's Administration determined that, in the circumstances of the application, the maximum 20% plot ratio bonus would be allowed.
7. The Processing Sheet for the Application states the following:
  - (a) Lot area 782m<sup>2</sup> (800m<sup>2</sup> with truncation)
  - (b) Maximum allowable plot ratio 0.55 (0.66 with 20% bonus)
  - (c) Maximum allowable plot ratio floor area: 440m<sup>2</sup> (528m<sup>2</sup> with 20% bonus)
  - (d) Plot ratio floor area proposed 533.5m<sup>2</sup>
  - (e) Plot ratio proposed 0.6936.
8. The calculation of the proposed plot ratio by the Administration was incorrect as the plot ratio for a floor area of 533.5m<sup>2</sup> would in fact be 0.6669.
9. The Administrator's Report to the Joint Commissioners referred to a proposed plot ratio of 0.6936, exceeding the maximum by 1.3% or 5.5m<sup>2</sup> (in fact a 5.5m<sup>2</sup> excess is equivalent to 1.04%). The report observed that the 5.5m<sup>2</sup> excess was minimal and 'accounted for within measuring and drafting error'.
10. The Commissioners of the respondent approved the application for planning consent at their meeting on 19 December 2000.

11. A Grant of Planning Consent form dated 8 January 2001, was issued by the respondent to CMP Architects (**Planning Consent**). The planning consent was subject to 21 conditions.
12. Condition 6 of the Planning Consent states:

*'The building shall be modified to comply with the 0.66 maximum plot ratio prescribed by Table 1 of the Residential Planning Codes for the type of development concerned.'*
13. A plot ratio bonus of 20% was granted by the Joint Commissioners, subject to condition 10 of the Approval which stated:

*'Prior to issue of a Building Licence the applicant shall lodge detailed costing estimates as justification for the proposed 20% plot ratio bonus to the satisfaction of the Manager, City Planning.'*
14. The applicant submitted modified building plans to the respondent which were approved by the respondent's Council.
15. On 26 February 2002, the respondent granted a conditional building licence for the erection of the building the subject of the planning consent.
16. The building in question was subsequently constructed in accordance with the plans authorised by the respondent.

**Representation to Minister under section 18(2) of the *Town Planning and Development Act 1928***

17. Section 18(2) of the *Town Planning and Development Act 1928* (WA) (**TPD Act**) provides that a person aggrieved by the failure of the respondent to enforce effectively the observance of a town planning scheme may make representations to the Minister.
18. By letters dated 3 May 2004 and 13 September 2004, a Mr Drake wrote to the Minister for Planning and Infrastructure (**Minister**) pursuant to section 18(2) of the TPD Act. Mr Drake was the registered proprietor of No. 2 and Nos 5 – 7 Scenic Drive, South Perth.

**Referral to State Administrative Tribunal**

19. By letter to the President of the Town Planning Appeal Tribunal (**Tribunal**) dated 22 December 2004, the Minister advised that Mr Drake's representations were being referred to the Tribunal under section 18(2a) of the TPD Act for a report and recommendations.
20. By decision dated 8 June 2005, the Tribunal determined whether the representations made by Mr Drake were within the scope of section 18(2) of the TPD Act. The Tribunal held that:
  - (a) the representations concerning the height of the building were not within the scope of section 18(2) of the TPD Act;

- (b) however, the representation that the building was in breach of the maximum 0.66 plot ratio prescribed by the R-Codes were within the scope of section 18(2) of the TPD Act and should proceed to a hearing.
21. By decision dated 14 October 2005 the Tribunal:
- (a) found that the building was in breach of condition 6 of the Planning Consent as it had a plot ratio of 0.78. The exceedance of plot ratio was principally due to three parts of the building, namely:
- (i) a terrace which was not a 'private open balcony';
- (ii) two 'lobby' areas which were not 'common to more than one dwelling'; and
- (iii) an 'equipment store' which was not reasonably required for the placement or keeping of implements for maintenance or day to day operation of the building;
- (b) reported to the Minister that the respondent had failed to enforce effectively the observance of TPS5 in relation to non-compliance with condition 6 of the Planning Consent which required the building to be modified to comply with a 0.66 maximum plot ratio; and
- (c) recommended that the Minister order the City to direct the owner of the land to demolish part of the masonry section which enclosed the terrace, and to make other physical alterations to the 'lobby' areas and to the 'equipment store' within six months.

**Minister's decision**

22. On 30 January 2008, the Minister for Planning and Infrastructure made an order pursuant to section 18(2) of the *Town Planning and Development Act 1928* and section 211(4) of the *Planning and Development Act 2005*, directing the respondent, to give a direction to the applicant under section 214 of the P&D Act.
23. The Minister's order gives effect to the recommendations of the Tribunal.

**Section 214 direction**

24. By direction issued under section 214(3) of the P&D Act and dated 15 February 2008, the City of South Perth directed the applicant to undertake specified works to the building on the Land (**Direction**).
25. The Direction is in accordance with the orders of the Minister and requires the specified works to be undertaken within six months from the date of the Direction.

**Town Planning Scheme No.6**

26. In April 2003, the City of South Perth *Town Planning Scheme No 6 (TPS6)* came into operation and revoked TPS5. The current Residential Design Codes 2002 came into operation in October 2002.

27. Under TPS6 and the current Residential Design Codes there is no longer any prescribed plot ratio for the building in question. As a result, the building does not exceed a prescribed plot ratio under TPS6.

**Application for review**

28. The applicant applies for a review of the decision of the respondent to issue a direction under section 214(3) of the *Planning and Development Act 2005* (WA) (P&D Act) in respect of the development on the Land.


**Grounds of review**

29. The Direction by the respondent was made in order to comply with an order of the Minister under section 18(2) of the TPD Act and section 211(4) of the P&D Act.
30. Under section 29(1) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act), the Tribunal when exercising its review jurisdiction, has the functions and discretions corresponding to those exercisable by the decision-maker in making the reviewable decision.
31. However, section 29(2) of the SAT Act provides that section 29(1) of the SAT Act does not limit that powers granted to the Tribunal under the SAT Act.
32. In this regard, section 29(3) of the SAT Act is relevant. It provides that the Tribunal may set aside the decision being reviewed and substitute its own decision and in any case, 'may make any order the Tribunal considers appropriate'.
33. Therefore, the Tribunal has broad powers to set aside the decisions of the decision-making authority, despite section 29(1) of the SAT Act. In this case, the Tribunal can set aside the Direction even though it has been issued pursuant to an order of the Minister.
34. The setting aside of the Direction is a matter of merit and arguable.

**Documents in support of review**

35. Copy of section 214 direction dated 15 February 2008.

14 March 2008



Minter Ellison  
Solicitors for the applicant



Photo 1- View from across Labouchere Road



Photo 2- View across Labouchere Road looking North



Photo 3- View from across Hardy street looking South



Photo 4- View from of the southern Elevation of the Building from the subject sites car parking area





Photo 1- View of the Proposed Parking bay within the front setback area



618 9367 3038

Date: 29<sup>th</sup> May 2008

Jennifer Clay  
C/o- Planning Solutions  
PO Box 8701  
PERTH BC WA 6849

Attn: Tayne Evershed

Fax: 9227 7971

Dear Sir,

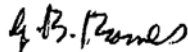
**LOT 301 (43) LABOUCHERE ROAD, SOUTH PERTH**  
**MINOR MODIFICATIONS TO APPROVED PLANS**

I, Greg Barnes, of Nos. 45 – 49 Labouchere Road, South Perth being the owner of Nos. 45 – 49 Labouchere Road, South Perth raise no objections to the amended plans and confirm that these aspects will not adversely affect my amenity, in particular:

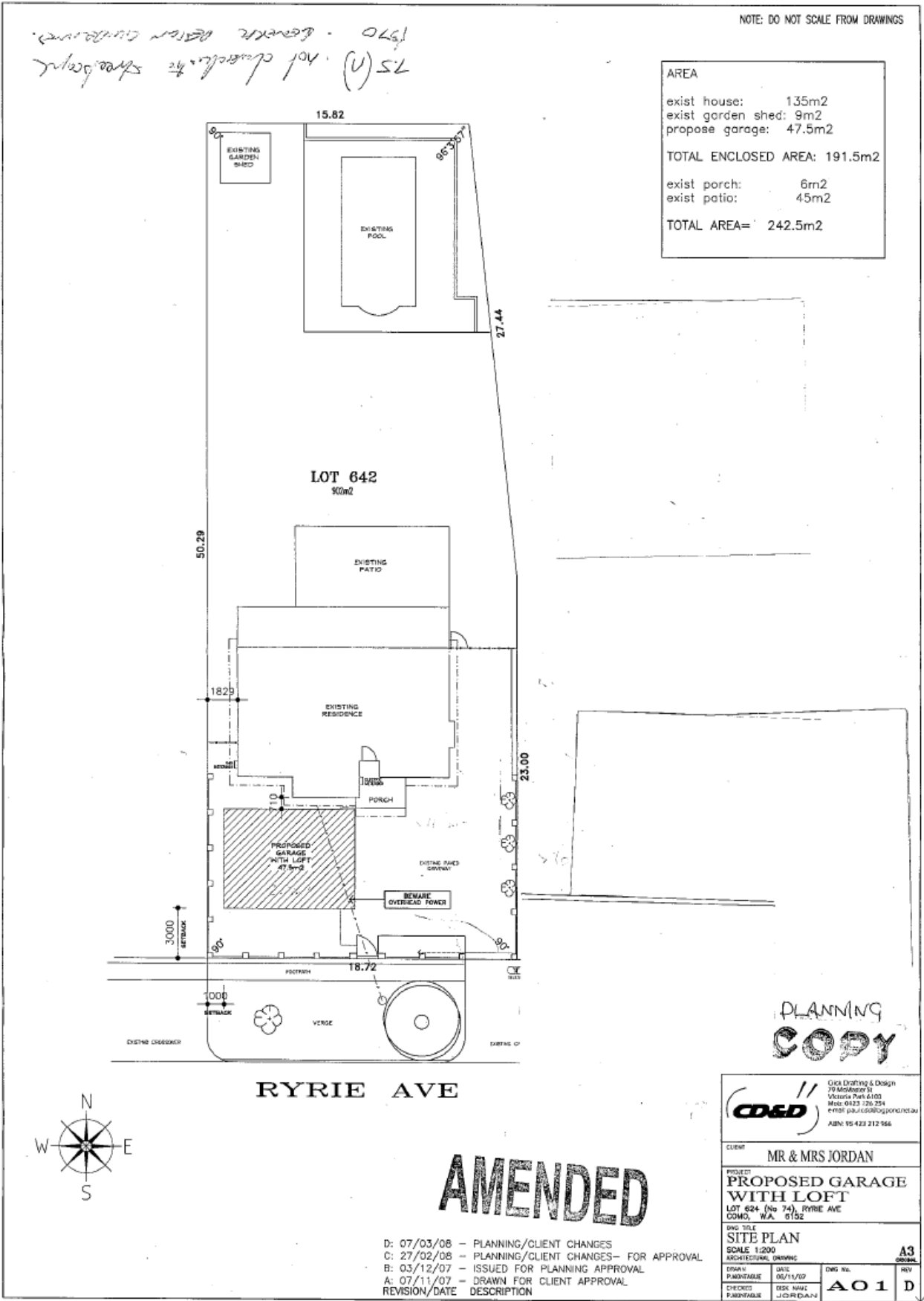
- Reduction in size of the lift shaft;
- Relocation of the lift shaft, with a 1.0m setback from my property boundary;
- The minor projection of the lift shaft above 17.5m;
- Modifications to the southern elevation which include the abovementioned lift shaft and, wall/roof structure to a maximum height of 17.5m associated with the change room and stairs located adjacent to the 'sun deck'; and
- Any additional overshadowing which may occur as a result of the amendments to the plans.

I fully understand these variations and that they do not meet with the City's normal requirements and that I am able to inspect the plans at the City of South Perth's Administration Centre.

Yours faithfully,



**GREG BARNES**  
**OWNER 45 – 49 LABOUCHERE ROAD, SOUTH PERTH**



Lot 100 (No. 74) Ryrie Avenue, Como- Site Plan





Lot 100 (No. 74) Ryrie Avenue, Como- right perspective



Lot 100 (No. 74) Ryrie Avenue, Como - left perspective



Ryrie Avenue, Como - streetscape assessment

ID No. 11.2008.42.1  
 File Ref: RY1/74  
 Processing Officer: Matt Stuart

City of  
**SouthPerth**

TOWN PLANNING SCHEME NO. 6  
 Schedule 8

Refer to Clause 7.9

## Notice of Determination of Application for Planning Approval

|   |                                     |
|---|-------------------------------------|
| <b>Owner:</b>                                     | Mr R D Jordan & Mrs J A Jordan      |
| <b>Applicant:</b>                                 | Mr R D Jordan                       |
| <b>Address for correspondence:</b>                | 74 Ryrie Ave<br>COMO WA 6152        |
| <b>Planning application for proposed:</b>         | Addition (Carport) to Single House  |
| <b>Property address:</b>                          | Lot 100 (No. 74) Ryrie Avenue, COMO |
| <b>Date of application for planning approval:</b> | 05 February 2008                    |
| <b>Date of determination of application:</b>      | 08 May 2008                         |

Pursuant to the provisions of the City of South Perth Town Planning Scheme No. 6 and the Metropolitan Region Scheme, Planning Approval, in accordance with the application for Planning Approval, and attached plans, is **granted**, subject to the following conditions:

- (1) Revised drawings shall be submitted, to the satisfaction of the City, and such drawings shall incorporate the following:
  - (i) The garage shall be setback a minimum 3.0 metres to the front street alignment;
  - (ii) The driveway paving shall be setback a minimum 3.0 metres from the front street alignment, other than where required for safe vehicular movement; and
  - (iii) The garage shall have two windows inserted into the face of the southern wall.
- (2) The external materials and colour finish of the proposed additions shall match with those of the existing building.
- (3) Any required filling or excavation of the site shall be retained by embankments or walls, details of which are to be incorporated in the working drawings submitted in support of a building licence application.
- (4) Any required retaining walls along lot boundaries shall be constructed immediately after excavation or filling has been carried out.
- (5) No street trees shall be removed, pruned or disturbed in any way.
- (6) The validity of this approval shall cease if construction is not substantially commenced within 24 months of the date of planning approval.



CITY OF SOUTH PERTH TOWN PLANNING SCHEME No. 6  
SCHEDULE 8 - Notice of Determination of Application for Planning Approval (continued)

Application date: 05/02/2008

ID No.: 11.2008.42.1

**IMPORTANT NOTE(S):**

- (1) It is necessary for revised drawings to be submitted prior to, or in conjunction with the building licence application as identified in <<insert Condition or Conditions and the relevant number(s)>>, prior to the assessment of the working drawings.
- (2) This planning approval is **not** an authorisation to commence construction. A **building licence must be obtained** from Council's Building Services Department prior to commencing any work of a structural nature.
- (3) The owner is encouraged to landscape the property to a high standard.
- (4) The above decision has been made by a duly assigned officer under delegated authority conferred by the Council in order to expedite the decision-making process. If you are aggrieved by aspects of the decision where discretion has been exercised, you may either:
  - (i) submit a letter to the City requesting that the matter be reviewed at a Council meeting; or
  - (ii) lodge an appeal with the State Administrative Tribunal within 28 days of the Determination Date recorded on this Notice.

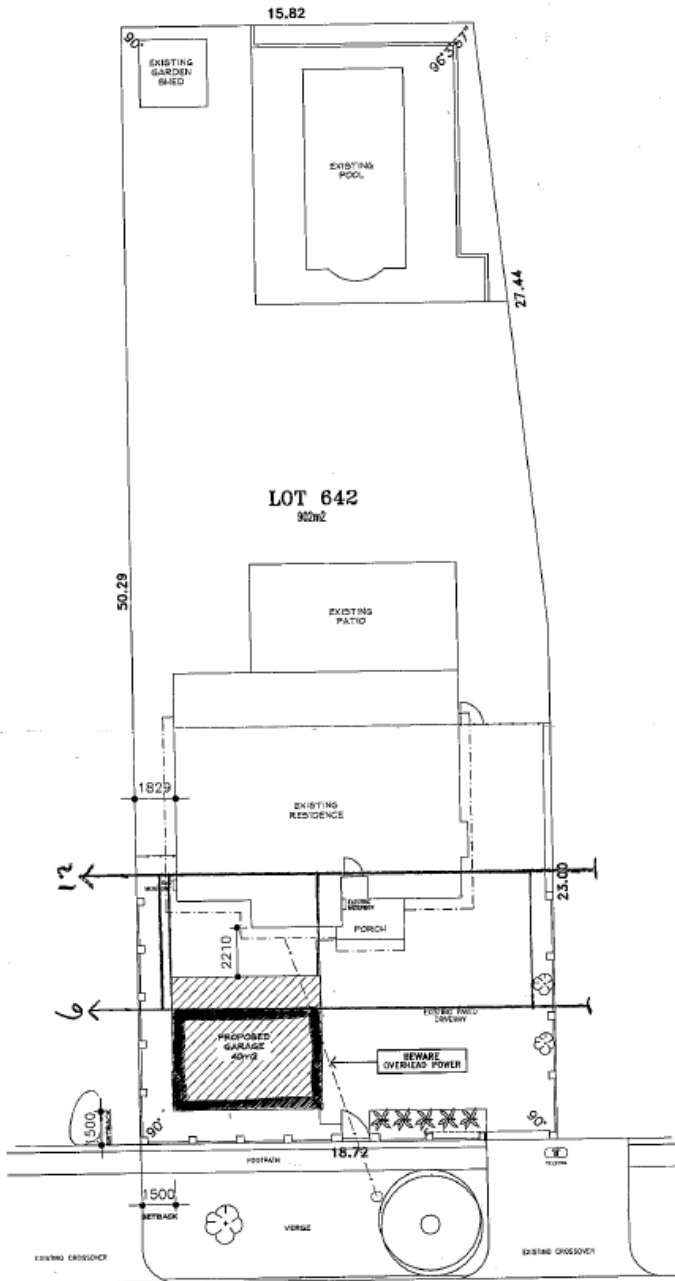
There are no rights of appeal in relation to aspects of the decision where the Council cannot exercise discretion.

SIGNED:   
L. ANDERSON  
PLANNING OFFICER, DEVELOPMENT SERVICES  
for and on behalf of the City of South Perth

DETERMINATION DATED: 08 May 2008

NOTE: DO NOT SCALE FROM DRAWINGS.

| AREA   |                   |
|--|-------------------|
| exist house:                                 | 135m <sup>2</sup> |
| exist garden shed:                           | 9m <sup>2</sup>   |
| propose garage:                              | 40m <sup>2</sup>  |
| <b>TOTAL ENCLOSED AREA: 184m<sup>2</sup></b> |                   |
| exist porch:                                 | 6m <sup>2</sup>   |
| exist patio:                                 | 45m <sup>2</sup>  |
| <b>TOTAL AREA= 235m<sup>2</sup></b>          |                   |



**CITY OF SOUTH PERTH**  
 METROPOLITAN REGION SCHEME  
 CITY OF SOUTH PERTH TOWN PLANNING SCHEME No. 6  
 Planning Approval Conditions apply and under Delegated Authority  
 File Ref: 841/744  
 ID No: 11/0005/42/0001  
 8 May 2008  
 L. R. [Signature]  
 Delegated Officer  
 Sheet 1 of 2

**PLANNING COPY**



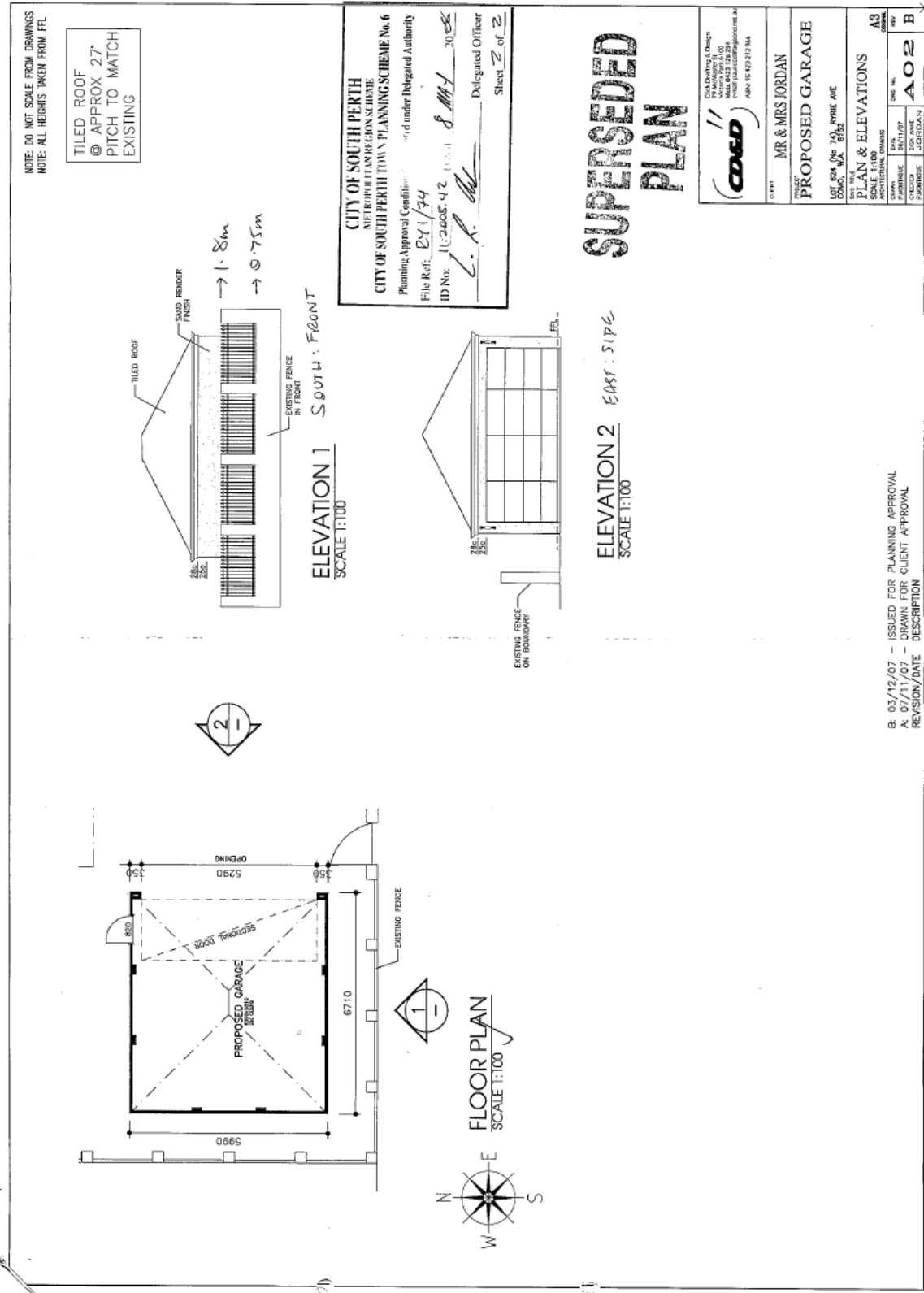
**RYRIE AVE**

**SUPERSEDED PLAN**

B: 03/12/07 - ISSUED FOR PLANNING APPROVAL  
 A: 07/11/07 - DRAWN FOR CLIENT APPROVAL  
 REVISION/DATE DESCRIPTION

|  |                       |
|--|-----------------------|
| <b>CD&amp;D</b><br>Click Drafting & Design<br>20 Melbourne St<br>Victoria Park 6100<br>Mob: 0423 126 259<br>EMAIL: paul@cdandd.com.au<br>ABN: 95 423 212 966 |                       |
| CLIENT   | MR & MRS JORDAN       |
| PROJECT  | PROPOSED GARAGE       |
| LOT 654 (No 74), RYRIE AVE<br>COMM, W.A. 6152  |                       |
| DWG TITLE<br>SITE PLAN<br>SCALE 1:200<br>ARCHITECTURAL DRAWING   |                       |
| DRAWN<br>P. JORDAN   | CHECKED<br>P. JORDAN  |
| DATE<br>06/11/07   | DWG No.<br><b>A01</b> |
| DATE<br>06/11/07   | REV<br><b>B</b>       |
| DATE<br>06/11/07   | REV<br><b>B</b>       |

**A3 ORIGINAL**



NOTE: DO NOT SCALE FROM DRAWINGS  
NOTE: ALL HEIGHTS TAKEN FROM FFL

TILED ROOF  
@ APPROX 27°  
PITCH TO MATCH  
EXISTING

CITY OF SOUTH PERTH  
METROPOLITAN PLANNING SCHEME  
CITY OF SOUTH PERTH METROPOLITAN PLANNING SCHEME No. 6  
Planning Approval Conditions issued under Delegated Authority  
File Ref: EX/1/74  
ID No: 11-24008-42 (1 of 1) 8 MAY 2008  
L. P. M. Delegated Officer  
Sheet 2 of 2

**SUPERSEDED  
PLAN**

**COED**  
Civil & Environmental Design  
17A Albany St  
Mandurah WA 6250  
Phone: 08 9422 1111  
www.coed.com.au

PROJECT: **MR & MRS JORDAN  
PROPOSED GARAGE**

LOT 804, 110 W. PINE AVE  
OSWALD, WA 6112

DATE: 03/12/07  
SCALE: 1:100  
DRAWN BY: **A02**  
CHECKED BY: **B**

B: 03/12/07 - ISSUED FOR PLANNING APPROVAL  
A: 07/11/07 - DRAWN FOR CLIENT APPROVAL  
REVISION/DATE DESCRIPTION

SCANNED

Robert & Juliet Jordan  
74 Ryrie Av, Como, W.A. 6152  
Tel/Fax: (00618) 9368 6968 Mob: 0400 60 50 56  
Email – [bob@dseau.com](mailto:bob@dseau.com)

22/5/08

TO WHOME IT MAY CONCERN

RE: Application for Garage with Loft room at the above address.

|  |                               |                               |
|--|-------------------------------|-------------------------------|
| CITY OF SOUTH PERTH                        |                               |                               |
| - 3 JUN 2008                               |                               |                               |
| Doc ID No:                                 | 538575                        |                               |
| File No:                                   | R41174                        |                               |
| Original To:                               | BS                            |                               |
| Action <input checked="" type="checkbox"/> | Info <input type="checkbox"/> | File <input type="checkbox"/> |

Dear sir/madam

I refer to the above application, I wish for the matter to be reviewed at council meeting.

I would like you to take into account that this is a three by one house, my wife and two children live in the house and we are completely out of space, we can not afford to build two outbuildings at this time.

The garage will be in keeping with the main house, there will be no height difference between the two buildings, it will be three meters to from the front boundary. Having already received planning permission, which is still current, by the council, to build a totally out of keeping with the street, two storey house, I can not see how the proposed dwellings loft room can be refused on these grounds.

Please can you amend the existing wording on the approval from carport to garage,

Thank you for attention in this matter

Kind regards

  
Rob & Julie Jordan

Vriston Pty Ltd Trading as

**R. J. KNOTT • P.T. KER & ASSOCIATES**

BUILDING DESIGNERS ♦ PLANNING AND DESIGN CONSULTANTS

A.C.N. 092 710 837

ABN 18 092 710 837

Member of the Building Design Association of Western Australia

SUITE 6, 23 RICHARDSON STREET, SOUTH PERTH W.A. 6151

TELEPHONE (08) 9367 5907

(08) 9367 1636

FACSIMILE (08) 9474 2037

RJK MOBILE 0408 097 574

PTK MOBILE 0413 614 558

**February 21st 2008**

City Of South Perth  
Cnr Sandgate Street and South Terrace  
South Perth WA 6151

**Attention: The Manager of Planning Services.****Re: Proposed 4 Grouped Dwellings on Lot 51 (#81) cnr Comer Street & McDonald Street Como.**

Dear Sir,

This letter is in support of the application for 4 new Grouped dwellings proposed to be built on Lot 51 (#81) cnr Comer Street and McDonald Street, Como.

The site in question currently comprises 4 dwelling units or flats that appear to have been built in the early 80's. They are constructed of a plain cream face brick and orange roof tiles and are in need of major maintenance and refurbishment. The buildings are dated in appearance with very basic gable elevations which do little to enhance the streetscape or amenity of the area, especially with most of the adjoining properties being redeveloped with new high quality residences with a rich variety of styles and facades, especially the nearly completed development to the southern side on McDonald Street which has a variety of pitched and flat roofs and boundary parapet walls.

The proposed development will provide 4 high quality custom designed modern family homes with landscaped gardens, which will replace the existing run-down buildings and untidy un-kemp gardens. This development will improve the existing streetscape by providing homes that enhance the streetscape and compliment the neighboring buildings.

We ask that Council consider approving this application under the provisions of the Town Planning Scheme, part 6.1 parts (1) (2) & (3). The site is currently coded R20/30 (R30 under TPS 5), our research shows that we can satisfy 7 of the planning criteria needed to qualify for the higher R30 coding and have therefore designed the development with setbacks and courtyards in accordance with R30 requirements, which has been done on the adjoining southern site. We propose 2 parapet walls on the external boundaries, the one adjoining lot 15 Comer street fits within the R codes height and length requirements and abuts an existing carport which is built up to the common boundary. The other wall adjoins the new development on Lot 30 McDonald Street and for most of its length abuts an existing boundary wall. Just under 6.0m of the wall fits within R Codes requirements, it is only the front 2.56m of the wall which is above the R Codes height, being at 4.25m

## H.I.A. Designer Awards

|   |   |               |
|---|---|---------------|
| Group Housing Redevelopment                     | - | 1991 winner   |
| Group Housing 2 to 4 Units                      | - | 1992 winner   |
| Group Housing 2 to 4 Units                      | - | 1993 finalist |
| Group Housing 2 to 4 Units                      | - | 1994 finalist |
| Display Homes                                   | - | 1999 finalist |
| W.A. Medium Density Project of the Year         | - | 1999 winner   |
| W.A. Medium Density Country Project of the Year | - | 1999 winner   |
| National Medium Density Project of the Year     | - | 2000 finalist |

## Building Designers Association Awards

|  |   |                        |
|--|---|------------------------|
| Multi Residential Development            | - | 2001 state winner      |
| Multi Residential Development            | - | 2001 national finalist |
| Mixed Commercial-Residential Development | - | 2002 state winner      |
| Mixed Commercial-Residential Development | - | 2002 national finalist |
| Commercial Development                   | - | 2003 state winner      |
| Commercial Development                   | - | 2003 national winner   |

above the existing GL. Half of this higher section of wall abuts the adjoining parapet wall with the balance abutting an existing driveway and is setback 6.95m from the front boundary. We believe that this minor portion of the wall, which encloses the staircase, will have little or no impact on the adjoining property as it abuts a boundary wall and a driveway and the adjoining development has a number of 2 storey walls on or close to boundaries, so the wall we propose, which in effect, is only one and a half storeys high, will not dominate or overpower the adjoining development and not appear out of scale.

Any overshadowing will be over that part of the building with the parapet wall and the driveway so there is no loss of amenity to the adjoining property. All the units have been designed to comply with the privacy provisions of the R Codes by using privacy screens or screen walls and windows with sill heights of 1.65m.

We ask that Council approve this application in it's current form. Please contact my office on 9367 1636 if you require any further information regarding this application.

Kind Regards

A handwritten signature in black ink, appearing to read 'P. T. Ker', with a stylized flourish at the end.

Phillip T Ker  
R J Knott P T Ker & Associates

# City of South Perth

Attachment 10.5.1

## List of Application for Planning Consent Determined Under Delegated Authority for the Period 1/06/2008 to 30/06/2008

| Application #         | Ext. Ref. | PC Date    | Address                       | Applicant                      | Status   | Description                              |
|-----------------------|-----------|------------|-------------------------------|--------------------------------|----------|--|
| 011.2007.00000285.001 | MO2/45    | 18/06/2008 | 45 Monk ST KENSINGTON         | APG Homes                      | Approved | Single House                             |
| 011.2007.00000483.001 | LA6/66    | 11/06/2008 | 66 Lawler ST SOUTH PERTH      | Mr M J Nevermann               | Refused  | PATIO ADDITION TO SINGLE HOUSE           |
| 011.2007.00000499.001 | PE2/3 -   | 5/06/2008  | 3B Pepler AVE SALTER POINT    | MI Constructions               | Approved | TWO STOREY SINGLE HOUSE                  |
| 011.2007.00000598.001 | AL2/1 -   | 10/06/2008 | 1 Alexandra ST SOUTH PERTH    | Mr Peter Moran                 | Approved | TWO STOREY SINGLE HOUSE                  |
| 011.2007.00000627.001 | EL3/15    | 10/06/2008 | 15 Elizabeth ST SOUTH PERTH   | Building Corporation Pty Ltd   | Approved | TWO STOREY SINGLE HOUSE                  |
| 011.2008.00000064.001 | MI3/28    | 18/06/2008 | 281 Mill Point RD SOUTH PERTH | VBS Property Solutions         | Approved | CHANGE IN LAND USE                       |
| 011.2008.00000065.001 | CL3/78    | 12/06/2008 | 78 Cloister AVE MANNING       | Honest Holdings Pty Ltd        | Approved | TWO STOREY SINGLE HOUSE                  |
| 011.2008.00000066.001 | CL3/78    | 12/06/2008 | 78 Cloister AVE MANNING       | Honest Holdings Pty Ltd        | Approved | TWO STOREY SINGLE HOUSE                  |
| 011.2008.00000074.001 | KI5/11    | 30/06/2008 | 11 King ST KENSINGTON         | Mrs A G Goodchild              | Approved | Additions / Alterations to Single House  |
| 011.2008.00000086.001 | KI5/37    | 3/06/2008  | 37 King ST KENSINGTON         | Webb & Brown-Neaves Pty Ltd    | Approved | TWO STOREY SINGLE HOUSE                  |
| 011.2008.00000109.001 | PE2/24    | 11/06/2008 | 24 Pepler AVE SALTER POINT    | Webb & Brown-Neaves Pty Ltd    | Approved | TWO STOREY SINGLE HOUSE                  |
| 011.2008.00000116.001 | GW1/11    | 23/06/2008 | 111 Gwenyfred RD KENSINGTON   | Mrs J L Kirkpatrick            | Approved | Additions / Alterations to Single House  |
| 011.2008.00000123.001 | LE5/14    | 27/06/2008 | Ley ST COMO                   | J-Corp Pty Ltd t/a Perceptions | Approved | TWO STOREY SINGLE HOUSE                  |
| 011.2008.00000133.001 | CR3/6     | 20/06/2008 | 6 Crawshaw CRES MANNING       | Mr A G Hopkins                 | Approved | Additions / Alterations to Single House  |
| 011.2008.00000135.001 | WE1/46    | 26/06/2008 | 46 Welwyn AVE MANNING         | Prestigious Building & Design  | Approved | TWO STOREY GROUPE D DWELLING             |
| 011.2008.00000147.001 | ED1/18    | 9/06/2008  | 18A Edgumbe ST COMO           | Mr A Yong                      | Approved | Additions / Alterations to Single House  |
| 011.2008.00000153.001 | PA4/10    | 10/06/2008 | 10 Parsons AVE MANNING        | JWH Group Pty Ltd              | Approved | Additional Dwelling to form 2 Grouped Dw |
| 011.2008.00000156.001 | CR3/42    | 30/06/2008 | 42 Crawshaw CRES MANNING      | Amano Homes                    | Approved | TWO STOREY SINGLE HOUSE                  |
| 011.2008.00000157.001 | FO1/62    | 10/06/2008 | 62 Forrest ST SOUTH PERTH     | Mrs J L Cameron                | Approved | DIVIDING FENCE EXCEEDING 1.8 METRES      |
| 011.2008.00000159.001 | CA4/1 -   | 19/06/2008 | 1 Campbell ST KENSINGTON      | Patio Living                   | Approved | PATIO ADDITION TO SINGLE HOUSE           |
| 011.2008.00000167.001 | LO1/11    | 5/06/2008  | 110 Lockhart ST COMO          | Mr D S Brown                   | Approved | Carport Addition to Single House         |
| 011.2008.00000191.001 | MU1/4     | 17/06/2008 | 4 Mullingar CL WATERFORD      | Ms D L Kenny                   | Approved | FENCE GREATER THAN 1.8 METRES            |

## List of Application for Planning Consent Determined Under Delegated Authority for the Period 1/06/2008 to 30/06/2008

| Application #         | Ext. Ref. | PC Date    | Address                      | Applicant                     | Status   | Description                             |
|-----------------------|-----------|------------|------------------------------|-------------------------------|----------|---|
| 011.2008.00000199.001 | ED3/47    | 4/06/2008  | 47 Edgewater RD SALTER POINT | Carport Constructions         | Approved | Carport Addition to Single House        |
| 011.2008.00000202.001 | LA5/14    | 5/06/2008  | 140 Lansdowne RD KENSINGTON  | Mr J B Walters                | Approved | BOUNDARY SCREEN WALL                    |
| 011.2008.00000204.001 | MA3/13    | 5/06/2008  | 139 Manning RD MANNING       | Build West Pty Ltd            | Approved | Additions / Alterations to Single House |
| 011.2008.00000206.001 | BA6/51    | 19/06/2008 | 51 Barang CC KARAWARA        | Mr K Fong                     | Approved | TWO STOREY SINGLE HOUSE                 |
| 011.2008.00000211.001 | PR1/36    | 16/06/2008 | 36 Preston ST COMO           | Oasis Patios                  | Approved | PATIO ADDITION TO GROUPED DWELLING      |
| 011.2008.00000212.001 | CO6/94    | 18/06/2008 | 94 Coode ST SOUTH PERTH      | Mrs C A Borromei              | Approved | Additions / Alterations to Single House |
| 011.2008.00000215.001 | BI3/10 -  | 18/06/2008 | 10 Birdwood AVE COMO         | Australian Renovation Group   | Approved | Carport Addition to Single House        |
| 011.2008.00000218.001 | BR2/21    | 17/06/2008 | 21A Brandon ST SOUTH PERTH   | Mr A Bisignano (Section 51B)  | Approved | Additions / Alterations to Single House |
| 011.2008.00000221.001 | PR1/39    | 4/06/2008  | 39 Preston ST COMO           | Ms K P Watson                 | Approved | EXTENSIONS TO GROUPED DWELLINGS         |
| 011.2008.00000226.001 | GW1/12    | 10/06/2008 | 125 Gwentyfred RD KENSINGTON | Mr G White                    | Approved | Additions / Alterations to Single House |
| 011.2008.00000227.001 | CH1/L1    | 11/06/2008 | Challenger AVE MANNING       | City Of South Perth           | Approved | CIVIC BUILDING                          |
| 011.2008.00000228.001 | MC1/62    | 12/06/2008 | 62 McDonald ST COMO          | Patio Perfect                 | Approved | PATIO ADDITION TO GROUPED DWELLING      |
| 011.2008.00000232.001 | MC1/66    | 11/06/2008 | 66 McDonald ST COMO          | Kalmar Factory Direct         | Approved | PATIO ADDITION TO GROUPED DWELLING      |
| 011.2008.00000234.001 | FI1/11    | 13/06/2008 | 11 Fifth AVE KENSINGTON      | Mr S J Allen                  | Approved | OUTBUILDING                             |
| 011.2008.00000236.001 | BR9/6A    | 19/06/2008 | 6 Bruning RD MANNING         | Ross North Homes              | Approved | GROUPED DWELLING(S)                     |
| 011.2008.00000240.001 | LO1/13    | 13/06/2008 | 134A Lockhart ST COMO        | Mr J Roque                    | Approved | Additions / Alterations to Single House |
| 011.2008.00000242.001 | CO6/58    | 20/06/2008 | 58 Coode ST SOUTH PERTH      | Perth Home Improvement Centre | Approved | PATIO ADDITION TO GROUPED DWELLING      |
| 011.2008.00000252.001 | RO1/12    | 25/06/2008 | 120 Robert ST COMO           | Kalmar Factory Direct         | Approved | PATIO ADDITION TO GROUPED DWELLING      |





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2187.50

LEASE WESTERN AUSTRALIA STAMP DUTY  
11/01/95 267731 DUP \$\*\*\*\*\*2.00  
4905931 D/S \$ 2187.50

DEED dated **3 November** 1994

BETWEEN CITY OF SOUTH PERTH of Civic Centre, Sandgate Street, South Perth, Western Australia ('the Lessor')

AND MILLAR HOLDINGS PTY LTD ACN 063 656 048 of care of Judge Constable, Burswood Chambers, 67 Burswood Road, Burswood, Western Australia ('the Lessee')

AND GRAEME ROSS MILLAR and DONNA CHRISTINE MILLAR both of 59 Preston Street, Como, Western Australia ('the Guarantor')

RECITALS

- A. Reserve No.34565 known as Sir James Mitchell Park ('the land') is vested in the Lessor for recreation purposes with power, subject to the approval in writing of the Minister for Lands to each and every lease or assignment of lease being first obtained to lease the whole or any portion thereof for any term not exceeding 21 years from the date of the lease.
- B. The Lessor has agreed to Lease to the Lessee that portion of the land outlined in green on the attached plan together with all buildings fixtures and fittings therein or erected therein from time to time including the kiosk facility referred to in Recital C ('the premises').
- C. The Lessee wishes to erect on the land the kiosk facility including public toilets as shown on the attached plan ('the kiosk facility') and the Lessor has agreed that the Lessee may erect the kiosk facility upon the terms and conditions contained herein.

- D. The Minister for Lands and the Minister for Local Government, pursuant to section 267 of the Local Government Act 1960, have both consented to the grant of this Lease.

#### OPERATIVE PART

#### 1.0 LEASE

#### 1.1 Lease

Subject to clause 1.2 the Lessor HEREBY LEASES the premises to the Lessee for the term of 21 years from and including the date of execution of this Lease by the Lessor ('date of commencement') and expiring at midnight on the day being 21 years thereafter ('the term') the Lessee yielding and paying therefor the rent reserved by Clause 2 hereof and otherwise upon the terms and conditions herein contained.

#### 1.2 Condition Precedent

Prior to the date of commencement the Lessee shall provide proof to the complete satisfaction of the Lessor that the Lessee has sufficient financial resources to construct the works referred to in clause 3.1 and the Lessor shall confirm in writing that it is satisfied with the proof provided by the Lessee or otherwise.

#### 2.0 RENT

#### 2.1 Annual Rent

The Lessee shall pay annual rent to the Lessor as follows:

- (a) the first year of the term shall be rent free;
- (b) in the second year of the term the annual rent shall be \$5,000;
- (c) in the third year of the term the annual rent shall be \$5,000;

- (d) in the fourth year of the term the annual rent shall be \$5,000;
- (e) in the fifth year of the term the annual rent shall be \$10,000;
- (f) in the sixth year of the term the annual rent shall be \$10,000;
- (g) in the seventh year of the term the annual rent shall be \$10,000;
- (h) in the eighth year of the term the annual rent shall be \$10,000;
- (i) in the ninth year of the term the annual rent shall be \$20,000;
- (j) in the tenth year of the term the annual rent shall be \$20,000;
- (k) in the eleventh year of the term the annual rent shall be \$30,000;
- (l) in the twelfth year of the term the annual rent shall be \$40,000;
- (m) in the thirteenth year of the term the annual rent shall be equal to an amount of \$50,000 which has been increased each year from the date of commencement by a factor equal to the percentage increase in the Consumer Price Index between firstly:
  - (1) the quarter ending immediately prior to the date of commencement and the quarter ending immediately prior to first anniversary of the date of commencement; and
  - (ii) thereafter between the quarter ending immediately prior to each anniversary of the date of

commencement and the quarter ending immediately prior to the next anniversary of the date of commencement up to the quarter ending immediately prior to the commencement of the thirteenth year of the term.

- (n) from the date of commencement of the fourteenth year of the term and annually thereafter the annual rent shall be increased by a factor equal to the percentage increase in the Consumer Price Index between the quarter ending immediately prior to the previous rent review date and the quarter ending immediately prior to the current rent review date,

and in each case the rent shall be payable in equal quarterly instalments in advance commencing on the date of commencement of the second year of the term and in no case shall the annual rent be less than that payable for the previous twelve month period and any late payment of rent shall bear interest at the rate referred to in Clause 6.4 from the due date for payment until the actual date of payment.

For the purposes of this clause and wherever appearing in this Lease 'Consumer Price Index' means the Consumer Price Index All Groups Index Numbers for Perth the subject of Catalogue No. 6401.0 provided by the Australian Bureau of Statistics or if the basis upon which the Consumer Price Index figure as determined by the Australia Bureau of Statistics is substantially varied or altered then the Lessor may utilise such figure in place of the figure no longer provided or such basis for determination in place of the basis for determination which is so varied or altered (as the case may be) as the Lessor may reasonably determine and in so determining the Lessor shall utilise as the basis therefore an index which is as near to the Consumer Price Index previously referred to as is reasonably possible.

## 2.2 Profit Bonus

For the purposes of this clause:

'Lessee's Base Return' means an initial amount of \$150,000 increased annually from the date of commencement by a factor equal to the percentage increase in the Consumer Price Index between firstly the quarter ending immediately prior to the date of commencement of this Lease and the quarter ending immediately prior to the first anniversary of the date of commencement and thereafter between the quarter ending immediately prior to each anniversary of the date of commencement up to the quarter ending immediately prior to the next anniversary of the date of commencement.

'Lessee's Total Annual Return' means the gross profit of the business carried on by the Lessee at the premises before tax plus any salaries or wages commission bonuses or allowances paid by way of remuneration to the Lessee or its directors.

(a) Calculation

In addition to the annual rent, the Lessee shall pay to the Lessor from the commencement of the eleventh year of the term one third of the amount by which the Lessee's Total Annual Return exceeds the Lessee's Base Return ("the profit bonus")

(b) Payment

The profit bonus shall be payable annually in arrears.

(c) Lessee's Records

The Lessee shall keep or cause to be kept proper books of account and records relating to all transactions in the course of the business or businesses carried on, in, at, from or on the premises and supporting data and bank deposit records all of which shall be kept available for at least 2 years after the expiration of each year of this Lease.



(d) **Annual Statement and Payment**

Within 14 days after the end of each calendar year or portion thereof during the term commencing at the end of the eleventh year of the term the Lessee shall furnish to the Lessor a set of accounts and a statement (certified by the Lessee's duly authorized responsible officer or representative) of the Lessee's Total Annual Return during such year or portion thereof and when applicable pay to the Lessor with the statement profit bonus due to the Lessor.

(e) **Right to Examine Books**

The Lessor and the Lessor's Auditors shall have the right at any reasonable time to examine and make copies of such portion of the Lessee's books and records in respect of the Lessee's business carried on in or from the premises as to satisfy themselves and to the correctness of the certificate referred to in clause 2.2(d).

(f) **Audit**

The Lessor at its option by serving written notice upon the Lessee within 30 days of receipt of the certificate referred to in clause 2.2(d) may cause a complete audit to be made by the Lessor's auditor of those portions of the Lessee's books and records which relate to the premises for the period covered by such certificate and if the audit discloses a liability for profit bonus in excess of the profit bonus computed and payable or paid by the Lessee to the Lessor such outstanding profit bonus shall be paid by the Lessee to the Lessor within 14 days of demand and if such audit discloses a liability for profit bonus to the extent of 5% or more in excess of the profit bonus computed and payable or paid by the Lessee to the Lessor for such period the Lessee

shall pay to the Lessor on demand the cost of such audit but otherwise the Lessor shall bear and pay the costs of such audit. If the audit discloses a liability for profit bonus less than the profit bonus computed and payable or paid by the Lessee to the Lessor then if no other moneys are outstanding from the Lessee to the Lessor pursuant to this Lease the Lessor shall repay to the Lessee within 14 days of demand any amount of any excess profit bonus paid by the Lessee to the Lessor.

### **3.0 KIOSK FACILITY**

#### **3.1 Plans and Specifications**

Subject to clause 3.2 the Lessee shall erect or cause to be erected the kiosk facility and works associated with it including the public toilets (together 'the works') in accordance with plans and specifications signed on behalf of the Lessor and the Lessee contemporaneously with their execution of this Lease for the purpose of identification.

#### **3.2 Completion**

Subject to the Lessee having complied with clause 1.2 and having received written confirmation from the Lessor that it is satisfied with the proof to be supplied by the Lessee pursuant to that clause the works shall be commenced as soon as reasonably practical after the date of commencement of this Lease and shall be completed ready for occupation with all reasonable speed but in any event no later than 6 months after the date of commencement of this Lease.

#### **3.3 Compliance with Laws**

The Lessee shall at all times during the construction of the works comply with all relevant acts, by-laws, regulations and orders of every relevant authority.

#### 3.4 Inspection by Lessor

The Lessor or the Lessor's consultants or architects shall be entitled at all reasonable times to inspect the kiosk facility and the progress and quality of its construction up to the date of issue of a certificate of classification for the kiosk facility and within a reasonable time after the issue of a certificate of classification for the kiosk facility.

#### 3.5 Contractors Works Insurance

The Lessee shall ensure that prior to the commencement of the construction of the works that:

- (a) any contractor, employed by the Lessee, shall, in the joint names of the contractor, the Lessee the Lessor and all subcontractors for their respective rights and interests, effect insurance upon such terms and conditions including exclusions and excesses (if any) and for such period as shall be reasonably required be the Lessor, a Contractors Risk Insurance Policy or Policies which shall at all times cover the whole of the value of the works and other works the subject of any contract with the contractor for the construction of the works including any associated temporary works and for which the contractor or any subcontractors are responsible plus 10% of that value against loss destruction or damage for the full reinstatement and replacement costs; and
- (b) to ensure that the contractor agrees in writing to be liable for and shall indemnify the Lessor against any liability, loss, claim or proceeding whatsoever arising under any Statute or at common law in respect of personal injury to or death of any person whomsoever, or any injury loss or damage whatsoever to any real or personal property of the Lessor or any other person arising our of or in the course of or by reason of the carrying out of the construction of the works by the contractor or any subcontractor.

**3.6 Accounts**

The Lessee shall keep or cause to be kept proper accounts and records relating to all costs in connection with the construction of the kiosk facility.

**3.7 Right to Inspect**

The Lessor and the Lessor's auditors shall have the right at all times during the construction of the kiosk facility and for a reasonable period after the issue of the Certificate of Classification for the kiosk facility to examine and make copies of the accounts and records in order to verify the exact cost of construction and fitting out of the kiosk facility.

**3.8 Adjustment of Rental**

If the final cost of construction and fitting out of the kiosk facility is less than \$750,000 then the rental payments referred to in Clause 2.1 shall be adjusted to give the Lessee an internal rate of return of 14.86%. The Schedule annexed to this Lease headed 'SJMP Kiosk - Miller Revised Proposal' sets out a calculation of the internal rate of return to the Lessee of 14.86% on the basis of a \$750,000 cost to build and fitout the kiosk facility and any adjustment to the rental shall be made having regard to the altered figure for the kiosk facility and the other figures referred to in the Schedule.

**3.9 Inventory**

Upon completion and fitting out of the kiosk facility, the Lessee shall provide the Lessor with a costed inventory of any fixtures, fittings, furniture and other moveable items forming part of the fitting out of the premises and included in the cost of construction and fitting out of the kiosk facility as determined pursuant to clause 3.8.

**3.10 Furniture and Moveable Items**

- (a) The Lessor and the Lessee agree that all fixtures, fittings and furniture and other moveable items in the premises included in the cost of the construction of the kiosk facility of \$750,000.00 or such lesser amount determined pursuant to clause 3.8 and any replacement of these items during the term of this Lease shall be and become part of the premises.
- (b) If the Lessee wishes to replace any of the items shown on the inventory referred to in clause 3.9 during the term of this Lease, then at the time of the replacement, the Lessee shall pay to the Lessor the amount shown for the item on the inventory. Property in the item shall pass to the Lessee at the time of payment and the Lessee at that time shall be entitled to remove the item from the premises and any replacement of the item shall be the property of the Lessee.

#### 4.0 LESSEE'S COVENANTS

The Lessee HEREBY COVENANTS with the Lessor as follows:

#### 4.1 Payment of Rent

To pay the Lessor the rent hereby reserved at the times and in the manner provided herein.

#### 4.2 Rates, Taxes & Outgoings

To pay and discharge all rates and taxes including land tax assessed or charged in respect of the premises and all other outgoings, including without limitation all telephone, electricity, gas, water, rubbish collection and sewerage charges levied, charged or imposed upon the premises or any part thereof or arising out of the use thereof and whether expressed to be payable by the owner or occupier thereof and to pay all charges for water and electricity used or consumed at or upon the premises PROVIDED THAT the Lessee shall not be required to pay for any water usage for that part of the premises specified as public toilets which shall be separately

metered and not required to pay for any rates and taxes for that part of the premises specified as public toilets.

**4.3 Maintenance, Repairs & Painting**

To keep and maintain every part of the premises and all additions thereto and all lighting and electrical installations and all drainage and all other fixtures and fittings in good repair to a standard acceptable to the Lessor and to paint all such parts of the interior and exterior of the premises as are now painted or may be painted at any time or are usually painted at such times and in accordance with the directions of the Building Surveyor of the Lessor.

**4.4 Cleaning**

At its own expense during the term at all times to keep and maintain the premises, including the public toilets, clean, drained, properly disinfected, free from rubbish, refuse and disused material of any kind and in good and sanitary condition to a standard acceptable to the Lessor provided however that the Lessee shall not be responsible for the cost of consumable items in the public toilets which will be paid and supplied by the Lessor.

**4.5 Entry by Lessor to View**

To permit the Lessor, its officers, members or agents at all reasonable times with or without workmen or others to enter the premises to view the state of repair and condition thereof causing minimum disruption to the carrying out of the business of the Lessee at the premises in the circumstances and to forthwith carry out any repairs, cleaning, painting or other works for which the Lessee is responsible under this Lease in accordance with any notice in writing which contains reasonable details of any defects, repairs or works and steps required to comply with the notice and which is given to the Lessee or left on the premises by the Lessor.

**4.6 Abatement of Nuisances**

(a) Not to do or leave undone any act matter or thing which

may be or be deemed to be a nuisance within the meaning of the Local Government Act, the Health Act, the Factories and Shops Act or any other Act or under any by-laws or regulations applicable to the premises or the use or occupation thereof by the Lessee and forthwith to abate any such nuisance.

- (b) To ensure that the premises are not used in any manner which may be or become a nuisance disturbance or annoyance to the quiet and comfort of any occupier of any land in the vicinity of the premises and on being reasonably required to do so by the Lessor or any officer of the Lessor to forthwith abate any such nuisance, disturbance or annoyance.

**4.7 Pests**

To keep the premises free of ants, pests and vermin.

**4.8 Disorderly Behaviour**

To prevent disorderly behaviour and indecent language in the premises at all times during the day and night.

**4.9 Compliance with Statutes**

At its own expense to comply with, carry out and perform the requirements of the Local Government Act, the Health Act and all other Acts, town planning schemes, by-laws or regulations or of any requisitions or orders thereunder applicable to the premises or the use or occupation thereof.

**4.10 Permitted Use**

To use the premises solely for the purpose of a kiosk and food servery and associated facilities and not at any time to use the premises as a restaurant and without limiting the generality of that use:

- (a) to ensure that the premises are accessible during the hours referred to in Clause 4.22 for recreational users of the land;
- (b) to serve take-away food and beverages from the premises;
- (c) not to take any bookings or reservations at any time from any patrons of the premises for any part of the premises provided however, that this shall not prevent the Lessee from providing table service to patrons of the premises at any time.

#### 4.11 Prohibited Use

Not to use the premises for any illegal or immoral purpose nor for Lease in any other business or commercial use without the prior written consent of the Lessor the Swan River Trust and the Minister for Lands.

#### 4.12 Insurance

- (a) To pay to the Lessor on demand the cost to the Lessor of insuring and keeping insured for the full value thereof all buildings, erections or other improvements comprised in the premises including any plate glass therein (if any) in the names of the Lessor and the Lessee for their respective interests with an insurance company nominated by the Lessor against fire, storm, tempest, earthquake, malicious damage and such other risks as the Lessor shall reasonably determine and to allow the Lessor to hold every insurance policy therefor.
- (b) To effect and keep in force throughout the term a public risk policy of insurance in an amount of not less than \$5,000,000 in respect of any one event or such other amount as the Lessor may reasonably require from time to time and to produce to the Lessor on request a certificate of the currency of that policy.



- (c) To effect and keep in force throughout the term a worker's compensation and employer's indemnity policy of insurance in respect of the Lessee's employees.
- (d) To effect and keep in force throughout the term any other policy of insurance which the Lessor acting reasonably may from time to time require the Lessee to effect and maintain with an amount of cover as may be reasonably specified by the Lessor.
- (e) Not to do or suffer to be done anything whereby any policy of insurance in respect of the premises may become void or voidable or whereby the rate or premium thereon may be increased and if any increased premium shall be payable by reason of any acts or defaults of the Lessee (including absence from the premises) under this sub-clause then to pay to the Lessor on demand the amounts by which such premium shall be increased.
- (f) At its own expense to make such amendments alterations and additions to the premises as shall be required by any requisitions or requirements of the Insurance Council of Australia or other body or authority having power or control over electrical installations or fixtures or dealing with insurance matters.

#### 4.13 Indemnity

To indemnify the Lessor and keep the Lessor indemnified from and against all claims, demands, writs, summonses, actions, suits, proceedings, judgments, orders, decrees, damages, costs, losses and expenses of any nature whatsoever which the Lessor may suffer or incur in connection with the loss of life, personal injury or damage to property arising from or out of any occurrence in upon or at the premises or the use by the Lessee of the premises or any access ramp for the premises or disabled parking area for the premises or any part or to any person or the property of any person using or entering or near any entrance to the premises or occasioned (wheresoever it may occur) wholly or in part by any act, neglect, default or omission by the Lessee its agents, contractors,

servants, workmen, customers, members or any other person or persons using or upon the premises with its consent or approval expressed or implied except to the extent that such loss or damage is caused by the negligent act of omission of the Lessor, its agents, contractors, servants or workmen.

**4.14 Alterations & Improvements**

Not without the prior written consent of the Lessor which consent will not be unreasonably withheld to erect or suffer to be erected any building or structure on the premises or to make or suffer to be made any alteration in or additions to any building or any other improvements to the premises or to remove any such improvements or to cut main or injure or suffer to be cut maimed or injured any of the walls or timbers thereof.

**4.15 Fixtures, Fittings and Furniture**

Not without the prior written consent of the Lessor which consent will not be unreasonably withheld to erect, install or place any fixtures, fittings or furniture in or upon the premises.

**4.16 Sale of Liquor**

Not to sell or permit the sale of any spirituous or fermented liquors or alcohol on the premises or any part thereof other than under a valid licence issued in pursuance of the Liquor Licensing Act 1988, and then only with the prior written consent of the Lessor, the Swan River Trust and the Minister for Lands.

**4.17 Assignment or Subletting**

The Lessee shall not assign sublet transfer or part with possession of the premises or any part thereof or the benefit of this Lease or any estate or interest herein without obtaining the prior written consent of the Lessor which the Lessor shall have an absolute right to withhold on reasonable grounds and the provisions of Sections 80 and 82 of the Property Law Act 1969 shall not apply to this Lease. To enable the Lessor to consider the Lessee's request to assign sublet transfer or part with possession at the

premises or any part thereof the Lessee shall comply with the following:

- (a) the Lessee shall prove to the Lessor that the proposed sublessee or assignee is respectable responsible and of substantial means and with previous proven successful management experience in the conduct of premises similar to the premises and capable of complying with of the covenants of the Lessee contained in this Lease and if the Lessee is unable to prove these matters to the Lessor the Lessor and the Lessee agree that these are reasonable grounds for the Lessor to withhold consent.
- (b) in the case of a proposed sublease the Lessee shall prove to the satisfaction of the Lessor that the proposed sublease is at a rent and on terms and conditions which are not more favourable to the proposed sublessee than the rent hereby reserved and the covenants of the Lessee contained in this Lease;;
- (c) all rent and other moneys (including interest) then due and payable by the Lessee pursuant to this Lease shall have been paid;
- (d) there shall not be at either or both of the time such consent is sought and at the date any sublease or assignment is to take effect any subsisting breach of any of the covenants of the Lessee contained in this Lease;
- (e) if the consent is given, the Lessee has procured the execution by the proposed assignee or sub-lessee and such guarantors as are referred to in paragraph (h) of an assignment of this Lease or a sublease (as the case may be) to which the Lessor is a party and which is in a form prepared by the Lessor's solicitors and has delivered such assignment or sublease to the Lessor;
- (f) the Lessee pays to the Lessor all reasonable costs and expenses including legal costs administrative costs stamp duty and other disbursements incurred or to be incurred by

the Lessor in respect of any deed of assignment or sublease and all costs and expenses incurred by the Lessor of and incidental to any enquiries and investigations which are made by or on behalf of the Lessor as to the respectability solvency and suitability of any proposed assignee or sublessee;

- (g) the Lessee enters into a deed in such form as the Lessor's solicitors shall approve under which the Lessee releases the Lessor from all claims which the Lessee may then have or may thereafter have against the Lessor in respect of or in any way arising from this Lease; and
- (h) where any proposed sublessee or assignee is a Corporation the directors and principal shareholders thereof at their expense execute and complete a Deed of Guarantee and Indemnity in a form approved by the Lessor's solicitors in favour of the Lessor in respect to the payment of all rent and the observance and performance of all of the covenants of the Lessee contained in this Lease.

For the purposes of this clause:

- (i) any change in the principal shareholders of any corporate Lessee which has the effect of altering the effective control of the Lessee; or
- (j) where the Lessee has executed this Lease as the trustee of a trust and any change in the persons beneficially entitled to the trust assets occurs,

shall be deemed an assignment of this Lease and shall require the prior consent of the Lessor and the Minister for Lands in the manner referred to in this Clause.

#### 4.18 Signs

Not without the prior written consent of the Lessor which consent will not be unreasonably withheld to affix or exhibit or permit to be affixed to or exhibited upon any part of the exterior of the

premises or in any place visible from beyond the premises any placard, sign, poster, hoarding or advertisement.

#### 4.19 Legal Costs

To pay the costs (on the scale applicable to the Lessor) of and incidental to the negotiations and instructions for and the preparation, completion and stamping of this Lease (including stamp duty) and all copies thereof and also all costs, charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of any notice under Section 81 or any other section of the Property Law Act 1969 requiring the Lessee to remedy a breach of any of the covenants herein contained.

#### 4.20 Delivery Up of Possession

At the expiry or sooner determination of the term peaceably and quietly to deliver up possession of the premises and all furniture, fixtures and fittings belonging thereto included in the cost of construction of the kiosk facility of \$750,000 or such lesser amount determined pursuant to Clause 3.8 and not purchased and replaced by the Lessee pursuant to Clause 3.10(a) in such good and tenable repair, order and condition as shall be consistent with the covenants herein contained in that behalf PROVIDED THAT forthwith upon the expiry or sooner determination of the term the Lessee shall be entitled to remove any other tenant's fixtures and fittings and shall make good any damage caused to the premises in so doing and the other tenants fixtures and fittings not so removed prior to the expiry or sooner determination of the term shall become the property of the Lessor.

#### 4.21 Swan River Trust Requirements

To comply with the conditions of approval to commence development pursuant to part 5 of the Swan River Trust Act issued in respect of the premises and the land, a copy of which is attached to this Lease.

**4.22 Conduct of Business**

- (i) To carry on the Lessee's business in the premises in a competent businesslike and prudent manner each day of the year from 7.00am to 10.00pm unless otherwise agreed by the Lessor in writing.
- (ii) To keep the premises, including any public toilets, open from 7.00am to 10.00pm each day of the year unless otherwise agreed by the Lessor in writing.
- (iii) To keep the public toilets within the premises well lit during such times as they are open.
- (iv) During such time as the premises are not open, to keep the premises, including the public toilets locked and in a secure condition.

**4.23 Damage to Pumps**

To be liable for any damage, or repairs required to, any pumps and sewers situated on or near the premises when such damage or repairs arise as a result of the negligent act or omission of the Lessee its agents, contractors, servants and workmen or customer or any other person or persons using or upon or about the premises with the Lessee's consent or approval expressed or implied except to the extent of damage or repairs caused or required as a result of the negligent acts or omissions of the Lessor, its agents, contractors, servants or workmen.

**4.24 No Encumbrance of Leasehold Interest**

Not to mortgage, charge or otherwise encumber the whole or any part of its interest in this Lease without the prior written consent of the Lessor which the Lessor shall have an absolute discretion to give or withhold and if the Lessor consents to the Lessee mortgaging charging or otherwise encumbering the whole or any part of its interest in this Lease then the Lessor may as a condition of that consent require the Lessee and any mortgagee chargee or encumbrancer to enter into a deed prepared by the

solicitors for the Lessor at the cost of the Lessee which is in a form and substance satisfactory to the Lessor.

4.25 Bills of Sale or Charges

Not without the prior written consent of the Lessor on each occasion give any bill of sale or charge over or affecting any plant or equipment affixed or to be affixed to the premises and in respect of any bill of sale or charge whether over such plant and equipment or otherwise affecting any property in or about the premises or this Lease and:

- (a) to duly and punctually comply in all respects with the terms and conditions thereof;
- (b) to give written notice to the Lessor forthwith of any notice of default or demand received by the Lessee in respect thereof;
- (c) to give written notice to the Lessor at least once in each year of the term hereof and also wherever notice of any default or any demand is given or made under subparagraph (ii) hereof of all items comprised therein their respective values and the balance of moneys owing thereunder; and
- (d) authorise the Lessor and the Lessor's servants and agents to obtain from any Grantee or Chargee thereof all such particulars thereof and of the moneys from time to time owing thereunder as the Lessor may from time to time require.

**4.26 Income Tax Returns**

The Lessee shall:

- (a) by the due date for lodgment each year during the term lodge its Income Tax Return at the Australian Taxation Office;
- (b) produce a copy of the Income Tax Return and proof of lodgment to the Lessor each year during the term within 48 hours of lodgment;
- (c) notify the Lessor immediately if any audit of the Income Tax Return or any part of it is requested by the Australian Taxation Office and inform the Lessor of the results of the audit;
- (d) notify the Lessor immediately of any amendments or variations made to the Income Tax Return after lodgment; and
- (e) produce to the Lessor a copy of the Notice of Assessment of Income Tax within 48 hours of receipt by the Lessee.

**5.0 LESSOR'S COVENANT - QUIET POSSESSION**

The Lessor HEREBY COVENANTS with the Lessee that the Lessee paying the rental hereby reserved and observing and performing the covenants herein expressed and implied and on the Lessee's part to be observed and performed shall during the term and any extension thereof quietly enjoy the use and occupation of the premises without interruption by the Lessor or any person lawfully claiming through or under the Lessor.

**6.0 MUTUAL AGREEMENTS**

IT IS HEREBY MUTUALLY AGREED as follows:

**6.1 Ownership of Kiosk Facility**

At the expiration or determination of the term of this Lease the



kiosk facility is the property of the Lessor absolutely.

**6.2 Default by Lessee**

If:

- (a) any rent hereby reserved or any part thereof is at any time in arrears for 14 days after the same shall have become due (whether or not any formal or legal demand is made therefor);
- (b) the Lessee fails to carry on the Lessee's business in the premises in a competent businesslike and prudent manner each day of the year from 7.00am to 10.00pm unless otherwise agreed by the Lessor in writing and continues to do so for 7 days after service of notice required under section 81 of the Property Law Act (and the parties hereto expressly agree that 7 days notice shall be a reasonable period).
- (c) (subject to the provisions of the Bankruptcy Act 1966) the Lessee becomes bankrupt or suffers the Lessee's interest in this Lease to be taken in execution or being a company calls a meeting of its creditors, has a receiver appointed, goes into liquidation or has any order made against it for winding up of the Lessee;
- (d) the Lessee calls a meeting of the Lessee's creditors or makes any composition or arrangement with or assignment for the benefit of the Lessee's creditors or suffers any execution under any legal process to issue or be levied upon or against any of the Lessee's goods or chattels; or
- (e) the Lessee breaches or fails to observe and perform any other covenant condition or stipulation herein expressed or implied and on the part of the Lessee to be observed or performed and the Lessee fails to remedy such breach if it is capable of remedy and to make reasonable compensation in money to the Lessor for the breach within 28 days (which the parties hereto expressly agree shall be a reasonable

period) or such further time as the Lessor may allow after the service of the notice required by Section 81 of the Property Law Act,

THEN this Lease and the term shall at the option of the Lessor cease, determine and be absolutely void and the Lessor may thereupon without notice re-enter upon, occupy and resume possession of the premises in the name of the whole but without releasing the Lessee from liability for rent up to the determination of this Lease or for any antecedent breach and for the purpose of such re-entry the Lessor and all persons authorised by the Lessor may forcibly eject or put out the Lessee and any Licensee and any property or thing belonging to the Lessee or the Licensee found thereon without being liable to any action for trespass, assault or other proceedings whatsoever for so doing but with liberty to plead the leave and licence hereby given in bar of any such action or proceedings if any such action or proceedings is brought or instituted.

### 6.3 Destruction of Premises

- (a) Subject to paragraph (b) of this Clause, if the premises or any part thereof shall be burned down, destroyed or damaged by fire so as to render the same unfit for the purpose permitted by this Lease then in such case (unless the insurance of the premises shall have been forfeited or become null or void or the payment of any moneys payable under such insurance be refused or withheld through any act or default of the Lessee or its members, agents, servants, invitees or licensees) the rental hereby reserved or a fair and just proportion thereof according to the nature and extent of the damage sustained shall cease to be payable until the premises shall have been rebuilt and rendered fit for the purpose permitted by this Lease. In case of difference touching this paragraph such difference shall be referred to the award of a single arbitrator if the parties can agree upon one and otherwise to two arbitrators one to be appointed by the Lessor and the other by the Lessee and their umpire (to be appointed before proceeding with the arbitration) and in either case in accordance with the

provisions of the Commercial Arbitration Act 1985 or any modification or re-enactment thereof for the time being in force PROVIDED THAT in the event of such difference no part of the said rental shall be allowed by the Lessor to the Lessee as aforesaid but the Lessee shall continue to pay the rental in full until the date of the award of such arbitrator whereupon the Lessor shall refund to the Lessee free of interest any rental which according to such award shall have been overpaid. In any such arbitration each party shall be entitled to be represented by a duly qualified legal practitioner and this Clause shall be deemed to be the agreement in writing referred to in Section 20 of the Commercial Arbitration Act 1985 in respect of such representation.

- (b) If, during the first ten (10) years of the term, the premises or any substantial part be burnt down, destroyed or damaged so as to be wholly unfit for occupation or use then the proceeds of insurance of the premises (unless the insurance shall have been forfeited or become null or void or the proceeds of that insurance is refused or withheld as a consequence of any act or default of the Lessee or its members, agents, servants, invitees or licensees) shall be applied by the Lessor (with the assistance where required of the Lessee) in the reconstitution and rebuilding of the premises and the continuation of the term, subject only to the abatement of rent by clause 6(a) and provided that any shortfall between the proceeds of the insurance and cost of reconstitution and rebuilding of the premises shall be paid by the Lessee.
- (c) If, during the eleventh (11th) to fifteenth (15th) years of the term, the premises or any substantial part be burnt down, destroyed or damaged so as to be wholly unfit for occupation or use then either party by notice in writing to the other within 28 days of the date of destruction, may require the proceeds of insurance of the premises (subject only to the proviso referred to in clause 6(b)) to be applied to the reconstitution and rebuilding of the premises and the continuation of the term save that the

Lessee, upon receipt of a notice from the Lessor to that effect, may elect (by notice in writing served upon the Lessor within a further period of 7 days) not to proceed. Upon the receipt by the Lessor of a notice from the Lessee to that effect this lease and the term created by it shall be determined but without affecting the obligations of the Lessee to the Lessor prior to the date of destruction and all money paid or payable under any policy of insurance effected in respect of the premises shall belong to the Lessor absolutely.

- (d) At any time after the expiration of the fifteenth (15) year of the term, if the premises or any substantial part be burnt down, destroyed or damaged so as to be wholly unfit for occupation or use, this Lease may be determined by the Lessor by notice in writing to the Lessee (which determination shall be served upon the Lessee no later than 28 days after the date of destruction) and all money paid or payable under any policy of insurance effected on the premises shall belong to the Lessor absolutely.

#### 6.4 Entry by Lessor

If the Lessee shall fail to duly and punctually observe or perform any covenant, condition or agreement herein expressed or implied and on the part of the Lessee to be observed and performed the Lessor shall be entitled to carry out the observance or performance of such covenant, condition or agreement and for such purpose the Lessor or the Lessor's agents workmen or architects may if necessary enter the premises or any part thereof and the cost and expense incurred in such observance or performance together with interest thereon at the rate of interest charged by the Commonwealth Bank on overdrafts of \$100,000.00 or less plus 4% shall be a debt due by the Lessee to the Lessor and shall be payable on demand and may be recovered by the Lessor in the same manner as if such debt were for rent due under this Lease in arrear by action in law and such cost expense and interest shall be a charge on the term.

**6.5 Holding Over**

If the Lessee holds over the premises at the expiry of the term:

- (a) a tenancy from year to year shall not thereby be presumed but the tenancy shall in such event be and continue to be a tenancy from month to month;
- (b) subject to paragraph (c) of this paragraph, the tenancy shall be upon the terms and conditions herein contained insofar as they are applicable and shall be determinable at the expiration of one month's notice by either party to the other at any time;
- (c) the Lessee shall pay to the Lessor by equal monthly instalments in advance at the times referred to in Clause 2 an annual rent calculated in accordance with clause 2.0(a) together with the profit bonus for each month of the term calculated in accordance with clause 2.1.
- (d) the Lessor may give to the Lessee notice in writing at any time specifying an annual rent being an amount greater than the annual rent referred to in paragraph (c) and the Lessee shall commence paying the annual rent specified in the notice at the commencement of the month following the receipt of the notice.

**6.6 Lease Subject to Commercial Registrar's Consent**

- (a) The granting of this Lease is entirely subject to and conditional upon the Commercial Registrar approving (and where that approval is subject to any conditions, those conditions being acceptable to the Lessor) under the Commercial Tenancy (Retail Shops) Agreements Act 1985 the inclusion in this Lease of any provisions which in the absence of the Commercial Registrar's approval would not bind the parties to this Lease intended to be bound by those provisions or would be void or voidable or capable of being declared void or voidable (in each case whether in whole or in part); and

- (b) The condition precedent referred to in clause 6.6(a) is for the benefit of the Lessor alone and the Lessor may waive the whole or any part of the Lessor's rights arising pursuant to clause 6.6(a) at any time by notice in writing to the Lessee.

#### 6.7 Arbitration

- (a) If the Lessor and the Lessee are unable to agree on any matter or thing associated with this Lease then:
- (i) if the Lessor and the Lessee agree the dispute may be referred for the determination of a single arbitrator if the parties can agree upon one and failing agreement to an arbitrator appointed by the President for the time being of the Law Society of Western Australia at the request of the Lessor and the Lessee or either of them. The costs of the arbitrator shall be paid in accordance with the award of the Arbitrator. The arbitrator shall act as an expert and not as an arbitrator and his decision shall be final and binding on the Lessor and the Lessee;
  - (ii) if the Lessor and the Lessee do not agree for the dispute to be determined in accordance with Clause 6.7(i) then any dispute or difference arising between the Lessor and the Lessee on any matter or thing associated with this Lease shall be and is hereby referred to the arbitration pursuant to the Commercial Arbitration Act 1985 of an arbitrator if the parties can agree upon one and failing agreement to an arbitrator appointed by the President for the time being of the Law Society of Western Australia at the request of the Lessor and the Lessee or either of them. The costs of the arbitrator shall be paid in accordance with the award of the arbitrator.

- (b) Where it is necessary for any dispute under this agreement to be determined by an arbitrator or umpire under the Commercial Arbitration Act 1985 then each party to the proceedings before an arbitrator or umpire may be represented by a duly qualified legal practitioner and written Submissions may be made.
- (c) The Lessor and the Lessee agree that in any matter under this Lease in which the Lessor has an absolute discretion to give or withhold consent the Lessee shall not be entitled to refer that matter to arbitration.

#### 6.8 Force Majeure

- (a) Force majeure means events or occurrences and the effects thereof beyond the reasonable control of the party claiming force majeure which affects the ability of that party to observe and perform its obligations hereunder including war, invasion, riot, civil or military disturbances, sabotage, strikes, picketing or other labour disputes or disturbances, expropriation, lightning, fire, flood or threats of floods, earthquake, storm, cyclone, explosion, governmental restrictions or other governmental actions or inactions (unless such restrictions, actions, or inactions arise out of the failure of the party affected to comply with any governmental requirement), and orders or temporary or permanent injunctions of any duly constituted court of competent jurisdiction or any duly authorised administrative agency or officer (unless any such order or injunction was imposed by reason of the failure of the party affected to observe and obey any legal requirement or obligation under this Lease).
- (b) If any party is unable, wholly or in part, by reason of force majeure to carry out any obligation on it, and notifies the other parties that it wishes to claim that it is affected by force majeure, the obligation shall be suspended so far as it is affected by the force majeure during the period from the giving of the notice that force majeure is claimed until the force majeure and the effects

of the force majeure cease. The notice claiming force majeure shall contain the particulars of the force majeure, and so far as is known, the extent to which the party claiming force majeure considers that it will be unable to perform or be delayed in performing its obligations.

- (c) A party affected by force majeure shall take all necessary steps to remedy or remove the force majeure and the effect of it as quickly as possible.
- (d) Where a party gives a notice pursuant to this Clause it shall thereafter during the continuance of the force majeure at least every five days give notice to the other parties of the then probable extent to which it will be unable to perform or be delayed in performing its obligations and of any significant changes relative to the force majeure since it gave its last notice to the other parties.

#### 6.9 Service of Notices

That all notices, consents and approvals or any demand to be given to or made upon the Lessee or the Guarantor shall be in writing and may be signed by the Lessor or its solicitors or agents and all such notices or demands shall be considered as having been properly served upon the Lessee or the Guarantor if delivered to the Lessee or the Guarantor or posted to the Lessee or the Guarantor by prepaid registered post addressed to the premises or to the address of the Lessee or the Guarantor and if served by post shall be conclusively deemed to be served upon and be received by the Lessee or the Guarantor at the expiration of the next day following the day when the same shall be posted.

#### 6.10 Headings

That the headings appearing in this Lease are inserted only as a matter of convenience and in no way define, limit, construe or describe the scope or intent of the clauses of this Lease nor in any way affect this Lease.



## 6.11 Definitions

That whenever herein appearing unless repugnant to the sense or context:

The expression 'Lessor' and 'Lessee' shall if only one Lessor or Lessee is party hereto mean the Lessor or the Lessee as the case may be and the executors, administrators and assigns of the Lessor or the Lessee as the case may be and shall if there are two or more Lessors or Lessees parties hereto mean the Lessors or the Lessees as the case may be and each of them and their and each of their executors, administrators and assigns and if the Lessor or the Lessee or any of the Lessors or the Lessees as the case may be shall be a corporation shall include such corporation and its successors and assigns.

The expression 'Guarantor' shall if only one Guarantor is party hereto mean the Guarantor and the executors, administrators and permitted assignees of the Guarantor and if there are two or more Guarantors parties hereto shall mean the Guarantors and each of them and their and each of their executors, administrators and permitted assigns and if the Guarantor or any of the Guarantors shall be a corporation shall include the successors and permitted assigns of such corporation.

Words importing the masculine gender shall include the feminine gender and shall also have application to corporations.

Words importing the plural number shall include the singular number and words importing the singular number shall include the plural number.

References to statutes shall include all statutes amending the statutes referred to or passed in lieu thereof.

When two or more Lessors or Lessees or Guarantors (as the case may be) are parties hereto the covenants and agreements on their part shall bind them and any two or greater number of them jointly and severally.

## 7.0 ESSENTIAL TERMS

The covenants by the Lessee hereinbefore contained to pay rent and rates, taxes and outgoings and insurance in respect of the premises at the time and in the manner therein respectively prescribed and to construct the works in the manner and in the time referred to in this Lease and not to assign sublet mortgage charge encumber or part with possession of the premises and to keep the premises including any public toilets open from 7.00am to 10.00pm each day of the year unless otherwise agreed by the Lessor in writing and to carry on the Lessee's business in the premises in a competent businesslike and prudent manner each day of the year from 7.00am to 10.00pm unless otherwise agreed by the Lessor in writing are essential terms of this Lease and any breach of any of those covenants shall be regarded by the Lessor and the Lessee as a fundamental breach by the Lessee of this Lease. Should the Lessor determine this Lease following such a breach then (without prejudicing or limiting any other right or remedy of the Lessor arising from such breach or otherwise under this Lease) the Lessor shall be entitled to recover from the Lessee and the Lessee hereby covenants to pay to the Lessor as and by way of liquidated damages for such breach the rent, rates, taxes and outgoings and insurance which would have been payable by the Lessee for the unexpired residue of the term of this Lease remaining after such determination after making allowance for the rent, rates, taxes and outgoings and insurance which the Lessor by taking reasonable steps to relet the premises obtains by reletting the premises for such unexpired residue of the term hereof on reasonable terms as to rental and otherwise PROVIDED THAT:

- (a) any such reletting shall not be required to be on like terms as are herein expressed and implied;
- (b) the acceptance by the Lessor of arrears or any late payment of the rent, rates, taxes or outgoings or insurance shall not constitute a waiver of the essentiality of the Lessee's obligations to make such payments;
- (c) the Lessor's entitlement to recover damages as aforesaid shall not be prejudiced or limited if :

- (i) the Lessee abandons or vacates the premises;
  - (ii) the Lessor elects to re-enter the premises or to determine this Lease;
  - (iii) the Lessor accepts the Lessee's repudiation of this Lease; or
  - (iv) the parties' conduct constitutes a surrender by operation of law;
- (d) the Lessor shall be entitled to institute proceedings to recover damages as aforesaid either before or after any of the events or matters referred to in sub-paragraph (c);
- (e) any conduct by the Lessor to mitigate damages shall not of itself constitute acceptance of the Lessee's breach or repudiation or a surrender by operation of law; and
- (f) nothing herein expressed or implied shall be construed to mean that no other covenant herein on the part of the Lessee to be observed or performed may be an essential term.

#### 8.0 GUARANTEE

In consideration of the Lessor at the request of the Guarantor granting this Lease to the Lessee, the Guarantor HEREBY AGREES WITH AND GUARANTEES to the Lessor the due and prompt performance of the covenants and conditions contained in this Lease on the part of the Lessee to be observed and performed upon and subject to the following conditions:

- (a) if the Lessee shall make default in any payment of rent or other sums of money to be made under this Lease for the space of 7 days the Guarantor will upon written request of the Lessor pay to the Lessor the amount which shall be so in arrear or unpaid;
- (b) if the Lessee shall make default in the performance or observance of any of the obligations of the Lessee under

this Lease the Guarantor will pay to the Lessor all losses, damages, expenses and costs which the Lessor shall be entitled to recover from the Lessee or from the Guarantor by reason of such default;

- (c) this guarantee shall be a continuing guarantee and shall not be considered as wholly or partially discharged by the payment at any time or from time to time hereafter of any of the rent or other sums of moneys due and payable by the Lessee to the Lessor under this Lease or by any settlement on account or by any other matter or things whatsoever;
- (d) this guarantee shall continue for the duration of this Lease and for any assignment extension or renewal thereof and any holding over thereunder and shall extend to the acts and defaults of the Lessee during such duration, assignment extension, renewal or holding over;
- (e) notwithstanding the assignment by the Lessee of the benefit of this Lease the Guarantor shall remain liable to observe and perform all of the term covenants and conditions contained in this Lease and on the part of the Lessee to be observed and performed until the expiration of the term of this Lease.
- (f) this guarantee shall be a principal obligation and shall not be treated as ancillary to or collateral with any other obligation howsoever created or arising to the intent that this guarantee shall be enforceable unless the same shall have been satisfied according to the terms of this guarantee notwithstanding that any other obligation whatever arising between the Lessor and the Lessee shall be in whole or in part unenforceable whether by reason of any statute (including any statute of limitation) or for any other reason whatsoever;
- (g) until the Lessor shall have received in full all rent and other sums of moneys due from the Lessee under this Lease or further lease the Guarantor shall be bound by this guarantee and in the event of the Lessee becoming bankrupt

or entering into any scheme or arrangement in favour of creditors or being a company entering into liquidation either voluntarily or involuntarily the Guarantor shall not be entitled to proof or claim against the official receiver or liquidator in competition with the Lessor so as to diminish any dividend or any payment which the Lessor may receive but may prove or claim for and on behalf of the Lessor if so authorised by the Lessor and any such proof or claim by or on behalf of the Lessor shall not prejudice or affect the right of the Lessor to recover from the Guarantor any payment of rent and other sums of money to be made by the Lessee to the Lessor under this Lease;

- (h) this guarantee is to continue binding upon the Guarantor notwithstanding:
- (i) the death, bankruptcy or insolvency or liquidation (as the case may be) of the Lessee or the Guarantor or any one or more of them;
  - (ii) any change or alteration in the constitution of the Lessor the Lessee or the Guarantor; or
  - (iii) the happening of any matter or thing which under the law relating to sureties would but for this provision have the effect of releasing the Guarantor from this Guarantee or of discharging this Guarantee;
- (i) the liability of the Guarantor shall not be affected by any collateral rights or obligations which may exist between the Guarantor or any two or more of them and the Lessee and the same shall not be affected by any variation or avoidance of any such collateral rights or obligations;
- (j) the Lessor may at any time and from time to time without the consent of the Guarantor and without discharging, releasing, impairing or otherwise affecting the liability of the Guarantor under this guarantee grant to the Lessee or if more than one then to any one or more of them or to

any person who may be jointly indebted with the Lessee to the Lessor at any time any forbearance, release, concession, indulgence, time or other consideration and may compound with or release the Lessee or if more than one then any one or more of them and also any such other person or may assent to any assignment to trustees for the benefit of creditors or any scheme or deed of arrangement and whether with or without sequestration of the estate or (in the case of a corporation) to the winding up of the Lessee or any of them if more than one or of any such person or to the appointing of a receiver or official manager for them or any one of them and may release or discharge or otherwise deal with any property whether real or personal comprised in any security which may or might be held by the Lessor without discharging or affecting the liability of the Guarantor under this Guarantee.

#### 9.0 TRUSTEE PROVISIONS

If any one or more parties to this Deed other than the Lessor (in this Clause severally referred to as 'the Trustee') enters into this Deed as trustee of any trust (each of which trusts is severally referred to in this Clause as 'the Trust') the following covenants shall have effect (whether or not the Lessor has notice of the Trust):

- (a) the Trustee covenants and agrees with the Lessor that:
  - (i) the Trust has been duly created and is validly existing under the laws of Western Australia;
  - (ii) the Trustee shall be unconditionally liable in its personal corporate capacity for the performance of all covenants and agreements on the part of the Trustee contained in this Deed;
  - (iii) the Trustee has full, complete and valid authority pursuant to the Trust and the document evidencing the establishment and terms of the same ('the Trust Deed') to enter into this Deed;

- (iv) the Trustee is entering into this Deed and the transactions evidenced by this Deed as part of the due and proper administration of the Trust and for the benefit of all of the beneficiaries or unit holders of the Trust;
  - (v) the Lessor will have all the rights of the indemnity which the Trustee has or will have from time to time against the trust assets or the beneficiaries or unit holders of the Trust, and that such rights of indemnity have not been and will not be excluded or limited by the provisions of the Trust Deed or by any breach of trust or otherwise, and that it will not release restrict or otherwise prejudice such rights of indemnity;
- (b) the Trustee further warrants to and covenants with the Lessor that at the date of this Deed and until the Trustee has fulfilled all its obligations under the Lease and this Deed unless the prior written consent of the Lessor on each occasion has been obtained:
- (i) the Trustee is and will continue to be the sole trustee of the Trust and will not retire or be removed and no new or additional trustee will be appointed;
  - (ii) the Trust Deed has not been and will not be amended varied or revoked;
  - (iii) the Trustee has not agreed or become liable to nor will become liable to distribute any capital of the Trust or vest transfer resettle or make any gift of any assets of the Trust;
  - (iv) the Trustee has not and will not advance the vesting date of the Trust;

(v) the Trustee is not and will not be in default of any of its duties or obligations whether at law or in equity or under the Trust Deed or otherwise;

(vi) no person has or will have any prior equitable or legal right or claim to receive any of the assets of the Trust;

(vii) other than in the ordinary course of business and then so as not to prejudicially affect the rights of the Lessor the Trustee has not and will not:

(A) compromise any claim made by or against the Trustee;

(B) incur any debt;

(C) lend any money;

(D) give any guarantee or indemnity;

(E) dispose of any property;

(viii) the Trustee has not and will not:

(A) carry on any business on its own behalf or act as trustee of any other trust;

(B) blend or mix the assets of the Trust;

(C) mortgage charge pledge or suffer any charge or lien to subsist over the Trust assets other than as may be allowed pursuant to this Lease;

(D) enter into any partnership joint venture or other profit sharing agreement;



- (ix) the Trustee has not published and will not publish any notice pursuant to Section 63 of the Trustees Act;
  - (x) no remuneration is payable to the Trustee or will become payable save as specifically disclosed in writing prior to the date of this Deed and any remuneration will not be increased;
  - (xi) the Trustee has kept and will keep full true and correct records and books of account of the Trust including copies of the Trust Deed and any amendment or variation to the Trust Deed and the minutes of meetings and decisions of the Trustee and an inventory of all the assets of the Trust and the location of them and will make all such records and books of accounts available from time to time upon request;
  - (xii) the Trustee has filed and will file all requisite returns of income, sales, land and other taxes and has paid and will punctually pay all taxes assessed against or payable by the Trustee;
  - (xiii) the Trust being a Unit Trust the Trustee has not agreed or become liable and will not agree or become liable to issue any additional units other than for cash payable on issue and has not agreed or become liable to redeem any unit;
- (c) at any time after the occurrence of a default by either or both of the Lessee and the Guarantor in observing and performing the terms covenants and conditions contained in the Lease and on their respective parts to be observed and performed the Trustee:
- (i) shall not exercise any of the powers or discretions conferred on the Trustee by the Trust Deed or by law without the prior written consent of the Lessor;

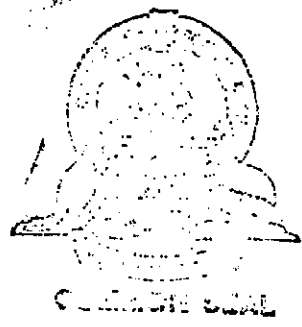
(11) shall on demand exercise all rights of indemnity which the Trustee possesses in relation to the Trust assets and the Trustee irrevocably appoints the Lessor the true and lawful attorney of the Trustee to execute and do all such assurances documents acts deeds and things as the attorney may think expedient or necessary for the Trustee to be fully indemnified out of the Trust assets and the Trustee agrees to ratify whatever the attorney may do or cause to be done.

EXECUTED as a Deed.

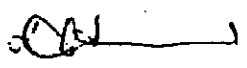
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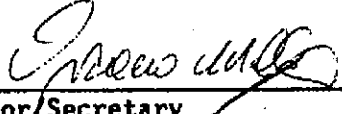
  
\_\_\_\_\_  
Deputy Mayor

  
\_\_\_\_\_  
Acting Chief Executive/Town Clerk



THE COMMON SEAL of MILLAR HOLDINGS PTY LTD ACN 063 656 048 was hereunto affixed in the presence of: )

  
\_\_\_\_\_  
Director

  
\_\_\_\_\_  
Director/Secretary



SIGNED by the said GRAEME ROSS  
MILLAR in the presence of:

}

Witness: *M. Burrows*

Address: *City of South Perth*

Occupation: *Executive Manager  
Federal Services*

SIGNED by the said DONNA CHRISTINE  
MILLAR in the presence of:

}

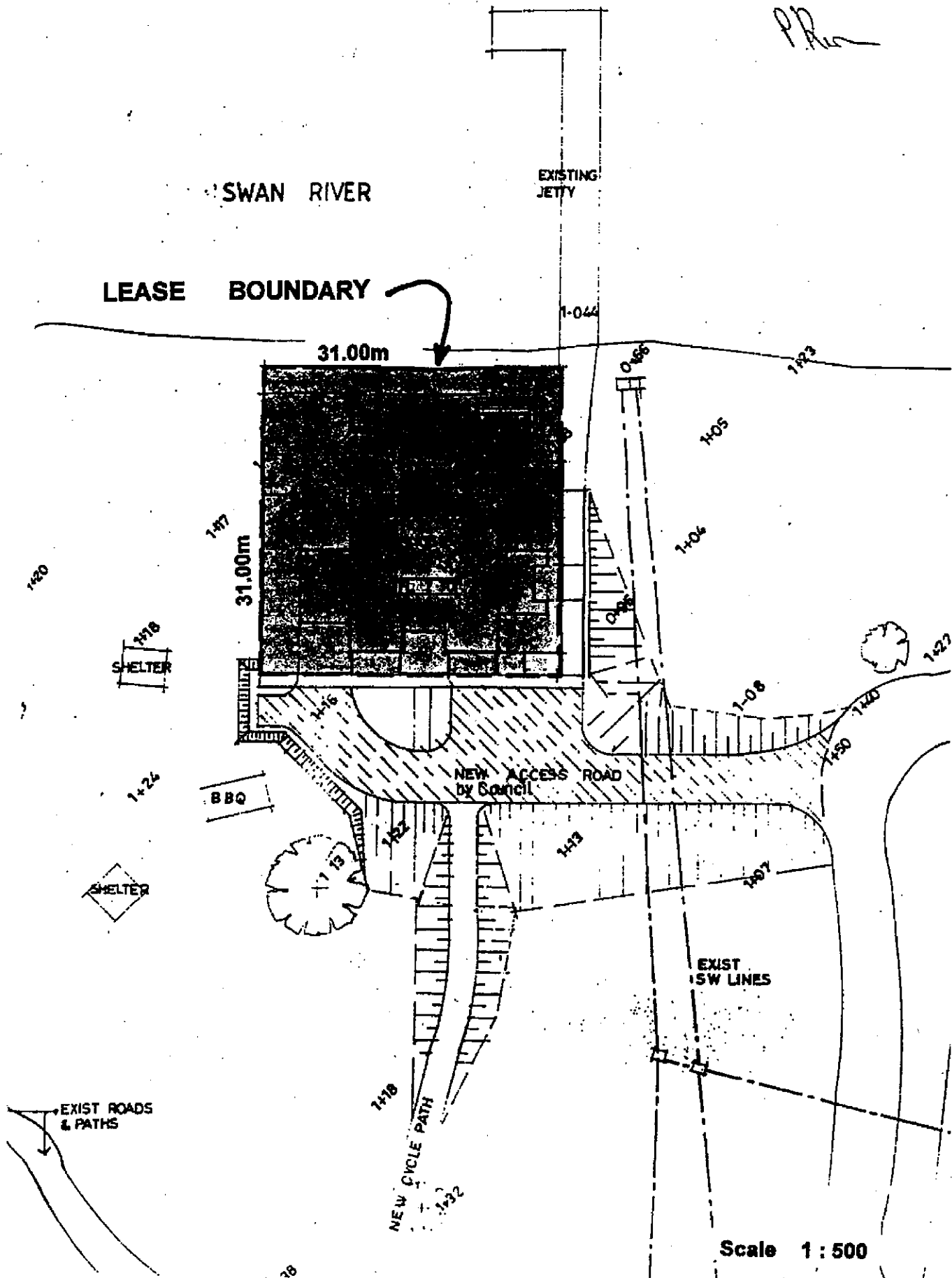
Witness: *M. Burrows*

Address:

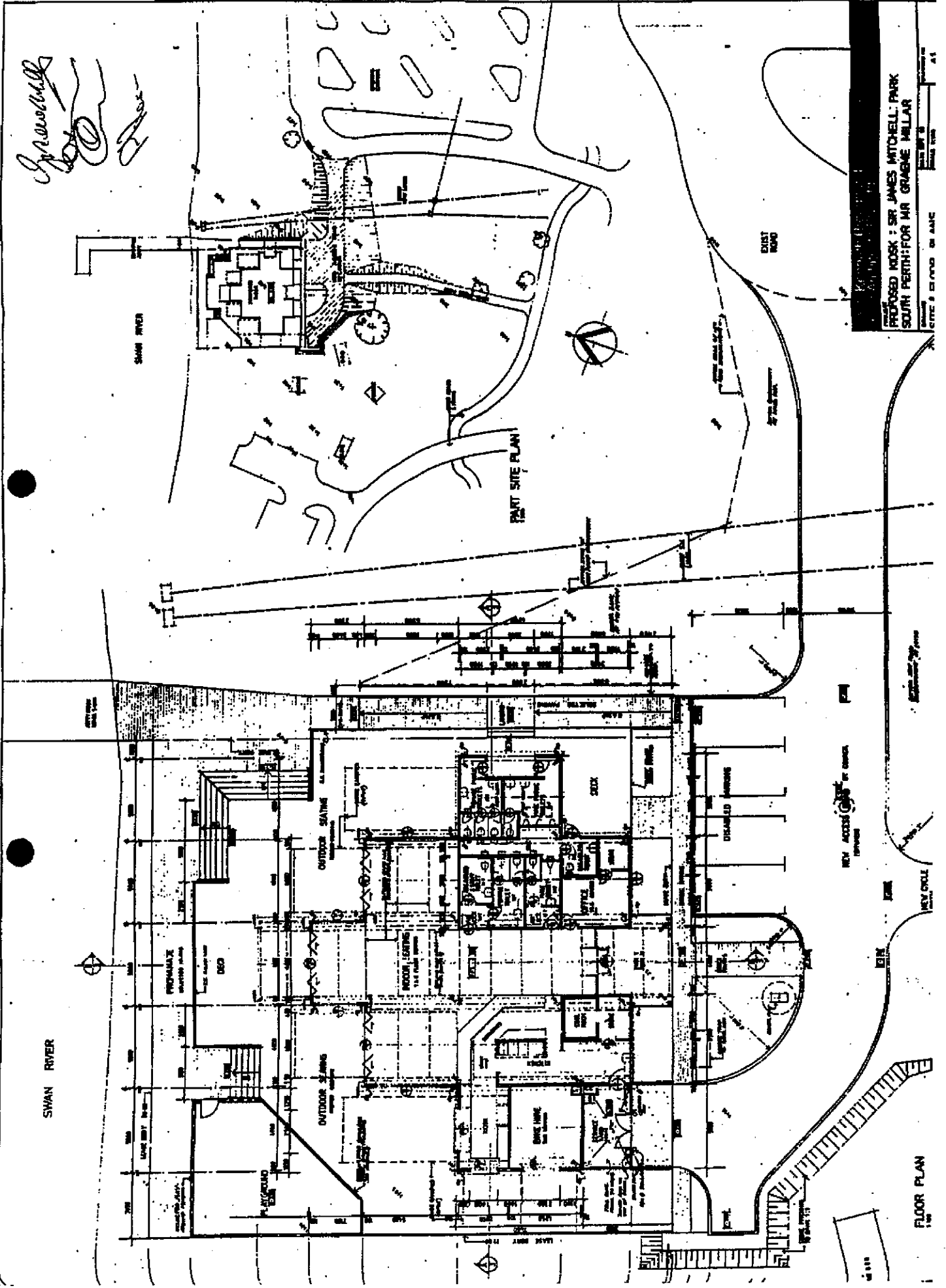
Occupation:

# PART SITE PLAN FOR PROPOSED KIOSK

*Yasvinder*  
*PR*



Scale 1 : 500



PROJECT: SOUTH PERTH  
 PROPOSED KIOSK : SR JAMES MITCHELL PARK  
 SOUTH PERTH: FOR MR GRAGNE MILLAR  
 DRAWN BY: [Signature]  
 CHECKED BY: [Signature]  
 DATE: 10/10/11

FLOOR PLAN

PART SITE PLAN

SWAN RIVER

SWAN RIVER

EAST ROAD

NEW ACCESS

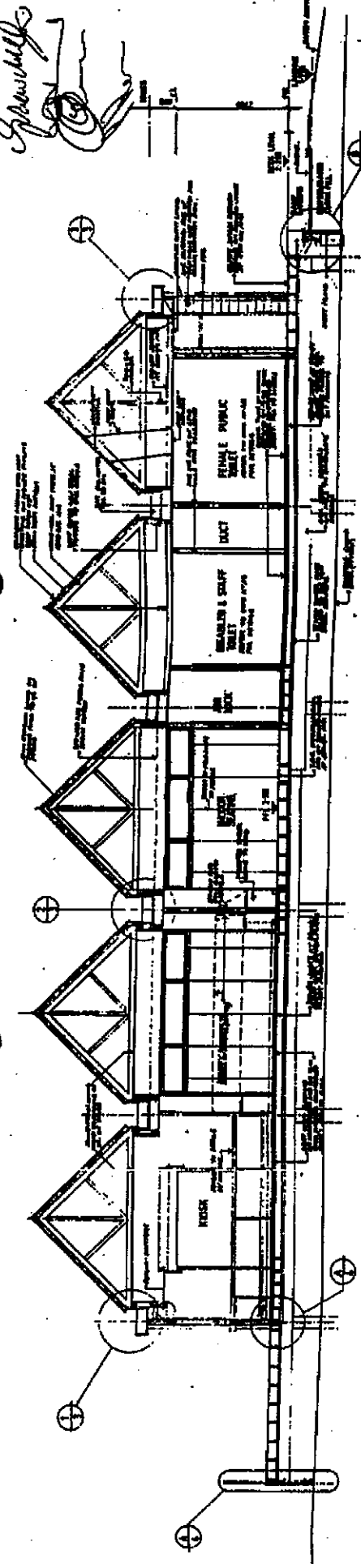
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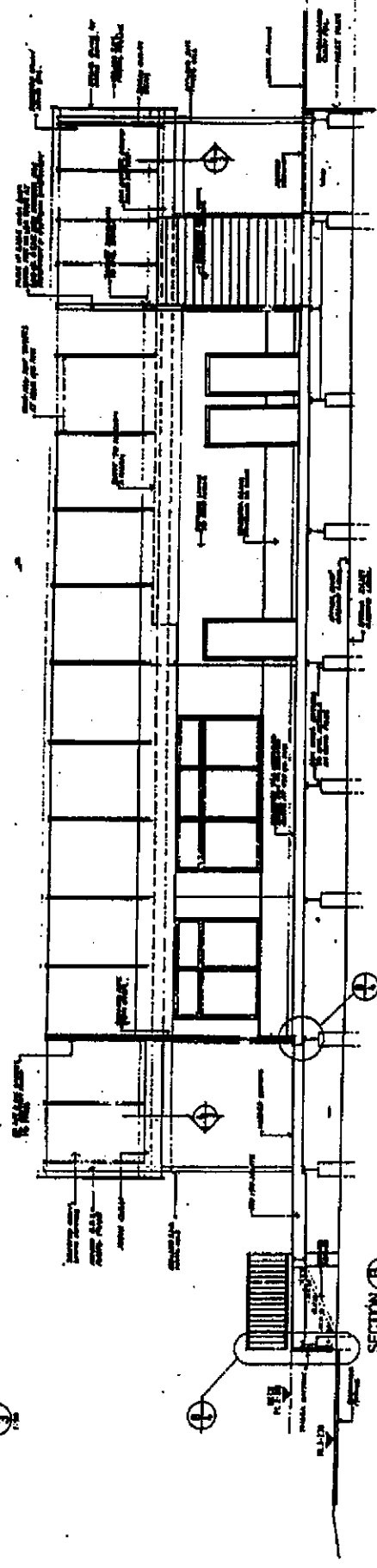
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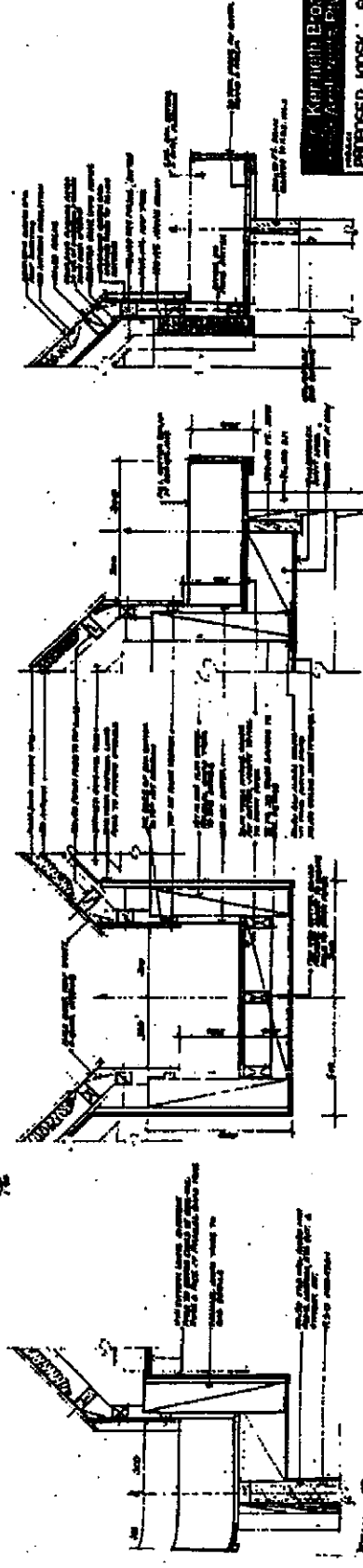
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SECTION 1



SECTION 2



DETAIL 1

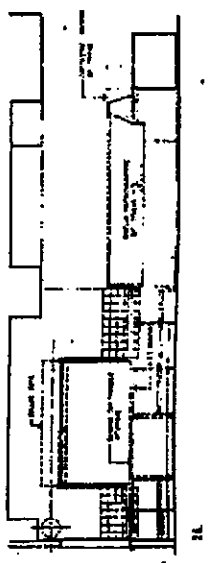
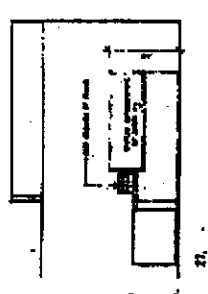
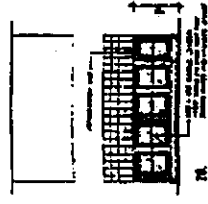
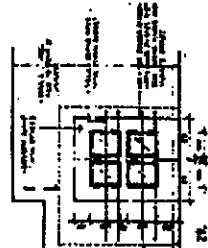
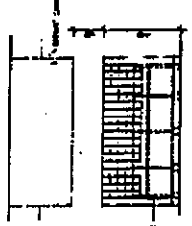
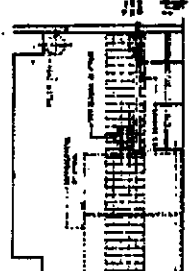
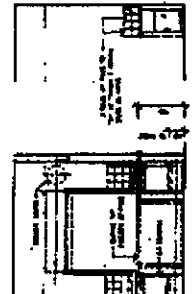
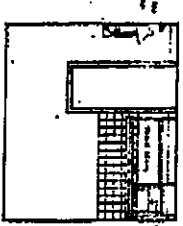
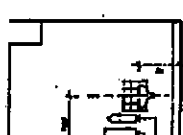
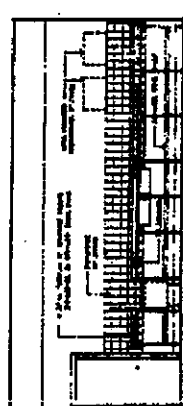
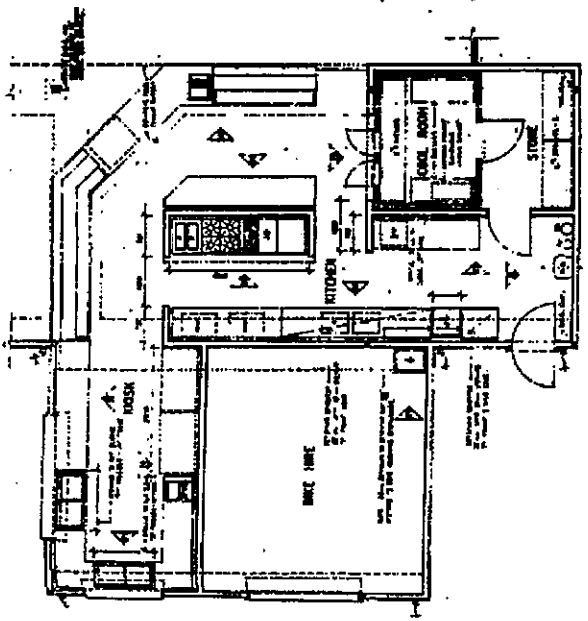
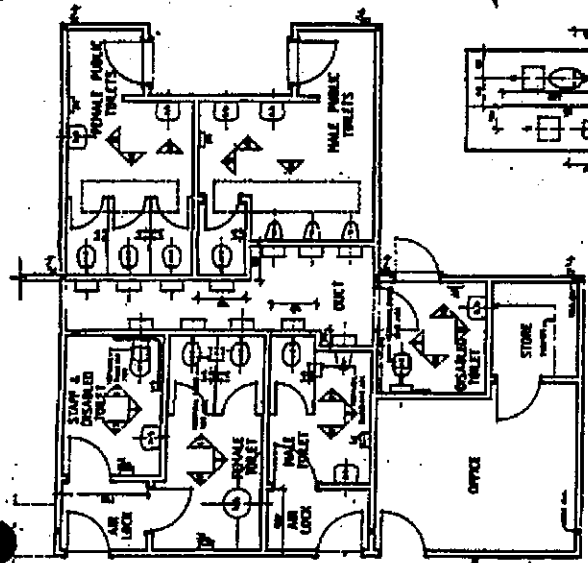
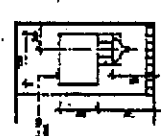
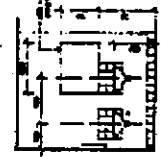
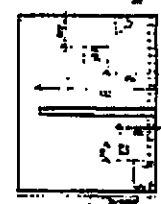
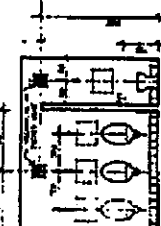
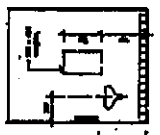
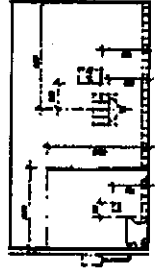
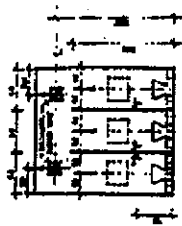
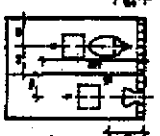
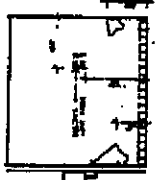
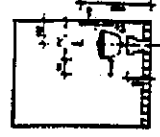
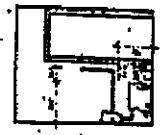
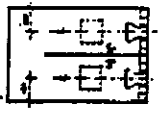
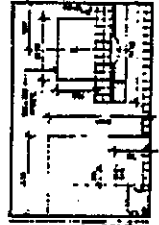
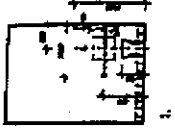
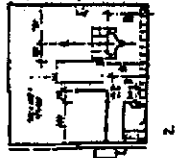
DETAIL 2

DETAIL 3

DETAIL 4

Kenneth Brunchfield  
 PROPOSED KIOSK, SR JAMES MITCHELL PARK  
 SOUTH PERTH: FOR MR GRAEME MILLAR

*Approved*



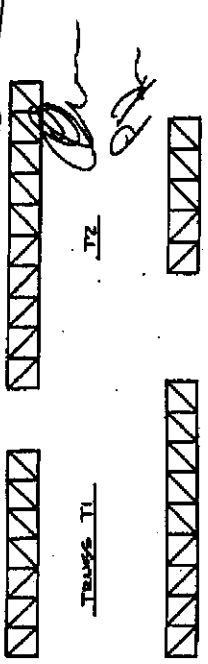
Kenway Engineering  
PROPOSED KIOSK : SR JAMES MITCHELL PARK  
SOUTH PERTH : FOR MR GRAEME MILLAR  
DATE: 14/01/2011  
SCALE: 1:50





*Shawn Mella*  
*DR*

NEEDS VERIFYING OWNERS WITH MEMBERS  
 OF BOARD AS TO THE LOCATION OF THE  
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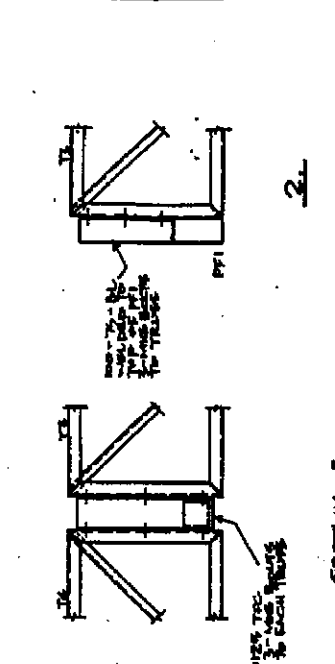
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SECTION A

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SECTION F

ROOF FRAMING PLAN

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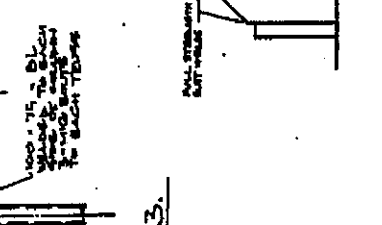
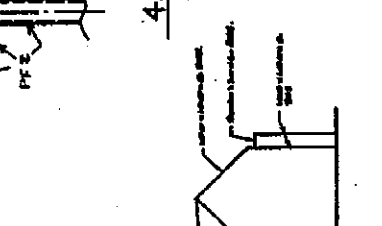
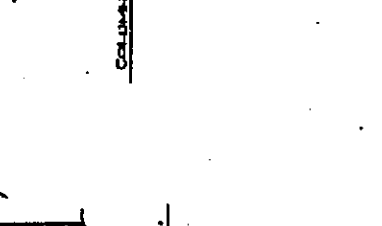
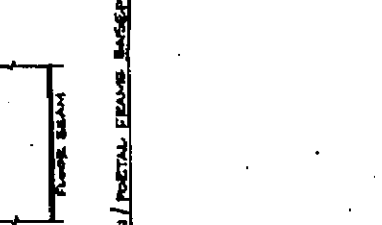
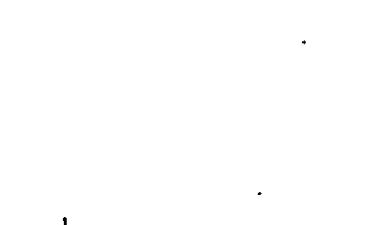
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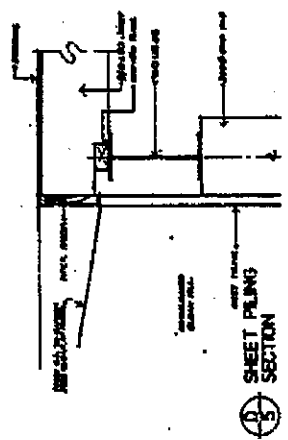
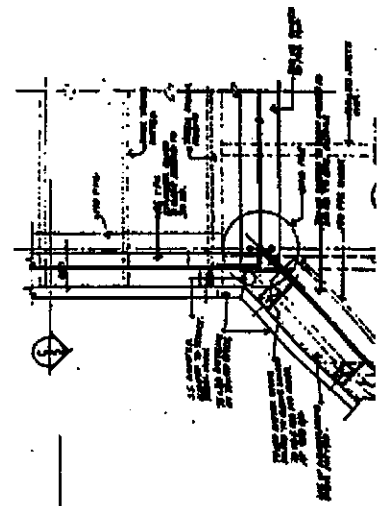
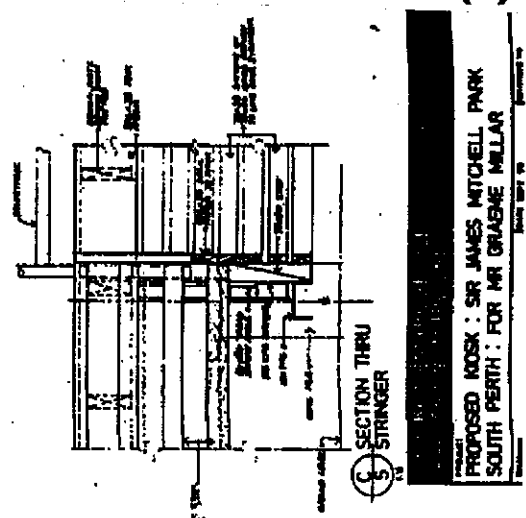
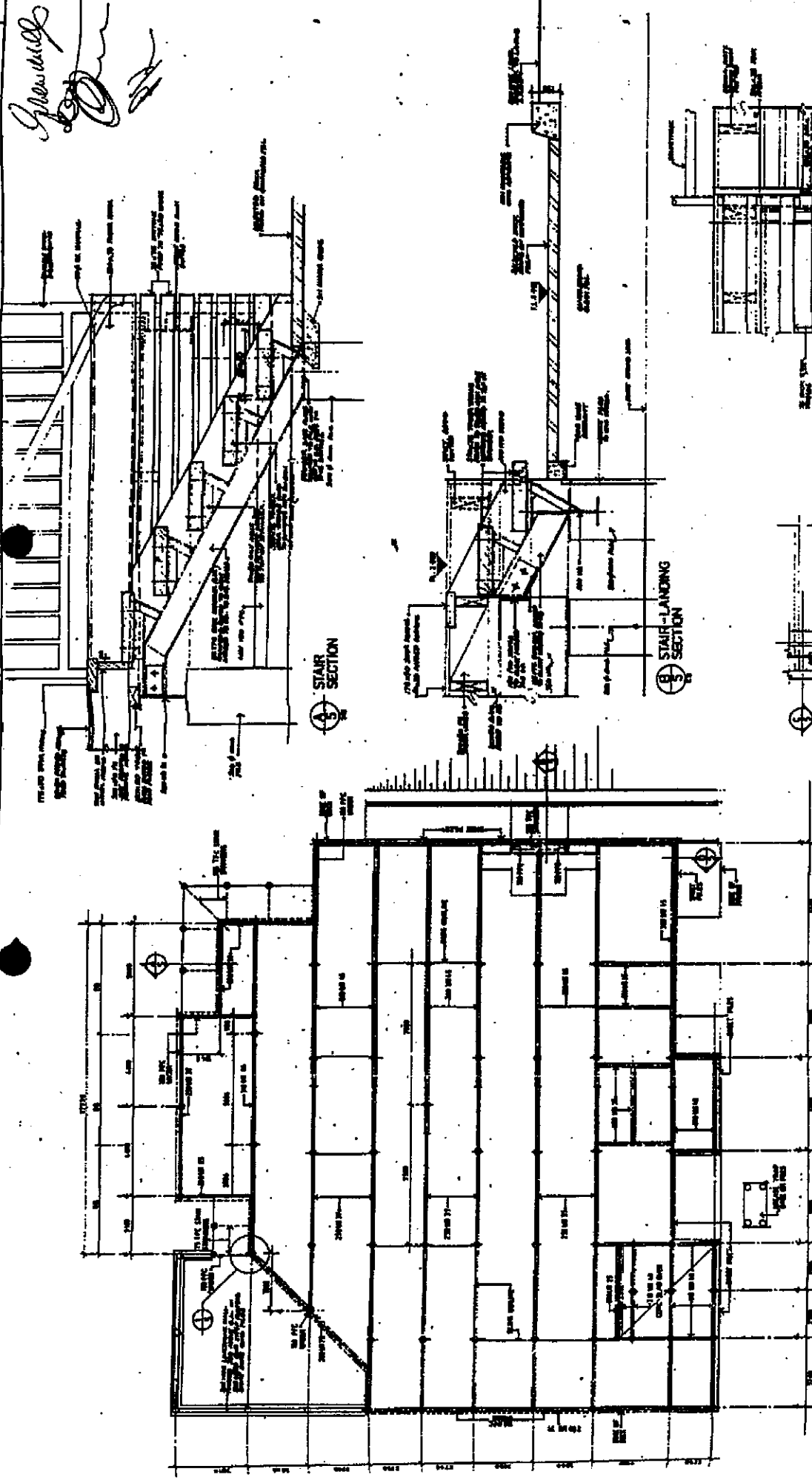
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| KENNETH BRONDALEST<br>ASCANTICITY   |
| ROOF FRAMING PLAN<br>AND DETAILS  |
| MR. CHADWICK & ASSOC<br>1000 10th St. N. W.<br>ALBANY, GA 31706<br>PHONE: 334-381-1111<br>FAX: 334-381-1112 |

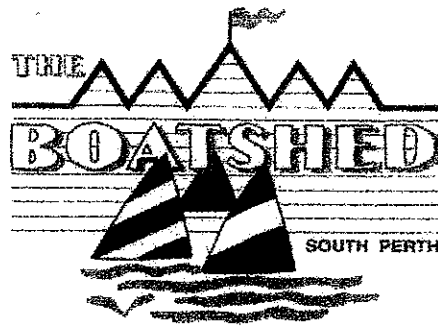




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PROJECT  
 PROPOSED MUSEUM : SIR JAMES MITCHELL PARK  
 SOUTH PERTH : FOR MR GRABAE MELLAR



Mr Cliff Frewing  
Chief Executive Officer  
City of South Perth  
Cnr Sandgate Street and South Terrace  
South Perth WA 6151

26<sup>th</sup> April 2007

Dear Mr Frewing

Re Boatshed Restaurant

I refer to our meeting held on the 20<sup>th</sup> March 2007 with you and other officers of the City in regard to our request for an extension and variation of lease together with an application for building improvements and liquor license,

As indicated at the meeting it was the intention to lodge a detailed submission to the City so the matter can be placed before Council for consideration. We are of the view that the attached submission provides the framework for the Council to proceed and approve the application as outlined.

As you will be aware the matters addressed in the submission have been subject of many discussions and correspondence over the past six years and it is now respectfully requested that the application now proceed with some priority. It would be beneficial if all matters were finalised so they could be introduced in time for the 2007/8 summer season.

In this regard the Manager State Lands has indicated his support and will process the application as soon as the City advises him of its determination.

Should you require any further information please do not hesitate to contact me at the Restaurant or by telephoning 0408 947 413.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Graeme Millar', written over a white background.

Graeme Millar  
Proprietor

Millar Holdings Pty Ltd ACN 063 656 048 trading as

**THE BOATSHED**

Coode street Jetty South Perth WA 6151  
Bus Tel: 9474 1314 Fax: 9474 1740  
[www.boatshedrestaurant.com](http://www.boatshedrestaurant.com)

# **BOATSHED RESTAURANT**

## **EXTENSION AND VARIATION OF LEASE**

### **BUILDING IMPROVEMENTS and LIQUOR LICENCE**

On the 3rd of November 1994 a 21 year lease agreement was entered into between the City of South Perth and Millar Holdings Pty Ltd (the Lessee) for the construction and operation of the Boatshed Kiosk/Restaurant (the Restaurant).

The Lessee (Principal Mr Graeme Millar) erected the Restaurant and public toilets on Reserve No 34565 known as Sir James Mitchell Park at its own cost and risk and has successfully operated the Restaurant for the past thirteen (13) years. The Restaurant is now considered one of Perth's best restaurants and tourist destinations.

Since 1994, when the lease was first agreed, public attitudes and entertainment needs have changed considerably and there is a need to review the existing facilities, operations and to redraft the lease to make it more relevant to modern business practice and the needs of the City and the Lessee.

The existing Lease Deed signed in 1994 in large part, addressed the issues surrounding the initial construction of the premises and did not take into consideration or anticipate the future changes and needs surrounding the operation of the Restaurant.

The important changing role of restaurants in the promotion of Western Australia, especially those located in prime locations such as the Boatshed, has been recognised by the State Government with the recent changes to the Liquor Licensing Act and tourism announcements. A "big picture" view of tourism and the part the hospitality industry plays in promoting the State and providing facilities for those who live and work here is now being taken by enlightened policy makers which reinforces the need to review the structure and operation of the Restaurant at this time.

The City of South Perth in partnership with the Lessee had the initial vision to construct the Restaurant at its current location and it was brought to finalisation due to the unfailing drive and energy of Mr Graeme Millar that has now seen the Restaurant become a South Perth icon and a major part of the local hospitality scene fully supported by the many residents and ratepayers who utilise its facilities.

In keeping with current demand the Lessee has an expanded vision for the Restaurant based on feedback received from patrons and to make the best use of the facilities and its outstanding location.

**This new Vision includes the following enhancements;**

- (1) Improvements to the existing building to incorporate:**
  - (a) Major refurbishment to the existing building, public toilets and kiosk.
  - (b) Provision of a store room
  - (c) Construction of an enclosed rubbish bin storage area
  - (d) Construction of a gazebo adjacent to the main restaurant entry
  - (e) Upgrade the main electricity supply
- (2) The granting of a liquor licence**
- (3) An extension of the existing Lease term**
- (4) The drafting of a new lease agreement.**

The finalization of a new Lease Deed to address the current and future operation of the Restaurant and remove the many redundant references relating to the construction of the original premises.

Over the past 6 years discussions have been held between the Lessee and officers of the City in regard to various matters relating to the operation and tenure of the Boatshed and these discussions have resulted in some indication of support being given subject to final details being negotiated and the State Government agreeing to an extension of the Lease on the basis it would not have any detrimental impact upon the City's ongoing interests.

It is now considered that as these previous discussions have become fragmented it is time for a fresh comprehensive review of the current situation surrounding the issues relating to the operation and lease of the Restaurant so the matters under consideration can be resolved to the satisfaction of each the City and the Lessee.

**This submission is prepared on that basis and addresses the proposals highlighted previously.**

## **LEASE**

The Lessee was granted a 21 year lease for the construction and operation of the Restaurant including Public Conveniences on the 3<sup>rd</sup> November 1994. The Lease has a further 8 years to run before it expires on 3<sup>rd</sup> November 2015.

The current lease does not reflect the activities undertaken at the Restaurant, is outdated as it largely deals with the construction of the premises thirteen (13) years ago and now needs to recognise the current and future requirements of the business.

The Lessee seeks permission to undertake improvements to the current premises **totally at its cost**. These improvements (outlined later in the submission) are needed to ensure that the Restaurant meets current demand from patrons and to aesthetically enhance the foreshore area surrounding the Restaurant.

The Restaurant has become an integral part of the South Perth landscape and is well supported by the residents of South Perth.

The Lease has over eight (8) years remaining and to undertake the proposed works at the Lessee's cost, a further eleven (11) year lease term expiring on the 3<sup>rd</sup> November 2026 is requested.

The extension of the term is required to provide sufficient time for the Lessee to recover the large capital outlay required to extend, maintain and refurbish the Building.

If the conditions and terms of the current Lease are not addressed positively at this time then it is unlikely that any major improvements can be undertaken for the next eight (8) years which could only be seen as a backward step and the under utilization of one of the City of South Perth's and indeed one of Western Australia's much needed tourist locations.

A new lease can only be beneficial to the City and its ratepayers.



## **LIQUOR LICENCE**

At present the Restaurant operates as a Bring Your Own (BYO) liquor restaurant and the BYO option does not meet the current needs required by patrons.

The State Parliament has just introduced sweeping changes to the Liquor Licensing Act in recognition that the previous laws were outdated and did not reflect changing community expectations as to the manner in which alcohol could be purchased and consumed.

The Government recognised that the previous regime was overly restrictive and did little to promote innovation and diversity, to the detriment of local consumers and tourists.

The new provisions in part allow for;

- More flexibility for restaurants to serve drinks without a meal.
- A new “small bar” licence to encourage a more vibrant café style drinking culture in Western Australia.
- Stronger harm minimisation and policy measures to promote responsible drinking and to reduce anti – social behaviour.

The Government found that change was needed to provide greater flexibility for restaurants to enable them to better meet community and consumer demands for low – risk drinking environments.

As a BYO restaurant, there is no limit on the amount of alcohol a person may bring and consume at any given time, whereas, if the Restaurant was licensed the Act places many conditions and responsibilities on the licensee to control how alcohol is consumed.

In keeping with the new Laws the Restaurant would now be in a position to be able to offer locals and tourists the opportunity to enjoy a glass of wine whilst viewing the City skyline and the sun setting over Kings Park

It is the Boatshed’s strategy to concentrate on providing Western Australian wines to customers rather than becoming a general liquor outlet which would not be in keeping with the marketing and image that has been successfully established for the Restaurant over the past decade.

**The liquor licence would be ancillary to the Restaurant operation, and not be the main focus of its business.**

The absence of a liquor licence has proved a significant detriment to the operation of the business and is a constant source of surprise and disappointment on the part of patrons.

The City and other Local Governments have many licensed restaurants operating on or in close proximity to the foreshore and the Restaurant and these restaurants operate in a similar manner to the Restaurant and have a clear commercial advantage. The other licensed restaurants within the City are situated in close proximity to each other. If problems due to the serving of alcohol were to occur it would be in these locations. However, it is understood that little or no problems have occurred as a result of the operation of the licensed restaurants.

The Liquor licensing Authority has previously written to the lessee granting approval for a License and the Swan River Trust has indicated that they also support the granting of a license.

#### **MAINTIANCE AND REFURBISHMENT OF THE EXISTING BUILDING.**

The Restaurant is now entering its thirteenth year of operation and a major refurbishment of the building is now required.

The Restaurant is situated on the south bank of the Swan River and it is this location so near to the River's edge that is one of the main reasons that lead to the excessive deterioration of the building and the need for extensive maintenance work.

The refurbishment/enhancement work required urgently can be summarised as follows;

- Public toilets
- Children's playground
- Replace building timber floor (decking)
- Upgrade electricity supply
- Refurbishment/modernise existing kitchen
- Refurbishment of the existing kiosk facilities.

**Public Toilets.**

The public toilets situated at the eastern side of the building are well used and are in need of complete renovation so they will continue to meet the demand and expectations of the public utilising the Reserve.

**Children's Playground.**

The children's playground situated on the western side of the Restaurant is popular and the existing equipment will soon require a major overhaul and the addition of new equipment more suited to the needs and challenges children require.

**Replacement of the Building's Timber floor (Decking)**

The Restaurants timber decking floor has now deteriorated to such a point that it must all be replaced as it will become dangerous and unsightly in the near future. The timber decking forms a major part of the aesthetics' and ambiance of the Restaurant, due to its river setting and the casual atmosphere it creates for patrons.

**Upgrade Electricity Supply**

The main electricity supply into the Restaurant does not meet the operational needs for the Restaurant and at peak times the supply, due to the lack of capacity, cuts out resulting in major inconvenience to patrons.

The power shortage also affects the Restaurants refrigeration and the loss of the freezers due to the loss of electricity results in food being ruined, which is not only costly, wasteful but due to the intermittent periods in which it occurs, it cannot be planned for in advance and this seriously affects the ability to provide the quality service for which the Restaurant has become renowned.

**Refurbish/Modernise existing kitchen.**

The existing kitchen has been in use since the Restaurant was established and no longer meets the needs required to service a modern restaurant operation.

**Refurbishment of existing Kiosk**

The kiosk is very popular with the many people who utilise the Reserve and it is proposed to reconfigure the existing kiosk to make it more functional so as to better satisfy the needs of patrons.

**STORE ROOM.**

A small alteration to the existing building is required to provide the Restaurant with much needed storage space.

At present there is a general lack of storage space at the Restaurant and the provision of a store room will aid the operation of the Restaurant. The exclusion of a suitable store room was an oversight when the building was first designed.

**GAZEBO**

The construction of a gazebo adjacent to the main restaurant entry would provide a pleasing entry statement and an excellent welcoming area for patrons as well as catering for those who may wish to smoke and who can no longer utilise the Restaurant for this purpose.

**ENCLOSED RUBBISH BIN STORAGE AREA**

The construction of an enclosed rubbish bin storage area would be an asset to the Restaurant and all users of the Reserve as it would remove the very necessary, but unsightly facility from view.

**PROPOSAL**

The Lessee and the City have been in discussions regarding an extension of the lease and building improvements for many years without the matter reaching a stage where the proposals could be progressed.

The Lessee has received correspondence from the City which has been generally in support of the above proposals, However, concern has been expressed that if the current leasing arrangements were changed, the State Government would take responsibility for managing the lease and this may have the potential for conflict between the City and the State Government over the revenue derived from the Lease and other management issues.

In this regard the Lessee and its agents have held discussions with staff from the Department of State Land Services and have received advice that the Department would support the new lease proposal and in doing so would not change the current lease management structure between the Government and the City of South Perth.

The Government's position was reinforced at a meeting held at the City of South Perth on the 20<sup>th</sup> March 2007 which was attended by Mr Cliff Frewing Chief Executive Officer, Mr Roger Burrows, Director Corporate and Community Services Mr Sean McLaughlin, Legal and Governance Officer, (all of the City of South Perth), Mr Larry Fouracres, Manager State Lands, Department of State Land Services, Mr Graeme Millar and Mr Graham Partridge for the Lessee.

The Government's position can be summarised as follows;

(1) It supports and recommends an amendment to the existing lease to make it more relevant to the current operation.

(2) Once the lease has been amended as in (1) above it would approve the granting of a liquor licence. The Department fully supports the proposed liquor licence; however it considers the lease should recognise the existence of the Restaurant rather than a kiosk as it is now described.

(3) (a) It supports the excision of the Restaurant Land from the Reserve as it does not fit with the recreational nature of the Reserve.

(b) It would vest the excised Restaurant land in the City of South Perth with the right to lease

(4) (a) The Government would not necessarily require 20% of the unimproved rental value to be paid to the State.

(b) As the City incurs significant expenditure for the provision of infrastructure and maintenance at Sir James Mitchell Park the Minister for Planning and Infrastructure on application from the City could waive any payments to the State.

(5) The land to be excised from the Reserve and vested in the City should take into consideration any proposed changes to the leased area. In this regard, the Department and officers of the City have already met and agreed on a revised surveyed land area.

- (6) As far as the Government is concerned all lease negotiations are a matter between the City and the Lessee. The Governments only request was that the matter of the Lease be clarified at the earliest possible time.

It can be clearly ascertained that the City of South Perth has nothing to lose and everything to gain by entering into a new lease agreement with the current lessee.

As confirmed by the officer in charge of Reserved and Vested Land from the Department of State Lands, this matter has been outstanding for nearly seven years and the department would like the matters raised in regard to the operation and lease of the Restaurant considered and rectified at the earliest possible time.

Most importantly, the officers representing the Government advised that if the City of South Perth made an application to the Department of State Land Services on the basis outlined above, the Department would recommend to the Minister the agreement to the new lease without affecting the existing management arrangements for the Reserve.

#### **RENT REVIEW**

The current lease involves a phased in rental, which on the thirteenth (13) November 2007 will amount to \$50,000 dollars increased annually by the Consumer Price Index (CPI).

The lease also provides for a "Profit Bonus" to be paid in addition to the annual rent

The Profit Bonus is calculated by the Lessee paying to the City one third of the amount by which the Lessee's total annual return exceeds the Lessee's base return.

The manner in which the calculation of the profit bonus rent component is determined is considered complicated, unfair, and unworkable and although specified in the lease it was included as a result of an oversight by the Lessee and it was never the intention for it to be included in its present form.

It would not be possible for the Lessee, or any restaurant business, to meet the requirements in the current form. The current lease specifies that gross profit is to be utilised when calculating the total annual return when in fact it should state the net profit of the business.

As part of preparing a new lease agreement it is considered that the lease rental should be reviewed to make it more equitable and relevant to the current operations. A rent review would benefit both the City and Lessee as it would ensure that the City receives a fair rental based on current restaurant operations and it would also correct the anomalies that are contained in the present lease.

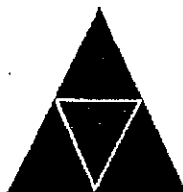
It is suggested that a suitably qualified valuer or property consultant, approved by both the City and Lessee be appointed to undertake a rent review to determine the current market rent which should apply. In this regard Christie White Moore Licensed Valuers and Property Consultants have had considerable experience in determining valuation and lease payments and would be suitable to undertake the review.

**In view of the information received from the Department of State Land Services and in order to positively progress this long outstanding matter it is requested;**

- (1) Subject to the current vesting arrangements for the Reserve and Restaurant bring maintained between the State Government and the City of South Perth the City support the following:
  - (a) The lessee be granted a further eleven (11) year lease extension for the Boatshed Restaurant
  - (b) A new Lease agreement be entered into to formalise the current and future operations of the Restaurant
  - (c) The City support an application for a liquor licence
  - (d) Approval be granted for the following;
    - Construction of a gazebo adjacent to the front entry of the Restaurant
    - Storage room
    - Enclosed rubbish bin storage area
    - Upgrade of the electricity supply
    - Major maintenance to the existing building

(2) The City and the Lessee agreeing on the appointment of a suitably fair qualified valuer or property consultant to undertake a rental review so as to establish the current market rental.





christie whyte moore  
LICENSED VALUERS AND  
PROPERTY CONSULTANTS

Mark Christie - Managing Director  
David Moore - Director  
Duncan Cameron - Director  
Andrew Kavanagh - Director  
Jeremy McGrade - Director

A member of



L227105

17 April 2008

The Director  
Millar Holdings Pty Ltd  
C/- Boatshed Restaurant  
Coode Street  
SOUTH PERTH WA 6151

Attention Mr Graeme Millar

Dear Graeme

**RE: BOATSHED RESTAURANT**

We refer to your verbal instructions for this Company to provide valuation advice concerning the Market Rental Value of the *Boatshed Restaurant* site as at 18 April 2008, having regard to the recently surveyed area the subject of the Ground Lease agreement.

For the purposes of this advice, Market Rental Value is defined as: *"the estimated amount of rental for which an asset should lease for on the date of valuation between a willing Lessor and a willing Lessee in an arms length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion"*.

Assumptions specific to this advice include:

- Assessing a market rent based on the recently surveyed site area of 1,574sqm to be the subject of the Ground Lease; and
- The existing Ground Lease agreement with the City of South Perth remains fundamentally unchanged in its essential terms and conditions aside from the above, lease commencement date, lease term and rent review provisions. (we understand that these may be amended in negotiations with the City of South Perth);

Consistent with your instructions we now provide the following abbreviated advice to assist your negotiations with the City of South Perth.

**18 April 2008****Boatshed Restaurant**

---

**1.0 LOCATION**

The *Boatshed Restaurant* enjoys a prime river front location within Sir James Mitchell Park on the southern foreshore of the Swan River directly adjacent to Coode Street's intersection with Douglas Avenue and Witcomb Place.

Panoramic river and CBD views are available from the site to the north.

**2.0 SITE**

In accordance with the survey plans provided to us the site comprises a rectangular parcel measuring 34.55 metres by 45.56 metres, equating to a total area of 1,574sqm.

We assume that the above mentioned site area will be the subject of the Ground Lease. In the event the area is amended we would suggest multiplying the rental value expressed as a rate per square metre by the agreed site area, providing there is only a minor variation in the agreed/amended area. In the event the site area changes by more than say 20% we would recommend the matter be referred to this office for comment.

**3.0 ZONING**

We are informally advised by the City of South Perth that the site is currently zoned "Parks and Recreation Reserve" in accordance with the City's existing Town Planning Scheme Number 6.

**4.0 SERVICES**

It is assumed that all essential services are available to the subject property including water, electricity, telephone, gas and deep sewerage.

**5.0 LEASE DETAILS****5.1 Existing ground lease**

We have been provided with a copy of a signed, stamped and executed Ground Lease agreement between the City of South Perth, as Lessor and Millar Holdings Pty Ltd, as Lessee, relating to Reserve Number 34565.

A summary of the principal terms and conditions appear below:

Lease Term: 21 years

Commencement Date: Date of execution of lease (presumed 3 November 1994)

**18 April 2008****Boatshed Restaurant**

|                      |             |   |
|----------------------|-------------|---|
| <b>Lease Rental:</b> | Year 1      | free  |
|                      | Year 2 - 4  | \$ 5,000 pa   |
|                      | Year 5 - 8  | \$10,000 pa   |
|                      | Year 9 - 10 | \$20,000 pa   |
|                      | Year 11     | \$30,000 pa   |
|                      | Year 12     | \$40,000 pa   |
|                      | Year 13     | \$50,000 pa increased by<br>Consumer Price Index from<br>the commencement date. |
|                      | Year 14     | Previous rental increased by<br>CPI   |

(The Lease Rental is payable quarterly in advance but is not to be less than the previous rental payable)

|                            |   |
|----------------------------|---|
| <b>Additional Payment:</b> | From Year 11 the Lessee pays one third of the Total Annual Return (gross profit before tax salaries wages etc) that exceeds the Lessee's Base Return ("profit bonus") where by the Lessee's Base Return is equivalent to \$150,000 increased by CPI. The Additional Payment is payable annually in arrears. |
|----------------------------|---|

|                            |                   |
|----------------------------|-------------------|
| <b>Variable Outgoings:</b> | Payable by Lessee |
|----------------------------|-------------------|

|                            |   |
|----------------------------|---|
| <b>Special Conditions:</b> | Upon expiry of the ground lease all building improvements revert to the Lessor. |
|----------------------------|---|

## 6.0 GENERAL COMMENTS

In assessing the Market Rental Value of the *Boatshed Restaurant* site, we consider the most appropriate methodology to be by direct comparison to Ground Lease rentals being paid for comparable tenure sites throughout the Perth Metropolitan area.

According we confirm having conducted an investigation into rental levels payable of such properties with specific relevance being placed on: prime water front sites within prime tourist areas; and sites commanding substantial views.

Based on lease investigations the following market evidence is considered most comparable to the *Boatshed Restaurant* Site:

- **Old Port, Barrack Square, Perth**

|                    |  |
|--------------------|--|
| Site area:         | 1,831sqm                                       |
| Ground Lease Type: | Seabed   |
| Current Rental:    | \$95,389.05 per annum net of outgoings and GST |

**18 April 2008****Boatshed Restaurant**

|                          |                       |
|--------------------------|-----------------------|
| Rental Rate:             | \$52.10/sqm           |
| Lease Commencement Date: | 1 July 1995           |
| Lease Term:              | 21 years              |
| Rent Review Method:      | Market                |
| Rent Review Frequency:   | 3 yearly              |
| Last Rent Review:        | 1 July 2007 to Market |

Comments: A larger site situated within the Barrack Square precinct in close proximity to the Perth Central Business District. The property is considered to enjoy a superior location despite poor parking facilities, due to the presence of the ferry terminals and the extensive tourist trade that utilises this precinct. The analysed seabed lease rental of \$52.10/sqm is considered broadly comparable to the subject site.

- **Proposed Restaurant – Point Fraser, Riverside Drive, Perth**

|                    |   |
|--------------------|---|
| Land Area:         | 2,200sqm                                    |
| Ground Lease Type: | Land  |
| Agreed Rental:     | \$72,600 per annum net of outgoings and GST |
| Rental Rate:       | \$33/sqm                                    |
| Commencement Date: | Unknown.                                    |
| Lease Term:        | 20 years                                    |

Comments: We understand the parties are still negotiating with the Swan River Trust. The agreement, in principal, had been reached (several years ago) between the developers and the City of Perth over the Ground Lease terms for the site. The agreed rental equates to \$33/sqm but was established some years ago. A directly comparable site situated towards the eastern end of Perth water adjacent to Heirisson Island. The site area is slightly larger than that of the *Boatshed Restaurant* site which arguably influences the rental rate downwards in comparison to a smaller site. A comparable property but does not enjoy the direct outlook towards the Perth CBD skyline that the *Boatshed Restaurant* enjoys. The date of the rental negotiation dictates a higher rental rate should be applicable to the *Boatshed Restaurant*.

- **Florence Hummerston Centre, Corner Esplanade & Barrack Street, Perth**

|                          |   |
|--------------------------|---|
| Site Area:               | 1,170sqm                                    |
| Ground Lease Type:       | Land  |
| Current Rental:          | \$35,282 per annum net of outgoings and GST |
| Rental Rate:             | \$30.16/sqm                                 |
| Lease Commencement Date: | 1 September 2004.                           |
| Lease Term:              | 10 years                                    |
| Rent Review Method:      | CPI and Market                              |
| Rent Review Frequency:   | Annually and 5 yearly respectively          |
| Last Rent Review:        | 1 September 2007 to CPI                     |

**18 April 2008****Boatshed Restaurant**

Comments: An inferior property situated on the corner of The Esplanade and Barrack Street which operates as a Chinese restaurant. The property lacks the river front location and views which the subject features. It is considered an inferior level of rental when analysed on a rate per square metre.

- **Oceanus Restaurant and Cafe, Challenger Parade, City Beach**

|                          |   |
|--------------------------|---|
| Site Area:               | 1,650sqm  |
| Ground Lease Type:       | Land  |
| Current Rental:          | \$67,500 per annum net of outgoings and GST   |
| Rental Rate:             | \$41/sqm  |
| Lease Commencement Date: | 1 April 2000  |
| Lease Term:              | 21 years with 10 year option  |
| Rent Reviews:            | 5 yearly to market  |
| Last Review:             | 1 April 2005  |
| Special Conditions:      | The ground Lessee pays a turnover rental equivalent to 5% in excess of a threshold of \$3 Million. (None paid for the last 24 months) |

Comments: An ocean front site with limited commercial development nearby. Considered to provide a sound guide to the subject's rental value albeit that the views are slightly different (ie ocean versus river and CBD skyline). The rent has not been reviewed since April 2005. A higher level of rental is considered to apply to the *Boatshed Restaurant* site.

- **Indiana Tea Rooms, Marine Terrace, Cottesloe**

|                          |   |
|--------------------------|---|
| Site Area:               | 2,400sqm  |
| Ground Lease Type:       | Land  |
| Current Rental:          | \$128,572.68 per annum net of outgoings and GST |
| Rental Rate:             | \$53.57/sqm                                     |
| Lease Commencement Date: | 3 August 1995                                   |
| Lease Term:              | 21 years  |
| Rent Review Method:      | CPI   |
| Rent Review Frequency:   | Annual  |
| Last Rent Review:        | 3 August 2007 to CPI                            |

Comments: We understand the lease was assigned in November 2006 and the rental was determined based on the capital outlay for the improvements. A larger, superior ocean front site within a prime commercial and tourist precinct with other attractions within the immediate location. Our enquiries indicate the leasehold interest in the site was subject to sale on several occasions in recent years. The evidence is considered superior to the *Boatshed Restaurant* site, accordingly a lower rental value should apply, albeit the annual CPI increases.

**18 April 2008****Boatshed Restaurant**

- **The Red Herring Restaurant, Riverside Road, East Fremantle**

|                        |   |
|------------------------|---|
| Site Area:             | 2,443sqm                                    |
| Ground Lease Type:     | River bed                                   |
| Current Rental:        | \$48,860 per annum net of outgoings and GST |
| Ground Rental Rate:    | \$20/sqm                                    |
| Lease Expiry Date:     | 1 July 2027                                 |
| Rent Review Method:    | By agreement                                |
| Rent Review Frequency: | 3 yearly to market                          |
| Last Rent Review:      | 1 July 2006 to Market                       |

Comments: An inferior level of rental due to the riverbed nature of the site as opposed to a land based site. A higher value should apply to the *Boatshed Restaurant* site.

- **Jo Jo's Restaurant, Broadway, Nedlands**

|                          |   |
|--------------------------|---|
| Site Area:               | 3,445sqm                                    |
| Ground Lease Type:       | River bed                                   |
| Current Rental:          | \$68,900 per annum net of outgoings and GST |
| Rental Rate:             | \$20/sqm                                    |
| Lease Commencement Date: | 1 July 1985                                 |
| Lease Term:              | 21 years                                    |
| Option Period:           | 21 years                                    |
| Rent Review Method:      | Market                                      |
| Rent Review Frequency:   | 3 yearly basis                              |
| Last Rent Review:        | 15 November 2007 to Market                  |

Comments: An inferior level of rental due to the riverbed nature of the site as opposed to a land based site. A higher value should apply to the *Boatshed Restaurant* site.

- **"Oyster Bar on the Beach" Port Beach Road, North Fremantle**

|                          |   |
|--------------------------|---|
| Site Area:               | 2,100sqm                                    |
| Ground Lease Type:       | Crown land reserve                          |
| Current Rental:          | \$78,540 per annum net of outgoings and GST |
| Rental Rate:             | \$37.40/sqm (as at April 2008)              |
| Lease Commencement Date: | 1989  |
| Lease Term:              | 21 years                                    |

Comments: We understand the rent has not been reviewed over the last 5 to 6 years. Our verbal discussions with an officer at the City of Fremantle revealed the parties are currently in negotiations to further develop the site. An ocean front site with limited appealing commercial development nearby. It is arguably an inferior site due to the immediate surrounding industrial uses. A higher level of rental is considered to apply to the *Boatshed Restaurant* site due to the superior immediate surrounding development, Perth CBD skyline views and smaller site area.

**18 April 2008*****Boatshed Restaurant***

Of the rental evidence collated the most directly comparable are those ground lease sites within the City of Perth area and environs of the Swan River, specifically including: the *Old Perth Port* at Barrack Square (\$52.10/sqmpa), albeit the seabed nature of the lease.

Other directly relevant evidence outside of the Perth Water precinct is considered to be: the *Oceanus Restaurant* at City Beach (\$41/sqmpa); *Indiana Tea Rooms* (\$53.57/sqmpa) and *Oyster Bar on the Beach* at North Fremantle (\$37.40/sqmpa), albeit no reviews have occurred over the last 5 to 6 years.

The analysed rental rates range from \$20/sqm (*Jojo's Restaurant & Café* and *The Red Herring Restaurant*) to \$53.57/sqm (*Indiana Tea Rooms*).

We believe the rental rate applicable to the *Boatshed Restaurant* should lie in the vicinity of \$50/sqm per annum net of outgoings.

## 7.0 CONCLUSIONS

Having due regard for the market evidence available it is our opinion that the Market Rental Value of the *Boatshed Restaurant* site lies in the vicinity of \$50/sqm of site area net of outgoings and GST.

Based on the surveyed site area of 1,574sqm this equates to a total rental liability of **\$78,700 (Seventy Eight Thousand Seven Hundred Dollars)** per annum net of outgoings and GST.

Given the relatively unique nature of the subject property and its extensive panorama, a degree of subjectivity is associated with any assessment as to the Market Rental Value of this site. Further the eventual terms and conditions of any (re-) negotiated Ground Lease could have an influence on the eventual Rental payable (ie if rental is paid quarterly as opposed to monthly etc).

We trust the above is sufficient for your needs and provides sufficient information to progress negotiations with the City of South Perth. However should you require any further information or wish to discuss the matter further please do not hesitate to contact the undersigned.

Yours sincerely

**CHRISTIE WHYTE MOORE**



**DUNCAN CAMERON**

Director

Fellow of Australian Property Institute

Certified Practising Valuer

This valuation report is for the use of and may be relied upon only by the party to whom it is addressed. No other party is entitled to use or rely upon it and the valuer shall have no liability to any party who does so.

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# **Indicative Rental Assessment**

## **Boatshed Cafe**

### **Portion of Sir James Mitchell Park**

### **SOUTH PERTH WA 6210**





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## Appendices

Appendix 1

Appendix 2

Appendix 3



## 1.0 Indicative Assessment Summary

|  |  |
|--|--|
| <b>Address:</b>  | Boatshed Cafe, Portion of Sir James Mitchell Park,<br>South Perth, Western Australia, 6210   |
| <b>Prepared for and Purpose:</b>                         | City of South Perth for Asset Reporting  |
| <b>Interest Assessed:</b>                                | Leasehold (ground lease)   |
| <b>Brief Description "As Is":</b>                        | The subject property is located on the South Perth Swan River foreshore, occupying a unique riverside location.  |
| <b>Site Area:</b>  | 961 square metres  |
| <b>Proposed Site Area</b>                                | 1,574 square metres  |
| <b>Tenancy:</b>  | Boatshed Cafe  |
| <b>Current Net Rental:</b>                               | \$50,000 per annum   |
| <b>Major Issues:</b>                                     | <ul style="list-style-type: none"><li>- A unique Swan River front property</li><li>- Property is leased on a ground rental basis</li><li>- Strong market demand for development sites</li><li>- Limited availability of development sites with water frontage</li><li>- Significant increases in land values over the past 24 months</li></ul> |
| <b>Market Comment:</b>                                   |  |
| <b>Assessment Date:</b>                                  | July 2008  |
| <b>Indicative Rental Assessment Range Current Area:</b>  | <b>\$57,650 - \$67,250 per annum net</b>   |
| <b>Indicative Rental Assessment Range Proposed Area:</b> | <b>\$76,000 - \$88,725 per annum net</b>   |
|  | This assessment is GST exclusive   |
|  | DTZ (WA) Pty Ltd   |

Date of Final Print: <Insert>

**IMPORTANT:** All data provided in this summary is wholly reliant on and must be read in conjunction with the information provided in the attached report. It is a synopsis only designed to provide a brief overview and must not be acted on in isolation.



## 1.1 Assumptions, Conditions and Limitations

### Critical Assumptions

This is an indicative assessment only and cannot be construed as a formal valuation as all facts relating to the subject property have not been fully investigated. Indeed and in accordance with instructions the property has not been fully inspected as at the date of our assessment.

We have assumed that all information supplied in conducting our indicative assessment consists of a full and frank disclosure of all information that is relevant.

All other professional/consultancy advice provided and relied upon is true and correct.

The development complies and conforms to all statutory requirements.

Our assessments are GST exclusive.

We have not been provided with or undertaken a search of the owner's corporation records, and have therefore assumed there are no outstanding financial liabilities associated with the subject lot and that there are no notable special levies proposed or agreed for the strata scheme. Our enquiries indicate that this is the case, however, should confirmation be required, a formal search of the owner's corporation records should be obtained.

While all reasonable endeavours have been made to clarify the accuracy of the information provided, it is assumed that the information with respect to tenancy details, lettable areas, outgoings and proposed capital expenditure, consists of a full and frank disclosure of all information that is relevant.

In undertaking our indicative assessment we have relied upon various financial and other information. Where possible, within the scope of our retainer and limited to our expertise as valuers, we have reviewed this information including by analysis against industry standards. Based upon that review, DTZ (WA) Pty Ltd has no reason to believe that the information is not fair and reasonable or that material facts have been withheld. However, DTZ (WA) Pty Ltd is necessarily limited by the nature of its role and DTZ (WA) Pty Ltd does not warrant that they have identified or verified all of the matters which a full audit, extensive examination or "due diligence" investigation might disclose. For the purpose of our indicative assessment, we have assumed that this information is correct.



### **Verifiable Assumptions**

Verifiable assumptions relate to environmental issues, structural integrity of the improvements, condition of building services, zoning and encroachments, and can be confirmed by obtaining appropriate documentation relating to each.

While in the course of inspection due care is taken to note building defects, no structural survey has been made and no undertaking is given about the absence of rot, termite or pest infestation, deleterious substances such as asbestos or calcium chloride or other hidden defects. We can give no guarantee as to outstanding requisitions in respect to the subject building.

Our indicative assessment and report is conditional upon the land being free of any contamination or industrial waste problems unless otherwise noted.

We have made no survey of the property and assume no responsibility in connection with such matters. Unless otherwise stated it is assumed that all improvements lie within the title boundaries.

### **Assumptions Based on Opinion**

It should be noted that in the case of advice provided in this report which is of a projected nature, we must emphasise that specific assumptions have been made which appear reasonable based on current market sentiment and forecasts. It follows that any one of the associated assumptions may change over time and no responsibility can be accepted in this event. The value performance indicated above is an assessment of the potential value trend and the indicated figures should not be reviewed as absolute certainty.



## 2.0 Property Risk Analysis

### 2.1 Market

#### 2.1.1 Investment

- Unique water front property.
- Strong demand for zoned land ready for immediate development the residential commercial, retail or industrial.
- South Perth recognized as one of Perth's Premier residential locations.
- South Perth has continued to experience strong investment within the suburb.

### 2.2 Leasing

- Strong demand has seen rental levels increase for commercial and retail property.
- Limited supply of riverfront location such as the subject would create we consider strong interest if available for lease.

### 2.3 Asset

- Absolute water frontage to the Swan River.
- The site is currently operating as The Boatshed Cafe.
- Situated within close proximity to Mends Street Shopping precinct of South Perth.
- Current area 961 square metres
- Proposed area of 1,574 square metres

### 2.4 Cash Flow Profile

- The current rental is \$50,000 per annum.
- Current lease expires 2 November 2015.
- Balance of unexpired lease term some 85 months.

### 2.5 Asset Management

- Existing property appears to have been well maintained having due regard to its age and current use (observations based on prior external inspections of the subject property).



### 2.5.1 Opportunities

- Continue to utilise for its existing use.
- Maintain status of current Lease Agreement.
- Continued current discussions with the Lessee to renegotiate the existing terms and conditions of the Lease Agreement.
- City of South Perth takes possession of the premises at the expiry of the existing Lease term.
- Renegotiate the lease on beneficial commercial terms providing improved rental returns to the City of South Perth.

### 2.5.2 Threats

- Changes to Federal, State and Local Government policies and regulations.
- Changes to current economic climate.
- Increase in interest rates.
- Renegotiation of the existing lease agreement does not match existing returns of current lease agreement over the expired term.
- Continued increase in global oil prices.

**Note: Our observations within the Property Risk Analysis of this report provide our opinion of the property as at the date of assessment. Refer to our Limitation**



## 3.0 Overview and Recommendations on Current Negotiations

### 3.1 Overview

- Lessee has accepted a base rental for the current area of 961 square metres of \$60,000 per annum (\$62.43 per square metre)
- Lessee has accepted the area will be increased by 613 square metres to 1,574 square metres.
- The Lessees valuer has determined the rental for 1,574 square metres at \$78,700 per annum net (\$50 per square metre)
- Extension of the current lease term expiring 2 November 2015 has been proposed
- Effectively an extension of 14 years expiring 2 November 2029.

### 3.2 Recommendations

- Minimum rental for the proposed area of 1,574 square metres of \$78,700 per annum net of as assessed by the Lessees valuer.
- Target rental in the range of \$80,000 per annum to \$85,000 per annum being to the high side of our assessment range.
- Remove reference to turnover figures/trading performance and as noted in Clause 2.2 Profit Bonus of the lease agreement.
- Accept lease extension to 2 November 2029 (such extension to be based on a new lease agreement as discussed)
- Rental reviews should be annually to CPI with a market review every three years and should incorporate a no less than provision. This would represent the minimum acceptable review provisions.
- The new lease should be subject to the completion of the works specified in the Lessees correspondence of 8 May 2008 for the amount of \$473,000 plus GST.
- Rental continued to be paid quarterly in advance as per the existing lease agreement.
- All other terms and conditions of the original lease to remain basically unchanged.

We consider the above minimum terms and conditions provide to the City of South Perth not only a sound and improved financial return but also an asset enhancing the Swan River foreshore and amenity to City of South Perth residences and to the broader Western Australian community.



## 4.0 Instructions

We have received instructions from Mr Sean McLaughlin, Legal and Governance Officer to provide an Indicative Rental Assessment of the of the property being, Boatshed Restaurant, Portion of Sir James Mitchell Park, South Perth, Western Australia, with the intent of expressing our opinion of the rental for asset reporting and lease negotiation purposes.

### 4.1 Date of Assessment

July 2008





## 5.0 Location

The subject property is located within South Perth, a suburb situated approximately 2.5 kilometres south of the Perth GPO. More specifically, the property is situated to the north east of the intersection of Coode Street Witomb Place and Douglas Avenue. The property lies within the local authority boundaries of the City of South Perth.

Additional facilities include:

- Recreational:
- Sir James Mitchell Park
  - Swan River foreshore
  - Public amenities
  - A jetty is associated with the subject property
- Transport links:
- Local Bus service along Mill Point Road
  - Ferry service from South Perth to the Perth CBD

### Location Plan

<Insert>

Source: StreetSmart Street Address 2007





## 5.1 Services

The roads surrounding the subject property are fully constructed, bituminised and kerbed.

The main services including electricity, telephone, gas, scheme water and sewer are currently available in the area and available to the subject property.

## 5.2 Environmental, Heritage and Cultural Issues

### Contamination

In accordance with Valuation Procedures – Real Property (Revised February 2006) Property Guidance Note 1, Section 4.12 Site, Services and Environmental Hazards outlined within the Fifth Edition Professional Practice Guidelines we have undertaken a search on the contaminated sites database contained on the Department of Environment and Conversation website ([www.dec.wa.gov.au/](http://www.dec.wa.gov.au/)). Our search dated 8 August 2007 of the site revealed no information attached to the subject land or land in the vicinity of the subject being indicative of contamination.

The *Contaminated Sites Act 2003* came into effect on 1 December 2006 and the online register is incomplete and frequently updated therefore our search is valid at date of valuation.

No soil tests or environmental studies have been made available for our perusal. Therefore, it should be noted that our valuation is subject to there being no surface or sub-surface soil problems including instability, toxic or hazardous wastes or building material hazards in or on the property that would adversely affect its existing or potential use or reduce its marketability. Should any problems be known or arise then the valuation should be referred to me for comment and review of the valuation as deemed appropriate.

### Environmental Issues

We have not been provided with any subsoils survey for the site and we are therefore unable to report or confirm the property is free of contamination.

### Asbestos

We have not been advised as to the presence of asbestos within the property and have assumed it to be unaffected. Verification the property is free from asbestos contamination should be obtained from a suitably qualified consultant. Should any subsequent advice indicate the property to be contaminated, we reserve the right to reassess our indicative assessment.

### Pest Infestation

The subject property is located in an area considered susceptible to termite infestation. Inspection of the subject improvements did not reveal any apparent termite infestation. This should however, be confirmed by a certified pest control firm.



### **Aboriginal Sites**

We have undertaken a search on the Aboriginal Heritage Inquiry System ([www.dia.wa.gov.au/Heritage/SitesSurveysSearch](http://www.dia.wa.gov.au/Heritage/SitesSurveysSearch)) on 8 August 2007 and the search revealed the property is unaffected by sacred sites.

### **Heritage and Cultural**

We have undertaken a search on The State Register of Heritage Places (<http://register.heritage.wa.gov.au>) on 8 August 2007 and the search revealed the property is not listed or considered to have historical significance by the National Trust or Western Australian Heritage Commission.

### **Right to Review**

The right is reserved to review and if necessary vary the indicative assessment figure if any contamination or other environmental hazard is found to exist.



## 6.0 Tenancy Details

The subject property is currently subject to a Lease Agreement and accordingly we have examined the Lease and summarised the main terms and conditions as follows:

### Lease Synopsis

|                  |  |
|------------------|--|
| Lessor           | City of South Perth  |
| Lessee           | Millar Holdings Pty Ltd  |
| Term             | 21 years   |
| Leasing Date     | The Lease commences from the date of execution of the Lease by the Lessor which we have assumed to be 3 November 1994 being the date at which the Deed is dated  |
| Terminating Date | 2 November 2015  |
| Option to Renew  | Not applicable   |
| Rent Review      | The Lessee shall pay rental as follows:<br><br>Year 1 - Rent free<br><br>Years 2-4 - \$5,000 per annum<br><br>Years 5-8 - \$10,000 per annum<br><br>Years 9 & 10 – \$20,000 per annum<br><br>Year 11 - \$30,000 per annum<br><br>Year 12 - \$40,000 per annum<br><br>Year 13 – The rental shall be the amount of \$50,000 which has been increased each year from the date of commencement by a factor equal to the percentage increase in the Consumer Price Index<br><br>Year 14-onwards - CPI |
| Current Rent     | \$50,000 paid quarterly in advance   |



Profit Bonus

In addition to the annual rent the Lessee shall pay to the vessel from the commencement of the 11th year of the term one third of the amount by which the Lessees total annual return exceeds the Lessees based returned

Clause 2.2 states:

*Lessees based returned that means an initial amount of \$150,000 increased annually from the date of commencement by a factor equal to the percentage increase in the consumer price index 20 firstly the quarter ending immediately prior to the date of commencement of this lease and the quarter ending immediately prior to the first anniversary of the date of commencement and thereafter between the quarter ending immediate the prior to each anniversary of the date of commencement up to the quarter ending immediately prior to the next anniversary of the date of commencement*

*Lessees total annual return means the gross profit of the business carried on by the Lessee of the premises before tax plus any salaries or wages commission's bonuses or allowances paid by way of commemoration to the Lessee or its Directors*

Outgoings

The Lessee is responsible for all normal building outgoings including rates and taxes

Permitted Use

To use the premises solely for the purpose of a kiosk and food server it and dissociated facilities and not at any time to use the premises as a restaurant and without limiting the generality of that use to ensure that the premises are accessible during the hours referred to in clause 4.224 recreational users of the land to serve take-away food and beverages from the premises not to take any bookings or reservations at any time from any patrons of the premises or any part of the premises provided however, that there shall not prevent the Lessee from providing cable service to patrons of the premises at any time

**Special Conditions**

The following Special Conditions we have noted from within the Lease Agreement:

**Annual statement and payment**

*Within 14 days after the end of each calendar year portion thereof to turn commencing at the end of the 11th the turn the Lessee shall furnish to the Lessors a set of accounts and statement right to examine books the Lessors and overseas auditors shall have the right at any reasonable time to examine may copies of such portion of the Lessees books and records in respect of the Lessees business carried on in awe from the premises as to satisfy themselves and to the correctness of the certificate referred to in clause 2.2 (d)*



### **Swan River Trust Requirements**

*To comply with conditions of approval to commence development issue to part five of the Swan River Trust Act issued in respect of the premises and the land conduct of business to carry on the Lessees business in the premises in a competent businesslike and prudent manner each day of the year from 7a.m. to 10p.m. unless otherwise agreed by the Lessors in writing to keep the premises including any public toilets open from 7a.m. to 10p.m. each day of the year unless otherwise agreed by the Lessor will in writing to keep the public toilets with the premises of a well lit during such times as they are open during such time as the premises are not open to keep the premises including the public toilets locked and in a secure condition Ownership of Kiosk Facility at the expiration or determination of the term of this Lease the kiosk at the facility is the property of the Lessor absolutely*

## **7.0 Lettable Area (Ground Lease)**

The area of the subject land is outlined within the second schedule plan with the Lease. The plan outlines the subject land and depicts an agreed area of 961 square metres.

Current negotiations between the Lessor and the Lessee indicate the ground lease area is proposed to be increased to 1,574 square metres, subject to final approval.



## 8.0 Market Commentary

### 8.1 REIWA Market Overview

Information released by Real Estate Institute of Western Australia for the March quarter 2008 states;

The negative impacts of global economic instability, growing inflationary pressures and tightening monetary policy which resulted in two further interest rate rises in quick succession in February and March 2008 have aligned to drag down the Perth housing market in the March quarter. This comes after the Perth house price reached a new record median sale price in the December quarter 2007. The fall in consumer confidence saw both turnover fall further below the seasonal low of December and prices ease as sellers look to adjust prices in the wake of a dramatic increase in listings. Two positive effects of new, speculative housing stock coming to the market are that affordability is improving and first home buyers remain resilient.

In contrast to the subdued metropolitan market renewed activity in regional Western Australia saw several centres record healthy price growth and sales volumes after periods of correction or consolidation.

The increase in listings which was a feature of the Perth, Mandurah and Bunbury markets during 2007 includes speculative land purchases and new dwellings coming to the market as the housing industry works through the backlog of work. The latest estimate of dwellings under construction from the Australian Bureau of Statistics for the December quarter 2007 was 20,100, down 15% on the record high of 23,600 in the March quarter 2007. The continuing fall in the backlog is expected to feed into the listings for some time.

However the announcement in the 2008 Federal Budget of further increases in immigration should drive the demand for housing over the medium term and soak up the excess capacity. In the meantime, the WA market must grapple with the prospect of a temporary hiatus in the second half of the June quarter until the stamp duty relief announced in the State Budget in mid-May is implemented from the 1st July.

## 8.2 Perth Housing Market

Both Perth house and land markets experienced a fall in activity in the March quarter with reiwa.com indicating a significant decline in transactions in the month of March as the effects of the second rate rise for the year and fourth since August 2007 took hold. The unit market showed a little more resilience in terms of volume but, as with the housing market, experienced a price correction.

What came as a surprise was the 31% increase in the stock of listings for the quarter which accompanied the 5% downturn in house sales. This has driven prices down, reflecting classic demand - supply economics. Whilst the growth in listings in the March quarter has had an effect on price, providing greater choice and improving affordability, the broader macro economic impacts are obviously providing a greater influence in moderating activity through suppressed consumer confidence.

### *Houses*

The preliminary median house sale price for the March quarter is \$460,000, a fall of 2.7% on the December quarter which is consistent with the reiwa.com figure released in April. The latest fall, the second in three quarters, has occurred just after the Perth median house sale price achieved a new record of \$473,000 which has subsequently nudged a little higher to \$474,250 at the time of writing.

In terms of the sub-regional market movements, the summary on page 12 indicates an interesting turn of fortune in the March quarter. It was a quarter of widespread red ink with a number of the upper end markets also declining. Some of these were significant such as the Western Suburbs (-8.3%) which is unlikely to move from the negative even when all settlements are received. The quarterly volatility in South Perth-Victoria Park (-7.0%) and Melville (-6.6%) continued, along with several first home buyer areas experiencing falls. Gosnells (-4.1%) gave up its gain from the December quarter whilst Armadale-Serpentine (-4.1%) and Stirling East (-6.7%) both recorded falls for the second quarter.

Of the six areas showing positive price growth, four were below the overall Perth median and three are designated as first home buyer regions, namely; Wanneroo North West, Rockingham-Kwinana and Swan.

Of course within these areas, there was still volatility in suburb price movements reflecting the fragile state of local markets. For example, of the suburbs with larger sales volumes in the Rockingham-Kwinana area, Secret Harbour (3.4%) and Waikiki (2.4%) had gains while Rockingham (-10.6%) and Warnbro (-3.0%) fell and Baldivis arrested its twelve-month slide.

### *Land*

An estimate of land sales (~1,500) for the March quarter suggest that sales volume has fallen to just a third of the market peak (4,600) in March quarter 2006. Despite the decline, the preliminary data indicate a small increase in the median land price for the quarter. However experience is showing that due to pre-selling, the preliminary median has been tending to moderate as settlements are received and therefore the March quarter median land price is expected to be around \$265,000. This would mean the median land price has stagnated over the year since March





2007 whilst the average land price has grown by 10% from \$340,000 in March 2007 to \$375,000 in March 2008.

## **9.0 Indicative Assessment Considerations**

### **9.1 Introduction**

In deriving an indicative rental assessment for the subject property utilising the direct comparison method we have analysed recent ground rentals from throughout the Perth Metropolitan area as directly comparable rentals are extremely limited.

In analysing these transactions the following amongst other factors have been considered:

- Site area and configuration;
- Location of property and access;
- Zoning of the property;
- Quality and size of onsite improvements; and
- Current state of the Perth commercial/residential development property market having regard to the environment in which the property is located.



## 9.2 Rental Evidence

We have researched the market for appropriate leasing evidence and summarise the results as follows:

| Property Address                    | Date Set        | Area (sqm)                             | Rental Per annum | Rent \$ psm                                | Review Period      | Comments  |
|-------------------------------------|-----------------|--|------------------|--|--------------------|---|
| Lot 2032<br>Mews Road,<br>Fremantle | March<br>2004   | 1,623.83                               | \$85,251         | \$52.50                                    | 3 Years            | Similar size to the subject. Located within the Fremantle Fishing Boat Harbour currently being used as Kailis Bros Restaurant. Superior location overall discloses a superior rate per square metre.                      |
| Lot 1996<br>Mews Road,<br>Fremantle | July 2003       | 2,527.00                               | \$123,207        | \$48.76                                    | 3 Years            | Larger area, located within the Fremantle Fishing Boat Harbour currently being utilised as Cicerello's Restaurant. Larger site however superior location overall discloses a superior rate.                               |
| Lot 2024<br>Mews Road,<br>Fremantle | January<br>2004 | 4,403<br>ground<br><br>2,210<br>seabed | \$178,000        | \$34.91<br>ground<br><br>\$11.00<br>seabed | 3 Years            | Excellent Waterfront site currently occupied by Joes Fish Shack. Superior location however a much larger site with some land set aside for parking. Discloses an increase of 7.23% between January 2001 and January 2004. |
| Marine<br>Parade,<br>Cottesloe      | August<br>2004  | 2,400                                  | \$107,413        | \$44,76                                    | Annually<br>to CPI | Excellent landmark site currently occupied by the Indiana Tea Rooms. Larger site also considered to occupy a slightly superior location. Overall discloses a superior rate per square metre.                              |
| Lot 2029<br>Mews Road,<br>Fremantle | July 2005       | 1,492                                  | \$73,317         | \$49.14                                    | 3 Years            | The site currently occupied Café Il Porto and is to the north side of Mews Road. Considered to be a comparable ocean front location. Similar sized site within a comparable location.                                     |

Continued

| Property Address                                | Date Set      | Area (sqm) | Rental Per annum | Rent \$ psm | Review Period                         | Comments  |
|---|---------------|------------|------------------|-------------|---------------------------------------|---|
| City Beach Cafe/Restaurant                      | April 2005    | 1,500      | \$67,500         | \$45.00     | 5 years                               | This property comprises land situated the beachfront in the Oceanside suburb of city beach. The restaurant is situated adjacent to the main car park area. Tenants have constructed a large restaurant on the site which is divided into two tenancies being Oceanus restaurant and the Mediterraneo cafe. The tenancies have direct access to the beach with excellent 180° views. In addition to the base rent percentage rent is also payable at 5% of gross sales above and beyond \$3 million. The \$3 million gross sales adjusted annually to CPI. |
| Bellhouse Café,<br>Mends St Jetty               |               | 227        | \$23,000         | \$101       |                                       |   |
| Lot 2033D<br>Mews Rd,<br>Fremantle              |               | 180        | \$21,013         | \$116.73    |                                       | Leased to Kailis Bros   |
| Jo Jo's<br>Restaurant,<br>Nedlands              | November 2004 | 3,445      | \$52,300         | \$15.18     |                                       | Seabed rental, with a review due November 2007.   |
| Old Perth Port<br>Stage 2                       |               | 2,097      | \$97,489         | \$46.48     |                                       | Seabed rental, with a review due November 2007.   |
| Old Perth Port,<br>Stage 1                      | July 2007     | 1,831      | \$95,389         | \$52.10     | 3 yearly                              | Seabed rental, set July 2007.   |
| Hans Café<br>Boardwalk<br>Precinct,<br>Mandurah | 1 July 2006   | 400        | \$40,000         | \$100       | Annual to CPI with 3 yearly to market | New 21 year lease with 20 year option. Building has been constructed and is now operated as a Hans Café. The lessee is responsible for all normal building outgoings. Rental paid quarterly.  |
| Oyster Bar on<br>the Beach, Port<br>Beach Road, |               | 2,100      |                  | \$37.40     |                                       | (Awaiting confirmation from the City of Fremantle)  |



North Fremantle



## 10.0 General Comments

The subject tenancy comprises 961 square metres of land situated on the Swan River foreshore in South Perth. The cafe is situated adjacent to a public car park and has direct access to the Swan River foreshore with excellent 180 degree Swan River and Perth city skyline views.

The site has the advantage of an adjoining public car park which allows the cafe to operate without any of the land contained within the Lease Agreement being required for patron parking. The South Perth location provides an excellent setting for high class dining with a view; however with a lack of surrounding retail and commercial development the location may not have the drawing power to that of the likes of Cottesloe, Hillarys and Fremantle.

The premises is also subject to a Profit Rent which is calculated at the end of each Lease Year on the basis of the Tenant's Gross Profit for that Lease Year. The amount payable is 33.33% of Gross Profit above and beyond \$150,000 at the commencement date of November 2005. The \$150,000 is adjusted to CPI every year.

The Profit Rent is an additional rent payable under the lease and in this instance we have deemed it to be separate from our analysis of the ground rental.



## 11.0 Rental Assessment Current Area

We have analysed rental evidence of ground leases a broad best cross-section for rental assessment purposes due to the unique nature of the subject property will.

After analysis of rental market data we recommend a rate in the order of \$60.00 to \$70.00 per square metre net of outgoings and exclusive of GST as at July 2008:

### Land Area

|                         |                   |   |                          |           |                 |
|-------------------------|-------------------|---|--------------------------|-----------|-----------------|
| Land Area               | 961m <sup>2</sup> | @ | \$60.00 per square metre | =         | \$57,660        |
| Land Area               | 961m <sup>2</sup> | @ | \$70.00 per square metre | =         | \$67,270        |
| <b>ADOPT (rounded):</b> |                   |   | <b>\$57,650</b>          | <b>to</b> | <b>\$67,250</b> |

We note as per the Lessee correspondence of 8 May 2008, they have accepted a rental of \$60,000 per annum net, which is to the lower end of the assessed range and represents \$62.43 per square metre.

## 12.0 Rental Assessment Proposed Area

As per the Lessees correspondence of 8 May 2008 the additional area of 613 square metres incorporates part of the existing road, reserve, four car parking bays (two disabled bays) garden pathway to public toilets and jetty and bin area.

The Lessee states the increased area is non-income producing although accepts that portion of the land does support the existing restaurant operation. We would consider this a fair comment and a view supported by the City of South Perth as per our discussions.

As such we consider it fair and reasonable to adopt a discount on rental for this particular area of 613 square metres. One of the main reasons for a discount is that the ability to utilise the land in a more appropriate or income producing manner for the lessee would be dependent upon redevelopment of the total site of 1,574 square metres. We would not consider this a viable option for the Lessee considering significant capital has been expended to construct the existing café and that the existing lease expires 2 November 2015. It would be extremely difficult or near impossible to use the additional land area without total redevelopment of the site.

After analysis of rental market data we consider a discount of in the vicinity of 50% to be fair and reasonable and our calculations are as follows:

### Current Land Area

|           |                   |   |                          |   |                    |
|-----------|-------------------|---|--------------------------|---|--------------------|
| Land Area | 961m <sup>2</sup> | @ | \$60.00 per square metre | = | \$57,660 per annum |
| Land Area | 961m <sup>2</sup> | @ | \$70.00 per square metre | = | \$67,270 per annum |



**Additional Land Area**

| Land Area         | 50% Discount on assessed rental range current area (as above) \$/square metre | Rental per annum |
|-------------------|---|------------------|
| 613 square metres | \$30.00   | \$18,390         |
|                   | \$31.25   | \$19,156         |
|                   | \$32.50   | \$19,923         |
|                   | \$33.75   | \$20,689         |
|                   | \$35.00   | \$21,455         |

**Combined Basis**

| Land Area          | 50% Discount on assessed rental range current area (as above) \$/square metre | Rental per annum | Discounted rental plus original rent at \$60 per square metre | Discounted rental plus original rent at \$70 per square metre |
|--------------------|---|------------------|---|---|
| 1,574square metres | \$30.00   | \$18,390         | \$76,050  | \$85,660  |
|                    | \$31.25   | \$19,156         | \$76,816  | \$86,426  |
|                    | \$32.50   | \$19,923         | \$77,583  | \$87,193  |
|                    | \$33.75   | \$20,689         | \$78,349  | \$87,959  |
|                    | \$35.00   | \$21,455         | \$79,115  | \$88,725  |

**ADOPT (rounded): \$76,000 per annum to \$88,725 per annum**

As mentioned previously the Lessee has accepted a rental of \$60,000 per annum net for the current lease area of 961 square metres equating to \$62.43 per square metre. If we were to adopt a 50% discount on this agreed rental then the rental for the additional portion of 613 square metres is \$19,136 or \$31.22 per square metre. The total rent for the new area of 1,574 square metres is therefore \$79,136 per annum equating to \$50.28 per square metre. This rental falls within our assessed range above.



## 13.0 GST Implications

The indicative assessment noted herein is exclusive of GST.

The impact of GST may be influenced by market conditions at that time and can only be interpreted from market evidence coming to hand as the market adjusts to the introduction of the tax.





## 13.1 Qualifications

Neither the whole nor any part of this indicative assessment report or any reference to it may be included in any published document, circular or statement without the written approval of DTZ (WA) Pty Ltd as to the form and context in which it may appear.

Information has generally been obtained from a search of records and examination of documents or by enquiry to Government Departments or Statutory Authorities. Where it is stated in the indicative assessment report that information has been supplied to us by another party, this information is believed to be reliable but we can accept no responsibility if this should prove to be not so.

This indicative assessment report has been prepared for the specific purpose stated. Any party that relies upon it for an alternative purpose without reference to DTZ (WA) Pty Ltd does so at its own risk.

The indicative assessment is conditional upon any, hot and cold water systems, drainage systems, electrical systems, air-conditioning or ventilating systems and other installations being in proper working order and functioning for the purpose for which they were designed.

### Market Movement Clause

This indicative assessment is current as at the date of indicative assessment only. The value assessed herein may change significantly unexpectedly over a relatively short period (including as a result of general market movements or factors specific to the particular property). We do not accept liability for losses arising from such subsequent changes in value. Without limiting the generality of the above comment, we do not assume any responsibility or accept any liability where this indicative assessment is relied upon after the expiration of three months from the date of indicative assessment, or such earlier date if you become aware of any factors that have any effect on the indicative assessment.

This report is to be regarded as confidential to the party to whom it is addressed, namely Ferrier Hodgson and is intended for the use of this party only and for the specific use for which it has been requested.

Consequently and in accordance with current practice, no responsibility is accepted to any third party who may use or rely on the whole or any part of its contents. Before the Report or any part of it is reproduced or referred to in any document, circular or statement, our written approval as to the form and context of such publication must be obtained.

Only a signed original of this indicative assessment should be relied upon and no responsibility will be accepted for photocopies of the report or signatures to the report.



## **Surrender of Existing Lease and Lease**

**City of South Perth**  
Lessor

**Millar Holdings Pty Ltd**  
**(ACN 063 656 048)**  
Lessee

**Graeme Ross Millar**  
Guarantor

**HARDY♦BOWEN**  
LAWYERS  
Level 1, 28 Ord Street, West Perth 6005  
PO Box 1364, West Perth WA 6872  
Tel + 61 8 9211 3600 Fax + 61 8 9211 3690  
Our Ref MJH:ICR:30425

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**This Deed of Lease made at** \_\_\_\_\_ **on** \_\_\_\_\_

**Parties**                    **City of South Perth** of Civic Centre, Cnr Sandgate Street and South Terrace, South Perth, 6151, Western Australia ("**Lessor**")

**Millar Holdings Pty Ltd (ACN 063 656 048)** of [insert] ("**Lessee**")

**Graeme Ross Miller** of [insert] ("**Guarantor**")

**Recitals**

- A.        The Land is the subject of a lease from the Minister for a term of 21 years with the power to sub-lease the Land for the purposes of a café and restaurant for a term not exceeding the term granted to the Lessor.
- B.        The Lessor and Lessee are parties to and have agreed to surrender the Existing Lease of the Premises, on the Date of Surrender, and release each other from all obligations under it, on the terms and conditions contained in this Deed.
- C.        This Lease has been entered into under and in accordance with section 3.58 of the *Local Government Act 1995*.

**The parties agree**

---

**1.        Definitions and Interpretation**

**1.1      Definitions**

In this Lease, unless the contrary intention appears, the following expressions have the following meanings:

**Act** includes all acts and statutes (State or Federal) for the time being enacted and all regulations, schemes, ordinances, local laws, by-laws, requisitions, orders or statutory instruments made under any Act from time to time by any statutory, public or other competent authority;

**API** means the Australian Property Institute (Inc.) Western Australian Division;

**Annexure 2** means Annexure 2 of this Lease;

**Business Hours** means the hours of operation of the Premises as set out in Item 10 of Schedule 1;

**Date of Commencement** means the date mentioned in Item 4 of Schedule 1 and **Date of Surrender** shall have a corresponding meaning;

**Dispute** means a dispute referred to in subclause 8.1;

**Encumbrances** means:

- (a)        all mortgages, charges, writs, warrants, caveats (and the claims stated in any caveat) and any other right or interest of any third party affecting the Land or any part of the Land;

- (b) all reservations (if any), existing easements and restrictive covenants contained in the Crown Grant of the Land or referred to in or registered as an encumbrance on the Certificate of Title to the Land;
- (c) all easements, restrictive covenants and encroachments (if any) affecting the Land or any part of the Land whether or not they are noted on the Certificate of Title to the Land; and
- (d) the encumbrances (if any) described in Item 2 of Schedule 1;

**Existing Lease** means the deed of lease made between the parties dated 3 November 1994;

**Good Repair** means good and substantial tenantable repair and in clean, good working order and condition;

**Land** means the land mentioned in Item 2 of Schedule 1;

**Lessee** means the Lessee and includes, where not repugnant to the context, the servants and agents of the Lessee;

**Lessee's Covenants** means each and every covenant contained or implied in this Lease to be observed or performed by the Lessee;

**Lessee's Fixtures** means any fixtures, fittings, plant or equipment supplied and fitted by the Lessee or on behalf of the Lessee to, in or on the Premises;

**Lessor** means the Lessor and includes, where not repugnant to the context, the servants and agents of the Lessor;

**Lessor's Powers** means each and every right, power and remedy exercisable by the Lessor under this Lease;

**Market Rent Review Date/s** means the date/s set out in item 12 of the Schedule 1;

**Minister** means the Minister for Lands;

**Outgoings** means the charges mentioned in subclause 4.3;

**Premises** means the premises mentioned in Item 3 of Schedule 1 and includes, where not repugnant to the context, any part thereof;

**Rent** means the rent mentioned in Item 7 of Schedule 1 and any agreed variation of the rent determined in accordance with the provisions of this Lease from time to time;

**Retail Shops Act** means the Commercial Tenancy (Retail Shops) Agreement Act 1985;

**Schedule 1** means Schedule 1 of this Lease;

**Schedule 2** means Schedule 2 of this Lease;

**Term** means the term of this Lease mentioned in Item 5 of Schedule 1 including any renewal or extension of the Term in accordance with the provisions of this Lease from time to time;

**this Lease** means the lease forming part of this Deed including any schedules and annexures and as amended from time to time by the Parties in writing;

**Tobacco Product** means tobacco, a cigarette or a cigar or any other product the main, or a substantial ingredient of which is tobacco and which is designed for human consumption or use; and

**Valuer** means a member of API who has been actively engaged for not less than three (3) years in valuing commercial premises in Western Australia.

## 1.2 Interpretation

In this Lease:

- (a) headings are for convenience only and do not affect the interpretation or construction of this Lease; and

unless the context indicates the contrary intention:

- (b) every covenant or agreement expressed or implied in this Lease in which more than one person covenants or agrees shall bind each person jointly and severally;
- (c) a reference to any party shall mean and include a reference to that party and the party's successors, personal representatives and transferees and a reference to a corporation or body includes a reference to the corporation or body's successors and assigns;
- (d) words importing the singular include the plural (and vice versa) and words denoting individuals include corporations (and vice versa);
- (e) a reference to a clause, a subclause, a paragraph, a schedule or an annexure is reference to a clause, a subclause, a paragraph, a schedule or an annexure of this Lease and as amended in accordance with the provisions of this Lease from time to time;
- (f) a reference to any Act or to any section or provision thereof includes a reference to that Act, section or provision as amended, replaced, varied or substituted from time to time; and
- (g) where any act, matter or thing is to be done under this Lease on a Saturday or Sunday, then that act, matter or thing may be done on the Monday immediately following the relevant Saturday or Sunday or in the event of a public holiday in Western Australia the act, matter or thing may be done on the working weekday immediately following that public holiday.

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## 2. Surrender of Existing Lease

### 2.1 Surrender

The Lessee surrenders and yields up to the Lessor the estate and interest of the Lessee in and to the Existing Lease and the Premises and the unexpired residue of the Term and all estate, right, title and interest, claim and demand of the Lessee in it on and from the Date of Surrender, to the intent that the Existing Lease from and after that date shall be deemed to have ceased.

### 2.2 Acceptance of surrender

The Lessor accepts the surrender on and from the Date of Surrender and undertakes to the Lessee and to the guarantors named in the Existing Lease that the guarantors so



named shall be released from their guarantees as given in the Existing Lease contemporaneously with the acceptance of the surrender of the Existing Lease.

### **2.3 Consequences of and obligations on surrender**

Each of the Lessor and the Lessee releases the other from all actions, suits, claims and demands of any description which either of them might have had against the other for or in respect of any future breach or non-observance of any covenant, agreement or condition on the part of the other contained or implied in the Existing Lease PROVIDED THAT the release shall be without prejudice to:

- (a) all actions, suits, claims and demands of any description which the Lessor may have against the Lessee for or in respect of any outstanding breach or non-observance of any covenant, agreement or condition on the part of the Lessee contained or implied in the Existing Lease prior to the Date of Surrender;
- (b) the Lessee's obligation to indemnify the Lessor, which survives the surrender.

### **2.4 Obligation on Lessee to vacate**

As the Lessor and the Lessee agreed to enter into this Lease, upon the terms and conditions contained in this Deed, the obligation of the Lessee to vacate the Premises on or before the Date of Surrender, in accordance with the Existing Lease, is waived.

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## **3. Re-grant of Lease - operative part**

The Lessor LEASES to the Lessee and the Lessee takes on lease the Premises, subject to the Encumbrances, from the Date of Commencement for the Term at the Rent and subject to and upon the covenants, conditions and stipulations contained in this Lease.

---

## **4. Lessee's Covenants**

The Lessee covenants with the Lessor:

### **4.1 Rent**

To pay the Rent (free from all deductions) in the manner and at the times mentioned in Item 7 of Schedule 1 to the Lessor at its address or as the Lessor may in writing from time to time direct.

### **4.2 Interest on overdue moneys**

Without prejudice to the rights, powers and remedies of the Lessor that are otherwise provided for under this Lease, to pay to the Lessor on demand interest on any money that are due but unpaid for SEVEN (7) days by the Lessee to the Lessor on any account whatsoever under this Lease. Interest shall be calculated from the due date for the payment of the moneys in respect of which the interest is chargeable until payment of these money in full and interest shall be recoverable as if it was Rent in arrears. For the purpose of this subclause, "**interest**" means the prevailing rate of interest charged on an overdraft of at least \$100,000 by a bank at which the Lessor keeps an account, calculated daily and capitalised on the last day of each calendar month.

### 4.3 Outgoings

To duly and punctually pay all local government rates, rubbish collection, water, electricity, power, gas and telephone and any other fees or charges which now or during the Term shall be charged upon or in respect of the Premises or be payable by the owner or occupier in respect of them upon the days or times upon which they are due and payable PROVIDED THAT the Lessee shall not pay for any rates and taxes for that part of the Premises specified as public toilets or water usage for that part of the Premises which shall be separately metered.

### 4.4 Other liabilities

To the extent permissible at law, to pay upon demand to the Lessor by way of reimbursement an amount equal to any money paid or outlaid by the Lessor in respect of any liability imposed on the Lessee under this Lease.

### 4.5 Cost of Lease

To pay:

- (a) the Lessor's reasonable and proper costs (including solicitors' costs) and all duties, fees, charges and expenses of and incidental to the instructions for and the preparation and completion of this Lease;
- (b) all stamp duty payable on this Lease and in respect of any renewal of the Term;
- (c) the Lessor's costs of any application for the consent of the Lessor;
- (d) the Lessor's costs incidental to any and every breach or default by the Lessee under this Lease and in or incidental to the exercise or attempted exercise of any right, power, privilege, authority or remedy of the Lessor under or by virtue of this Lease; and
- (e) the reasonable fees of all professional consultants reasonably and properly incurred by the Lessor in consequence of or in connection with any breach or default by the Lessee under this Lease.

### 4.6 Maintain and repair Premises

#### (a) Generally

During the Term and for so long as the Lessee remains in possession or occupation of the Premises, to maintain, replace, repair, clean and keep the Premises clean and in Good Repair having regard to the condition of the Premises at the Date of Commencement.

To comply with and discharge its general obligation under this paragraph, the Lessee must, at its expense:

- (i) immediately repair any damage, including structural damage, to the Premises caused by:
  - (A) the actions, whether negligent or deliberate of the Lessee or those for whom the Lessee is responsible including, but not limited to, its servants, agents, contractors or invitees; or

- (B) the happening of the risks described in (A) – (H) of clause 4.15(a)(ii); or
- (C) fair and reasonable wear and tear;
- (ii) immediately replace all electric globes and fluorescent tubes in the Premises which may be damaged, broken or fail for any reason;
- (iii) regularly maintain and repair the Lessor's plant, equipment, fixtures, fittings and accessories or services, including, but not limited to, air-conditioning plant, power, water, sewerage, gas, telecommunications, fire warning or prevention systems, that are located within and serve the Premises;
- (iv) only use, where maintaining, replacing, repairing or cleaning:
  - (A) any electrical fittings and fixtures;
  - (B) any plumbing and sewerage;
  - (C) any air-conditioning plant, fittings and fixtures; or
  - (D) any gas fittings and fixtures,

licensed tradespersons or tradespersons as may be approved by the Lessor and notified to the Lessee, which approval shall not be unreasonably withheld.

(b) **Lessee's Fixtures**

Subject to subclause 4.9, to repair and make good any damage (regardless of how minor) which may be caused to the Premises at any time by the installation or removal by the Lessee of any Lessee's Fixtures. Any areas of the Premises that are affected in any way by the removal or installation of any Lessee's Fixtures must be placed in a state of Good Repair as if the installation and the removal of the relevant Lessee's Fixtures had never taken place. This obligation shall include, without limitation, an obligation on the Lessee to place all walls, floors, ceilings, carpets, skirting boards, plasterwork, paintwork, window treatments and wallpaper in a state that is aesthetically consistent with the immediate surrounding areas and the rest of the Premises.

(c) **Specific maintenance requirements**

In addition to the obligations set out in this subclause 4.6, the Lessee must comply with the specific maintenance requirements set out in Annexure 2, if any.

(d) **Paint and decorate**

The Lessee, at the times and in accordance with the directions of the Lessor's building surveyor, shall properly paint and varnish with at least two coats of good quality paint and varnish (in colours approved by the Lessor in writing) those parts of the Premises as are now painted and varnished or are usually painted and varnished and to properly re-decorate in any other fashion (with suitable materials of good quality approved of by the Lessor in writing) all parts of the Premises that have been previously or are usually decorated.

The Lessor shall not unreasonably withhold any approval required under this paragraph.

#### **4.7 Use of premises**

(a) **Generally**

Not to use or permit the Premises to be used as the residence or sleeping place of any person or for auction sales but to use the Premises only for the purpose mentioned in Item 8 of Schedule 1, during the Business Hours and for no other purpose whatsoever.

(b) **Hire of Premises**

Not to hire the Premises to any person for a fee UNLESS:

- (i) the purpose for which the Premises are hired is consistent with the purpose mentioned in paragraph (a); and
- (ii) the hire occurs during the Term.

(c) **Offensive activities**

Not to do, exercise or carry on or allow any person to do, exercise or carry on in the Premises any noxious, noisome or offensive act, trade, business, occupation or calling or any act, matter or thing whatsoever which may cause nuisance, damage or disturbance to the Lessor or occupier of any building in the neighbourhood.

(d) **Birds, animals**

Not to keep any birds or animals in or about the Premises.

(e) **Lavatories etc.**

Not to use or allow to be used the lavatories, toilets, sinks and drainage and other plumbing facilities in the Premises for any purposes other than for which they were constructed or provided.

(f) **Chemicals etc.**

Not to use or allow to be used any chemicals or inflammable gases, fluids or substances on the Premises except where reasonably necessary in the normal course of the Lessee's business or the use of the Premises for the permitted use of the Premises.

(g) **Signs**

Not, without the prior written consent of the Lessor (which consent shall not be unreasonably withheld), to construct, display, affix or exhibit on or to the exterior or interior of the Premises any signs, lights, embellishments, advertisements, names or notices visible from outside the Premises.

(h) **Removal of rubbish**

To keep the Premises free from dirt and rubbish and to store and keep all trade waste, trash and garbage in proper receptacles.

(i) **Floor overloading**

Not to do or allow anything to be done on the Premises which would result in excessive stress, strain or floor loading to any part of the Premises except to those parts of the Premises designated in writing by the Lessor.

(j) **Pest control**

To take all reasonable precautions to keep the Premises free of rodents, vermin, insects, pests, birds and animals.

(k) **Not to pollute**

To do all things necessary to prevent pollution or contamination of the Premises by garbage, refuse, waste matter, oil and other pollutants.

(l) **No smoking**

Not to use or allow the Premises to be used for smoking, holding or otherwise having control over an ignited Tobacco Product, other than in facilities designated for that purpose and which are consistent with all Acts.

(m) **Cleaning of Premises**

To clean the whole of the Premises including any public toilet facilities located in the Premises and ensure that the Premises are maintained in a clean and sanitary condition at all times.

#### **4.8 Entry by Lessor and others**

To permit entry to the Premises at all reasonable times upon giving to the Lessee reasonable notice (except in the case of emergency when notice shall not be required):

(a) **To inspect**

By the Lessor and its agents, servants and contractors to view the state of Good Repair for the purposes of ensuring compliance by the Lessee with all or any of the Lessee's Covenants.

(b) **To repair**

By the Lessor and its agents, servants and contractors with workmen and others and all necessary materials and equipment for the purpose of complying with any request, requirement, notification or order of any authority having jurisdiction or authority over or in respect of the Premises for which the Lessee is not liable under this Lease or for which the Lessee is liable but has failed to carry out or for the carrying out or repairs, renovations, maintenance, modifications, extensions, alterations or replacements to the Premises and all plant, machinery and other building equipment within the Premises PROVIDED THAT in the exercise of this right the Lessor shall use its best endeavours not to cause any undue inconvenience to the Lessee.

#### **4.9 Alterations and installations**

(a) **Generally**

Not to make or allow to be made to the Premises any alterations or external projection or any structural alterations or to cut, maim or injure or allow to be

cut, maimed or injured any of the principal structure or walls or any part of them without the prior written consent of the Lessor PROVIDED THAT consent shall not be withheld by the Lessor in the case of any structural alterations or additions required to be made to the Premises by any local or statutory authority by reason of the particular use to which the Premises are put by the Lessee. Any structural alterations or additions shall be effected at the sole cost of the Lessee to a specification approved in writing by the Lessor prior to the commencement of the structural alterations or additions.

(b) **Carried out in workmanlike manner**

That all buildings, erections, improvements and alterations to be constructed and all works carried out or executed on the Premises by the Lessee shall be constructed, carried out or executed by the Lessee in a proper and workmanlike manner, using licensed trades persons or other trades persons as the Lessor may approve (which approval shall not be unreasonably withheld), and under the supervision and to the reasonable satisfaction of the Lessor's building surveyor (or other officer of the Lessor as the Lessor may appoint) and in the event of any dispute the certificate of the building surveyor (or other officer of the Lessor) shall be final and binding upon the parties.

(c) **Plant and equipment**

Not to make any alterations or additions to any plant, equipment, services, fixtures or fittings forming part of the Premises (including any air-conditioning plant, electrical fittings, plumbing and fire warning or prevention systems) ("**Plant and Equipment Alterations**") without the Lessor's prior written consent (which may be withheld in the Lessor's discretion or given on terms and conditions as the Lessor considers fit). Any application for consent shall be accompanied by detailed plans and specifications and, if approved by the Lessor, any works shall be carried out by the Lessee in a proper and workmanlike manner, using licensed trades persons or other trades persons as the Lessor may approve (which approval shall not be unreasonably withheld), and under the supervision and to the reasonable satisfaction of that officer of the Lessor as the Lessor may appoint, and in the event of any dispute the certificate of the officer shall be final and binding upon the parties.

If any Plant and Equipment Alterations are made by the Lessee at any time then, on the expiry or sooner determination of the Term, the Lessee shall at the Lessor's request, promptly reinstate and restore the Premises as nearly as possible to its original state and shall repair and make good any damage (regardless of how minor) which may be caused to the Premises as a result of the reinstatement and restoration works. This obligation shall include, without limitation, an obligation on the Lessee to place all walls, floors, ceilings, carpets, skirting boards, plasterwork, paintwork and wallpaper in a state that is aesthetically consistent with the immediate surrounding areas and the rest of the Premises.

#### **4.10 To report certain matters to the Lessor**

(a) **Defects**

To give to the Lessor prompt notice in writing of any accident to or defect or want of repair in any services or fixtures, fittings, plant or equipment in the Premises and of any circumstances known to the Lessee that may be or may cause a risk or hazard to the Premises or to any person on the Premises.

(b) **Vandalism**

To report to the Lessor immediately any act of vandalism to the Premises and the Land.

**4.11 No transferring, subleasing and parting with possession**

Subject to clause 4.7(b), not to transfer, sublet, assign or otherwise part with the possession of the Premises or any part of the Premises or in any way dispose of the benefit of this Lease without the prior written consent of the Lessor and the Minister in accordance with the provisions of the *Land Administration Act 1997* PROVIDED THAT:

(a) Consent not unreasonably withheld to transfer, sublease, assignment or license

If the Lessee wishes to transfer, sublet or assign the whole of the Premises and the benefit of this Lease the Lessor shall not unreasonably withhold its consent to that assignment if:

- (i) the proposed transferee, sublessee or assignee is respectable, responsible and solvent (the onus of proof of which shall be upon the Lessee);
- (ii) the Lessee procures the execution by the proposed transferee, sublessee or assignee of a deed of transfer, sublease or assignment of this Lease to which the Lessor is a party prepared and completed by the Lessor's solicitors at the reasonable cost of the Lessee in all respects and the covenants and agreements on the part of any transferee, sublessee or assignee shall be deemed to be supplementary to this Lease and shall not in any way relieve the Lessee from its liability under this Lease;
- (iii) all Rent and Outgoings then due or payable shall have been paid and there shall not be any existing un-remedied breach of any of the Lessee's Covenants;
- (iv) the transfer, sublease or assignment contains a covenant by the transferee, sublessee or assignee with the Lessor that the transferee, sublessee or assignee at all times during the continuance of the Term will duly observe and perform all the Lessee's Covenants; and
- (v) the Lessee pays to the Lessor all proper and reasonable costs, charges and expenses incurred by the Lessor of and incidental to any enquiries which may be made by or on behalf of the Lessor as to the respectability, responsibility and solvency of any proposed transferee, sublessee or assignee.

(b) **Corporate assignee**

If the transferee, sublessee or assignee is a company then it shall be a condition of the Lessor's consent to any deed of transfer, sublease or assignment that the directors or the substantial shareholders of that company guarantee to the Lessor the observance and performance by the transferee, sublessee or assignee of the Lessee's Covenants.

(c) **No release of assignor**

The covenants and agreements of any transferee, sublessee or assignee shall be deemed to be supplementary to the Lessee's Covenants and shall not in any way relieve or be deemed to relieve the Lessee from the Lessee's Covenants;

**PROVIDED FURTHER THAT** if the Lessee is a corporation any change in the beneficial ownership of a substantial holding (within the meaning of section 9 of the *Corporations Act 2001*) in the corporation or any related body corporate within the meaning of section 50 of the *Corporations Act 2001* shall be deemed to be a transfer, sublease, assignment or licence of the Premises and the benefit of this Lease for the purposes of this subclause;

**AND IT IS EXPRESSLY AGREED AND DECLARED** that sections 80 and 82 of the *Property Law Act 1969* are hereby excluded; and

The Lessee acknowledges and agrees that the failure by either the Lessee or any other relevant party to comply strictly with each of the conditions, stipulations and requirements contained in paragraphs (a) or (b) will constitute reasonable grounds upon which the Lessor may withhold its consent to any assignment of this Lease proposed by the Lessee.

(d) **No mortgage or charge**

The Lessee must not mortgage or charge the Lease or any estate or interest in the Premises without the prior written consent of the Lessor, which shall not be unreasonably withheld.

#### **4.12 Trust**

To not without the prior written consent of the Lessor:

- (a) hold the Lessee's interest in this Lease on trust for any party other than the trust (if any) specifically mentioned in Item 11 of Schedule 1;
- (b) declare a trust of the Lessee's interest in this Lease; or
- (c) vary, amend, alter or revoke the terms contained in any trust deed or add to or vary the beneficiaries of the trust or distribute or join in the distribution of any or all of the capital of the trust or in any other way vest the trust.

Any holding in trust or declaration of trust, amendment, alteration, revocation or distribution contrary to this subclause shall be deemed to be an assignment of the Lease to which all of the provisions of paragraphs 4.11(b) and (c) and shall apply.



#### 4.13 Comply with Acts

(a) **Generally**

Notwithstanding anything to the contrary contained or implied in this Lease, to comply with all Acts relating to the Premises or the use of them PROVIDED THAT the Lessee shall not be under any liability in respect of any structural alterations required by any Act other than caused or contributed to by the Lessee's particular use or occupation of the Premises.

(b) **Fire regulations**

In the positioning of partitions or any fixtures or fittings installed by the Lessee on the Premises, to comply with:

- (i) all Acts relating to fire detection and alarm;
- (ii) all policies of insurance that apply to the Premises and the Land,

and to pay to the Lessor the reasonable cost of effecting any alterations to the thermal detectors or other fire alarm installations which may be necessary to comply with any Act or any requirements of the Fire & Accident Underwriters' Association, the Insurance Council of Australia and the Fire and Emergency Services Authority of Western Australia.

(c) **Use of Premises**

The Lessor gives no warranty as to the use to which the Premises may be or are suitable to be put. The Lessee acknowledges that it has satisfied itself as to the requirements of all Acts in relation to the use of the Premises and enters into this Lease with full knowledge of and subject to any prohibitions under any Act. The Lessee at its cost shall obtain any necessary consents required by any Act to enable it to occupy the Premises for the purposes of its business.

#### 4.14 Public risk insurance

To effect and keep effected in respect of the Premises adequate public risk insurance (which insurance shall not be contributory with any policy effected by the Lessor), including insurance against the risks referred to in subclause 4.17, for the time being in an amount not less than the amount mentioned in Item 9 of Schedule 1 in respect of any one claim or any higher amount as the Lessor from time to time reasonably shall require with an insurer approved by the Lessor (which approval shall not be unreasonably withheld) and:

- (a) to ensure that the Lessor's interest in the policy in respect of public risk insurance ("**Policy**") is notified to the insurer and is reflected and noted on the Policy;
- (b) to notify the Lessor of the policy details as soon as practicable after the Date of Commencement;
- (c) to ensure that the insurance conforms with the reasonable requirements from time to time of the Lessor of which the Lessee is given notice;
- (d) if required by the Lessor to produce, on demand, a true copy of the Policy in respect of public risk insurance to the Lessor and true copies of the receipts for the last premium;

- (e) to deliver to the Lessor on or before the expiration of each year of the Term and at any other time upon the request of the Lessor a true copy of a certificate by the insurer in respect of the public risk insurance and the currency of the Policy; and
- (f) not to alter the terms or conditions of the Policy without the written approval of the Lessor and to promptly deliver to the Lessor particulars of any change or variation of the terms and conditions or any other matter in respect of any public risk insurance policy effected by the Lessee by this subclause.

#### **4.15 Other insurance**

- (a) During the Term to effect and keep effected
  - (i) a policy of insurance, with an insurer approved by the Lessor (which approval shall not be unreasonably withheld), covering fittings, accessories and stock in the Premises or associated with the activity carried on by the Lessee in the Premises. Insurance cover under this policy must be for the full insurable value of the fittings, accessories and stock against loss or damage because of fire and other risks including water, storm and rainwater damage; and
  - (ii) a policy of insurance over the Premises and the Land in relation to any risk relating to the Lessor's ownership or interest in the Land and the Premises, including the Lessor's plant, equipment, fixtures, fittings and accessories or services, including but not limited to air-conditioning plant, power, water, sewerage, gas, telecommunications, fire warning or prevention systems, that are located within and serve the Premises, including, insurance against loss or damage due to:
    - (A) fire or explosion (including architects' and other consultants' fees and the cost of demolition and removal of debris);
    - (B) lightning;
    - (C) earthquake;
    - (D) theft and burglary;
    - (E) deliberate destruction of the Premises by a third party;
    - (F) riot or civil commotion;
    - (G) storm and flood;
    - (H) accidental damage to plate glass; and
    - (I) loss of Rent (including loss of the other amounts payable under clause 4).
- (b) As soon as practicable after the Date of Commencement, to deliver to the Lessor a true copy of a certificate from the Lessee's insurer certifying that the Lessee is insured in the manner specified in paragraph (a) or evidence, to the satisfaction of the Lessor, of the existence of the policy for the insurance specified in paragraph (a), and true copies of the receipts relating to payment of the premiums in relation to those policies.

- (c) If required by the Lessor to produce, on demand, a true copy of each of the policies for the insurances specified in paragraph (a) and true copies of the receipts for the last premiums.
- (d) To deliver to the Lessor on or before the expiration of each year of the Term and at any other time upon the request of the Lessor a true copy of a certificate from the Lessee's insurer certifying that the Lessee is insured in the manner specified in paragraph (a) and stating the period for which it is so insured.
- (e) Not to alter the terms or conditions of the policies for the insurances specified in paragraph (a) without the written approval of the Lessor and deliver promptly to the Lessor particulars of any change or variation of the terms and conditions or any other matter in respect of those policies.

#### **4.16 Not to invalidate insurance**

(a) **Generally**

Not to do or allow any act, matter or thing upon the Premises or bring or keep anything on the Premises by which any insurance relating to the Premises or the Land (as described in clauses 4.14 and 4.15) may be rendered void or voidable or by which the rate of premium on that insurance shall be or be liable to be increased and the Lessee shall pay all additional premiums of insurance on the Premises and the Land (if any) required on account of the additional or increased risk.

(b) **Obligation to comply**

The Lessee shall comply with the requirements of any insurer of the Premises or the Land.

(c) **Obligation to notify**

The Lessee shall notify the Lessor promptly of any act, matter or thing occurring or likely to occur upon the Premises or the Land by which any insurance relating to the Premises or the Land may be rendered void or voidable.

#### **4.17 Indemnities**

(a) **Generally**

To take and be subject to the same responsibilities in regard to persons and property to which the Lessee would be subject, if during the Term, the Lessee were the owner of the freehold of the Premises.

(b) **Indemnity**

To indemnify and keep indemnified the Lessor from and against all claims, demands, writs, summonses, actions, suits, proceedings, judgments, orders, decrees, damages, costs, losses and expenses of any nature which the Lessor may suffer or incur in connection with the loss of life, personal injury, illness and or damage to property, arising from or out of any occurrence in or upon or at the Premises or the use of the Premises by the Lessee or any part of them or to any person or the property of any person using or entering on or near the Premises how ever caused (loss, injury, illness, damage or

destruction caused or occasioned by any negligent act, default or omission of the Lessor or its employees, agents or contractors excepted).

(c) **Abuse of installations**

To indemnify and keep indemnified the Lessor from and against any and all loss or damage how ever caused by the neglect, use, mis-use or abuse of:

- (i) water, electricity or gas supplied to the Premises; or
- (ii) installations, fixtures or fittings for water, gas or electricity,

by the Lessee or by any employee, agent, contractor or invitee of the Lessee, and that the Lessee shall pay for all damage or injury to the Premises or to the Lessor or to any other person in consequence of any breach or non-observance of the provisions of this paragraph.

(d) **Insurance moneys**

Without prejudice to the generality of paragraph (a) (to the extent that the terms and conditions of any insurances effected by the Lessee or any money paid to the Lessor out of insurances effected by it or any money paid to the Lessee out of insurances effected by it do not fully indemnify the Lessor from and against all actions, claims, demands, notices, losses, damages, costs and expenses to which the Lessor shall or may be or become liable in respect of all or any of the matters referred to in subparagraphs (i), (ii) and (iii) of this paragraph) to indemnify the Lessor and keep the Lessor indemnified from and against all actions, claims, demands, notices, losses, damages, costs and expenses to which the Lessor shall or may be or become liable in respect of all or any loss or damage to property or death or injury to any person of any nature or kind and however or wherever sustained that:

- (i) is caused or contributed to by the use or occupation of the Premises, except to the extent caused or contributed to by the negligence or act, default or omission of the Lessor;
- (ii) results from any act, default or omission by the Lessee under this Lease; or
- (iii) results from any notice, claim or demand to pay, do or perform any act, matter or thing to be paid, done or performed by the Lessee under this Lease.

## 4.18 Yielding up

(a) **Peaceably yield up**

Upon the expiration or sooner determination of the Term, to peaceably surrender and yield up to the Lessor the Premises clean and free of rubbish and in a state of Good Repair that is entirely consistent with all of the Lessee's Covenants having been fully complied with.

(b) **Removal of Lessee's Fixtures**

Subject to any clause to the contrary, at or prior to the determination or termination of the Term to take, remove and carry away from the Premises all Lessee's Fixtures and other articles upon the Premises in the nature of trade or Lessee's fixtures brought upon the Premises by the Lessee (other than air-conditioning plant and fire equipment, security alarms and security systems and other fixtures and fittings which, in the opinion of the Lessor, form an integral part of the Premises) and the Lessee on removal shall make good to the satisfaction of the Lessor immediately any damage which may be caused by that removal.

(c) **Liquidated damages for failure to remove Lessee's Fixtures, etc.**

Without limiting the Lessee's obligations under paragraphs (a) and (b) in any way, if, after receiving a notice from the Lessor given on or at any time after the determination or termination of the Term demanding that the Lessee remove any Lessee's Fixture or other article not removed in accordance with paragraph (b) (**Removal Notice**) the Lessee fails to comply with all of its obligations under paragraph (b) within FIVE (5) days of the date of receipt of the Removal Notice:

- (i) the Lessee shall pay the Lessor on demand by way of liquidated damages an amount per day equal to 1/365th of the Rent payable by the Lessee immediately prior to the expiration or sooner determination of the Term (as the case may be) (**Removal Rent**); and
- (ii) the Removal Rent shall be paid by the Lessee to the Lessor from and including the date on which the Removal Notice was received by the Lessee up to and including the day on which the Lessee has fully complied with all of its obligations under paragraph (b).

(d) **Abandonment of Lessee's Fixtures**

Further or in the alternative to the Lessor's rights and powers under paragraph (c), the Lessor, at any time after the expiration or sooner determination of the Term, may give the Lessee a notice (**Abandonment Notice**) requiring the Lessee to remove all Lessee's Fixtures or other articles not previously removed by the Lessee in accordance with paragraph (b) (**Remaining Items**). On the Lessee's receipt of an Abandonment Notice, the Lessee shall have TWO (2) days within which to remove all Remaining Items and failing removal within that TWO (2) day period, all Remaining Items still on the Premises or in the Lessor's custody shall be deemed absolutely abandoned by the Lessee and shall become the absolute property of the Lessor automatically and may be sold by the Lessor at any time and without further notice or obligation to the Lessee. The Lessor shall be entitled to keep the proceeds of any sales and those proceeds shall not be taken into account to reduce any arrears, damages or other moneys for which the Lessee may be

liable. All reasonable costs incurred by the Lessor in respect of any sale shall be paid by the Lessee on demand.

Nothing shall preclude the Lessor from giving a Removal Notice and recovering the Removal Rent in accordance with paragraph (c) and later giving the Lessee an Abandonment Notice at any time under this paragraph. The Lessee's obligation to pay the Removal Rent shall cease immediately upon the Lessee's receipt of an Abandonment Notice. Nothing, however, shall release the Lessee from liability to pay any Removal Rent that is in arrears on the date that the Lessee receives an Abandonment Notice.

#### **4.19 Not to lodge caveat or other interest against Title to Land**

(a) **Interpretation**

In this subclause, a reference to a Certificate of Title to the Land includes a reference to a Certificate of Crown Land Title if the Land is Crown land.

(b) **No absolute or subject to claim caveat**

Not to lodge an absolute caveat or a subject to claim caveat over the Land or any part of the Land or against the Certificate of Title to the Land to protect the interest of the Lessee and the Lessee IRREVOCABLY APPOINTS the Lessor and every officer and employee of the Lessor for the time being authorised in that behalf by the Lessor jointly and severally, to be the true and lawful attorney for the Lessee in its name and on its behalf to execute and to lodge at the Department of Land Information a withdrawal of any absolute caveat or subject to claim caveat AND the Lessee RATIFIES AND CONFIRMS and AGREES TO RATIFY AND CONFIRM all that the attorney shall do or cause to be done under or by virtue of this subclause and shall indemnify the Lessor in respect of any loss arising from any act done under or by virtue of this subclause and the Lessee will pay the Lessor's reasonable costs (including solicitors' costs) and expenses of and incidental to the withdrawing of any caveat lodged by or on behalf of the Lessee affecting the Land or the Certificate of Title to the Land as provided by this subclause.

(c) **Not to register dealings**

Not to lodge or cause to be lodged any lease, sublease, mortgage, charge or other dealing against the Certificate of Title to the Land without the prior written consent of the Lessor.

#### **4.20 Alcohol**

(a) **Liquor licence or permit**

To apply for an appropriate liquor licence or permit under the *Liquor Control Act 1988* to use or allow the Premises to be used for the consumption or sale of alcohol.

(b) **Obligations if liquor licence or permit granted**

If a licence or permit under the *Liquor Control Act 1988* is granted to it:

- (i) to comply with any requirements attaching to the licence or permit at its cost and where any alteration is required to the Premises subclause 4.9 shall apply;

- (ii) to provide a copy of the licence or permit (together with a copy of any document referred to in the licence or permit) to the Lessor as soon as practicable after the date of grant; and
- (iii) to indemnify and keep indemnified the Lessor from and against any breach of the *Liquor Control Act 1988*, the licence or permit for which it may be liable as the owner of the Premises.

## 5. Rent Review

### 5.1 CPI Adjustment

- (a) With effect from each CPI Adjustment Date, the Rent is to be adjusted for changes in the CPI. The adjustment is to be calculated by using the following formula:

$$A = \frac{L}{E} \times PR$$

A means the Rent adjusted by CPI

L means the Current Index Number

E means the Previous Index Number

PR means the Rent payable immediately prior to the current CPI Adjustment Date

- (b) For the purposes of this clause:

**CPI** means the Consumer Price Index for Perth (All Groups) published by the Australian Bureau of Statistics;

**CPI Adjustment Date** means each anniversary of the Date of Commencement for the duration of the Term including any renewal or extension of the term in accordance with the provisions of this Lease from time to time but excluding any Market Rent Review Date;

**Current Index Number** means the Index Number last published before the current CPI Adjustment Date;

**Index Number** shall mean for the purposes of this clause the Consumer Price Index for Perth (All Groups) as published by the Australian Bureau of Statistics. In the event that there is any suspension or discontinuance of the Perth (All Groups) category of the Consumer Price Index or its method of calculation is substantially altered then:

- (a) "Index Number" shall mean the number selected by an actuary appointed by the Lessor from the Fellows of the Institute of Actuaries of Australia to accurately reflect changes in the prevailing levels of prices in the category dealt with by the Consumer Price Index during the period prior to that suspension or discontinuance;
- (b) an actuary's certificate which sets out the actuary's selection of an Index Number may not be disputed by the Lessor or the Lessee in any way; and

- (c) the Lessor and the Lessee are to pay the actuary's costs and expenses in equal shares.

**Previous Index Number** means, in respect of a CPI Adjustment Date, the Index Number last published before the latest of the Date of Commencement, the last Market Rent Review Date to have occurred or the preceding CPI Adjustment Date.

## **5.2 Market Rent Review – Proposed Rent**

The Lessor may review the Rent with effect from each Market Rent Review Date. The Lessor is to give to the Lessee a notice stating the rent the Lessor proposes should be payable from that Market Rent Review Date. The notice may be given at any time before or after a relevant Market Rent Review Date and any failure to give or delay in giving a notice will not affect the Lessor's right to review the Rent.

## **5.3 Agreement with Lessor's proposal**

If the Lessee agrees to the proposed Rent, it is payable from the relevant Market Rent Review Date.

## **5.4 Disagreement with the Lessor's proposal**

If the Lessee disagrees with the proposed Rent, the Lessee is to give the Lessor a notice (**Dispute Notice**) objecting to it within TWENTY EIGHT (28) days after the date the Lessor gives notice of the proposed rent. If the Lessee does not give the Lessor a Dispute Notice within that time, the Lessee is to be taken to have agreed to the proposed Base Rent.

## **5.5 Base Rent determination**

If the Lessee gives the Lessor a Dispute Notice, the Rent from the relevant Market Rent Review Date is to be the market rent for the Premises determined by a Valuer appointed under clause 5.6.

## **5.6 Valuer**

The market rent for the Premises is to be determined by a Valuer jointly appointed by the Lessor and the Lessee. If they do not agree on the Valuer to be jointly appointed within FOURTEEN (14) days after the Dispute Notice is given, the Rent is to be determined by a Valuer appointed by the President of API at the request of either the Lessor or the Lessee. A Valuer appointed under this clause is to act as an expert and not as an arbitrator. The Valuer's charges are payable by the Lessor and the Lessee in equal shares.

## **5.7 Market Rent**

For the purposes of this clause 5, but subject to this clause 5.7, the market rent of the Premises is to be the highest rent reasonably obtainable for the Premises having regard to any lawful use which is consistent with the terms of this Lease, taking into consideration:

- (a) the current rents of comparable premises; and
- (b) all other relevant valuation principles,

but excluding from consideration:



- (c) any poor condition of the Premises which is the result of a breach by the Lessee of its obligations under this Lease;
- (d) Lessee's Property; and
- (e) any concessions, incentives or other inducements given to the Lessee in relation to the granting of this Lease, or which may be given to obtain another Lessee of the Premises, or given to the Lessees of comparable premises .

## 5.8 Retail Shops Act

If this Lease is a lease to which the Retail Shops Act applies:

- (a) **Market rent** is to have the meaning given to it in that Act; and
- (b) Clauses 5.3 to 5.8 inclusive apply subject to that Act but any provision of those clauses that is not overridden by the Act continues to apply.

## 5.9 Rent payment pending determination

In the event that there is a dispute under this clause 5 as to Rent, the Lessee must continue to pay the Rent payable immediately prior to the relevant Market Rent Review Date until the time as the Rent is determined. Upon determination of the Rent, the Rent will be payable with effect from the relevant Market Rent Review Date and any amount owing by the Lessee to the Lessor or by the Lessor to the Lessee as applicable must be paid by way of an adjustment at the Payment Date first occurring after the determination of the Rent together with, for the avoidance of doubt, interest calculated at the rate of interest set out in clause 4.2 on the amount of the adjustment payable.

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## 6. Lessor's Covenants

The Lessor covenants with the Lessee, subject to the Lessee observing and performing the Lessee's Covenants:

### 6.1 Quiet enjoyment

The Lessee, except as provided in this Lease, is entitled to peaceably possess and enjoy the Premises during the Term without any interruption or disturbance from the Lessor or any other person lawfully claiming by, from or under the Lessor.

### 6.2 Repairs and Maintenance

The Lessor agrees to comply with the obligations set out in Annexure 2, if any.

### 6.3 Entitlement to hire fees

The Lessee shall be entitled to all the hire fees received in relation to the hire of the Premises by any other person under clause 4.7(b).

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## 7. Mutual Agreements

The parties agree as follows:

### 7.1 Default by Lessee

If:

- (a) the Rent shall be unpaid for FOURTEEN (14) days after it is due (whether demand for payment shall have been made or not); or
- (b) the Lessee shall breach any of the Lessee's Covenants and the breach shall continue for FOURTEEN (14) days after notice has been served on the Lessee by the Lessor; or
- (c) the Lessee being a company shall enter into liquidation whether compulsory or voluntary (except for the purpose of amalgamation or reconstruction) or a receiver or manager is appointed; or
- (d) the Lessee being an incorporated association shall have its incorporation cancelled, be wound up or cease to be an association eligible to be incorporated under the *Associations Incorporation Act 1987*; or
- (e) the Lessee ceases or threatens to cease carrying on business; or
- (f) the Lessee being a natural person shall commit an act of bankruptcy,

the Lessor at any time thereafter and without any notice or demand may enter and repossess the Premises. The Term and the estate and interest of the Lessee in the Premises shall immediately determine but without prejudice to any rights of the Lessor under this Lease and at law and without releasing the Lessee from liability in respect of any of the Lessee's Covenants.

Upon re-entry by the Lessor, the Lessor, after the Lessee has failed to comply with a written notice to remove its property within THREE (3) days, shall have the absolute right to remove any property left in or about the Premises and the Lessee shall indemnify the Lessor from and against all damage to that property and any reasonable costs that may be incurred by the Lessor as a consequence including but not limited to the costs of removal and storage.

## **7.2 Damages for breach of essential term**

The Lessor and the Lessee agree that the covenants by the Lessee contained or implied in:

- (a) subclauses 4.1 and 4.3 to pay the Rent and Outgoings respectively at the times and in the manner provided;
- (b) paragraph 4.7(a) to use the Premises only for the purpose described in that paragraph; and
- (c) subclause 4.11 not to assign, sub-let, licence, mortgage, charge or otherwise part with possession of the Premises or any part of the Premises or in any way dispose of the benefit of this Lease except as provided for,

are (subject to the following proviso) essential terms of this Lease and the breach, non-observance or non-performance of any one of those covenants, terms or conditions shall be deemed to be a fundamental breach of the provisions of this Lease on the part of the Lessee PROVIDED THAT the presence of this subclause in this Lease shall not mean or be construed as to meaning that there are no other essential terms in this Lease. Should the Lessor terminate the Term under subclause 7.1, following any fundamental breach and without prejudice to any other right or remedy of the Lessor contained or implied in this Lease, the Lessee covenants with the Lessor (and agrees with the Lessor that this covenant will survive the determination of the Term) that the

Lessor shall be entitled to recover from the Lessee by way of liquidated damages for the breach the difference between:

- (i) the aggregate of the Rent and Outgoings which would have become payable by the Lessee to the Lessor if this Lease had expired by effluxion of time, calculated at the rate payable at the date of determination (less a rebate in respect of instalments of Rent and Outgoings not then accrued or due to be ascertained by applying a rate of 10% per annum to each instalment over the period by which the date for payment is brought forward by this subclause) together with any costs and expenses incurred by the Lessor or which the Lessor reasonably estimates are likely to be incurred by the Lessor as a result of that breach, including the cost to the Lessor of re-letting or attempting to re-let the Premises; and
- (ii) the aggregate of the Rent and Outgoings which the Lessor by taking proper steps to re-let the Premises shall obtain or could be reasonably expected to obtain by re-letting the Premises after that determination to the date this Lease would have expired by effluxion of time PROVIDED THAT in so doing the Lessor shall not be required or obliged to offer or accept in respect of that re-letting terms, covenants, conditions or stipulations which are the same or similar to the terms, covenants, conditions or stipulations contained or implied in this Lease.

### **7.3 Abatement of Rent**

If the Premises or any part of them shall during the Term be destroyed or so damaged as to render the Premises unfit for occupation or use then the Rent or a fair and just proportion according to the nature and the extent of the damage sustained, from the date of such damage or destruction until the Premises shall be reinstated and made fit for occupation or use, shall be suspended and cease to be payable and any dispute concerning this provision shall be determined by a single arbitrator appointed by the parties in accordance with the provisions of the *Commercial Arbitration Act 1985* PROVIDED THAT the Rent shall be paid without any abatement until the date of the award of the arbitrator or agreement between the parties (whichever is the earliest) when the Lessor will refund to the Lessee any Rent overpaid by the Lessee.

### **7.4 Destruction of Premises**

If during the Term the Premises are destroyed or substantially damaged so as to require rebuilding or reconstruction of the Premises either party may by notice in writing to the other terminate this Lease as from the date of the giving of that notice without prejudice to the Lessor's rights in respect of any antecedent breach of the Lessee's Covenants by the Lessee.

### **7.5 Lessor may remedy Lessee's default**

If the Lessee omits or neglects to pay any money or to do or effect anything which the Lessee has agreed to pay, do or effect, then on each and every occasion the Lessor shall be entitled, without prejudice to any rights or powers the Lessor may have, to pay the money or to do or effect the thing by itself as if it were the Lessee and for that purpose the Lessor may enter upon and remain on the Premises for the purpose of doing or effecting that thing and any money expended by the Lessor shall be repayable by the Lessee to the Lessor upon demand.

## **7.6 Lessor not liable to third parties**

The Lessor shall not be responsible for any loss, damage or injury to any person or property of the Lessee or any other person in or about the Premises due to the negligence of the Lessor.

## **7.7 Notices**

Any notice required to be served under this Lease shall be sufficiently served on:

- (a) the Lessee if:
  - (i) left addressed to the Lessee at the Premises; or
  - (ii) forwarded to the Lessee by post to the Premises or to the address of the Lessee mentioned in this Lease; and
- (b) the Lessor if addressed to the Lessor and left at or sent by post to the Lessor's address mentioned in this Lease or such other address as may be notified to the Lessee from time to time,

and any notice sent by post shall be deemed to be given at the time when it ought to have been delivered in due course of post, unless the contrary is shown.

## **7.8 Holding over**

If the Lessee remains in possession of the Premises after the expiration of the Term then the Lessee shall be a monthly Lessee of the Lessor at a rent equivalent to the Rent payable by the Lessee at the expiration of the Term and otherwise on the same terms and conditions of this Lease. Any holding over may be determined by either party giving one month's written notice to the other party of its intention to determine the holding over at the expiration of the period of notice or such other date as may be stated in the written notice.

## **7.9 Waiver**

No waiver by the Lessor of any of the Lessee's Covenants shall operate as a waiver of another breach of the Lessee's Covenants.

## **7.10 Severance**

In the event of any part of this Lease being or becoming void or unenforceable, whether due to the provisions of any Act or otherwise, then that part shall be severed from this Lease to the intent that all parts that shall not be or become void or unenforceable shall remain in full force and effect and be unaffected by any severance.

## **7.11 Act by agent**

All acts and things which the Lessor or the Lessee is required or empowered to do under this Lease may be done by the Lessor or the Lessee (as the case may be) or the solicitor, agent, contractor or employee of the Lessor or the Lessee (as the case may be) as authorised by the Lessor or Lessee (as the case may be).

## **7.12 Exercise of powers**

The Lessor may exercise the Lessor's Powers without any proof of default by the Lessee or the continuance of that default or any notice being required (other than as

provided in this Lease) and notwithstanding any laches, neglect or previous waiver by the Lessor in respect of any of the Lessee's Covenants or the exercise of any of the Lessor's Powers.

### **7.13 Non-merger**

The terms or conditions of this Lease or any act, matter or thing done under or by virtue of or in connection with this Lease or any other agreement between the parties to this Lease shall not operate as a merger of any of the rights and remedies of the parties in or under this Lease or in or under any such other agreement all of which shall continue in full force and effect.

### **7.14 Proper law**

This Lease shall be governed by the law of Western Australia.

### **7.15 Effect of execution**

This Lease shall be binding upon each person or party who has executed it notwithstanding the avoidance or unenforceability of any part of this Lease.

---

## **8. Dispute Resolution**

### **8.1 Notice of Dispute**

In the event of a dispute between the Lessor and the Lessee concerning this Lease in any way, or concerning the rights and liabilities of the Lessor or the Lessee, the affected party may give the other a written notice setting out the material particulars of the Dispute.

### **8.2 Appointment of representative**

Each party shall appoint a senior officer, or other person, with authority to negotiate and reach settlement, and the parties' representatives shall personally meet in Perth within TEN (10) business days of the date of the receipt of the notice calling for that meeting.

### **8.3 Best endeavours to resolve Dispute**

The parties' representatives shall attempt to resolve the Dispute in good faith, and using their best endeavours at all times.

---

## **9. Arbitration**

### **9.1 Notice to arbitrate**

Provided that a party has not given a notice under subclause 8.1, or if it has that the Dispute has not been resolved under subclause 8.3, then:

- (a) any party to that dispute shall give notice in writing to the other party; and
- (b) at the expiration of SEVEN (7) days, unless the matter is settled in the interim, the Dispute shall be submitted to the arbitration of a single arbitrator who shall be a person appointed by the President of the Institute of Arbitrators (Western Australian Division).

## 9.2 Procedures

The arbitration will be held:

- (a) in Perth;
- (b) in accordance with the formalities and procedure settled by the arbitrator, and may be held in an informal and summary manner, on the basis that it will not be necessary to observe or carry out the usual formalities or procedures, pleadings and discovery or the strict rules of evidence;
- (c) as soon as possible after it is submitted with a view to it being completed within TWENTY EIGHT (28) days after it has been submitted to the arbitrator.

## 9.3 Final decision

The arbitrator's award shall be final and binding on the parties.

## 9.4 No entitlement to commence an action

No party is entitled to commence or maintain an action upon a Dispute until the matter in dispute has been referred to and determined by the arbitrator, and then only for the amount or relief to which the arbitrator, by her or his award, finds that party is entitled.

## 9.5 Costs of arbitration

The costs of the submission, reference or award are in the discretion of the arbitrator.

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## 10. Amendments to Lease

This Lease may be amended only by the agreement of the Parties in writing.

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## 11. Whole of Agreement

The Lessee acknowledges and declares that in entering into this Lease:

- (a) the Lessee has not relied on any promise, representation, warranty or undertaking given by or on behalf of the Lessor in respect to the suitability of the Premises or the finish, facilities, amenities or services on the Premises;
- (b) the covenants and provisions contained in this Lease as amended from time to time by the Parties in writing expressly or by statutory implication cover and comprise the whole of the agreement between the parties; and
- (c) no further or other covenants or provisions whether in respect of the Premises or otherwise shall be deemed to be implied or to arise between the parties by way of collateral or other agreement.

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## 12. Moratorium Negatived

The application to this Lease of any moratorium or other Act (whether State or Federal) having the effect of extending the Term, reducing or postponing the payment of the Rent or any part of the Rent, or otherwise affecting the operation of the covenants, conditions and stipulations on the part of the Lessee to be performed or observed, or

providing for compensation, rights or privileges at the expense of the Lessor in favour of the Lessee or any other person, is expressly excluded and negated.

---

## 13. Goods and Services Tax

### 13.1 Definitions

In this Lease:

**Basic Consideration** means all consideration (whether in money or otherwise) to be paid or provided by the Lessee for any supply or use of the Premises and any goods, services or other things provided by the Lessor under this Lease (other than tax payable pursuant to this clause);

**GST** has the meaning that it bears in the GST Act;

**GST Act** means *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* and any legislation substituted for, replacing or amending that Act;

**GST Adjustment Rate** means the amount of any increase in the rate of tax imposed by the GST Law;

**GST Law** has the meaning that it bears in section 195-1 of the GST Act;

**GST Rate** means 10%, or such other figure equal to the rate of tax imposed by the GST Law;

**Input Tax Credit** has the meaning that it bears in section 195-1 of the GST Act;

**Tax Invoice** has the meaning which it bears in section 195-1 of the GST Act;

**Taxable Supply** has the meaning which it bears in section 195-1 of the GST Act.

### 13.2 Lessee must pay

#### (a) GST

If GST is payable on the Basic Consideration or any part thereof or if the Lessor is liable to pay GST in connection with the lease of the Premises or any goods, services or other Taxable Supply supplied under this Lease then, as from the date of any such introduction or application:

- (i) the Lessor may increase the Basic Consideration or the relevant part thereof by an amount which is equal to the GST Rate; and
- (ii) the Lessee shall pay the increased Basic Consideration on the due date for payment by the Lessee of the Basic Consideration.

#### (b) Increase in GST

If, at any time, the GST Rate is increased, the Lessor may, in addition to the GST Rate, increase the Basic Consideration by the GST Adjustment Rate and such amount shall be payable in accordance with paragraph 13.2(a)(ii).

### 13.3 GST invoice

Where the Basic Consideration is to be increased to account for GST pursuant to subclause 13.2, the Lessor shall in the month in which the Basic Consideration is to be paid, issue a Tax Invoice which enables the Lessee to submit a claim for a credit or refund of GST.

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## 14. Western Australian Planning Commission Consent

If for any reason this Lease requires by law the consent of the Western Australian Planning Commission then this Lease is made expressly subject to and is conditional upon the granting of the consent of the Western Australian Planning Commission.

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## 15. Guarantee

In consideration of the Lessor at the request of the Guarantor granting this Lease to the Lessee, the Guarantor hereby agrees with and guarantees to the Lessor the due and prompt performance of the covenants and conditions contained in this Lease on the part of the Lessee to be observe dand performed upon and subject to the following conditions:

- (a) if the Lessee shall make default in any payment of rent or other sums of money to be made under this Lease for the space of 7 days the Guarantor will upon written request of the Lessor pay to the Lessor the amount which shall be so in arrear or unpaid;
- (b) if the Lessee shall make default in the performance or observance of any of the obligations of the Lessee under this Lease the Guarantor will pay to the Lessor all losses, damages, expenses and costs which the Lessor shall be entitled to recover from the Lessee or from the Guarantor by reason of such default;
- (c) this guarantee shall be a continuing guarantee and shall not be considered as wholly or partially discharged by the payment at any time or from time to time hereafter of any of the rent or other sums of moneys due and payable by the Lessee to the Lessor under this Lease or by any settlement on account or by any other matter or things whatsoever;
- (d) this guarantee shall continued for the duration of this Lease and for any assignment extension or renewal thereof and any holding over thereunder and shall extend to the acts and defaults of the Lessee during such duration, assignment extension, renewal or holding over;
- (e) notwithstanding the assignment by the Lessee of the benefit of this Lease the Guarantor shall remain liable to observe and perform all of the term covenants and conditions contained in this Lease and on the part of the Lessee to be observed and performed until the expiration of the term of this Lease;
- (f) this guarantee shall be a principal obligation and shall not be treated as ancillary to or collateral with any other obligation howsoever created or arising to the intent that this guarantee shall be enforceable unless the same shall have been satisfied according to the terms of this guarantee notwithstanding that any other obligation whatever arising between the Lessor and the Lessee shall be in whole or in part unenforceable whether by reason of any statute (including any statute of limitation) or for any other reason whatsoever;



- (g) unless the Lessor shall have received in full all rent and other sums of money due from the Lessee under this Lease or further lease the Guarantor shall be bound by this guarantee and in the event of the Lessee becoming bankrupt or entering into any scheme or arrangement in favour of creditors or being a company entering into liquidation either voluntarily or involuntarily the Guarantor shall not be entitled to proof or claim against the official receiver or liquidator in competition with the Lessor so as to diminish any dividend or any payment which the Lessor may receive but may prove or claim for and on behalf of the Lessor if so authorised by the Lessor and any such proof or claim by or on behalf of the Lessor shall not prejudice or affect the right of the Lessor to recover from the Guarantor any payment of rent and other sums of money to be made by the Lessee to the Lessor under this Lease;
- (h) this guarantee is to continue binding upon the Guarantor notwithstanding:
  - (i) the death, bankruptcy or insolvency or liquidator (as the case may be) of the Lessee or the Guarantor or any one or more of them;
  - (ii) any change or alteration in the constitution of the Lessor the Lessee or the Guarantor; or
  - (iii) the happening of any matter or thing which under the law relating to sureties would but for this provision have the effect of releasing the Guarantor from this Guarantee or of discharging this Guarantee;
- (i) the liability of the Guarantor shall not be affected by any collateral rights or obligations which may exist between the Guarantor or any two or more of them and the Lessee and the same shall not be affected by any variation or avoidance of any such collateral rights or obligations;
- (j) the Lessor may at any time and from time to time without the consent of the Guarantor and without discharging, releasing, impairing or otherwise affecting the liability of the Guarantor under this guarantee grant to the Lessee or if more than one then to any one or more of them or to any person who may be jointly indebted with the Lessee to the Lessor at any time any forbearance, release, concession, indulgence, time or other consideration and may compound with or release the Lessee or if more than one then any one or more of them and also any such other person or may assent to any assignment to trustees for the benefit of creditors or any scheme or deed of arrangement and whether with or without sequestration of the estate or (in the case of a corporation) to the winding up of the Lessee or any of them if more than one or of any such person or to the appointing of a receiver or official manager for them or any one of them and may release or discharge or otherwise deal with any property whether real or personal comprised in any security which may or might be held by the Lessor without discharging or affecting the liability of the Guarantor under this Guarantee.

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## 16. Special Terms

The special terms covenants and conditions (if any) set out in Item 13 of Schedule 1 shall be deemed to be incorporated in this Lease as if fully set out. In the event of there arising any inconsistency with the terms, covenants and conditions contained in this Lease then the terms, covenants and conditions set out in Item 13 of Schedule 1 shall prevail.

## Schedule 1 Schedule 1

### 1. The Encumbrances

Nil

### 2. The Land

[insert]

### 3. The Premises

That portion of the Land as is delineated for the purpose of identification only on the plan annexed to this Lease as Annexure 1 together with all buildings, fixture and fittings erected on it, including the kiosk facility and café known as 'The Boatshed Café', and including all carpets and floor coverings, window treatments (including but not limited to curtains and blinds) and other fixtures and fittings belonging to the Lessor and all additional or modifications and replacements for the time being.

### 4. Date of Commencement

[insert]

### 5. Term

21 years

### 6. Term of renewal

Nil

### 7. Rent

The Rent shall be \$78,700 plus GST per year, payable annually on the Date of Commencement subject to adjustment and review under clause 5, provided that if the adjustment and review would result in the Rent being calculated to be a lesser amount than the Rent applicable during the immediately preceding year then the Rent will remain unchanged for that year.

### 8. Permitted use of Premises

For use as a restaurant to provide meals for patrons of the Premises, together with associated activities, and without limiting the generality of that use:

- (a) for the purpose of a kiosk, café and food servery to provide and serve take-way food and beverages to patrons;
- (b) to take table bookings or reservations at any time from patrons;
- (c) for the sale and supply of liquor to patrons of the Premises for consumption in accordance with the *Liquor Control Act 1988*;
- (d) if an extended trading permit in accordance with section 60 of the *Liquor Control Act 1988* has been granted, for the sale and supply of liquor to patrons for consumption:

- (i) in an extended area of the Land such as an alfresco area, subject to obtaining the Lessor's prior approval, which shall not be unreasonably withheld;
  - (ii) attending a function that is conducted on the Premises without the requirement to have a meal; or
  - (iii) of the Premises without the requirement to have a meal where patrons are seated at a table or a fixed structure used as a table in the Premises, with bar sales not permitted;
- (e) nothing in (c) or (d) shall prevent a patron from bringing their own liquor into Premises with the consent of the Lessee (as licensee) for consumption with a meal and to remove any unconsumed portion of that liquor from the Premises when they leave, regardless of whether they purchased the liquor on the Premises or brought the liquor with them.

**9. Public risk insurance**

TWENTY MILLION DOLLARS (\$20,000,000)

**10. Business Hours**

Daily from 7.00am to 10.00pm unless otherwise agreed with the Lessor.

**11. Trust**

Nil

**12. Market Rent Review Date/s**

Each third anniversary of the Date of Commencement.

## Schedule 2 Schedule 2 – Lessee's Fixtures

Listed below are items supplied and installed by the Lessee:

| <b>Item</b> | <b>No</b> |
|-------------|-----------|
| Nil         | Nil       |

**Executed** by the parties as a deed

**The Common Seal of City of South Perth** )  
was affixed pursuant to a resolution of )  
Council in the presence of: )  
)

\_\_\_\_\_  
Signature of Chief Executive Officer

\_\_\_\_\_  
Name of Chief Executive Officer in full

**Executed** as a deed by **Millar Holdings** )  
**Pty Ltd (ACN 063 656 048)** in )  
accordance with section 127 of the )  
*Corporations Act 2001*: )

\_\_\_\_\_  
Signature of Director

\_\_\_\_\_  
Signature of Secretary/other Director

\_\_\_\_\_  
Name of Director in full

\_\_\_\_\_  
Name of Secretary/other Director in full

**Signed** by **Graeme Ross Millar** in the )  
presence of: )  
)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature of Witness

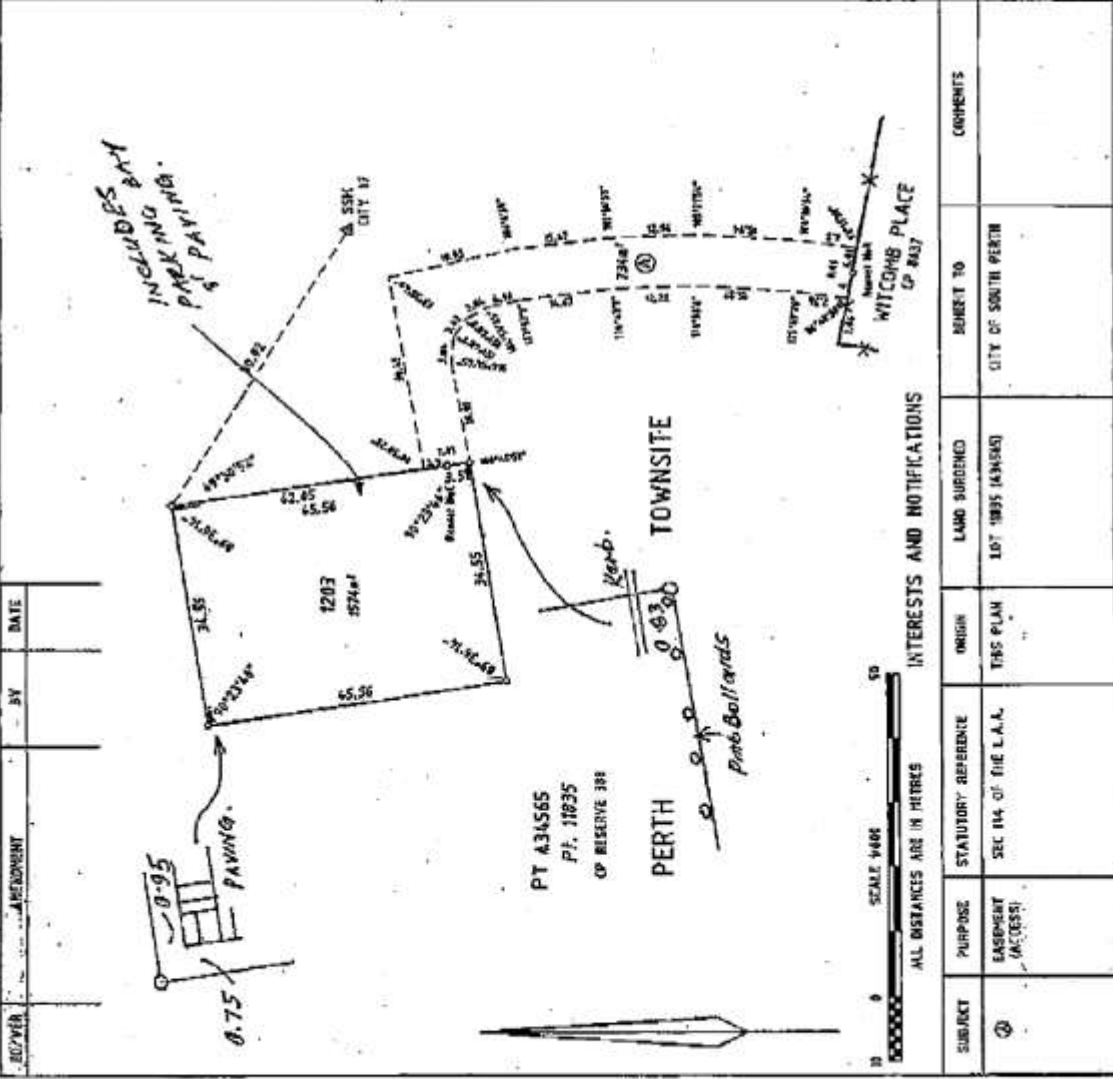
\_\_\_\_\_  
Name of Witness in full

## Schedule 3 Annexure 1 – Plan of Premises

UP 28824



|  |                                 |
|--|---------------------------------|
| TYPE   | CROWN                           |
| PURPOSE  | SUBDIVISION                     |
| PLAN OF  | LOT 1203 AND EASEMENT           |
| DISTRICT   | SWAN                            |
| TOWNSITE   | PERTH                           |
| LOCAL AUTHORITY  | SOUTH PERTH CITY OF SOUTH PERTH |
| FORMER TENURE  | CON                             |
| PI LOT 11835   | INDEX BC34 01 26.14             |
| CP RESERVE 311   | PUBLIC BC34 01 0.22             |
| CP RESERVE 312   | FIELD BOOK #1622                |
| SCALE: 1:600   | SIRES JOB 848 0185              |
| ALL DISTANCES ARE IN METRES  | 197500-0-0-0-0-0 - PERTH/CON    |
| <b>SURVEYOR'S CERTIFICATE - Reg 64</b><br>CHARLES A. YOUNG Surveyor<br>This plan of survey is a correct representation of the survey and/or subdivisions shown, and the measurements thereon, in the field book, signed by the surveyor, and the plan and field book comply with the requirements of the Act and the Regulations thereunder. |                                 |
| LOGGED   | TYPE OF VALIDATION              |
| OUT  | APPROVED BY                     |
| WESTERN AUSTRALIAN PLANNING COMMISSION   |                                 |
| IN ORDER FOR DEALINGS  |                                 |
| APPROVED   |                                 |
| DEPOSITED PLAN   |                                 |
| 28824  |                                 |
| SHEET 1 OF 1   |                                 |



| INTERESTS AND NOTIFICATIONS |  | TO | COMMENTS |
|-----------------------------|--|----|----------|
| SUBJECT                     | PT 434565<br>PT. 11835<br>CP RESERVE 311 | TO |          |
| PURPOSE                     | EASEMENT (ACCESS)                        | TO |          |
| STATIONARY REFERENTE        | SEC 114 OF THE L.A.A.                    | TO |          |
| LAND SURROUND               | LOT 11835 (ANNEK)                        | TO |          |
| TO                          | CITY OF SOUTH PERTH                      | TO |          |

**Schedule 4 Annexure 2 – Maintenance Requirements**  
**Schedule 5**  
**Schedule 6**  
**Schedule 7**



*LOCAL GOVERNMENT ACT 1995*

CITY OF SOUTH PERTH

AMENDMENT (PARKING & PENALTY UNITS LOCAL LAWS)  
LOCAL LAW 2008

Under the powers conferred by the *Local Government Act 1995* and under all other powers, the Council of the City of South Perth resolved on . . . . . 2008 to make the following local law.

**Part 1 - Preliminary**

**1.1 Citation**

This Local Law may be cited as the *City of South Perth Amendment (Parking and Penalty Units Local Laws) Local Law 2008*.

**1.2 Commencement**

This Local Law comes into operation 14 days after the day it is published in the *Government Gazette*.

**1.3 Application and intent**

The application and intent of this Local Law is to amend certain local laws to provide for the Scheduling of General No Parking Zones in the City of South Perth and for increasing the value of a penalty unit as prescribed in the Schedule to the local law.

**1.4 Local Laws Amended**

The local laws amended are -

- (a) the Parking Local Law 2003 as published in the *Government Gazette* on 23 December 2003 and amended as published in the *Government Gazette* on 17 December 2004, 29 November 2005 and 5 October 2007; and
- (b) the Penalty Units Local Law as published in the *Government Gazette* on 20 June 2003 and amended as published in the *Government Gazette* on 23 December 2003.

**Part 2 - Amendment of Local Laws**

**Division 1 - Parking Local Law 2003**

**2.1** The local law to be amended in this Division is the Parking Local Law 2003.

**2.2** Schedule 4 - General No Parking Zone - is amended by deleting the second paragraph and inserting instead -

From 6:00 a.m. to 6:00 p.m. on 1 and 2 November 2008, the area contained within the Wards of Civic and Mill Point in the City of South Perth which area is bounded by and includes South Terrace to the south, Canning Highway to the east and the Swan River foreshore to the west and north is declared to be a General No Parking Zone for the purposes of this local law.

**Division 2 - Penalty Units Local Law 2003**

- 3.1** The local law to be amended in this Division is the Penalty Units Local Law 2003.
- 3.2** Schedule 1 is amended by inserting the following text in the table contained within the Schedule:

|                        |                                      |   |                       |                    |
|------------------------|--------------------------------------|---|-----------------------|--------------------|
| Parking Local Law 2003 | All Clauses prescribed in Schedule 2 | The area contained within the Wards of Civic and Mill Point in the City of South Perth which area is bounded by and includes South Terrace to the south, Canning Highway to the east and the Swan River foreshore to the west and north | 1 and 2 November 2008 | 6.00 am to 6.00 pm |
|------------------------|--------------------------------------|---|-----------------------|--------------------|

The Common Seal of the City of South Perth was affixed by the authority of a resolution of the Council in the presence of:

\_\_\_\_\_  
 JAMES BEST  
 MAYOR

\_\_\_\_\_  
 CLIFF FREWING  
 CHIEF EXECUTIVE OFFICER