

# ATTACHMENTS

## **Attachments for the Special Meeting of Council**

20 May 2015

**Item 7.1.1(a) McLeods – Legal Advice**

# **ATTACHMENTS TO AGENDA ITEMS**

Special Council Meeting - 20 May 2015

## **Contents**

### **7.1.1 ELECTORS' MOTIONS - SPECIAL ELECTORS' MEETING - 6 MAY 2015**

Attachment (a): McLeods - Legal Advice

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our Ref AR:SOU:35336  
our Ref

13 May 2015

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Dear Vicki

**Special Electors' Meeting motions concerning the South Perth Station Precinct**

Thank you for your emails dated 7 and 8 May 2015.

You have sought my advice in relation to 5 motions adopted at a special elector's meeting on 6 May 2015 in relation to 'development issues concerning the Mill Point Peninsula'. In addition, you have asked for advice on the necessity for, and legality of, a local planning strategy being prepared given that the City now has properly approved scheme provisions.

**1. Executive summary**

In summary, and for the reasons which follow, it is my view that:

- (1) The City was not legally obliged to prepare and adopt a local planning strategy prior to the adoption of Amendment No. 25 to the City's *Town Planning Scheme No. 6 (Scheme)*.
- (2) There is no legal obligation requiring the City to now adopt a local planning strategy.
- (3) In relation to motion 1, an amendment to the Scheme to exclude areas of the 'Mill Point Peninsula' would not entitle landowners with properties within these areas to claim compensation for injurious affection from the City.
- (4) In relation to motion 2, section 5.5 of the South Perth Station Precinct Plan (**SPS Precinct Plan**) does not create a legal requirement for the City to prepare and adopt a local planning strategy.
- (5) If motion 3 was adopted and acted upon by the Council, it would involve Council recommending to the Joint Development Assessment Panel (**JDAP**) that it act in an unlawful manner. Properly advised, the JDAP would refuse to accede to such a request from the City.

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- (6) In relation to motion 4:
- (a) whether or not the City proceeds with Amendment No. 46 is a matter for Council; and
  - (b) the Council cannot lawfully impose a moratorium on determining development applications until a local planning strategy is in place.
- (7) In relation to motion 5, no discernible purpose would now be served by preparing and adopting a local planning strategy. It would not assist in applying the provisions of Schedule 9 of the Scheme.

**2. Advice**

**2.1 The adoption of a local planning strategy**

There are 2 aspects to this issue:

- (1) Should the City have adopted a local planning strategy before proceeding with Amendment No. 25 to the Scheme?
- (2) Is there a requirement that the City now prepare and adopt a local planning strategy?

**2.2 Adoption of local planning strategy before Amendment No. 25**

The *Planning and Development Act (WA) (PD Act)* does not require a local planning strategy as a prerequisite to a scheme amendment. Under section 12A of the *Town Planning Regulations 1967 (Regulations)* the adoption of a local planning strategy is a prerequisite to the adoption of a scheme that envisages the zoning or classification of land. This requirement is applicable to schemes not amendments to schemes. This is evident from regulation 25(1)(b) which makes the requirement for a local planning strategy inapplicable to scheme amendments. Consequently, neither the PD Act nor the Regulations make the adoption of a local planning strategy a prerequisite to a scheme amendment.

Clause 9.8 of the Scheme is also concerned with amendments, but contains no requirement for a local planning strategy.

Therefore, there was no requirement for the City to adopt the local planning strategy prior to the adoption of Amendment No. 25.

**2.3 Adoption of local planning strategy following Amendment No. 25**

The PD Act, Regulations and the Scheme contain no requirement for the City to adopt a local planning strategy after a scheme amendment comes into effect.

From the motions adopted at the special electors' meeting, it appears those advocating the adoption of a local planning strategy are relying on section 5.5 of the SPS Precinct Plan dated January 2011 as creating an obligation for the City to prepare and adopt a strategy.

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The references to a 'local planning strategy' in the SPS Precinct Plan are few in number. The 'Action Summary' in section 5.5 summarises a number of actions proposed to be taken with respect to the precinct within various timeframes. The local planning strategy is identified as something required immediately (ie within one year) although its purpose is unstated. However, it appears to have been contemplated that it would be prepared before the adoption of a development contribution plan and a scheme amendment. However, the nature and purpose of a precinct plan under the Scheme is not such that it can impose on the City any legal obligation to prepare and adopt a local planning strategy.

Under clauses 1.5(d) and 9.6(8)(c) precinct plans are deemed to be planning policies for the purposes of the Scheme. The nature of planning policies is that they are not binding on Council. This is evident from clause 7.5(f) of the Scheme, which requires Council to have due regard to planning policies in considering development applications and clause 9.6(6) which states that planning policies do not bind the Council in respect of development applications.

The Scheme does not suggest that precinct plans are intended to be a source of obligation for the City to adopt other planning instruments, such as a local planning strategy. The primary role of precinct plans, as a form of policy, relates to development. This is evident from a number of clauses in the Scheme:

- (a) clause 1.6(2)(a) – which relates precinct plans to the introduction of performance based controls;
- (b) clause 3.3(5) – which relates precinct plans to land use controls;
- (c) clause 4.3(1)(b) – which relates precinct plans to the variation of *Residential Design Codes*;
- (d) clause 5.1(4)(c) – which relates precinct plans to street setbacks;
- (e) clause 6.11(6)(a)(ii) – which relates precinct plans to development applications for places on the Heritage List;
- (f) clause 7.5(a) – which identifies precinct plans as a relevant consideration in considering development applications;
- (g) clause 7.8(1)(b)(iii) – which relates precinct plans to variations of development standards and requirements; and
- (h) clause 9.6(6) – which provides that planning policies (including precinct plans) do not bind Council in respect of development applications.

It is evident from these provisions that precinct plans are not intended to be binding on Council and their primary purpose relates to development, not the requirement for or control of future strategic planning documents such as local planning strategies. For these reasons, it is my view that the SPS Precinct Plan does not impose an obligation on the City to prepare and adopt a local planning strategy.

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**2.4 Motion 1**

Motion 1 states:

*'The South Perth Council should initiate the necessary process to exclude from the South Perth Station Precinct, the Mill Point Peninsula that lies north of Ferry Street.'*

From your email, I understand that the 'Mill Point Peninsula' incorporates part of the South Perth Station Precinct but also includes areas outside the precinct.

Your particular query about this motion is whether removing areas comprising the Mill Point Peninsula from the South Perth Station Precinct would have any liability implications for the City as this amendment would remove the current development potential of land within these areas which is presently available under the Scheme.

Giving effect to the motion would involve an amendment to the Scheme. The question is whether affected landowners could claim compensation from the City on the basis that the land had been injuriously affected by the amendment.

Under section 173(1) of the PD Act, any person whose land is injuriously affected by the amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection from the responsible authority. Section 174 sets out the circumstances in which land is to be regarded as injuriously affected by the amendment of a scheme:

- (a) the amendment reserves land under the scheme for a public purpose;
- (b) the amendment permits development on that land for no purpose other than a public purpose; or
- (c) the amendment prohibits wholly or partly the continuance of a non-conforming use or the erection, alteration or extension of the building in relation to a non-conforming use.

An amendment to the Scheme to alter the boundary of the South Perth Station Precinct would not have any of these effects. Consequently, the amendment would not entitle landowners to claim compensation for injurious affection from the City under the PD Act.

Clause 9.3 of the Scheme also relates to compensation, but creates no additional ground on which to claim compensation. Therefore, clause 9.3 would not give rise to any alternative basis on which landowners would be entitled to compensation for injurious affection as a consequence of a scheme amendment to alter the boundaries of the South Perth Station Precinct.

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**2.5 Motion 2**

Motion 2 states:

*'The South Perth Council should resolve to initiate immediately a Local Planning Strategy for the Mill Point Peninsula and the land included in the South Perth Precinct Plan pursuant to the requirement in paragraph 5.5 of the Precinct Action Plan'.*

As stated earlier, there is no legal obligation created by section 5.5 of the South Perth Station Precinct Plan to adopt a local planning strategy for the precinct. Further, section 5.5 would have no application to those areas of the Mill Point Peninsula located outside the boundaries of the South Perth Station Precinct.

**2.6 Motion 3**

Motion 3 states:

*'The South Perth Council should inform JDAP that applications for developments of heights of more than 25 metres at the Mill Point Peninsula (including the 74 Mill Point Road development application) should be refused as premature until such time as a Local Planning Strategy is in place which addresses the Mill Point Peninsula'.*

Regulation 8(1) of the *Planning and Development (Development Assessment Panels) Regulations 2011* requires the JDAP to determine DAP applications under the Scheme as if it was the City. The JDAP, like the City, must determine development applications on the basis of the law as it stands at the time of determination (*Miller v City of Stirling* [2007] WASAT 247 at [35]). The JDAP must make a decision on the merits of an application having regard to the existing planning controls applicable to a proposed development (*Nicholls and Western Australian Planning Commission* [2005] 149 LGERA 147). Therefore, if the JDAP is presented with a DAP application it must determine it in accordance with the Scheme and applicable policies as they exist at the date of determination.

The prospect that a policy in the form of a local planning strategy is being contemplated or even in the process of being prepared provides no lawful basis upon which the JDAP could lawfully refuse to deal with development applications (see, for example, *Coastal MidWest Transport and City of Canning* [2012] WASAT 202 at [72]). Any draft strategy that was prepared may become a relevant consideration in the JDAP's decision making at a point in time when the strategy becomes seriously entertained. However, the contemplation or preparation of a policy provides no lawful basis on which to place a moratorium on proposed development with building heights in excess of 25m if these heights are capable of approval under the Scheme.

For these reasons, if Motion 3 was adopted and acted upon by Council, it would involve Council recommending to the JDAP that it act in an unlawful manner. Properly advised, the JDAP would undoubtedly refuse to accede to such a request.

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**2.7 Motion 4**

Motion 4 states:

*'All further action in connection with Amendment 25, including proposed Amendment 46, should be deferred until a Local Planning Strategy is in place for the South Perth Planning Precinct.'*

The apparent intent of Motion 4 is that Amendment 46 and all development applications are deferred until a local planning strategy is in place. I understand Amendment No. 46 will provide for some minor changes to the provisions controlling development within the South Perth Station Precinct.

The motion proceeds on the assumption that a local planning strategy must be adopted by the City. As concluded above, this assumption is incorrect.

Whether or not the City proceeds with Amendment No. 46 is a matter for the City. However, as noted earlier, a local planning strategy is not a necessary prerequisite to the adoption of a scheme amendment.

Insofar as Motion 4 calls for a moratorium on the determination of development applications for land within the South Perth Station Precinct, Council has no power to implement a moratorium. The same principles discussed above in relation to Motion 3 apply equally to the City. It is required to determine development applications on the basis of the planning framework (ie scheme and policies) applicable to a proposed development. The City cannot lawfully refuse to determine development applications. This would simply result in each such development application being deemed to have been refused, thereby entitling applicants to seek review in the State Administrative Tribunal. In my view, there is little doubt that the State Administrative Tribunal would disregard any self-imposed moratorium adopted by the City and that the City would be at significant risk of having an order made against it requiring it to pay the applicant's costs of the SAT proceeding.

**2.8 Motion 5**

Motion 5 states:

*'By reason of the State Architect's Report into the proposed development at 74 Mill Point Road, this house has no confidence in the ability of the planners in the South Perth Council to determine whether a development application meets the Performance Criteria in Schedule 9 of the TPS, thereby underscoring the urgent need for a Local Planning Strategy.'*

This motion does not give rise to any particular legal issue. Rather, it appears to be a criticism of the City's planners in applying the provisions of Schedule 9 of the Scheme.

The intended purpose of a local planning strategy in the context of Schedule 9 is unclear. The provisions of Schedule 9 do not refer to or require a local planning strategy as an adjunct to those provisions. Further, the nature of local planning strategies is that they are a strategic planning instrument that is usually a prerequisite to the preparation of a new scheme. Local



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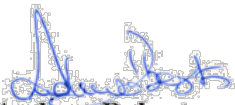
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planning strategies are not instruments which directly control a development through the imposition of development standards and requirements. A local planning strategy could not override the provisions of Schedule 9.

Under section 5.5 of the SPS Precinct Plan, the adoption of a local planning strategy was contemplated prior to the adoption of a development contribution plan and amendment to the Scheme. The above motions do not appear concerned with development contributions but the interpretation and application of the Schedule 9 provisions. Amendment No. 25 has since been adopted and is now operative as part of the Scheme. Therefore, the evident purpose of the local planning strategy in section 5.5 has been superseded by Amendment No. 25. Consequently, no discernible purpose would now be served by adopting a local planning strategy at this time.

If I can be of further assistance, please contact me.

Yours sincerely



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**Managing Partner**

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