

**15.0 ELECTED MEMBERS' REPORT/INFORMATION BULLETIN**

---

**DRAFT MOTION**

**VOTING REQUIREMENT: SIMPLE MAJORITY**

**THAT the Elected Member's Report/Information Bulletin, as circulated, be received and the contents noted.**

---

## 16.0 MOTIONS OF WHICH PREVIOUS NOTICE HAS BEEN GIVEN

**ITEM TITLE: Referrals of Subdivision Applications – Council Consideration**

**DATE & TIME RECEIVED: Monday 05/01/09 at 5.24pm**

---

**ITEM NUMBER: 16.1 MOTION BY Councillor Bostock**

**VOTING REQUIREMENT: SIMPLE MAJORITY**

**THAT any subdivision application forwarded to the City of Albany by the Western Australian Planning Commission or the Department of Planning for comment, recommendation or endorsement is required to come before full Council for determination.**

---

### **Councillors Reason:**

1. Whilst recognizing that Western Australian Planning Commission (WAPC) is the ultimate decision making body with regard to subdivision, The *Planning and Development Act 2005* at Section 142(1) requires consultation and recommendation by the Local Government. Further, at Section 138.(2) "... Commission is to have due regard to the provision of any Local Planning Scheme that applies to the land under consideration and is not to give approval that conflicts with the provision of a local planning scheme."
2. Town Planning Scheme 1A (clause 4.35) and Town Planning Scheme 3 (clause 5.5.1) are clear on the issue...."Before granting approval under Table 1 or endorsing an application for subdivision the Council will require the submission to, and approval by, the WAPC of an Outline Development Plan....". In a number of cases approval for subdivision has been granted contrary to the Town Planning Scheme and State subdivision policy, Council needs to be aware of this and address the difficulty.

### **OFFICERS REPORT**

**Author:** Executive Director Development Services (R Fenn)

### **STATUTORY IMPLICATIONS**

3. There are certain Sections in the Planning and Development Act 2005 dealing with the subdivision of land:  
135 (1) *A person is not to:*
  - i) *subdivide any lot;*
  - ii) *amalgamate any lot with any other lot, whether within the same district or otherwise; or*
  - iii) *lay out, grant or convey a road, without the approval of the Commission.*
- 138 (1) *The Commission may give its approval under section 135 or 136 subject to conditions which are to be carried out before the approval becomes effective.*

Item 16.1 continued.

- 138 (2) *Subject to subsection (3), in giving its approval under section 135 or 136 the Commission is to have due regard to the provisions of any local planning scheme that applies to the land under consideration and is not to give an approval that conflicts with the provision of a local planning scheme.*
- 138 (3) *The Commission may give an approval under section 135 or 136 that conflicts with the provisions of a local planning scheme if -*
- a) the planning scheme was not first published, or a consolidation of the local planning scheme has not been published, in the preceding 5 years and the approval is consistent with a State planning policy that deals with substantially the same matter;*
  - b) the approval is consistent with a region planning scheme that deals with substantially the same matter;*
  - c) in the opinion of the Commission\_*
    - i) the conflict is of a minor nature; or*
    - ii) the approval is consistent with the general intent of the local planning scheme;*
  - d) the local planning scheme includes provisions permitting a variation of the local planning scheme that would remove the conflict.*
  - e) in the case of an application under section 135, the local government responsible for the enforcement of the observance of the scheme has been given the plan of subdivision, or a copy, under section 142 and has not made any objection under that section; or*
  - f) the approval is given in circumstances set out in the regulations.*
- 142 (1) *When, in the opinion of the Commission, a plan of subdivision may affect the functions of a local government, a public authority, or a utility services provider, the Commission is to forward the plan or a copy of the plan to that local government, public authority or utility services provider for objections and recommendations.*
- 142 (2) *A local government, public body or utility services provider receiving such a plan or copy is to, within 42 days of receipt of the plan or copy or within such longer period as the Commission allows, forward it to the Commission with -*
- a) a memorandum in writing containing any objections to, or recommendations in respect of, the whole or part of that plan; and*
  - b) in the case of local government receiving a plan or copy relating to land within the area to which an assessed scheme (as defined in the EP Act) applies, advice of any relevant environment condition to which the assessed scheme is subject.*
- 142 (3) *If a local government, public authority or utility services provider does not forward a memorandum within the time allowed under subsection (2), the Commission may determine that it is to be taken to have no objections or recommendations to make or advice to give.*

Item 16.1 continued.

143 (1) *After considering any objections or recommendations contained in a memorandum forwarded to the Commission under section 142, and any advice of a relevant environmental condition forwarded to it under that section, the Commission is to -*

- a) Approve the plan of subdivision;*
- b) Refuse to approve the plan of subdivision; or*
- c) Approve the plan of subdivision and require the applicant for approval to comply with such conditions as the Commission thinks fit before the diagram or plan of survey will be endorsed with the approval of the Commission.*

**POLICY IMPLICATIONS:**

- 4. There are no policy implications relating to this item.

**FINANCIAL IMPLICATIONS:**

- 5. There are no financial implications relating to this item.

**STRATEGIC IMPLICATIONS & ALIGNMENT TO CORPORATE PLAN**

- 6. There are no strategic implications relating to this item.

**ALTERNATE OPTIONS & LEGAL IMPLICATIONS**

- 7. Officers within the Department of Planning, acting under the delegated authority of the WAPC make the ultimate determinations on whether subdivision applications will be supported or refused pursuant to Section 143 of the *Planning and Development Act 2005*. The matter before Council is whether the referral response that will be forwarded to officers of the Department of Planning by a Council determination will carry greater weight in that decision-making process, or bring to light information that may not be covered in a response supplied by officers of the City of Albany.
- 8. There is no legal impediment or procedural requirements that would preclude Council from receiving and responding to the subdivision application referrals supplied by the Department of Planning. For Council to adequately respond to those referrals, each application would need to be adequately researched, a report supplied to Council and a decision taken within 42 days to meet the legal requirements of Section 142. That timeline would be impractical to meet on larger developments and a failure of Council to handle the applications within those timelines would allow Department of Planning officers to determine (as per section 142(3)) that Council has no objection to the application.
- 9. The options available to Council are to allow the process of subdivisional referrals to continue as they currently operate; for Council to set clear parameters on those applications that Council wishes to review; for Council to provide a policy direction to Staff to implement on those subdivision applications that are currently causing concern to Council; or for Council to require all applications to be submitted to Council for determination.

Item 16.1 continued.

**COMMENT:**

10. Information from the City of Albany's development register has highlighted that there were 78 subdivision application referrals in 2002, 106 in 2003, 78 in 2004, 159 in 2005, 152 in 2006, 130 in 2007 and 130 in 2008, producing an average of 119 referrals per annum over the past seven years. These were also 3409 Applications for Planning Scheme Consent (average of 487 per annum) received over the corresponding period, as well as general planning inquiries, enforcement actions, State Administrative Tribunal Reviews, Scheme amendments and policy developments that all required officer attention. Considerable staff resources are currently consumed in preparing agenda items for the more complex development applications that are presented to Council and the imposition of a reporting requirement for all subdivision applications will consume all of the available planning resources of the Development Services Team, plus place additional pressure on staff within the Environmental Health, Rangers and Works and Services sections to provide expeditious internal advice on the suitability of subdivision proposals. The effect on staff moral will be considerable.
  
11. Where subdivision applications take place within land zoned as "Residential Development" in Scheme 3 or either the "Foreshore Development" or "Future Urban" zone in Scheme 1A, there is a requirement that an Outline Development Plan or Structure Plan be prepared over the zone area before Council can support a subdivision or development application; Council has received legal advice reinforcing this requirement. All other zones are not subject to a secondary planning process and subdivision proposals are required to comply with general planning principles, and be assessed against various policy requirements.
  
12. Section 138(3) of the Act provides that the WAPC and officers of the Department of Planning have limited scope to determine whether to allow the subdivision to proceed, contrary to any recommendation made by either Council or City of Albany Staff. This position is best emphasised by State Administrative Tribunal member, Mr D Parry who said in *Landpark Holdings Pty Ltd and Western Australian Planning Commission* [2007] WASAT 130 at [21]: "*Section 138 of the PD Act effected a significant change in planning law concerning subdivision in Western Australia. Where approval of a subdivision conflicts with a provision of a local planning scheme such as TPS 20 the subdivision is prohibited unless one of the six exceptions set out in s 138(3) is established.*": He also referenced the case of *Rocca & Anor and Western Australian Planning Commission* [2007] WASAT 110 at [29] to support his argument. The former *Town Planning and Development Act 1928* allowed the WAPC to make decisions on subdivisions "without being fettered" by a Local Planning Scheme and that is 'the significant change in planning law' referred to by Mr Parry.
  
13. Any concern raised over the suitability of a subdivision decision taken by either the WAPC or by officers within the Department of Planning therefore rests with an analysis of two factors. Were the Departmental officers / Commission acting lawfully in taking the decision and was the information supplied by the City of Albany adequate to influence the decision-making process. With the absence of third party appeals within Western Australia and the inability of the public (and Council) to access WAPC reports, the capacity to bring inappropriate subdivision decisions before the State Administrative Tribunal (through the Supreme Court) is limited, time consuming and very expensive.

Item 16.1 continued.

14. In regards to the information supplied by City of Albany officers on subdivision referrals, all responses are prefaced by a review of the planning framework affecting the subdivision proposal (eg, the land is zoned Residential and the R20 code applies, the land is zoned Future Urban and clause 4.35 states..., etc). A recommendation is then provided in the response on whether the subdivision application should be supported (detailing conditions that should be attached to the approval) or refused (outlining the reasons for the refusal).
  
15. The above motion creates a massive workload for City of Albany staff and the potential for Council not to be involved in the subdivision referral process because of the practical implications of meeting statutory deadlines. As an alternate methodology to address the concerns that have been raised, staff consider that a series of operating guidelines could be developed to set out the manner in which staff are obligated to respond to subdivision proposals. Council is still then left with the dilemma of what to do if a subdivision approval is issued contrary to a report prepared in accordance with those guidelines.

**17.0 MAYORS REPORT**

---

**DRAFT MOTION**

**VOTING REQUIREMENT: SIMPLE MAJORITY**

**THAT the Mayor's Report dated 20<sup>TH</sup> January 2009 be received.**

---

**18.0 URGENT BUSINESS APPROVED BY MAYOR OR BY DECISION OF THE MEETING**

**18.1 Finance Strategy Advisory Committee meeting minutes – 15<sup>th</sup> January 2009**

To be circulated on Friday 16<sup>th</sup> January 2009.

**19.0 CLOSED DOORS**

**19.1 LEHMAN INVESTMENTS**

To be circulated on Friday 16<sup>th</sup> January 2009.

---

**DRAFT MOTION:**

**VOTING REQUIREMENT: ABSOLUTELY MAJORITY**

**THAT Council meet behind closed doors to consider item 19.1 of the Ordinary Council Meeting 20<sup>th</sup> January 2009 in accordance with Section 5.23(2)(c) of the Local Government Act 1995, a matter relating to Lehman Investments.**

---

**20.0 NEXT ORDINARY MEETING DATE**

Tuesday 17<sup>th</sup> February 2009, 7.00pm

**21.0 CLOSURE OF MEETING**