

**2.1: MODIFICATIONS REQUESTED BY MINISTER FOR PLANNING -
LOCAL PLANNING SCHEME NO. 1**

Land Description	: N/A
Proponent	: City of Albany
Owner	: N/A
Business Entity Name	: N/A
Attachment	: Correspondence from the Western Australian Planning Commission - approval to advertise the Scheme (2 letters dated 22/11/11 and 17/01/12) Correspondence from McLeods to retain third party appeals
Councillor Workstation	: Nil
Responsible Officer(s)	: Acting Executive Director Planning and Development Services (S Lenton)

IN BRIEF

- The Minister for Planning has approved the draft Local Planning Scheme No. 1 (LPS1) to be advertised for public submissions subject to a modification to remove reference to third-party appeals.
- In accordance with the regulation 14(4) of the *Town Planning Regulations 1967*, Council must now consider the modification and resolve whether to proceed, or not, with the draft scheme, inclusive of the required modification.
- While the timeframe for responding to the Minister is set at 42-days by the *Town Planning Regulations 1967* this period needs to be extended, given considerable time was taken in receiving the correspondence from the WA Planning Commission.

RECOMMENDATION

**ITEM 2.1: RESPONSIBLE OFFICER RECOMMENDATION
VOTING REQUIREMENT: SIMPLE MAJORITY**

That Council in accordance with Regulation 14(4) of the *Town Planning Regulations 1967* RESOLVE to accept the Minister's modification and resubmit the draft Local Planning Scheme No. 1 to the WA Planning Commission/Minister with the modification (clause 10.10 'Appeals' to read 'An applicant') to enable the public submission period to commence.

CEO:	RESPONSIBLE OFFICER:
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BACKGROUND

1. The matter of third party appeals has been discussed previously by Council on a number of occasions during the drafting of LPS1. At its 20 March 2007 meeting (OCM 11.3.3), the Council in providing staff with guidance on certain scheme provisions, including appeals, resolved as follows:

THAT Council instructs staff;

- (1) *To utilise Clause 14 of Schedule 7 of the Planning and Development Act 2005 when drafting the Albany Community Planning Scheme, to confer upon persons aggrieved by the exercise of a discretionary power a right to apply to the State Administrative Tribunal for a review of the exercise of the power; and*
 - (2) *To utilise all the means at the City's disposal, including the recourse to law, to ensure the Minister gives effect to Council's intention.*
2. Council has continued to maintain this stance regarding appeals and most recently at its 20 September 2011 meeting (P&DS Item 2.1) and resolved (in part) to adopt the revised draft Local Planning Scheme No. 1 (LPS1) and resubmit it to the WA Planning Commission as follows:
 - (2) *ADOPT the revised draft LPS1 (Amended Version – July 2011) and resubmit it to the Department of Planning/WA Planning Commission for approval to advertise for public comment for an extended period of 4 months, including the advice supporting the retention of third-party appeals in the Discussion section of the report.*
3. As part of the referral to the WA Planning Commission the City provided the advice received from McLeods Solicitors regarding the third party appeal rights that exist in Town Planning Scheme No. 3 (refer attachment).
4. The revised LPS1 was sent to the WA Planning Commission (Albany Regional Office) on 21 September 2011 and following consideration by the WA Planning Commission Statutory Planning Committee, the City has now received correspondence from the WA Planning Commission advising that the Minister for Planning is willing to allow the Scheme to be advertised subject to one modification being affected.
5. The modification requires removing reference to third party appeal rights from the Scheme, more specifically changing the appeal clause 10.10 of the LPS1 to refer to 'An applicant' rather than 'Any person' as it is now drafted.

DISCUSSION

6. In accordance with the regulations, Council must resolve to either, proceed or not, with the draft scheme, with the requested amendment.

7. The modification would replace the existing wording 'Any person' with the words 'An applicant'. This change rules out third party appeals, with appeals only able to commence if lodged by the applicant. Whilst the decision of the WA Planning Commission/Minister is disappointing, especially given the previous decisions of Council and the evidence provided by the City to support the retention of this appeal right in the new scheme, the decision is final.
8. Whilst the City could meet with departmental staff to request the decision be reconsidered or modified, it is considered unlikely that their position would change.
9. It is a priority that the City finalise a single consolidated planning scheme which is advertised for public comment.
10. Agreeing to the modification would not prevent any person providing a submission during the advertising requesting third party appeal rights in the final draft.
11. The following table provides a summary of the processes and expected progress for preparing the new planning scheme (with the existing progress status highlighted):

No	Task	Progress to Date
1	Initiate the draft LPS1	Completed February 2009
2	Forward draft LPS1 to EPA and DoP/WAPC for assessment and comment	Completed February 2009
3	EPA determine if draft LPS1 requires formal or informal environmental review	EPA does not require formal assessment (May 2010) with advice and recommendations provided. Final modifications agreed (April 2011).
4	DoP provide comments and suggested modifications on LPS1	Final modifications agreed (May 2011). Third-party appeal rights retained in revised draft LPS1.
5	Revised draft LPS1, incorporating suggested modifications, adopted by City	completed September 2011
6	Forward draft LPS1 to DoP/WAPC for approval to advertise	expected September 2011
7	Minister for Planning grants approval for draft LPS1 to be advertised for public comment subject to modification to remove third-party appeal rights	received January 2012
8	City considers Minister's modification and resolves to proceed, or not, with the draft LPS1	expected 21 February 2012
9	Forward modified draft LPS1 to Minister for approval to advertise	expected late February 2012
10	Draft LPS1 advertised for public comment for 4-months	expected March 2012 – June/July 2012
11	City considers submissions and recommends modifications	expected October – November

No	Task	Progress to Date
	to draft LPS1 as a result of submissions received	2012
12	City refers draft LPS1, submissions and recommendations to DoP/WAPC for consideration and final approval	expected November/December 2012
13	Minister approves new LPS1 subject to modifications	expected January/February 2013
14	LPS1 gazetted and existing town planning schemes revoked	expected February/March 2013

GOVERNMENT CONSULTATION

12. Staff has sought an extension (till 22 February 2012) to the 42-day response period set down in the regulations as the correspondence from the WA Planning Commission was delayed. Staff are awaiting a formal response from the WA Planning Commission.

PUBLIC CONSULTATION / ENGAGEMENT

13. If Council supports the officer recommendation, the scheme will be modified and advertising will commence on receipt of formal approval to proceed from the Minister for Planning or authorised person.

STATUTORY IMPLICATIONS

14. The preparation of all local planning schemes is governed by the *Planning and Development Act 2005* and associated *Town Planning Regulations 1967*.
15. Regulation 11 of the *Town Planning Regulations* requires that scheme text be prepared in accordance with the Model Scheme Text and otherwise in such manner and form as the Minister or authorised person may require.
16. The Model Scheme text provides for the following appeal clause:
10.10 Appeals
An applicant aggrieved by a determination of the Local Government in respect of the exercise of a discretionary power under the Scheme may apply for review to the State Administrative Tribunal in accordance with the Part V of the Town Planning and Development Act 1928.
17. In accordance with regulation 14(4) of the *Town Planning Regulations 1967* Council is now required to consider the modification.

14. Action by Minister or authorised person and notification

- (1) *The Minister or authorised person shall consider the proposed Scheme and the recommendation made by the Commission in relation thereto pursuant to regulation 13 and shall -*
- (a) *give his consent for the Scheme to be advertised for public inspection;*
 - (b) *withhold his consent for the Scheme to be advertised for public inspection; or*

- (c) *give his consent for the Scheme to be advertised for public inspection subject to such modifications and on such conditions as he may think fit.*

Note: regulations 1a and 1b not included here.

- (2) *The Minister or authorised person shall notify the Commission of his decision in respect to the Scheme and the Commission shall thereupon forthwith give notice in writing of that decision to the local government.*
- (3) *The Commission shall retain one copy of the Scheme documents for its own use and record and shall return the other copy to the local government.*
- (4) *Within 42 days, or any longer period approved by the Minister or authorised person, of being notified of any modifications required by the Minister or authorised person, the local government shall –*
- (a) *if it resolves to proceed with the Scheme -*
- (i) *settle the modifications with the Commission together with any other modifications which appear to be necessary at that time;*
- (ii) *request the Commission to obtain the consent of the Minister or authorised person to the further modifications; and*
- (iii) *resubmit the Scheme documents with the required modifications duly carried out;*
- or*
- (b) *if it resolves not to proceed with the Scheme, notify the Commission in writing of that resolution.*

STRATEGIC IMPLICATIONS

18. This item directly relates to the following elements of the adopted City of Albany Strategic Plan (2011-2021)

Key Focus Area
Sustainability and Development

Community Priority
Single Town Planning Scheme

Proposed Strategies

Amalgamate Town Planning Scheme 1A and Town Planning Scheme 3 into one definitive plan that includes:

- Greater flexibility in housing options so there is greater property diversity;
- An increase in mixed use developments and dwellings, particularly in the CBD;
- Clearly defined “rules” and then ensure consistent application;
- Streetscape development guidelines for private development projects and a streetscape master plan for the City;
- Definitions of the type and location of future residential housing;
- High density housing of up to three levels in approved areas to reduce urban

expansion;

- Restrictions to development in prime locations and in accordance with a coastal policy;
- Protection of natural reserves;
- Flexibility for development in key tourism areas;
- The establishment of green belts around Albany;
- A requirement for developers to turn drainage basins into living streams or parks;
- Strategies to prevent urban sprawl;
- Strategies to retain prime agricultural land.

19. The completion of a new planning scheme for the City, based on the strategic land use direction promoted in Albany Local Planning Strategy (ALPS) and which consolidates the various existing planning schemes will assist the City deliver on its strategic plan for Albany.

POLICY IMPLICATIONS

20. Nil.

RISK IDENTIFICATION & MITIGATION

21. The risk identification and categorisation relies on the City's Risk Management Framework.

Risk	Likelihood	Consequence	Risk Analysis	Mitigation
<i>Minister's modification to appeal clause not accepted by Council resulting in the continued use of the two present schemes. Not adopting a single scheme will result in none of the crucial changes identified in the draft Scheme taking place (appeals is only one component).</i>	<i>Possible</i>	<i>High</i>	<i>High</i>	<i>Mitigation entirely dependent on Council's decision.</i>

FINANCIAL IMPLICATIONS

22. The City has included an amount of \$20,000 in the 2011/12 budget to undertake consultation on the draft LPS1.
23. Any costs associated with additional meetings with departmental staff etc would be undertaken by the Planning & Development Directorate using existing staff resources within budget.

LEGAL IMPLICATIONS

24. Council is required to consider the modification and make a decision in accordance with regulation 14(4) of the Town Planning Regulations as follows:
- (a) *If it resolves to proceed with the Scheme -*
 - (i) *settle the modifications with the Commission together with any other modifications which appear to be necessary at that time;*
 - (ii) *request the Commission to obtain the consent of the Minister or authorised person to the further modifications; and*
 - (iii) *resubmit the Scheme documents with the required modifications duly carried out;*
 - or
 - (b) *If it resolves not to proceed with the Scheme, notify the Commission in writing of that resolution.*

ALTERNATE OPTIONS

25. Council has the following options in relation to the Minister’s requested modification:

Option A

To request the Department of Planning that the modification be reconsidered.

Option B

To accept the modification and resubmit the scheme to the WA Planning Commission/Minister for approval to commence advertising.

Option C

To not accept the modification and advise the WA Planning Commission in writing accordingly.

SUMMARY CONCLUSION

26. It is imperative that the City has one Local Planning Scheme, so acceptance of the Minister’s modification to the appeal clause in the draft LPS1 is required to resubmit the scheme to the WA Planning Commission/Minister for approval to commence advertising.

Consulted References	<i>Planning and Development Act 2005 Town Planning Regulations 1967</i>
File Number (Name of Ward)	LP.PLA.8 (All Wards)
Previous Reference	OCM 11/4/00 Item 12.1.14 OCM 5/9/00 Item 11.3.1 OCM 16/1/07 Item 11.3.3 OCM 20/3/07 Item 11.3.3 OCM 17/02/09 Item 11.6.1 OCM 20/09/11 Item 2.1