

Ben Killigrew  
Chief Operations Officer  
Town of Victoria Park  
Locked Bag 437  
Victoria Park WA 6979

Your ref:  
Our ref: ALH/GAM 36909

**By post and email**

13 July 2020

Dear Mr Killigrew,

## **Development Proposal for 1022 - 1032 Albany Highway and Right of Way 54, East Victoria Park**

1. We refer to our letter dated 1 July 2020 and the Town of Victoria Park's Agenda Briefing Forum dated 7 July 2020 (**Agenda**), in particular Item 13.1 - Request for road dedication and subsequent closure and amalgamation of portion of Right of Way 54 (**ROW 54**).

### **Summary**

2. There are a number of irregularities in the road dedication, closure and amalgamation processes described in the Agenda and the corresponding recommendation to Council.
3. In summary, these irregularities relate to:
  - (a) the Town's reliance on a single aerial image from January 2020 as sufficient evidence that the public has had uninterrupted use of ROW 54 for at least a 10 year period;
  - (b) no obvious attempt being made to locate the current owner of either ROW 54 or Lot 67 on Diagram 13701 (**Lot 67**);
  - (c) the suggestion that no further consultation is required in relation to the proposed dedication, closure and amalgamation of ROW 54 and Lot 67, under the erroneous position that the consultation carried out in December 2019 - January 2020 satisfies the relevant requirements under the *Land Administration Act 1997 (WA)* (**LA Act**);
  - (d) the suggestion that the Town should seek to request contemporaneously (rather than consecutively) that the Minister for Lands (**Minister**) dedicate ROW 54 and Lot 67 as a road, close the road and amalgamate the closed road with the adjacent land owned by the Town; and
  - (e) whether the Town exercising its powers under sections 56, 58 and 87 of the LA Act to facilitate a transaction for the benefit of a private developer (rather than for a public purpose) is an appropriate and lawful use of these powers accordingly.

### **Continuous use for 10 years**

4. The Town has asserted in the Agenda that it has complied with Regulation 8(c) of the *Land Administration Regulations 1998 (WA)* (**LA Regulations**), which requires the Town to

provide the Minister with 'written confirmation that the public has had uninterrupted use of the private road for a period of not less than 10 years'.

5. The basis for this assertion by the Town is the production of an 'aerial image from January 2000 which shows the land parcels comprised in ROW 54 being used by the public as a road' from which the Town purports that 'This aerial image is deemed sufficient evidence to satisfy section 56(1)(c) of the Land Administration Act 1997.'
6. It is clear that a single aerial image from January 2000 is not sufficient evidence (for the purposes of section 56(1)(c) of the LAA Act) to show that the public has had uninterrupted use of ROW 54 for not less than a 10 year period. This is because the aerial image does not provide any reasonable or objective indication or confirmation that the use of ROW 54:
  - (a) has been uninterrupted over this period; and
  - (b) has in fact been used by the public rather than just the current owners of ROW 54 and the abutting properties in the area.
7. For example, the aerial image is unable to demonstrate whether the current owners have blocked the use of ROW 54 for at least one day over the past 10 year period (which is a practical measure commonly taken by land owners in a similar situation) to prevent the continuous use of ROW 54.

#### **Current owner of ROW 54 and Lot 67**

8. The Agenda notes that the owners of ROW 54 and Lot 67 are deceased. On this basis, the ownership of ROW 54 and Lot 67 has presumably passed to the residuary estates a number of successive descendants of Alexander Joseph Monger and Charles Victor Hale.
9. The Agenda is silent on this point as well whether the Town has made any attempt to contact or consult the beneficiaries of the residuary estates of Alexander Joseph Monger and Charles Victor Hale.
10. Given that the Town is seeking to remove the property rights of these beneficiaries by not only dedicating their privately owned land as a road, but also amalgamating their land with the land owned by the Town, it is essential that the current beneficiaries be contacted and consulted as part of the process that is proposed and prior to any referral to the Minister accordingly.

#### **No further consultation**

11. The recommendation in the Agenda does not mention the need for further consultation to be carried out in respect of the Town's proposal to request that the Minister dedicate, close and amalgamate ROW 54.
12. The Agenda states:

*'In accordance with Council Resolution 244/2019, the Town previously advertised the proposed closure and amalgamation of the subject portion of ROW 54 for a period of 35 days to seek public comments and engaged in consultation by writing to the adjoining landowners to seek further input. The submission period concluded on 17 January 2020 and no submissions were received.'*

13. The advertising referred to in the above extract was carried out under section 58(3) of the LA Act, in the mistaken belief that ROW 54 was already a dedicated road. It has now transpired that this is not the case and that ROW 54 is in fact a private road.
14. Given that the advertising was carried out under section 58 (and not section 56) of the LA Act, the Town is unable to state that it has carried out the required consultation. Clearly, advertising on the basis that ROW 54 had already been dedicated as a road (rather than the correct position that it was a private road) would affect whether or not submissions were lodged with the Town.
15. On this basis, the Town is required to carry out further consultation to seek the views of the public and especially adjoining landowners to comply with:
  - (a) the requirements under section 56(1)(c) of the LA Act and regulation 8(d) of the LA Regulations to dedicate ROW 54 as a road; and
  - (b) subject to our comments concerning the appropriateness of closing the road immediately after it has been dedicated, further consultation should be carried out under section 58(3) of the LA Act, in relation to the proposed closure and amalgamation of the road.

#### **Contemporaneous dedication, closure and amalgamation of ROW 54 and Lot 67 into adjacent land owned by the Town**

16. The recommendation in the Agenda is that the Council resolve to request that the Minister:
  - (a) dedicate ROW 54 and Lot 67 as roads;
  - (b) close a 445m<sup>2</sup> portion of ROW 54; and
  - (c) amalgamate the closed road into the adjacent land owned by the Town.
17. This recommendation incorrectly suggests that these three processes can be carried out contemporaneously (rather than consecutively).
18. This is because section 58(1) of the LA Act refers to '*when a local government wishes a road in its district to be closed permanently, the local government may, subject to subsection (3) request the Minister to close the road*' (emphasis added). It is therefore impossible for the Town to resolve to close ROW 54 as a road when it has yet to be dedicated as a road.
19. Similarly, section 87(3) of the LA Act refers to '*a parcel of land comprised in a road that is closed...the Minister may...amalgamate the land so conveyed or leased with the adjoining land*' (emphasis added). This suggests that the road must be closed prior to the Minister making an order for its amalgamation with adjoining land and means that it is not possible to contemporaneously close and amalgamate a road.

#### **Town's ability to exercise powers under LA Act for benefit of a private developer**

20. The Town also needs to consider whether it can lawfully use the LA Act processes referred to above to facilitate a transaction for the sole benefit of Fabcot Pty Ltd (**Fabcot**), a private entity, rather than for public purposes. There are three material concerns in this regard
21. First, as stated in the Agenda:

*'Council at its Ordinary Council meeting in November 2019 resolved to approve the contract of sale for land adjacent to ROW 54... The contract obligates the Town to satisfy conditions precedent before the sale can proceed.*

*Condition precedent 2.3(b) requires the Town to close and amalgamate a portion of dedicated road (known as ROW 54) into adjacent Lot 30 on Diagram 10509, Lot 488 on Plan 2609 and Lots 131 and 132 on Deposited Plan 45782.'*

22. The Town is proposing first to ask the Minister to dedicate the privately owned ROW as a road, then to close it, then to amalgamate the road land with the adjoining land owned by the Town (presumably in an attempt to satisfy the conditions precedent contained in its contract of sale with Fabcot).
23. However, this approach ignores a fundamental requirement of the LA Act, that is, the closure of ROW 54 must be for a public purpose.
24. Under the current arrangements proposed by the Town, a piece of private property will be taken from an (as yet) unidentified private landowner for the benefit of another private landowner and entity (being Fabcot), purely to facilitate a transaction for private purposes. In addition, the Town is also assisting Fabcot by giving an indemnity to the Minister against any claim for compensation that may arise as a result of the dedication (and therefore releasing Fabcot from any future liability).
25. The Minister should not be requested to apply the provisions of the Act purely to assist a private entity to facilitate a transaction with the Town as part of a private enterprise designed to result in a financial benefit for Fabcot (rather than for any public purpose). It is beyond the power of the Town to ask the Minister to apply the LA Act as requested and it would be beyond the power of the Minister to apply the LA Act in that way.
26. Secondly, the Town's proposal to dedicate, close and amalgamate ROW 54 is designed to enable a private entity to circumvent the need to obtain the consent and signature of the owner of ROW 54 on the development application which it will be required to submit for its proposed development in the area. This is a further instance in which the Town proposes to apply the LA Act not for a public purpose but purely for the benefit of a private entity.
27. Thirdly, the Town's proposal presupposes that a development approval will be granted and that the development proposal will not be amended or resubmitted as part of the process to keep ROW 54 in its current ownership and layout, or in an entirely different configuration from that contemplated by Fabcot (and as shown in the annexure to the contract of sale with the Town). The LA Act process should not pre-empt the development process but rather follow it.

## **Conclusion**

28. We request that the above matters be referred to the Council ahead of its meeting on 21 July 2020. Please provide written confirmation that each member of the Council has been provided with the above information.
29. Further, we request that Council defer consideration of the dedication, closure and amalgamation of ROW 54 until the Town has addressed the irregularities that we have outlined.

30. Finally, please also provide a response to our letter dated 1 July 2020. In particular, please let us know whether the Town has executed the contract with Fabcot and the extent to which the matters that we have raised affect the contract (if at all).

If you have any questions or wish to discuss the above, please let us know.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Glen McLeod', written in a cursive style.

Principal  
Glen McLeod  
**Glen McLeod Legal**