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Claremont WA 6010

Your ref: FG:VIC:44924
Our ref: ALH/GAM 36924

31 August 2020

cc: Anthony Vuleta
AVuleta@vicpark.wa.gov.au

By post and email

Dear Fiona,

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

1. We refer to our letter dated 28 August 2020, relating to the Special Council Meeting (**SCM**) which has been called by the Town of Victoria Park (**Town**) on 1 September 2020 to discuss the dedication of ROW 54 as a public road.
2. We have reviewed the agenda for the SCM and note that it does not substantively address the issues which have been raised in our previous correspondence with the Town and you (most notably being our letters dated 17 August 2020 and 26 August 2020). These include:
3. the requirement for a satisfactory level of public consultation to occur prior to the Town making a decision as to whether it should request that the Minister dedicate ROW 54 as a public road;
4. the insistence that an aerial photograph is sufficient evidence to demonstrate that the public has enjoyed continuous and uninterrupted use of ROW 54 for at least a 10 year period, despite the fact that the Department of Planning, Lands and Heritage (**DPLH**) advising that it would expect a more detailed submission in this regard;
5. the failure to take any steps to identify (or consult with) the current registered proprietor(s) of ROW 54 and to notify them that the Town is seeking to unilaterally dedicate their land;
6. the correspondence with the DPLH dated 3 August 2020 and 14 August 2020 and the advice given to the Town in respect of the processes for dedicating ROW 54 not being consistent with the commentary contained in either the agenda for the SCM (**SCM Agenda**) or agendas that were prepared on this matter previously; and
7. whether the Town can lawfully use the *Land Administration Act 1997* (WA) (**LA Act**) to request that the Minister dedicate ROW 54 in order to satisfy a condition precedent in its contract with a private entity, rather than for a public purpose.
8. In addition, the Town has also failed to advise when the contract with Fabcot Pty Ltd (**Fabcot**) was executed and whether the parties subsequently agreed to extend the 'Latest Date' by which Condition Precedent 2.1(a)(i)(C) must be satisfied.

9. The SCM Agenda also raises a number of new issues in relation to the proposed dedication of ROW 54. These issues are contained in the additional generic and broad commentary which was not included in previous meeting agendas when this item was discussed. In response to these issues and the additional commentary we make the below remarks.

Compliance of ROW 54 location and crossover to Shepperton Road

10. From the SCM Agenda it now appears that the central justifications which the Town is relying on to support its recommendation to request that the Minister dedicate ROW 54 are:
 - (a) the crossover which connects ROW 54 with Shepperton Road is 'non-compliant' and should therefore be relocated (together with a slip lane) to ensure that there is a 'compliant' crossover to Shepperton Road;
 - (b) the proposed development by Fabcot of 1022-1032 Albany Hwy (**Property**) intends to bring this crossover up to 'a current safer design standard';
 - (c) ROW 54 has become redundant as a result of the intended future use of the Property and inappropriate when having regard to future road design; and
 - (d) the current alignment of ROW 54 is no longer consistent with the planning objectives of the Town for the Property.
11. These justification demonstrate that the Town has introduced a new narrative in the SCM Agenda, which is that that the proposed dedication should be referred to the Minister for reasons of 'safety', 'compliance' and to achieve a 'better standard'. To suggest that these aspects should be the reason to approve the proposed referral is incorrect. The only relevant considerations are the requirements contained in the *Land Administration Act 1997* (LA Act), which the Town has failed to properly address for the reasons previously provided. These new justifications for the Town's position also raises the following issues.
12. ROW 54 is intended to be realigned as a part of the development of the Property. On this basis, any comment by the Town that the proposed realignment of ROW 54 (as compared to its current configuration) provides a more desirable outcome pre-supposes that the development of the Property will be approved (and the realignment implemented accordingly). Any such justification in this regard is fundamentally flawed because of this presupposition.. The Town has an obligation to give proper, objective and independent consideration to any development application it receives. It is unable to do so if it holds a pre-determined view on any specific matter associated with the development of the Property.
13. Comments made by the Town which presuppose the development of the Property being approved are also concerning given that they compromise the future decision making of the Town in relation to the Property.
14. No analysis has been provided to support the Town's position that the policy objective of creating a 'safer design standard' would be achieved by realigning ROW 54. At a minimum, any such analysis would need to consider the traffic volumes utilising ROW 54 in its current configuration as opposed to realigning ROW 54 as proposed and introducing a significantly higher volume of traffic as a result of development of the Property. The Town has also not provided any objective information as to why the current configuration of

ROW 54 is considered 'unsafe' such as providing crash data history or other similar information to support its position.

15. If ROW 54 is 'non-compliant' then the Town should clearly advise why it has not previously sought to realign ROW 54 to an alternative location and when it would have otherwise done so (had it not been for the obligation on the Town to do so under its contract with Fabcot).
16. The Town has not demonstrated how the planning objective to '*...have a positive impact in reducing anti-social and crime related activity...*' will be achieved by dedicating ROW 54 as a public road and subsequently realigning it as well. This objective *may* be achieved by developing the Property (but not by the dedication of ROW 54 in isolation) which further supports the view that the proposed dedication is only being sought to facilitate the development of the Property.
17. Each of these issues reinforces the view that the proposed dedication of ROW 54 is not being done for a 'public purpose' but rather to facilitate its closure to solely benefit the private interests of Fabcot, pursuant to the contract of sale that it has with the Town.

Common law dedication of ROW 54

18. The Agenda suggests that the circumstances surrounding ROW 54 may allow it to be dedicated as a public road under common law and therefore this provides justification for the proposed request to dedicate ROW 54 in accordance with section 56(1)(c) of the LA Act.
19. We are at a loss to understand how it can be suggested that such a common law dedication would apply in this situation given that the Town is seeking to recommend that it be dedicated under the LA Act. Even if there was some merit in stating that such a dedication would apply (which is denied) it is incorrect to suggest that this provides an appropriate basis to make a request under section 56(1)(c) of the LA Act.

Correspondence with Main Roads WA

20. The Town has stated that it has consulted with Main Roads WA (**MRWA**) in relation to the proposed relocation of ROW 54. The agenda states that MRWA has confirmed that the new proposed access point onto Shepperton Road will (amongst other things) satisfy Development Control Policy 5.1.
21. However, the basis on which this advice was provided by MRWA is not explained in the SCM Agenda. For example, it is not clear whether the advice was provided in the context of the current uses of the Property or once Fabcot has developed the Property into a commercial centre that would result in a significantly higher volume of traffic in the area.
22. Any correspondence from MRWA in support of the proposed relocation of ROW 54 would only be applicable in the latter situation. However, any such consideration of this situation by MRWA should only occur as part of any development application lodged for the Property. It should not form part of any preliminary discussion with the Town so as not to fetter the discretion of MRWA in the future.
23. If the Town has relied on any advice from a third party (including MRWA) then it should be provided as an attachment to the SCM Agenda to ensure transparency. This is especially

pertinent given that the previous agenda contained comments concerning advice from the DPLH which were identified to be inaccurate.

24. In the event that the Town does not provide any advice it receives from a third party as an attachment to the SCM Agenda, and therefore should carry little weight.

Probate enquiry

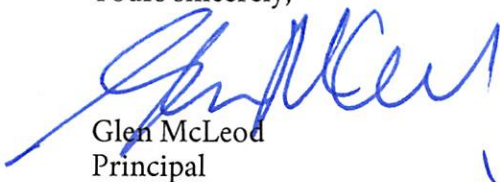
25. The Town has advised that it intends to ‘...undertake a probate enquiry as a matter of course...’. This cannot be taken as a justification for not attempting to identify or notify the current registered proprietors of ROW 54 of the Town’s intention to request to dedicate their land unilaterally as a public road.
26. On this basis, the assurance to undertake a ‘probate enquiry’ should not be taken as a replacement for a satisfactory level of public consultation, prior to requesting that the Minister dedicate ROW 54 as a public road.

Conclusion

27. In light of the above, we request the following:
- (a) that a substantive response be provided to both this letter and our letter dated 17 August 2020; and
 - (b) that the Council defer consideration of this agenda item and any associated recommendation until such time as a proper and substantive response to both this letter and our letter dated 17 August 2020 has been provided to us and also circulated to the Councillors.
28. If the Town nevertheless decides to proceed with the SCM, then it should:
- (a) immediately takes step to attach a copy of this letter to the SCM Agenda; and
 - (b) provide a copy (as an attachment to the SCM Agenda) of any advice it has received from MRWA.

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

Yours sincerely,



Glen McLeod
Principal
Glen McLeod Legal