

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

Your ref:  
Our ref: ALH/GAM 36916

**By post and email**

3 August 2020

Dear Mr Killigrew,

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

1. We refer to the agenda published on 30 July 2020 for the Agenda Briefing Forum on 4 August 2020 (**Agenda**). The recommendations for Item 13.1 in the Agenda, which relate to Right of Way 54 (**ROW 54**), clearly state that the Town of Victoria Park should persist with the dedication, closure and amalgamation of the land comprised in ROW 54, despite the significant issues associated with this position that we have raised in our letters referred below.
2. The Town has failed to substantively address these issues which were previously raised in our letters of 1, 13, 17 and 21 July 2020. The broad references in the Agenda to the Town having received legal advice does not provide any level of transparency as to how these issues have been addressed. In this regard, the mere references to the legal advice (and the lack of any specific commentary as to how this advice has been applied to each individual issue that has been identified) does not provide us with any comfort that the Town has properly and adequately considered the issues that we have previously raised.
3. The following is a brief summary of the issues which the Town has failed to address in any meaningful or substantive way:
  - (a) a consultation process in respect of the dedication of ROW 54 as a public road should be carried out (prior to any referral to the Minister) in addition to a subsequent consultation process for the proposed closure and amalgamation of ROW 54 (if the Minister approves the dedication of ROW 54 as a public road);
  - (b) the recommendation that the proposed closure and amalgamation of ROW 54 (with the adjacent land owned by the Town) be advertised contemporaneously with the referral to the Minister presupposes that the dedication will be approved by the Minister accordingly. Further, the recommendation is also not consistent with the requirements of the *Land Administration Act 1997* (WA) (**LA Act**) which requires that these two processes should be undertaken consecutively and not contemporaneously (see our letter dated 13 July 2020 for our further commentary). On this basis, the proposed advertising should not be resolved to be approved until (and only if) the Minister dedicates ROW 54 as a public road;

- (c) no attempt has been made by the Town to identify, contact or notify the current owners of ROW 54 to advise them that the Town is seeking to remove their property rights by dedicating their privately owned land as a public road. Further, the current owners have not been provided with any opportunity to make any submission in this regard;
  - (d) no satisfactory evidence has been provided to support the assertion that the public has had uninterrupted use of ROW 54 for not less than a 10 year period. All that has been provided is one 'point in time' aerial photograph from January 2000 (together with references to other photographs from 1980 and 2009 that have not been provided) which the Town has used to extrapolate its subjective view that on no occasion during this elongated period has the use of ROW 54 been interrupted;
  - (e) the only subsequent additional commentary contained in the Agenda on this issue is the references to ROW 54 being used as the vehicle access point for multiple properties over the previous 10 year period as well as for the public car park operated by the Town. However, any such use does not absolutely demonstrate that the current owner has not blocked the use of ROW 54 for at least one day over the past 10 year period. To assist with addressing this issue the Town should carry out a proper consultation process (in conjunction with the advertisement of the proposed dedication of ROW 54 as a public road) to seek submissions to determine whether or not such a closure has actually occurred; and
  - (f) whether the Town can lawfully and properly use the processes and procedures contained in the LA Act and the *Land Administration Regulations 1998* (WA) (**LA Regulations**) to dedicate the privately owned ROW 54 as a public road for the benefit of a private company (being Fabcot Pty Ltd) rather than for a public purpose and thereby ignoring a fundamental requirement of the LA Act.
4. We are also concerned with the commentary included in the Agenda that '*...[the Town] has sought the advice and the guidance of the Department of Planning, Lands and Heritage in connection with the dedication request...*' to support the recommendation. The Department of Planning, Lands and Heritage (DPLH) has confirmed in the **enclosed** correspondence that it has not provided any substantive advice or guidance to the Town in relation to the merits of the recommendation contained in the Agenda. Instead, the advice provided by DPLH has been limited to:
- (a) preliminary comments in relation to the options available to resolve the tenure issues that have been identified; and
  - (b) clarifications in relation to minor procedural matters associated with the LA Act.
5. The DPLH has not provided any advice or guidance as to whether it is proper or lawful to use these procedures in the manner proposed by the Town (and has specifically stated that it is unable to provide any such advice until a proposal is received). On this basis, it would be a mistake to assume that the DPLH has in any way provided its support of the processes the Town has proposed or to the recommendation contained in the Agenda.



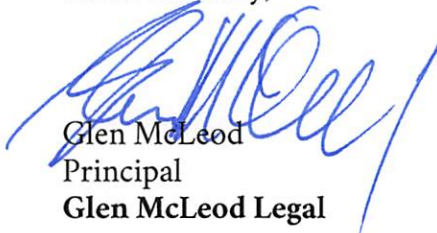
6. We request that the Town either:

- (a) provides a substantive response which addresses all of the issues we have raised;  
or
- (b) releases a copy of the legal advice (and any other advice) it has received together with further commentary as to how this advice supports the Town putting forward the recommendations contained in the Agenda,

so that the Town is able to demonstrate in a proper and transparent manner that the processes it has proposed are lawful and in accordance with both the LA Act and LA Act Regulations.

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

Yours sincerely,



Glen McLeod  
Principal  
**Glen McLeod Legal**