

Fiona Grgich
Partner
McLeods
220 Stirling Highway
Claremont WA 6010

Your ref: FG:VIC:44924
Our ref: ALH/GAM 36919

By post and email

17 August 2020

Dear Fiona,

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

1. We refer to your letter dated 12 August 2020 responding to the matters raised in our various letters to the Town of Victoria Park (**Town**). We note that despite the comments made by the Town in the agenda for the council meeting on 18 August 2020 (**Agenda**) that '*[t]he Town's solicitors have been corresponding with Glen McCleod Legal and [are] preparing a further response*', your letter is the only substantive correspondence in relation to this matter from or on behalf of the Town.
2. As previously explained to the Town in our letter dated 17 July 2020, it is not necessary or relevant for the identity of our client to be disclosed. We have stated that our client has a legitimate interest in the development proposal for 1022-1032 Albany Highway, East Victoria Park and Right of Way 54 (**ROW 54**). Our correspondence to the Town has been supplied in the public interest in this regard.

Engagement with DPLH regarding proposed dedication of ROW 54

3. In relation to paragraphs 4-6 of your letter, we do not agree that the Town has '*...at all stages of this process, sought the guidance of the officers of the DPLH...*'. In our discussions with the Department of Planning, Lands and Heritage (**DPLH**) it has been repeatedly stated that any advice that the DPLH has provided has been of a very general nature.
4. In particular, the DPLH has advised that no specific advice on any processes required under the *Land Administration Act 1997* (WA) (**LA Act**) or the *Land Administration Regulations 1998* (WA) (**LA Regulations**) has been (or will be) provided to the Town until a formal proposal to dedicate ROW 54 is received by the DPLH. This was confirmed in writing to us by the DPLH on 3 August 2020. We are very concerned that despite this correspondence being provided to the Town, a copy and any reference to it has been omitted from the Agenda. Further, no reference has been made to this correspondence in your letter to us of 12 August.
5. In any event, any advice provided by the DPLH should not be considered as a substitute for the obligations on the Town under the LA Act or LA Regulations. Further, the Town should not seek to absolve itself of its obligations under the LA Act and the principles of good governance generally on the basis that any deficiencies in the process it follows are immaterial, as it is the Minister who will ultimately make the

decision. The Town should not be referring the proposal to dedicate ROW 54 as a public road to the Minister unless it is satisfied that it is proper and lawful to do so under the LA Act. To date, the Town has failed to demonstrate (in an objective and transparent manner) the basis on which it is satisfied in this regard.

6. We would also like to clarify that the views and concerns expressed in our letters to the Town are not based on the Crown Land Manual. We have not referred to this document.
7. As part of paragraphs 8 and 9 of your letter, you have advised that the DPLH has not 'indicated' that any advertising or other form of public consultation is necessary to proceed with the dedication of ROW 54 under section 56 of the LA Act. This comment is broad and vague and we are concerned that this purported lack of 'indication' is being put forward as justification for the approach that the Town has adopted. On this basis, we liaised directly with the DPLH to clarify its position.

8. In the **enclosed** email, the DPLH confirmed that it has advised the Town that:

While there is no specific statutory requirement under the Act to consult, the Department would expect an appropriate level of consultation to have been undertaken by the Town. In agreement with s. 8(d) of the Regulations, the Town will be required to submit copies of submissions related to the proposal as well as Town responses addressing these for consideration.

9. It is therefore incorrect to state that DPLH has 'indicated' that a public consultation period for the proposed dedication of ROW 54 is not necessary. Rather, there is a clear expectation from the DPLH that an appropriate level of consultation is required. Given no form of advertising or public consultation has occurred, there is no objective basis upon which the Town is able to assert that an 'appropriate level of consultation' has been undertaken. Further, the requirement for the Town to provide our previous correspondence on this matter to the DPLH should also not be considered as a substitute for the requisite consultation.
10. In addition, whether the Crown Land Manual is no longer available or not, the very fact that there was a previous formal requirement for such consultation being carried out suggests that this is a better and more appropriate approach to take, especially where concerns about the appropriateness of the process have been raised with the Town.

Continuous use of ROW 54 for at least a 10 year period

11. In relation to paragraph 10 of your letter, we say that as stated earlier, the Town should not be referring the proposal to dedicate ROW 54 as a public road to the Minister, unless it is satisfied that it is proper and lawful to do so under the LA Act.
12. The Agenda states that the DPLH has advised that if '*...the Town provides an aerial photograph and confirms that the public has had the use of the ROW for at least 10 years, it will have met the requirements*' of section 56(1)(c) of the LA Act.
13. According to the DPLH, no such specific advice was provided to the Town. Rather, in the **enclosed** email the DPLH states that:

The Town would be expected to include a statement within the formal submission indicating as such as well as any accompanying evidence to demonstrate validity of this claim (in addition to the other requirements stipulated in the Act and Regulations). This can be inclusive of but not limited to, aerial imagery. Any assessment of whether the Town has complied with this requirement is premature in advance of a formal submission to this Department.

14. Further, we were advised that the DPLH has advised the Town to seek independent legal advice as to what would be sufficient evidence in this situation.

Identification of current registered proprietor(s) of ROW 54

15. In relation to paragraph 11 of your letter, we agree that the procedures of the Crown Land Manual are not to be taken as conclusive evidence of the steps which need to be taken to identify the registered proprietors of land which is proposed to be dedicated as a public road.
16. However, in the absence of there being a conclusive statement in relation what the *'DPLH's current policy relative to such matters is'*, it cannot be conveniently interpreted (as it appears to have been done so by the Town) that no consultation is required at all. It is clearly untenable for the Town not even to attempt to identify who the current registered proprietors of ROW 54 are and also not to attempt to notify the registered proprietors that the Town is seeking to dedicate their land unilaterally, without consultation.

Dedication of ROW 54 for a public purpose

17. Paragraph 12 of your letter states that *'there is no requirement that the road closure must be for a public purpose'*. Our concerns in relation to the requirement for there to be a public purpose are not limited to the closure of a dedicated road. Rather there are two principal concerns:
 - (a) the dedication of privately owned land as a public road (in order to ultimately facilitate the closure of the road); and
 - (b) that the closure is solely to benefit a private interest pursuant to a contract with the Town.
18. The example you have provided is not applicable to either of the above concerns. In regard to paragraph 17(a), in this case the proposal is to dedicate an area of private land as a public road, whereas your example involves the excision of an area of a public road, to amalgamate it with private property. Your example is the reverse of what is proposed in this case. In regard to paragraph 17(b), in your example the Town is contracting with a private party to close a small portion of a dedicated road, whereas in this case the Town is proposing to dedicate then close land that is private property.
19. We do not accept that the dedication and closure of ROW 54 will effect a public benefit by ensuring a 'necessary' road realignment resulting in an 'overall benefit' to the public at large. This is because the realignment of ROW 54 is not 'necessary' as it is operating in a satisfactory manner in its current configuration. Further, we do not accept the assertion that there will be an 'overall benefit to the public at large'. This reference is broad and vague and does not identify any specific benefit that would be provided to

the public. Rather the only identifiable benefit is one that would be enjoyed by the private party contracting with your client. Further, there is can be no additional benefit to the public if they are already using ROW 54.

Contemporaneous dedication and closure of ROW 54

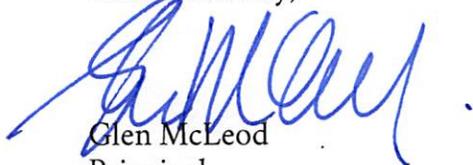
20. In paragraph 7 of your letter, you state that '*[t]he Town will only seek to close ROW 54 under section 58 of the LA Act following the dedication of ROW 54 under section 56 of the [LA Act]*'. You reiterate this point in paragraphs 15 and 16.
21. We agree with this position that the Town can only seek to close ROW 54 when (and only if) the Minister approves the dedication of ROW 54 as a public road.
22. However, we note that it is clear that the Town is proposing to resolve that the advertising of the proposed closure of ROW 54 occur simultaneously with the proposed referral to the Minister accordingly. This is evidenced by the fact that there are timeframes mentioned in the recommendation for the results of the advertising to come back to the council for consideration (which can only occur if each process is undertaken simultaneously).
23. In this regard, the recommendations in the Agenda state that the Council:
 1. Resolves to request the Minister for Lands (WA) to dedicate portion of Lot 0 on Plan 2609, East Victoria Park as a road, pursuant to section 56(1)(c) of the *Land Administration Act 1997*, and regulation 8 of the *Land Administration Regulations 1998*.
 - ...
 4. Gives notice and seeks public submissions on a proposal to request the Minister for Lands (WA) to close and amalgamate a 445 m² portion of ROW 54, pursuant to section 58 and 87 of the *Land Administration Act 1997*, and regulation 9 of the *Land Administration Regulations 1998* into adjacent Lot 30 on Diagram 10509, Lot 488 on Plan 2609 and Lots 131 and 132 on Deposited Plan 45782.
 5. Requests the CEO provide a further report to the October Ordinary Council Meeting for Council to consider the closure of ROW 54 and any submissions received on the closure.
24. If it is not the intention to refer the proposed dedication of ROW 54 to the Minister and simultaneously advertise the proposed closure of ROW 54, then Recommendations 4 and 5 should be amended to state clearly that the proposed advertising is not to commence until such time as (and only if) the dedication of ROW 54 has been approved.
25. If it is the intention to refer the proposed dedication of ROW 54 to the Minister and simultaneously advertise the proposed closure of ROW 54 then the Town should advise why it is not providing a recommendation in accordance with the advice you have provided for these processes to occur consecutively (rather than simultaneously).
26. We request that you:
 - (a) please provide a copy of this correspondence (together with a copy of the enclosed correspondence from the DPLH) to the Town and each member of the

Council and confirm that this has occurred by no later than **5:00pm on Monday, 17 August 2020**;

- (b) please confirm that the previous correspondence issued by the DPLH dated 3 August 2020 (which was attached to our letter also dated 3 August 2020) has been provided to each member of the Council (and ensure that the attachments to the Agenda are updated to include a copy of this correspondence) by no later than **5:00pm on Monday, 17 August 2020**;
 - (c) please ensure that the Agenda is amended to address the inconsistencies between the commentary currently contained in the Agenda and the accurate information that we have provided (in paragraphs 1, 3, 8, 11 and 12) by no-later than **5:00pm on Monday, 17 August 2020**; and
 - (d) please provide a substantive response to the matters raised in this letter (particularly in relation to paragraphs 22 and 23) by no later than **12:00pm on Tuesday, 18 August 2020**.
27. We remain concerned that the Town is seeking to undertake the proposed dedication with little to no consultation and with no substantive justification as to why this consultation is not required and no objective demonstration of the public purpose which is behind the proposal.

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

Yours sincerely,



Glen McLeod
Principal
Glen McLeod Legal