

ITEM NUMBER: 8.1

CONFIDENTIAL REPORT

Appeal Matter – OTR, 285-287 Kensington Road

Notice is hereby given in accordance with Section 83(5) of the *Local Government Act 1999* that the information and matters contained in the following documents, being documents related to the agenda item No. 8.1 entitled Appeal Matter – OTR, 285-287 Kensington Road dated (Report No: 064-21) may, if the Council so determines, be considered in confidence under Part 3 of the *Local Government Act 1999* under Section 90(2) and 90(3)(h) and 90(3)(i) of the *Local Government Act 1999*:

1. To enable the Council to consider the item in confidence on the basis it is necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence information or matter relating to the item, the disclosure of which would involve the consideration of:

- legal advice; and
- information relating to actual litigation involving the Council,

in that Council's legal advice and information relating to the litigation should not be publicly disclosed to preserve the Council's position in the litigation (and any possible future litigation) and to maintain the Council's legal professional privilege over the advice.

2. Accordingly, on this basis, the principle that meetings of the Council should be conducted in a place open to the public is outweighed by the need to keep the information or matter confidential.

Chris Cowley
Chief Executive Officer

Item No: 8.1
Date: 16 March 2021
Author: General Manager Corporate and Development, M Cooper
Subject: Appeal Matter – OTR, 285-287 Kensington Road

Recommendation

Exclusion of the Public – Section 90(3) (h) and (i) Order

That:

1. Under the provisions of Section 90(2) of the *Local Government Act 1999*, an order be made that the public with the exception of the Chief Executive Officer, General Manager Corporate and Development, General Manager Urban and Community, Group Manager City Development and Safety, Team Leader Planning, Council's Legal Advisors and Governance Officer be excluded from attendance at the meeting in order to receive, discuss and/or consider in confidence this item.
 2. The Council is satisfied that it is necessary that the public be excluded to enable the Council to consider the report at the meeting on the following grounds:
 - Section 90(3)(h) of the *Local Government Act 1999*, legal advice; and
 - Section 90(3)(i) of the *Local Government Act 1999*, information relating to actual litigation involving the Council,in that Council's legal advice and information relating to the litigation should not be publicly disclosed to preserve the Council's position in the litigation (and any possible future litigation) and to maintain the Council's legal professional privilege over the advice.
 3. Accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential.
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Item No: 8.1
Date: 16 March 2021
General Manager: General Manager Corporate and Development, M Cooper
Subject: **Appeal Matter – OTR, 285-287 Kensington Road**
Attachments: A. Plans
B. Draft Order
C. Expert reports
Prev. Resolution: NA

Recommendation

That Council:

1. **Accept the compromise proposal and settle the appeal in the matter of OTR, 285-287 Kensington Road (PC Infrastructure) v City of Burnside (ERD-19-189), in accordance with the draft Minutes of Order prepared by Norman Waterhouse Lawyers and subject to the conditions as prepared by Council's lawyers.**
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Retain in Confidence - Section 91(7) & (9) Order

That Council:

1. **in accordance with Section 91(7) and Section 91(9) of the *Local Government Act 1999* and on the grounds that Item No. 8.1 Report No: 064-21, on the Agenda for the special meeting of the Council held on 16 March 2021 entitled Appeal Matter – OTR, 285-287 Kensington Road, was received, discussed and considered in confidence pursuant to:**
 - **Section 90(3)(h) of the *Local Government Act 1999*, legal advice; and**
 - **Section 90(3)(i) of the *Local Government Act 1999*, information relating to actual litigation involving the Council,**

this special meeting of the Council, does order that the agenda, report, documents and information relating to this item and any other associated information submitted to this meeting in relation to the item and the minutes of this meeting in relation to the item remain confidential and not available for public inspection until further order of the Council in order to preserve the Council's position in the litigation (and any possible future litigation) and to maintain the Council's legal professional privilege over the advice; and
 2. **the confidentiality of the matter be reviewed within a period of 12 months, and each 12 months thereafter; and**
 3. **the Chief Executive Officer (or anyone Acting in that position) be delegated the authority to review and revoke all or part of this order.**
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Purpose

1. To provide Elected Members with relevant background and analysis to make an informed decision as to whether to settle the appeal in the matter of OTR 285-287 Kensington Road (PC infrastructure) v City of Burnside.

Strategic Plan

2. The following Strategic Plan provisions are relevant:

Principles: 4. Governing with Integrity

Theme: Place

Goals: 3: A City of accessible and livable precincts, open spaces, and treasured heritage

Priorities: 3.2 Council as an advocate and influencer to ensure our community's voices are heard

Communications/Consultation

3. The following communication / consultation has been undertaken:

3.1. The Administration has sought and obtained expert traffic engineering advice from Melissa Mellon of Murray F Young (MFY).

3.2. The Administration has sought and obtained expert town planning advice from Greg Vincent of Masterplan Town and Country Planners.

3.3. The Administration has sought and obtained expert legal advice from Gavin Leydon of Norman Waterhouse Lawyers.

3.4. The Administration has sought and obtained advice from the City of Burnside Council Assessment Panel.

3.5. Council's solicitors have confirmed with the appellant's solicitor, on a 'without prejudice' basis that the conditions are suitable and would provide an acceptable basis for the settlement of the proceedings. There is a minor typographical error in condition 14 whereby 'internally' is to be replaced with 'internal'. This can be corrected using the Burnside 'slip rule'.

Statutory

4. The following legislation is relevant in this instance:

Development Act 1993

Environment, Resources and Development Court Act 1993

Policy

5. There are no policy implications or requirements associated with this recommendation.

Risk Assessment

6. There are risks associated with not agreeing to a compromise, namely:

- 6.1. there is a high likelihood of defeat if the matter progresses to a Hearing;
- 6.2. Council's expert witnesses could be subpoenaed to give evidence against the Council's case, thereby increasing the likelihood of defeat in the Court;
- 6.3. the appellant could opt to pursue the previous development proposal refused by the CAP on appeal and the Court could approve that development; and
- 6.4. the appellant could opt to pursue an even lesser desired development shaped by the policies of the incoming Planning and Design Code, which is generally considered to be more favourable to development and less sensitive to the interests of the local community in terms of character and amenity impacts.

CEO Performance Indicators

7. There are no impacts on or threats to achieving the CEO's Performance Indicators with this recommendation.

Finance

8. There are financial implications associated with the matter as refusal to compromise will commit the Council to legal expenses associated with the Hearing process in the Environment, Resources and Development Court. These costs would likely exceed \$30,000 and could be as high as \$50,000.

Environmental Sustainability

9. There are no environmental sustainability implications for the City of Burnside in respect to the recommendation

Discussion

Background

10. In June 2017 the (then) Development Assessment Commission (DAC) refused an application for a new 24 hour integrated service station complex and associated features for the site at the north eastern corner of the intersection of Kensington Road and May Terrace, Kensington Park on land previously operating as a motor repair station (DA 180\0958\16).
11. The applicant appealed this decision in the Environment, Resources and Development Court (ERD Court) and both the City of Burnside and Defence Housing Australia were successfully joined to the appeal having made representations as adjacent land owners (ERD-17-159).
12. In July 2018 The ERD Court upheld the DAC refusal on the grounds that the development would have a detrimental impact on the traffic safety on Kensington Road and on the amenity of local residents within the locality. This decision was further appealed in the Supreme Court of South Australia, but again the refusal was upheld (SCCIV-18-899).
13. In December 2018 the applicant lodged an application with the Council for a scaled back development utilising the existing motor repair station control building already in place (DA 180\1265\18). The application was assessed on merit and subject to Category 2 public consultation. A total of five representations were received,

including one submission from the Council again acting in its capacity as an adjoining land owner.

14. To avoid any real or perceived conflict of interest the application was assessed by an independent planning consultant who made a recommendation to the Council Assessment Panel (CAP). The application was refused by the CAP in September 2019 on grounds of traffic safety and amenity, despite a recommendation from the consultant that approval be granted.
15. In October 2019 this decision was appealed in the ERD Court (ERD-19-189), prompting Council to engage the services of Gavin Leydon (Norman Waterhouse Lawyers), Melissa Mellon (MFY traffic consultants) and Greg Vincent (Masterplan Town and Country Planners) to assist Council through the appeal process and in the case of the latter two, act as expert witnesses before the Court.
16. Engagement through the conciliation process has produced a number of key design amendments, which were presented to the CAP in confidence on 02 February 2021 as a potential means for settling the appeal. Having considered the changes, the CAP endorsed the compromise proposal by consensus.
17. On Tuesday 9 February 2021 the matter was referred to the Chief Executive Officer for a decision on whether to settle the appeal or not. Given the sensitivities of the proposal, strong local interest and the history of the site it was determined that this decision should rest with the Council.

Analysis

18. The development proposal presented to the CAP in September 2019 could already be considered an improvement to the version refused by DAC in 2017 and considered by the Courts in 2018 (DA 180\0958\16).
19. Of particular note, the revised proposal seeks to utilise the existing building in the northern portion of the land rather than establish a new control building at the southwest corner adjacent the intersection of Kensington Road and May Terrace.
20. While the 24 hour operation and direction of traffic flow had been maintained (i.e. access from Kensington Road and egress from May Terrace), a controversial dog wash element had been removed, a 3 metre boundary fence was no longer required for acoustic screening purposes and greater landscaping was to be introduced across the primary and secondary frontages.
21. In considering the application, the CAP held concerns about traffic impacts within the locality and considered that the scale of the development was inconsistent with the objectives of the Development Plan. Ultimately the application was refused on the following grounds:
 - 21.1. Scale of development incompatible with zone objectives due to intensity of activity and hours of operation;
 - 21.2. Effect on amenity for surrounding residential zones (visual amenity, increased traffic, increased movement, 24 hour activity, noise, light and potentially smell/air quality);
 - 21.3. Effect on free and safe flow of traffic on Kensington Road; and
 - 21.4. Inadequate landscaping.
22. This decision was appealed in the ERD Court in October 2019, bringing together the experts of both parties to exchange views on the key issues in dispute, namely

those of traffic functionality, safety and amenity impacts imposed on the locality. These discussions produced the following design amendments offered as a means of settling the appeal:

- 22.1. Redirection of traffic flow in a clockwise manner through the site with access from May Terrace and egress to Kensington Road;
 - 22.2. Relocation of the May Terrace access crossover to accommodate a queue of three cars exiting May Terrace to Kensington Road;
 - 22.3. Introduction of a pedestrian access point from May Terrace to minimise conflict between cars and local residents; and
 - 22.4. Reconfiguration of fuel bowsers and on-site parking spaces for safer and more convenient vehicle maneuverability.
23. In coordination with Norman Waterhouse Lawyers, Council's independent expert witnesses analysed the design amendments from a traffic and planning perspective, noting the following positive improvements:
- 23.1. Redirecting the flow of traffic reduces congestion on Kensington Road from cars slowing to enter the site and reduces northbound traffic in May Terrace from cars exiting the site;
 - 23.2. Relocating the May Terrace crossover further north avoids conflict with a queue of up to three southbound vehicles and therefore avoids northbound congestion at the intersection and the possibility of a rear end collision;
 - 23.3. The introduction of pedestrian access promotes foot traffic and reduces conflict between pedestrians and vehicles within the site;
 - 23.4. Internal reconfigurations improve vehicle movements through the site and, together with the updated access arrangements, permit a larger fuel tanker vehicle to access the site and therefore reduce the frequency of deliveries and associated amenity impacts; and
 - 23.5. When viewed as a whole, the above improvements resolved questions of appropriate scale in accordance with the guidance provided by the Courts.
24. In view of these improvements, and despite some minor lingering deficiencies, both experts concluded that refusal is no longer sustainable and that approval should now be granted.
25. This approach reflects the established approach of the Courts that a proposed development need not be the best, or ideal form of development for the subject land, but simply sufficiently in compliance with the relevant provisions of the Development Plan in the context of the relevant factual circumstances.
26. Critically, in view of this advice and the previous ERD Court judgement, Norman Waterhouse Lawyers have concluded that Council would have little prospect of success in defending a refusal should the matter proceed to trial based on the amended scheme.
27. The compromise proposal was presented to the CAP in confidence on 2 February 2020 together with written analysis from Council's traffic, planning and legal experts and a summary report from the Administration recommending the proposed be supported. Gavin Leydon attended the session in person and answered questions from the CAP members.

28. Having considered the proposed design changes and accompanying expert advice the CAP voted unanimously to support the compromise proposal together with conditions generally consistent with that put forward by Greg Vincent and advise the CEO accordingly.
29. The final decision on whether to settle the appeal based on the compromise proposal now rests with the CEO or the Council.

Conclusion

30. The proposed development presented to the Council for consideration is a significant improvement on the previous design considered by the CAP in September 2019.
31. Through close consultation with Council's expert witnesses and legal advisers, the Administration has negotiated key improvements that reduce the impacts of the development on the local road network and community and bring the proposal further in line with the objectives and principles of the Development Plan.
32. Should the Council not agree to settle the appeal in the matter of OTR 285-287 Kensington Road (PC Infrastructure) v City of Burnside it exposes itself to both financial risks and a greater likelihood of a worse outcome for the community should the appellant decide to avail themselves of other opportunities afforded to them under the Planning and Design Code.
33. In light of this position it is recommended that the Council accept the compromise proposal as detailed in the draft Minutes of Order prepared by Norman Waterhouse Lawyers on 8 February 2021.