



## **AGENDA**

### **SPECIAL COUNCIL MEETING**

**COUNCIL CHAMBERS  
241 ROKEBY ROAD, SUBIACO**

**THURSDAY 23 JANUARY 2020**

**COMMENCEMENT: 5:30PM**

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\*Separate attachments

- 1. DECLARATION OF OPENING / ANNOUNCEMENT OF VISITORS**
  
- 2. ATTENDANCE / APOLOGIES / LEAVE OF ABSENCE**
  
- 3. DISCLOSURES OF INTEREST**
  
- 4. PUBLIC QUESTION TIME**
  
- 5. PUBLIC STATEMENT TIME**
  
- 6. PETITIONS AND APPROVED DEPUTATIONS**
  
- 7. ANNOUNCEMENTS BY THE PRESIDING MEMBER**

## 8. REPORTS FOR PRESENTATION

### SC1 CONSIDERATION OF A RANGE OF MOTIONS IN RELATION TO THE MINISTER'S CONSIDERATION ON DRAFT LOCAL PLANNING SCHEME NO. 5\*

#### REPORT FROM CHIEF EXECUTIVE OFFICER

**Author:** Chief Executive Officer, Rochelle Lavery  
**Date:** 23 January 2020  
**File Reference:** A/5555  
**Voting Requirements:** Simple - more than half members present required to vote in favour

#### COUNCIL MOTIONS

That the following motions be endorsed:

1. Transacting the business, and only the business, in an Agenda comprised of the following:
  - a. Declaration of opening/announcement of visitors;
  - b. Attendance/apologies/leave of absence;
  - c. Disclosure of interest;
  - d. Response to previous public questions taken on notice (if any);
  - e. Public question time;
  - f. Consideration of motion 2.1 (if statements not allowed by CEO or Presiding Member);
  - g. Public statement time;
  - h. Petitions and approved deputations;
  - i. Consideration separately of each of the motions set out in 2.2 to 2.7 below;
  - j. Closure of the meeting.
2. As provided for in the Agenda in paragraph 1 above, considering a motion:
  - 2.1 That as permitted by clause 3.4 of the City of Subiaco Meeting Procedures Local Law 2013, the procedure be adopted for this meeting only, regarding the making of statements by members of the public, that statements need not have been submitted in writing prior to the meeting provided that the maker of the statement proves their name and address to the City. Each maker of public statements to be entitled to speak for 3 minutes and such time as extended by the Presiding Member. Each maker of a public statement is requested to provide the City with a copy of their statement or (if they speak without written notes) a summary of the points they make for the City's records.
  - 2.2 Declaring that the letter from the Minister of Planning (the Minister) to the City of Subiaco dated 16 January 2020 (the Minister's Letter) is not to be treated as a confidential document.

- 2.3 Declaring that the City of Subiaco is disappointed that the Minister has not agreed to meet with a delegation of councillors and that it continues to support the Local Planning Strategy and Local Planning Scheme 5 (LPS5) submitted by it in mid-2019.**
- 2.4 Declaring that the council on behalf of the City of Subiaco requests that the Minister defer final approval and/or Gazettal of the LPS5 until such time as the review and updating of the City's local planning policies are progressed sufficiently to achieve the protections the Minister suggests by her Letter are available (the Policy Protections).**
- 2.5 That by no later than 12 noon on Friday 24 January 2020 the Chief Executive Officer of the City of Subiaco is to send by email and courier a letter as per Attachment A to this notice as amended by any amendment made by the council during the meeting called by this notice (the Council Letter) to the Minister for Planning and the Chairman of the Western Australian Planning Commission and then email a copy to each Elected Member. The Council Letter to be finalised by the Council in meeting including an amendment to insert the estimated amount of time needed to sufficiently advance the review of local planning policies that will apply to LPS5, following the receipt of staff advice about the time likely to be involved in ensuring that the available Policy Protections are achieved.\***
- 2.6 That within 2 business hours of receipt of any written response to the Council's Letter, the CEO will provide unredacted and non-confidential copies of any such response to all Councillors.**
- 2.7 That by no later than 2 pm on Friday 24 January 2020 the Chief Executive Officer of the City of Subiaco is to publish unredacted copies of the Minister's letter and of the Council Letter on the City of Subiaco's website with an article that accords with the content of the Council Letter and also notifies the community what has occurred after 6 January 2020 including disclosing a summary of when and what (if any) discussions occurred between the City (whether by City's administration or the Mayor) with the Minister or her staff or anyone at the Western Australian Planning Commission about the proposed meeting.**

*Reasons for all motions:*

- Subsection 5.4(a)(ii) of the Local Government Act 1995 empowers one third of a local government's elected members (ie. 4 of 12 Subiaco councillors) to call a special meeting.
- Pursuant to the Local Government Act 1995 the council is responsible for the good governance of the City (ss 2.7(1)(a)) and responsible for the performance of all of the local government's functions (ss 2.7(1)(b)).
- The only way the council can express a view or give directions is in a meeting.
- The next Ordinary Council Meeting is to occur on 18 February 2020 (about 4 weeks away). The LPS 5 documents called for by the Minister are due on 23 January 2020. The City has no knowledge of when the Minister will make her final decision pursuant to s 87(2)(b) of the Planning and Development Act 2005. The Minister's

expectation that the modified documents be returned to her by 23 January 2020 suggest she is motivated to act quickly.

- Without resolutions of council the Mayor, or if she delegates the task to the CEO, neither will be in a position to inform the community of the council's and therefore the City's views and intended actions consequent upon the receipt and content of the Minister's Letter.
- The Minister did not deny that transition and interface problems exist.
- The Council passed a resolution on June 2019 that local planning policies be prepared "to address the interface between areas of different density to minimise negative impacts on the amenity of lower density areas, heritage areas and streetscape" even though the final form of LPS5 was not then settled. Some policy changes have already been made but the work required is not complete. While there may be some protections in place already a thorough review in relation to particular areas and even particular pieces of land may be warranted.
- Decision makers, including the State Administrative Tribunal, are required to take such policies into account. But if they are deficient, or non-existent, those decision makers will have limited capacity to moderate the change that is coming to ensure a fair, reasonable and optimal outcome.
- Orderly and proper planning requires the entire "planning framework" to be properly in place before the LPS5 is operative and/or influencing decision making.
- It is important for governments (of all levels) to manage change, particularly when it is imposed against the will of the people directly affected by that change, to achieve desired outcomes and to build a fair and just society.
- The Minister's Letter addresses issues that are matters of great public importance and the council should inform the community of its intentions as soon as possible and consider its needs and opportunities in light of the statements' therein.
- Public participation and open and transparent government are important features of our parliamentary democracy designed to encourage a fair and just society.
- The circumstances are such that it is appropriate that council shows leadership and acts quickly. This accords with Community Strategic Plan goal 6.1.1.

### **Introduction**

This report considers the motions provided for the Special Council Meeting regarding Ministerial direction on draft Local Planning Scheme No. 5 (LPS 5) and draft Local Planning Strategy (the Strategy) and provides comment on each of the above motions where possible and/or applicable.

### **Background**

LPS 5 and the Strategy have been progressed in accordance with relevant legislation and have been subject to community consultation, Council consideration and modification, and further consideration and modification by the Minister for Planning (the Minister) and Western Australian Planning Commission (WAPC). A detailed history of the LPS 5 and the Strategy process is available in the minutes of the following Council meetings:

- 6 January 2020 Special Council Meeting;
- 18 June 2019 Ordinary Council Meeting; and
- 7 February 2019 Special Council Meeting.

Recent progression of the Strategy and LPS 5 is detailed below.

On 26 November 2019 the Statutory Planning Committee (SPC) of the WAPC met to consider the Strategy and LPS 5. The SPC determines the Strategy on behalf of the

WAPC and makes a recommendation to the Minister for Planning on LPS 5. The Mayor, CEO and Manager Planning Services made a deputation on behalf of the City, representing Council's position on the Strategy and LPS 5 as resolved at its meetings on 7 February 2019, 18 June 2019 and 23 July 2019.

The City received the WAPC's decision on the Strategy on 13 December 2019 and the Minister for Planning announced her decision on LPS 5 on 18 December 2019.

The LPS Regulations require the City to make the required changes to both documents and return the Strategy to the WAPC for endorsement and return the executed LPS 5 to the Minister for Planning for endorsement and publication in the Government Gazette. There is no opportunity in the relevant planning legislation for the City to request any further modifications and the City is required to execute the LPS 5 documents and return them to the Minister for Planning.

At the 6 January 2020 Special Council Meeting, Council resolved (amongst a number of resolutions) to send a letter to the Minister for Planning and WAPC Chairman requesting additional time to undertake the modifications to the Strategy and LPS 5. The letter included an invitation for a meeting with Elected Members.

The Minister for Planning responded by letter dated 16 January 2020. In summary, the letter from the Minister for Planning:

- acknowledges the community's concerns;
- provides considerations for the LPS 5 decision;
- notes that the City has commenced a review of its local planning policies; and
- clarifies that the Minister expects to receive the modified draft LPS 5 in accordance in the timeframe specified in the *Planning and Development (Local Planning Schemes) Regulations 2015*, which is 23 January 2020.

## **Officer Comment**

### **Motion 1**

This motion is not supported. The agenda for this meeting has been prepared in accordance with the *Local Government Act 1995* and Regulations and the *Meeting Procedures Local Law 2013*. It contains agenda items and reports that are necessary to provide Council with the information required to inform its decision making process. The CEO is required to provide advice and comment on the motions submitted however the Order of Business as provided in this motion does not include an item for Reports for Presentation. The agenda provided by the CEO for this Special Council Meeting is consistent with the agenda provided for the previous Special Council Meeting of 6th January 2020 and can still address the motions submitted for consideration.

### **Motion 2.1**

The Public Statement procedure provides that public statements must be submitted to the Chief Executive Officer (CEO) in writing by 5pm on the day before the meeting. Should Council wish to hear public statements not submitted in writing by 5pm Wednesday 22 January 2020 Council could consider this motion immediately after item 4 of the agenda (Public Question Time). In accordance with clause 2.3 of the Meeting Procedures Local Law 2013 the presiding member may announce a change in the order of business to allow this motion to be considered after item 4. Alternatively an elected member may move that a change in the order of business be accepted which if carried by a majority of members present will permit for the motion 2.2 to be

considered. If motion 2.2 is carried Council may proceed to hear all other public statements.

### **Motion 2.2**

The CEO is to ensure that records and documents of a local government are properly kept for the purposes of the *Local Government Act* and any other written law (section 5.41(h) of the *Local Government Act*). This includes the power to determine, under and for the purposes of the *Freedom of Information Act 1992*, what City records are to be accessible to the public. In the exercise of these functions, the CEO has the power to determine whether a City record (including correspondence received by the City) should be treated as confidential, as provided by regulation 6 of the *Local Government (Rules of Conduct) Regulations 2003*.

Where the CEO receives a communication that may have been sent in confidence the CEO should treat the communication as confidential until it can be determined by the CEO whether it was in fact sent in confidence and/or whether it should be treated as accessible to the public.

The Minister for Planning has consented to the letter being made public and it had been published on the City's website on 22 January 2020 along with a copy of the letter sent to the Minister dated 7 January 2020. This motion is no longer required.

### **Motion 2.3**

Officers note the motion.

### **Motion 2.4**

The City has planning instruments in place that appropriately control development, including local planning policies (LPPs) and the Subiaco Activity Centre Plan (SACP). These instruments will continue to operate with the finalisation of LPS 5. Areas with higher densities that interface with heritage areas also have deemed provisions protecting heritage values.

The City has commenced a review of its LPPs that protect the character of local areas and the existing LPPs are adequate in controlling development until such time as a full review has been completed. For properties in high density residential and mixed use zones, State Planning Policy 7.0 provides appropriate controls, in particular State Planning Policy 7.3 Residential Design Codes Volume 2 – Apartments (R-Codes Volume 2) and the Design Review guide.

The City operates a Design Review Panel providing expert architectural advice to assist in facilitating high quality design outcomes to enhance existing character.

This review of the LPPs is proposed to be informed by preliminary engagement through a community working group. Recruitment for the community working group is currently under way and workshops are proposed to start in early February and conclude by the end of March 2020. It is intended that the draft LPPs will be referred to Council for endorsement prior to formal advertising to the wider community in June or July 2020. The final draft policies are expected to be presented to Council for endorsement at the Ordinary Council Meeting in September 2020.

The interface between high and low densities and how this transition can be managed is one of the matters to be considered by the community working group as part of the

policy review within the wider context of defining and protecting local character as appropriate.

The higher density areas that have a direct interface with low density residential areas are not immediately ready for redevelopment as most have small lot sizes which would require amalgamation to achieve development sites of appropriate size to take advantage of the higher density.

A developer would be required to purchase the property, prepare development concepts and feasibility assessments before lodging a development application. These processes take significant amount of time to complete and are likely to result in few if any development applications being received before the new LPPs are in place.

The risk of being unable to deal with inappropriate development in the absence of appropriate LPPs is therefore substantially addressed.

The Strategy and LPS 5 have been progressed to a point where it may be considered that:

- there is certainty in the planning provisions contained in both documents; and
- with only administrative steps remaining, the documents' finalisation may be considered as imminent.

The Strategy and LPS 5 at this time may be considered as documents which are seriously considered (seriously entertained) and may apply in the consideration of planning proposals and development applications.

In light of this, requesting the Minister to defer gazettal of LPS 5 may not be of effect as LPS 5 may arguably be a seriously considered planning document.

### **Motion 2.5**

The letter to Minister Saffioti in Attachment A is to be amended by including an estimated timeframe for the completion of relevant LPPs. This timeframe is estimated to be September 2020.

Council may wish to consider addressing matters in Attachment A which may be incorrect, including but not limited to:

- The Minister did not reject the Local Planning Scheme No. 5 submitted by the City either in 2017 or in 2019. The WAPC (in 2018) and the Minister (in 2019) required modifications to the Scheme submitted by the City.
- The Minister did not propose blanket density throughout Subiaco. This was proposed in the version of the Scheme approved for advertising by the WAPC in December 2017.
- The reference to "the lack of transition zones" could be construed as Council seeking to include transition zones of medium density between high and low density areas. This could result in the Minister requiring further modifications that result in additional land being zoned with medium density codes in areas of established neighbourhood character and heritage areas. It is recommended that the reference is removed as the interface between densities is planned to be addressed through local planning policies and design review.

- The role of local planning policies within the planning system is clear. Local planning policies guide the implementation of a local planning scheme and consider matters including but not limited to: decision making, the use of discretion, replacing certain elements of planning documents and providing for administrative matters and processes. Local planning policies are considered with due regard as supplementary documents to a Local Planning Scheme..
- The planning framework and existing local planning policies allow for all relevant planning considerations (including the protection of heritage and character, and consideration of built form controls) to be considered.
- Attachment A refers to uncertainty as to which level of government is responsible for determining local planning policies. This is incorrect as the local government has always been the authority responsible for preparing and determining its own local planning policies. This is not proposed to change.

### **Motion 2.6**

It is not appropriate to provide Elected Members with unredacted and non-confidential copies of any response to the Council's letter referred to in motion 5. Personal details of the officers have been redacted in order to maintain the privacy of those officers. In addition, the Information Commissioners of WA place enormous importance on the privacy of individuals.

The CEO is to ensure that records and documents of a local government are properly kept for the purposes of the *Local Government Act* and any other written law (section 5.41(h) of the *Local Government Act*). This includes the power to determine, under and for the purposes of the *Freedom of Information Act 1992*, what City records are to be accessible to the public. In the exercise of these functions, the CEO has the power to determine whether a City record (including correspondence received by the City) should be treated as confidential, as provided by regulation 6 of the *Local Government (Rules of Conduct) Regulations 2003*.

Where the CEO receives a communication that may have been sent in confidence the CEO should treat the communication as confidential until it can be determined by the CEO whether it was in fact sent in confidence and/or whether it should be treated as accessible to the public.

Should the Minister's office provide its consent to make any written response accessible to the public then copies of the response can be provided removing the confidential nature as has occurred with the Minister's letter of 16 January 2020.

Motion 2.6 proposes that within two business hours of receipt of any written correspondence to the Council's Letter, the CEO is to provide unredacted and non-confidential copies of any such response to all Councillors. Two business hours is considered an unreasonable time and would divert a substantial and unreasonable portion of the City's resources away from its other functions. It is therefore recommended that written response to the Council's letter be provided by the CEO as soon as possible after it is received but no later than by the next business day. The redaction of officer's personal information is at the discretion of the CEO in consultation with the officer.

## **Motion 2.7**

Resolution 1 of 6 January 2020 Special Council Meeting required a letter (titled Attachment A) to be sent to the Minister for Planning and WAPC Chairman.

On 7 January 2020, City of Subiaco officers delivered the required letter to the Minister for Planning's office by hand and email. The WAPC Chairman was sent the letter by email on the same date.

The Minister for Planning responded by letter dated 16 January 2020 and this letter was published on the City's website on 22 January 2020 following confirmation from the Minister for Planning's office.

Except as set out in the letters detailed above, there have been no discussion between officers of the City of Subiaco or the Mayor and representatives from the Minister for Planning's office or the WAPC regarding the meeting proposed in the letter after 6 January 2020.

## **Consultation**

No consultation was required as part of this report. Consultation has been undertaken for the draft Strategy and LPS 5.

## **Strategic Implications**

A contemporary LPS 5 will enable the City to effectively implement its Strategy which has been endorsed by Council and sets out the long term plan to preserve the character of single residential areas, accommodate additional homes in appropriate areas and support the local economy and vibrancy of the Subiaco town centre.

LPS 5 broadly encapsulates most parts of the City's Strategic Community Plan, it most closely reflects the desired outcomes in *The Built Environment* focus area. It strongly supports the two objectives of this focus area:

- A built form with heritage value that is recognised and protected; and
- A sustainable City that accommodates the increasing population, whilst maintaining the valued character.

The Strategy and Scheme both set out to achieve these objectives, with the Strategy setting a long term vision, and LPS 5 setting the development framework on a shorter (five year) term.

## **Statutory and Policy Considerations**

The progression of the Strategy and LPS 5 has carefully followed the due process in the *Planning and Development Act 2005* and the *Planning and Development (Local Planning Schemes) Regulations 2015*.

Council's position on the Strategy and LPS 5 has been made clear to the WAPC and Minister for Planning on a number of occasions. There is no further mechanism in the relevant planning legislation for the Council to provide a subsequent recommendation for these documents. The relevant legislation requires the WAPC and Minister for Planning to consider the City of Subiaco's recommendations as well as the submissions received during public consultation.

The head of power for the Minister for Planning to consider a Local Planning Scheme is detailed in Part 5 – Local Planning Schemes of the *Planning and Development Act 2005*.

Section 87(2) of the Act states:

- (2) *The Minister may, in relation to a local planning scheme or amendment submitted to the Minister under subsection (1) —*
- (a) *approve of that local planning scheme or amendment; or*
  - (b) *require the local government concerned to modify that local planning scheme or amendment in such manner as the Minister specifies before the local planning scheme or amendment is resubmitted for the Minister's approval under this subsection; or*
  - (c) *refuse to approve of that local planning scheme or amendment.*

The *Planning and Development (Local Planning Schemes) Regulations 2015* details the administrative process relating to Local Planning Schemes. Division 3 – Giving effect to decision on local planning scheme of the Regulations details the process following a Ministerial decision.

Regulation 31(2) of the Regulations states:

- (2) *Within 42 days of being notified that, under section 87(2)(b) of the Act, the Minister requires the local government to modify the draft local planning scheme, or a longer period approved by the Minister or authorised person, the local government must —*
- (a) *modify the draft scheme as required; and*
  - (b) *execute the modified local planning scheme documents; and*
  - (c) *submit to the Minister a copy of the executed documents.*

Section 76 of the Act details the process for where a Minister may order local government to prepare or adopt a scheme or amendment.

- (1) *If the Minister is satisfied on any representation that a local government —*
- (c) *has refused to consent to any modifications or conditions imposed by the Minister,*

*the Minister may order the local government, within such time as is specified in the order, to prepare and submit for the approval of the Minister a local planning scheme, or an amendment to a local planning scheme or to adopt a local planning scheme, or an amendment to a local planning scheme or to consent to the modifications or conditions imposed.*

- (2) *If the representation under subsection (1) is that a local government has failed to adopt a local planning scheme or an amendment to a local planning scheme, the Minister, in lieu of making an order to adopt the scheme or amendment, may approve of the proposed scheme or amendment subject to such modifications and conditions, if any, as the Minister thinks fit.*

The planning legislation does not provide a mechanism to review decisions made by the Minister for Planning or to request a delay for the final approval and gazettal of LPS 5.

The Minister for Planning has the ability to modify and approve a Local Planning Scheme as the Minister thinks fit. Should Council seek to request reconsideration of

any modifications to the scheme by the Minister, this gives the Minister the opportunity to reconsider all matters under the scheme.

### **Resourcing**

Appropriate resourcing has been scheduled for the functions to finalise the Strategy and LPS 5. Any additional work tasks associated with the finalisation which are not contemplated by the legislative framework (including but not limited to Special Council Meetings, additional material being prepared, document discovery, reconsideration of previous advice provided, seeking and distributing legal advice) will impact on Planning Services' statutory development assessment function as a minimum and have implications on a range of City services.

### **Financial**

Undertaking additional work may require a re-allocation of existing budgets allocated to other Planning Services projects which may be impacted.

### **Social and Environmental Implications**

The preparation of LPS 5 carefully follows due process and is critical to achieving the sustainable development outcomes in the City of Subiaco and broader metropolitan region.

### **Attachments**

1. Notice calling a Special Council Meeting.
2. Attachment A.

- 9. NEW BUSINESS OF AN URGENT NATURE APPROVED BY THE PERSON PRESIDING OR BY A DECISION OF THE MEETING**
  
- 10. CLOSURE OF MEETING**