



Shire of
Peppermint Grove

SPECIAL MEETING OF COUNCIL

AGENDA

**TO BE HELD ON
MONDAY 4 NOVEMBER 2019
AT
4.00 PM**



Shire of Peppermint Grove

Notice of Meeting

Dear Councillor

It is advised that the **SPECIAL MEETING OF COUNCIL** will be held in the Council Chamber of the **Shire of Peppermint Grove**, 1 Leake Street, Peppermint Grove, on Monday 4 November 2019, commencing at 4.00pm. The purpose of the meeting being the determination of Entry to Heritage list - lot 100 (52) The Esplanade, Peppermint Grove.

MEETING AGENDA ATTACHED

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Don Burnett', is written over a light blue horizontal line.

Mr Don Burnett
CHIEF EXECUTIVE OFFICER

1 NOVEMBER 2019

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Any advice provided by an employee of the Shire on the operation of a written law, or the performance of a function by the Shire, is provided in the capacity of an employee, and to the best of that person's knowledge and ability. It does not constitute, and should not be relied upon, as a legal advice or representation by the Shire. Any advice on a matter of law, or anything sought to be relied upon as a representation by the Shire should be sought in writing and should make clear the purpose of the request.



Shire of Peppermint Grove

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Shire of Peppermint Grove

SPECIAL MEETING OF COUNCIL

1. Declaration of Official Opening

At _____ pm, the Shire President declared the meeting open and requested the recording of attendance and apologies.

Council recognises that it is permissible to record the Shire's Council and Forum Meetings in the written, sound, vision medium (or any combination of the mediums) when open to the public, however, people who intend to record meetings are requested to inform the Presiding Member of their intention to do so.

2. Recording of Attendance, Apologies and Leaves of Absence

2.1 Attendance

Shire President	Cr R Thomas
Deputy Shire President	Cr C Hohnen
Elected Member	Cr K Farley
Elected Member	Cr D Horrex
Elected Member	Cr P Macintosh
Elected Member	Cr G Peters

Chief Executive Officer	Mr Don Burnett
Manager Corporate & Community Services	Mike Costarella

Gallery _____ Members of the Public

_____ Members of the Press



2.2 Apologies

2.3.1 Leaves of Absence

3 Delegations and Petitions

3.1 Delegations

3.2 Petitions

4. Public Question Time

The Presiding Member will open council for public question time by asking the gallery if there were any questions or deputation for council.

- The Agenda
- Question to Council Forms and
- Deputation Forms

Have been placed at the end of the Council Meeting table in front of the public gallery, for the public, as well as on the Shire Webpage.

In the event there are no public members present, the Presiding Member will dispense with Public Question Time.

Rules for Council Meeting Public Question Time

- Public Question Time provides the public with an opportunity to put questions to the Council. Questions should only relate to the business of the Council and should not be a statement or personal opinion.*
- During the Special Council meeting, after Public Question Time no member of the public may interrupt the meeting's proceedings or enter into conversation.*
- Whenever possible, questions should be submitted in writing at least 48 hours prior to the start of the meeting.*
- All questions should be directed to the President and only questions relating to matters affecting Council may be answered at an Ordinary meeting, and at a Special meeting only questions that relate to the purpose of the meeting may be answered. Questions may be taken on notice and responded to after the meeting, at the discretion of the President.*
- The person presiding will control Public Question Time and ensure that each person wishing to ask a question should state his or her name and address before asking the question. If the question relates to an item on the agenda, the item number should also be stated. In general, persons seeking to ask a question will be given 2 minutes within which to address their question to the Council. The person presiding may shorten or lengthen this time in their discretion.*



4.1 Response to previous Questions taken on notice

4.2 Questions from members of the public

4.3 Deputations of the public

5. Declarations of Interest

Councillors / Staff are reminded of the requirements of section 5.65 of the Local Government Act 1995, to disclose any interest during the meeting when the matter is discussed, and also of the requirement to disclose an interest affecting impartiality under the Shire's Code of Conduct.

Councillors / staff are required to submit declarations of interest in writing on the prescribed form.

5.1 Financial interest

A declaration under this section 5.60 of the Act requires that the nature of the interest must be disclosed. Consequently a member who has made a declaration must not preside, participate in, or be present during any discussion or decision making procedure relating to the matter the subject of the declaration.

Other members may allow participation of the declarant if the member further discloses the extent of the interest and the other members decide that the interest is trivial or insignificant or is common to a significant number of electors or ratepayers.

5.2 Proximity Interest

A declaration under this section 5.60 of the Act requires that the nature of the interest must be disclosed. Consequently a member who has made a declaration must not preside, participate in, or be present during any discussion or decision making procedure relating to the matter the subject of the declaration.

Other members may allow participation of the declarant if the member further discloses the extent of the interest and the other members decide that the interest is trivial or insignificant or is common to a significant number of electors or ratepayers.

5.3 Impartiality Interest

Councillors and staff are required (Code of Conduct), in addition to declaring any financial interest, to declare any interest that might cause a conflict. The member / employee is also encouraged to disclose the nature of the interest. The member / employee must consider the nature and extent of the interest and whether it will affect their impartiality. If the member / employee declares that their impartiality will not be affected then they may participate in the decision making process.



5.4 Interest that may cause a conflict

Councillors and staff are required (Code of Conduct), in addition to declaring any financial interest, to declare any interest that might cause a conflict. The member / employee is also encouraged to disclose the nature of the interest. The member / employee must consider the nature and extent of the interest and whether it will affect their impartiality. If the member / employee declares that their impartiality will not be affected then they may participate in the decision making process.

5.5 Statement Of Gifts And Hospitality

Councillors and staff are required (Code of Conduct), to disclose gifts and acts of hospitality which a reasonable person might claim to be a conflict of interest. Gifts and acts of hospitality which exceed that amount of prescribed by regulation are to be recorded in the Councils Gift Register.

6. Announcements and Declarations by Elected Members

6.1 Announcements by the Presiding Member (without discussion)

Written announcements by the Presiding Member or important forthcoming functions to be tabled at this point. The Presiding Member may, at their discretion, wish to make verbal announcements.

7. OFFICER REPORTS

7.1 Entry to Heritage list - lot 100 (52) The Esplanade, Peppermint Grove

URBAN PLANNING

Voting Requirement	:	Absolute Majority
Subject Index	:	Property
Location / Property Index	:	Lot 100 (52) The Esplanade
Application Index	:	N/A
TPS No 4 Zoning	:	Residential R 10
Land Use	:	Single Dwelling
Lot Area	:	3652m ²
Disclosure of any Interest	:	Nil
Previous Items	:	25 September 2018, 1 October, 2019
Applicant	:	N/A
Owner	:	Dain Pty Ltd
Responsible Officer	:	CEO

COUNCIL ROLE

- Advocacy** *When Council advocates on its own behalf or on behalf of its community to another level of government / body / agency.*
- Executive** *The substantial direction setting and oversight role of the Council eg. adopting plans and reports, accepting tenders, directing operations, setting and amending budgets.*
- Legislative** *Includes adopting local laws, town planning schemes & policies.*
- Review** *When Council reviews decisions made by Officers.*
- Quasi-Judicial** *When Council determines an application / matter that directly affect a person's right and interests. The judicial character arises from the obligation to abide by the principles of natural justice. Examples of quasi-judicial authority include town planning applications, building licences, applications for other permits / licences (eg under Health Act, Dog Act or Local Laws) and other decisions that may be appealable to the State Administrative Tribunal.*

PURPOSE OF REPORT

The purpose of this report is to review and add further content to the delegation to the CEO made at the Special Council meeting held on 1 October 2019.

SUMMARY AND KEY ISSUES

- The Orders made by Justice Archer on 18 September provide the opportunity to still consider the listing of the Property on the heritage list.
- Justice Archer has granted a writ of certiorari (quashing of the Council resolution) in relation to the second resolution heritage listing the Property and the remaining tranche 3 properties, but suspended the operation of this until 27 November 2019.
- The process for the consideration of listing the Property is, so far as possible, to be at arm's length to Council, Councillors and the staff involved in the earlier decision-making process.
- Justice Archer has acknowledged that Council will delegate the review process to the CEO, who will on delegate it to an officer not involved in the earlier decision-making process.
- Council delegated to the CEO, who then on delegated to the Manager Corporate and Community Services (the Manager), the authority to determine whether to enter the property onto the heritage list, having due regard to advice from an independent heritage expert.
- In the event that Dain Pty Ltd (Dain) and the Shire couldn't reach agreement on the appointment of an expert the Council resolution provided that the President of the WA Chapter of the Australian Institute of Architects (AIA) was to select an expert.
- Dain has not responded to the Manager's request to agree on the appointment of an expert, and the Institute President advises that an expert appointment service is no longer provided.

LOCATION

Lot 100 (52) The Esplanade.

BACKGROUND

The history relating to the entry of the property at 52 The Esplanade, Peppermint Grove in the Shire's Heritage List under Local Planning Scheme No.4 and the resulting proceedings in the Supreme Court, has been set out in previous reports to Council.

Council considered a report presented to a Special Council meeting on 1 October 2019, dealing with the process to list the property following on from the final orders issued by Justice Archer on 18 September 2019. In summary, Justice Archer agreed with the Shire's submission that it was in the public or community interest to suspend the effect of the Court's decision quashing the Shire's previous decision, until at least 27 November 2019, to allow for the Shire to revisit the process of whether to enter the property on the Shire's Heritage List.

In relation to that process, a new notice under clause 8(3)(a) of the Deemed Provisions was sent to Dain by registered post on 15 October 2019 and was collected on behalf of Dain on 18 October 2019. As a result, any submission by Dain in relation to the proposal to enter the property on the Heritage List is to be lodged by 8 November 2019. At the time of writing this report, no submission had been made by Dain.

In addition, a separate letter was also sent to Dain on 15 October 2019, and was also collected on behalf of Dain on 18 October 2019, by which the Manager provided a list of 3 names of persons or architect firms to potentially undertake the role of expert advisor in relation to the proposal, and sought Dain's agreement to any one of those names by close of business on 24 October 2019. As set out in the letter, each of the persons and firms listed have had no prior dealings with the Shire or (so far as the Shire is aware) with Dain, and no prior involvement with the property. No reply has been received from Dain, but when the Shire approached the Australian Institute of Architects regarding the appointment of an expert advisor in accordance with the Council resolution made on 1 October 2019, the Shire was informed that the AIA has recently ceased to make such appointments. The Shire was informed, however, that each of the names in the list provided to Dain was suitable.

In light of the above, if agreement is not reached with Dain regarding the appointment of an expert advisor, there is currently no process to appoint the expert advisor. Dain have been informed that if agreement on the appointment of an expert advisor is not reached by close of business on **1 November 2019**, then in order to ensure that an appointment can be made, a Special Meeting of Council will be convened on 4 November 2019 to amend and add to the last part of the second paragraph of the resolution made by the Council on 1 October 2019. Dain was informed that the amendment or addition would be to also allow for the appointment of the expert advisor by the random selection of a name from a list of at least 3 heritage architects identified by the Shire who have had no prior dealings with the Shire and no prior involvement with the property.

A response has been received from Dain, but rather than agreeing to the appointment of one of the persons from the list previously provided by the Shire, or agreeing to the process of a random selection of a name from that list, Dain has proposed agreeing to extend the date referred to in Justice Archer's Order made on 18 September 2019, beyond 27 November 2019. Dain has provided several reasons for this, which are being considered by the Shire's lawyers. However, any extension will not address the current issue, which is that if there is no agreement from Dain for the appointment of an expert advisor, there is no process allowing for that appointment to occur. On that basis, it is still proposed to amend and add to the resolution on 1 October 2019, as set out above. It may not be necessary to use the further process that is proposed, either if the date referred to in Justice Archer's Order is extended as proposed by Dain, or if agreement can be reached on the appointment of an expert, but the addition of the further process ensures that an expert advisor can ultimately be appointed, if required.

CONSULTATION

There has been no specific consultation undertaken in respect to this matter.

STRATEGIC IMPLICATIONS

The Shire is following a community objective of the Strategic Community Plan to actively seek, assess and list properties which hold local heritage value, and in so doing to protect them from destruction.

POLICY IMPLICATIONS

There are no significant policy implications evident at this time.

STATUTORY IMPLICATIONS

Council has delegated to the CEO to make the final determination (under clause 8(3)(d) of the Deemed Provisions) and the CEO has on delegated this authority to the Manager Corporate & Community Services;

The delegation included the powers to make the preliminary evaluation as to whether the Property ought to be entered in the Heritage List for the purpose of issuing fresh notices to the owner and occupier of the Property (under clause 8(3)(a) of the Deemed Provisions), and to invite the owner and occupier to make submissions on the proposal within 21 days of the day on which the notice is served (under clause 8(3)(b) of the Deemed Provisions).

Under the *Local Government (Administration) Regulations 1996 (WA)*, if any change to the resolution made by Council on 1 October 2019 has the effect that the resolution would become "substantially different", the decision to change the resolution must comply with the requirements of regulation 10.

As the proposed amendment to the resolution adds a new process for the appointment of the expert advisor, to resolve the impasse that has arisen, it is considered that the change is likely to have the effect that the resolution would become "substantially different". As such –

- notice of the motion to amend the resolution is to signed by at least one-third of the number of members of Council (reg.10(1a));
- the motion to amend the resolution must be supported by at least one-third of the number of members of Council (reg.10(1)(b)); and
- any decision to amend the resolution must be made by an absolute majority of Council (reg.10(2)(b)).

FINANCIAL IMPLICATIONS

There are no financial implications evident at this time.

ENVIRONMENTAL IMPLICATIONS

There are no environmental implications at this time.

SOCIAL IMPLICATIONS

There are no social implications at this time.



OFFICER COMMENT

The on-delegation by the CEO to the Manager has been done, however the Manager has been unable to appoint an independent heritage expert, due to the fact Dain have not responded to the Shire's communications and that the President of the WA Chapter of Australian Institute of Architects is unable to make a recommendation.

Dain through their legal representative have been advised that unless agreement is reached before this Special Council meeting, that the resolution made by Council 1 October 2019 is to amended to also allow the appointment of the expert advisor by the random selection of a name from a list of at least 3 heritage architects identified by the Shire who have had no prior dealings with the Shire and no prior involvement with the property. The expert advisor will then be engaged by the Manager to review information relating to the property, including any submission received by the Shire in relation to the new proposal to enter the property on the Heritage List, and make a recommendation to the Manager regarding the proposal. The Manager will then determine whether or not to enter the property will be entered into the Heritage List.

Council will need to amend the delegation to the CEO, noting the CEO will on delegate it to the Manager.

OFFICER RECOMMENDATION/S – ITEM NO 7.1

That the second paragraph of the resolution of Council made on 1 October 2019 be amended as follows by the addition of the underlined words:

That pursuant to clause 82(3) of the Deemed Provisions, the delegation of the power under clause 8(3)(d) of the Deemed Provisions to determine whether to enter the property in the heritage list is subject to a condition requiring that due regard be had to the recommendation of an independent heritage expert, to be appointed either:

- (a) by agreement with the owner of the property (currently Dain Pty Ltd); or**
- (b) by the President of the WA Chapter of the Australian Institute of Architects; or**
- (c) if agreement cannot be reached with the owner of the property and the President of the WA Chapter of the Australian Institute of Architects is not willing to make an appointment, by the random selection of a name from a list of at least 3 heritage architects identified by the Shire who have had no prior dealings with the Shire and no prior involvement with the property.**



8. NEW BUSINESS OF AN URGENT NATURE

9. MOTION TAKEN ON NOTICE

10. CONFIDENTIAL ITEMS OF BUSINESS

11. CLOSURE

At _____ pm, there being no further business the meeting closed.