



Shire of  
**Peppermint Grove**

# **SPECIAL MEETING OF COUNCIL**

# **MINUTES**

**HELD ON  
TUESDAY 1 OCTOBER 2019  
AT  
5.30 PM**



# Shire of Peppermint Grove

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# Shire of Peppermint Grove

## SPECIAL MEETING OF COUNCIL

### 1. Declaration of Official Opening

At 5.30pm, the Shire President declared the meeting open and requested the recording of attendance and apologies.

The media indicated they were not recording the meeting.

### 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:** 0 Members of the Public

0 Members of the Press

#### 2.2 Apologies

Nil

#### 2.3 Leaves of Absence

Nil



### 3 Delegations and Petitions

#### 3.1 Delegations

Nil

#### 3.2 Petitions

Nil

### 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**

Nil

**4.2 Questions from members of the public**

Nil

**4.3 Deputations of the public**

Nil

**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**

Nil

**5.2 Proximity Interest**

Nil

**5.3 Impartiality Interest**

Nil

**5.4 Interest that may cause a conflict**

Nil

**5.5 Statement Of Gifts And Hospitality**

Nil

**6 Announcements by the Presiding Member (without discussion)**

Nil



## 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 <sup>2</sup>
Disclosure of any Interest	:	Nil
Previous Items	:	25 September 2018
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**

For Council to consider Orders made by the Supreme Court of Western Australia on the 18 September and in response, to determine a process for the consideration of the heritage listing of 52 The Esplanade Peppermint Grove (the Property).

## **SUMMARY AND KEY ISSUES**

- Orders made by Justice Archer of the Supreme Court on 18 September have the effect of providing a further opportunity for the Shire to consider whether or not to enter the Property on the heritage list.
- A Order for a Writ of Certiorari has been granted, quashing the previous decision of the Council made to enter the Property on the heritage list, but that Order does not take effect until 27 November 2019.
- Taking into account the earlier findings of the Court in July 2019 relating to apprehension of bias surrounding the previous decisions, it is necessary for any future consideration of whether or not to enter the Property on the heritage list be undertaken without further involvement of Council, Councillors or the staff who were significantly involved in the earlier decision-making process.
- Justice Archer has acknowledged that to achieve this separation, the Council will delegate the decision-making process to the CEO, who will on-delegate it to an officer with no past involvement in the earlier decision-making process.

## **LOCATION**

Lot 100 (52) The Esplanade.

## **BACKGROUND**

52 The Esplanade Peppermint Grove (the Property) contains a single house located within a lot which abuts the western edge of The Esplanade' Peppermint Grove.

In July, the Supreme Court delivered its judgment to the effect that the Shire's previous decisions to enter the Property in the heritage list were invalid and should be quashed, but the final form of the Orders to be made, and the time at which those Orders would take effect, was adjourned to a separate hearing in September.

The owner the Property, Dain Pty Ltd, sought Orders that the Property be removed from the Heritage List immediately, and also to prohibit the Shire from considering again in future whether the Property should be entered in the Heritage List.

The Shire opposed the prohibition sought by Dain Pty Ltd and also sought that the Order quashing the Shire's previous decision to enter the Property in the heritage list be suspended for a period of time to allow the Shire to revisit and properly consider whether the Property ought to be entered in the heritage list.

Both Orders sought by Dain Pty Ltd were refused. Justice Archer noted that the Court's decision in July related only to the particular processes that had led to the Council's previous decision to enter the Property on the new Heritage List. The Order seeking



prohibition was refused because Justice Archer was not satisfied that any future decision was also likely to involve the same issues that had led to the quashing of the previous decisions.

Justice Archer also noted that the Court's decision in July did not address, or make any determination about, the merits of whether the Property should or should not be entered in the heritage list, and that it was in the public or community interest to suspend the effect of the Court's decision quashing the Shire's previous decision, to allow for the Shire to revisit and complete the process of determining this.

In doing so, however, the Shire gave an undertaking to the Court that the determination would not include involvement by the Council, Councillors or the staff who were significantly involved in the earlier decision-making process. Justice Archer specifically acknowledged the Shire's proposal to delegate the decision-making process to the CEO, who will on-delegate it to an officer with no past involvement in the earlier decision-making process.

### **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**

Clause 82(1) of the Deemed Provisions provides that the Council may by resolution (an absolute majority is required by clause 83(2)) delegate to the CEO the exercise of any of its functions or the discharge of any of its powers under the Scheme.

Clauses 83(1) and (3) of the Deemed Provisions provides that the CEO may delegate to any employee of the Shire the exercise of any of the CEO's powers or the discharge of any of the CEO's duties under the Scheme, including a power or duty that has been delegated to the CEO under clause 82.

Clauses 82(3) and 83(2) of the Deemed Provisions require\ that the delegations in each case be in writing, and may be either general or subject to conditions.

### **FINANCIAL IMPLICATIONS**

There are no financial implications of this decision 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 process for the consideration whether or not to enter the Property on the heritage list will need to be conducted without any direct or indirect involvement of the Council, Councillors or any staff who were significantly involved in the earlier decision-making process.

The proposal that was put to the Court and that was referred to by Justice Archer in her decision on 18 September was that Council delegate the decision-making process to the CEO, and that the CEO then on-delegate this authority to the Manager Corporate & Community Services; the incumbent has recently commenced with the Shire and has no previous knowledge of or involvement with past listing processes.

The delegation to the CEO will encompass the whole of the process set out in clause 8(3) of the Deemed Provisions in relation to the entry of a place in the heritage list.

It is intended that the CEO will exercise the power to make a preliminary evaluation as to whether the Property ought to be entered in the Heritage List and the reasons for doing so, 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).

As put to the Court, the CEO will then on-delegate to the Manager Corporate & Community Services the further power to carry out any other consultation considered to be appropriate (under clause 8(3)(c) of the Deemed Provisions) and, following any consultation and consideration of any submissions made on the proposal, to actually determine whether or not to enter the Property in the heritage list (under clause 8(3)(d) of the Deemed Provisions).

A further element of the proposal that was put to the Court, and referred to by Justice Archer, is that the delegation to the CEO of the power to determine whether or not to enter the Property in the heritage list (and, accordingly, the on-delegation of that power by the CEO to the Manager Corporate & Community Services) is to be subject to a condition requiring that due regard be had to the recommendation of an independent heritage expert – with that expert to be appointed either by agreement between the Shire and Dain Pty Ltd, or by the President of the WA Chapter of the Australian Institute of Architects. The expert is also to be someone who has not previously been involved in any assessment of the Property and does not have any actual or perceived conflict of interest.

The Council, Councillors, Manager of Infrastructure or Manager of Development Services will not be involved in the appointing of the expert or any element of the review. The Manager Corporate & Community Services will liaise with the Shire's solicitor to ensure the process of the review is conducted promptly and fairly.



**OFFICER RECOMMENDATION/COUNCIL DECISION – ITEM NO 7.1**

**Moved: Cr Hohnen**

**Seconded: Cr Macintosh**

**That pursuant to clause 82 of the Deemed Provisions, the Council delegates to the CEO the exercise of the Shire's powers and the discharge of the Shire's duties under clause 8(3) of the Deemed Provisions in relation to the property at Lot 100, 52 The Esplanade, Peppermint Grove.**

**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 by agreement with the owner of the property (Dain Pty Ltd) or by the President of the WA Chapter of the Australian Institute of Architects.**

**CARRIED 6/0**

**8. NEW BUSINESS OF AN URGENT NATURE**

Nil

**9. MOTION TAKEN ON NOTICE**

Nil

**10. CONFIDENTIAL ITEMS OF BUSINESS**

Nil

**11. CLOSURE**

At 5.38pm, there being no further business the meeting closed.