

City of Melville 3 November 2020 ABF deputation

Item C20/5788 Independent Review – Cessation of Contract

Good evening Elected Members, fellow residents and the City officers.

Transparency and accountability are cornerstones of our democracy and principles that this Council is meant to embrace.

It has been 12 months to the day I submitted the petition seeking an Independent Review of the performance and conduct of the City's planning and building function, as a result of various building and consequential complaints since 2012 (Review). There has been little progress to move the Review forward, limited transparency and no constructive effort from the City's administration resolve any complaints.

I will cover 3 key areas in this deputation.

1. The Review objectives and benefits
2. The City Officers' report, and
3. The Recommendations

1. Objectives & Benefits

My objectives when submitting the petition were simple: I would like to see;

- a) Council proactively embrace accountability for the oversight of the administration's performance and conduct of its planning and building functions;
- b) the administration become far more transparent and accountable for its deficiencies;
- c) Council recognising the majority of my complaints over the last 8 years are valid and have merit;
- d) substantial changes in the City management of its building approvals, compliance and enforcement functions; and
- e) a step change in the City's culture to one that proactively listens to residents and acknowledges its deficiencies instead covering-up their failures, or worse still, using its wide discretion to dissuade those that dare complain.

All, so no one else suffers what I, and many others have put up with in pursuing such complaints.

Let's be clear; I do not expect to get anything out of this personally, to the contrary it will continue to cost me to contribute time and effort to help Council with its improvement efforts.

The community benefits are simple:

- a) Health and safety;
- b) confidence built forms within Melville are more likely to comply with appropriate approvals and relevant standards; and
- c) reduced costs to the ratepayers; by ensuring the City's administration get it's right the first time; and does not waste money going around in circle as I have done for 8 years.

That is there are significant community benefits if the Review is done properly.

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Let's consider the primary objective – Council proactively embrace accountability for the oversight of the administration's performance and conduct of its planning and building functions.

The Local Government Act (s 2.7) states Council's roles is to

(a) governs the local government's affairs; and

(b) **is responsible for the performance of the local government's functions.**

The Planning and Development and Building acts bestows significant roles, powers and discretion onto Council, which Council then delegates to the CEO. Any delegations should not be seen as an abrogation of Council's accountability for oversight and governance of the performance and conduct of those statutory planning and building functions. Council is elected to ensure these functions are properly and proficiently executed and Council to ultimately shoulder accountability for any known failures of these functions.

Over the past few years we have seen a number of reports highlighting serious concerns with the regulation and oversight of building services across Australia, including

- the February 2018 National Building Minister's Forum Building Confidence - Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia, and;
- the June 2019 WA Auditor General's Local Government Building Approvals Audit Report.

You all have been sent copies of these reports; both highlight the need for substantive improvements to the safety and quality of any building work.

WA has a reasonable building regulatory framework; however, the WA Auditor General's report highlights that proper execution of what we have remains is a significant issue. In short, the Auditor General found:

"The audit also identified opportunities for local government entities to strengthen their controls to reduce the risks of inappropriate permit approvals and improve the transparency of their building control activities.

"It was however disappointing to find that local government entities undertake limited monitoring and inspections of building works, and that compliance issues were not always resolved quickly. The Building Act 2011 provides local government entities with compliance and enforcement powers that can assist with ensuring buildings comply with permits and are safe, but that also act as a significant deterrent to anyone contemplating non-compliance. **However, we found these powers were little used.**"

I have many auditable examples to demonstrate the City is perhaps worse than those Councils audited; **examples Council needs to properly understand in order to improve.**

For example; you all should be aware that in December 2019 year I complained about a small patio on the property adjacent to mine. I alleged the patio did not meet the National Construction Code fire separation requirements, was inappropriately attached to a boundary wall without my consent, and the storm water run-off was directed into my property. The City's managers for legal services and building services were adamant there were no non-compliances; there were no problems.

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After much correspondence, my time and the intervention of the Department of Building and Energy the City reluctantly accepted that they were wrong and 7 months later started the process to issue building orders to have the illegal patio removed. The company that built the patio in 2017 has built hundreds of other patios within Melville; you must ask how many other patios built by this company are also non-compliant; particularly from a fire safety perspective?

However, 11 months on the illegal patio is still there and even yesterday the City's Manager Building Services could not, or would not, tell me what he was going to do about resolving the imminent building order non-compliance.

There is also the example of the lack of boundary retaining (see attachment); there is a clear issue.

I have been complaining since 2015 about the boundary structures on an adjoining property; something that has inhibited my ability to complete our family home. It should be clear from the attached photo that there is no wall; it is compacted sand. Yet, the City's building team provided retrospective approvals for this in 2017 on the basis it was a 'limestone boundary retaining wall'.

The City's past mayor, Russell Aubrey, past CEO Shane Silcox, current CEO Marten Tieleman and the responsible Director Mr Steve Cope have all been sent these pictures and structural engineers reports clearly stating this is not an adequate retaining wall; yet over 5 years on the issue is yet to be resolved, and there is no end in sight.

There appears to have been no change in the City's position this year. In July Mr Tieleman attended my property and saw this 'retaining wall' for himself; when asked for his opinion on if it was adequate retaining, he simply stated that he was not qualified to comment. Even as of yesterday the City's Manager Building Services refused to be drawn on what the City will do in relation to the lack of retaining; rather he stated that I have not provided any evidence that there was a retaining issue. Surely you can understand why I may not be a happy ratepayer after being treated like this.

The City has shown no contrition for its errors or the trouble it has caused, the CEO and the responsible Director been uncommunicative.

This demonstrates the City has not and is not changing its ways; re-enforcing the need to push ahead with the Independent Review to drive substantive change; particularly substantive cultural change.

Council, you need to ask yourselves that if the City get these 2 simple issues wrong, even after significant push back on my part; what else have they failed to do properly and proficiently?

Council, you have the primary accountability for the execution of the Building Act approvals, compliance and enforcement functions within the City of Melville.

The Independent Review, if done properly, will assist you to better understand the past issues with the City's building functions in order to properly frame a plan to improve your oversight and performance management of the City's planning and building functions.

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Improving the City's performance and conduct of its building functions has significant community benefit in terms of safety and compliance of built forms within the City.

2. The City Officers' Report.

There are a number of statements in the City Officer's report that I see as inaccurate and/or misleading. I will make comments on just three 3 issues to demonstrate this assertion;

Being the 1) Scope of Work, 2) the role of Council and 3) the list of current issues included as an attachment.

For example:

1. The City has not stated that the Review scope of work for the was agreed in July by Mayor Gear, Deputy Mayor Nic Pazolli, the City's Director Corporate Services - Mr Alan Ferris, Mr Dayle Kenny and myself. The scope of work considered the principles of natural justice. This scope of work formed the basis of the August RFP to which Quantum responded to. Quantum did not get past step 1 before withdrawing. I did not have any discussions with Quantum in relation to my specific issues. Anything Quantum may say in any report provided to Council is primarily based on information provided by the City from its own perspective.
2. The City Officers' report states "...the investigations of such allegations is outside the role and function of the Council".

This is misleading and/or a misdirection in my view. My building complaints relate to the failure of the City's administration to properly perform its building functions; something the Local Government Act clearly states Council is accountable for. This principle has been re-enforced in the recent Report into the Inquiry into the Shire of Toodyay and the recent Town of Cambridge Supreme Court Decision in which the Justice stated:

"Deficiencies in the day to day management of a local government will not provide an adequate foundation for a conclusion that it is inappropriate for the council to act or continue to act as the governing body unless those day to day management deficiencies can be traced back to some failing or suspected failing in the operation of the council in its capacity as the governing body."

That is, in my view, it could be argued that it follows that if Council does not act to consider substantiated allegations about deficiencies in the administration's day to day operations, in this case its planning and building functions; **then Council may have failed in its capacity as the governing body.**

3. The City Officers' report has stated: "A summary of the current building issues has been included in a confidential attachment. It is noted that there are two outstanding issues one of which is the dividing fence which requires agreement between two neighbours".

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The confidential list of current building issues was not freely provided to me, a copy of which is however attached. I have reviewed the list and it is not clear who produced it, the City or Quantum. Could I please ask the administration to clarify who authored the list?

This list is of 6 issues that have primarily come to a head post the submission of the petition; it does not include a list of the unresolved complaints dating back to 2012 to which the petition referred.

This list is absent significant facts to enable Council to properly understand the issues and the City's failures; I believe it contains false and/or misleading statements. This appears to be a case of the City obfuscating and attempting to **gloss over** its significant failures. This is why we need the Review. I make the following short observations about the items on the list.

No. 1 – the illegal patio. This is the example that I have outlined above; the building order time has elapsed, and the building order has not been complied with 11 months after the glaringly obvious non-compliances were reported. A clear failure on the City's part.

No. 2 - the illegal pool spa. The City has told the owners a number of times since 2015 that building approvals / pool safety fencing was required prior to using the spa. In early 2020 the City was informed that the pool spa was in operation without approvals and pool safety fencing. Why hasn't the owner been fined and why has it taken more than 7 months to address this significant pool safety issue?

No. 3 – Pool deck and retaining wall order. The City has not told you that this illegal pool deck was built with their full knowledge, under their noses; and in fact was the cause of much nocturnal noise that, only after much ado, led to the City to initiate prosecution of the neighbour for a number of breaches of the multiple noise abatement directions it issued as a result of that noisy nocturnal building work (which they later substantially discontinued without proper explanation). CEO Tieleman was informed of the possible illegal building work in April 2019, but seemingly did nothing about it until earlier this year after, I believe, the Dept. of Building and Energy raised the issues with him.

The City has not told Council that two building orders have actually been issued to remove the illegal pool deck, the first on 30 July was deficient requiring another to be issued on 5 October. Neither building order makes any reference to the 'retaining wall'. The City has not mentioned that the height of the illegal pool deck is also circa 400 mm higher than a previous planning approval, as evidenced by a 2016 level survey by qualified surveyor I provided them.

No. 4 – the front fence finish. The green screen fence adjacent the boundary of my property is less than 1800 mm in height for the majority of its length and thus not a dividing fence as defined by the Dividing Fences Act. If I had dividing fence issues then I would pursue them in accordance with the Dividing Fences Act via the Magistrates Court. In 2012 the City tried unsuccessfully to fob off my complaints as dividing fence issues outside of their jurisdiction, it seems they are reverting to the same approach. My issues relate primarily to the City's failure to properly perform its building functions properly as defined by the Building Act.

The City has also not told you that this structure was initially built without any approvals in 2015 and it was only after my complaints to the Public Sector Commission that in October 2016 the City

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acknowledged the structure needed building approvals. Subsequently the City issued retrospective planning and building approvals in 2017 when the side facing my property was not finished as it is today. That retrospective approval is most likely to be deficient in a number of other ways.

The City appears to be seeking to misdirect Council by telling you that it has tried to mediate this matter, and then seeks to blame me for the current state of affairs. It has not told Council that Part 6 of the Building Act has a defined process by which the person responsible for the building work must get consents from adjoining owners for such boundary structures and access to land, and that any disputes on such issues are dealt with in the Magistrates Court. The City has no jurisdiction to deal with such Building Act consent matters; other than enforcement action for failure to comply with the building approvals and consent requirements. The City has refused to take action against my neighbour for failing to follow these processes when the screen fence/wall was first constructed in 2015 and the City failed to address the issues prior to issuing the retrospective approval in 2017, long before I raised the issue of the unacceptable fence finish with CEO Tieleman.

No. 5 – foundations on dividing wall. This is related to the retaining wall as described in the previous example, for which the photos are attached. Again, the City has not told you that it issued the deficient retrospective approval for this screen fence/wall in 2017, and it is only now that that they are finally doing something about it over 5 years after I first raised the issues. I am not sure it is appropriate for the City to issue a second retrospective approval for exactly the same structure; in any event it should not consider issuing a retrospective approval for something that is not already built.

No. 6 – Patio application. The City has not told you the true status. Council should be aware that the Governance Committee has not yet responded to me in relation to the conduct complaint I submitted against the CEO for failing to properly follow LPP 1.1 in relation to my development application; that is not ensuring the application went to a DAU, and then potentially to Council for a decision.

I should note the City made untruthful statements about the patio approval history in its 3 July EMB and in responses to public questions at the July OMC, for example the City stated “a perusal of the City’s records it appears that the ratepayer would have been able to finalise the building of his patio as early as 2014.” This is simply not true. The City’s records will show you that the demolition permit for the large limestone wall that was encroaching onto my land where the patio was to be built was not substantially completed until 2015.

Council has the right to know all the facts, not just the Administration’s abridged take on those facts. Council has the right to know the full truth.

These are yet further examples of why we need the Review.

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3 Recommendations:

Firstly, I agree the QCA contract should be terminated as it appears their capabilities do not fit with the Review requirements as outlined in the August RFP.

Secondly, given my concerns with the City Officers' report I ask that Council add a caveat to recommendation 1 to make it clear that Council noting the City Officer's report should not be construed as Council endorsement and/or approval of its contents and/or assertions contained therein.

Thirdly, I ask that Council include a motion along the lines of:

Council directs the CEO to use his reasonable endeavour to assist Mr McLerie at his cost to obtain a copy of the 19 June 2018 SAT hearing transcript in relation to the Ince Road Attadale property issues.

If Council and the CEO are committed to the principles of transparency, then this motion should not require any justification given there would be no cost to the City. This transcript clearly outlines the City's position put to SAT on a number of matters in relation to Ince Road Attadale property issues and the resulting damage to my property, one of my significant unresolved complaints.

Lastly, I struggle to understand what is actually meant by the recommendation 3, the substantive recommendation, particularly given the scope had already been agreed, I am not aware of the issues and there were no subsequent discussions on such.

In any event I ask that this motion be changed to something along the lines of:

3. That Council directs the CEO to engage Ms Bronwyn Wier to

- review the existing scope of work with the view to proposing changes to be agreed by the Governance Committee, the City and Mr Kenny and Mr McLerie.
- undertake an initial review of a sample of 3 issues from Mr D Kenny and an initial sample of 5 issues from Mr M McLerie.
- provide a report to the Governance Committee Chair with a preliminary opinion on the sample issues and a proposed path forward to address the remaining issues by no latter than 20 December 2020.

In relation to the number of issues for initial review I believe it is prudent to ensure an adequate sample size to demonstrate a trend or pattern. I have 11 key planning and building complaints and a number of other consequential complaints. I believe that an initial review of at least a sample of 5 of my issues is required to demonstrate a trend in order for Council to properly frame further activities.

The proposed reviewer, Ms Bronwyn Weir, has already made a proposal to the City to assist with the Review in response to the City's August RFP. I assume Ms Weir would be ready to start on an hourly basis.

Ms Weir is an experienced lawyer with significant national experience in building approval, compliance and enforcement regimes. Ms Weir is also a founding Board member of the International Building Quality Centre at the University of Canberra and part of the Expert Advisory Group assisting the Australian Building Codes

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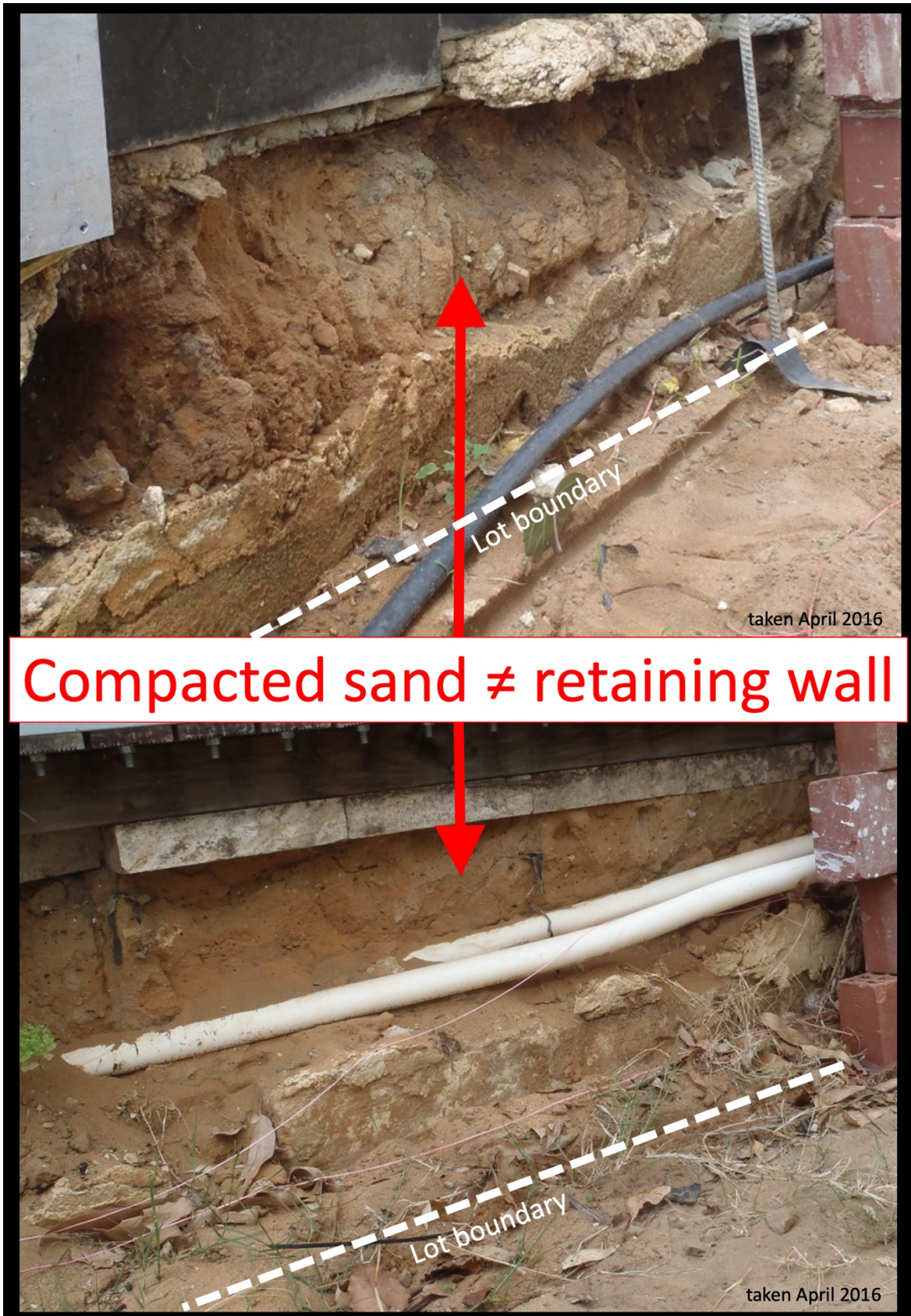
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Board to undertake work to assist all state and territories to implement the recommendations from the Building Confidence Report.

Ms Weir's skills and experience appears a good fit with the requirements of the review of an initial sample of the complaints.

I happy for any Elected Member to attend my home to properly familiarise themselves with the issues prior to making any decisions on item C20/5788.

Attachment: boundary 'retaining wall'



Attachment: City Officer’s confidential attachment (I had to spend \$30 to get under FOI)

Summary of Current Building Issues for Mr McLerie

No	Issue	Comment
1	██████████ Patio orders	A building order has been issued on 01 October 2020, owners working to a complying solution.
2	██████████ Spa bath building permit	A proposed building order has been issued on 08 October 2020
3	██████████ pool deck and retaining wall orders	A building order has been issued on 05 October 2020, owners indicate they will work to a complying solution.
4	12 Beach street and Beach street dividing fence finish	<p>The City has attempted in the past to mediate this matter, a planning approval DA-2017-417,</p> <p>Retrospective Front Fence condition: <i>The surface finish of the front fence within the primary street setback area shall be finished to the satisfaction of the City,</i></p> <p>The condition above is to provide a satisfactory finish to McLerie’s elevation, however McLerie has refused ██████████ permission to access the land, so the condition cannot be met.</p>
5	Foundations that may be included in the construction of, and on which the dividing wall between 12 Beach street and ██████████ is located	<p>The foundation at ██████████ have been previously certified as structurally adequate by ██████████ engineer,</p> <p>The City expects to receive a (retrospective) building approval certificate application for the wall/dividing fence, pool stone deck, stormwater containment.</p>
6	12 Beach street patio application	<p>McLerie recent planning application was refused, DA-2020-19, Boundary Wall and Patio as: The proposal does not meet the development standards contained in Clause 6 of Local Planning Policy 3.1 - Residential Development or the Design Principles contained in Clause 5.1.3 Lot Boundary Setback of State Planning Policy 7.3 Residential Design Codes Volume 1.</p> <p>No other application nor an appeal against the Cty’s refusal of the planning application has been received.</p>



taken April 2016

Compacted sand \neq retaining wall



taken April 2016