

14 November 2019

BY EMAIL

Louis Hitchcock
Executive Manager Governance and Legal Services
City of Melville
10 Almondbury Road
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Dear Mr Hitchcock

Delegated Authority: Responsible Authority Report to Joint Development Assessment Panel

We refer to your email dated 27 September 2019.

1. Question

1.1 The City of Melville (**City**) has sought our advice on:

- (a) whether the Council may pass a resolution to:
 - (i) withdraw the delegated authority that authorises the City's planning officers to submit a responsible authority report (**RAR**) to the Metro Central Joint Development Assessment Panel (**JDAP**) (without the Council's approval) (**Delegation**); and
 - (ii) instruct the CEO to present all RARs to Council for final approval before being submitted to JDAP; and
- (b) if the answer to (a) is 'yes', an indication of how the Council can provide an RAR to the JDAP.

2. Answer

2.1 For the detailed reasons we have given at section 3 below, our advice may be summarised as follows:

- (a) the Council may withdraw the current Delegation and require the CEO to present all RARs to the Council for:
 - (i) its consideration and comment; and
 - (ii) its approval to submit an RAR to the JDAP;
- (b) notwithstanding our advice in 2.1(a), it would be improper for the Council to require any modifications to be made to the RAR by the planning officer who prepared the RAR. If the Council does influence the officer's report, then the following consequences may arise:
 - (i) the JDAP may reject the RAR and determine the development application in the absence of an RAR;

- (ii) the Minister for Planning may become aware of the Council's conduct and intervene by issuing a direction requesting that the City's planning officers prepare an independent RAR that complies with the statutory framework; or
 - (iii) the RAR may be accepted by the JDAP in error and, as a consequence, the decision of the JDAP would be susceptible to legal challenge in the Supreme Court on administrative law grounds;
- (c) the proper process is for the Council to:
 - (i) consider the assessment of the development application and pass a resolution commenting on the content and recommendations in the RAR prepared by the planning officer, which may include any alterations that the Council considers appropriate if its members form a different view to the planning officer; and
 - (ii) require that the relevant officer attach the minutes of the meeting of Council to the RAR for consideration by the JDAP;
- (d) if the Council decides not to approve the submission of the RAR to the JDAP (because it does not agree with the recommendation of the planning officer or otherwise), the JDAP has the power to request separate technical advice from the City's officers or determine the development application without a RAR;
- (e) the City must ensure that it has sufficient time in the assessment process to hold a Special Council meeting to authorise the submission of the RAR to the JDAP within the prescribed time period (being either 48 days or 78 days of the application being received); and
- (f) if the current Delegation is withdrawn, the RAR may be submitted to the JDAP by the CEO after the RAR has been approved for submission by a resolution of the Council. The City may wish to consider amending the Delegation to reflect this process.

3. Detailed reasons

Relevant statutory provisions

- 3.1 The *Planning and Development (Development Assessment Panel) Regulations 2011* (WA) (**DAP Regulations**) set out the process for the assessment and determination of applications by the JDAP.
- 3.2 Regulation 12(2) of the DAP Regulations states that a 'responsible authority' to which a JDAP application is made must give the presiding members of the JDAP a report on the development application 'in a form approved by the Director General' and with sufficient information for the JDAP to determine the development application.
- 3.3 Relevantly, for the present circumstances, a 'responsible authority' is defined as the local government responsible for enforcing the observance of the relevant local planning scheme.¹
- 3.4 The approved form for an RAR is published on the website of the Department of Planning, Lands and Heritage. The approved form refers to an 'authorising officer' and requires the 'officer' to complete an assessment of the development application against the relevant planning framework and make a recommendation to the JDAP on how the application should be determined, including appropriate conditions of approval or reasons for refusal, whichever is applicable. The approved form for an RAR clearly distinguishes between the recommendation of the 'authorising officer' and the recommendation of the 'Council'.
- 3.5 Regulation 40(5) of the DAP Regulations states that:

'The Director General may issue practice notes about the practice and procedure of DAPs and each DAP must comply with those practice notes' (emphasis added).
- 3.6 In accordance with regulation 40(5), the Director General has issued the 'Development Assessment Panel Practice Notes' dated September 2018 and the 'DAP Standing Orders 2017' dated September 2018.

¹ *Planning and Development Act 2005* (WA).

- 3.7 Practice Note 5 specifically states that:

'The RAR is to be provided by the responsible authority's planning officer.'

...

The RAR is not a resolution of the relevant local government's council, it is the professional opinion of the local government's planning officer who assessed the application. It is improper for Councillors of a local government to influence the planning officer's report in any way.

If the local government council wishes to make a statement regarding an application before a DAP, it should do so by making a submission either by including a copy of the Council Resolution as an attachment to the RAR or via an approved deputation at the DAP meeting' (emphasis added).

- 3.8 In addition, clause 2.10 of the DAP Standing Orders provides that the JDAP is to 'invite the responsible authority officer preparing an [RAR] to attend' the JDAP meeting.
- 3.9 Based on this statutory framework, it is obvious that the RAR is intended to be a technical report prepared by a person with town planning expertise to assist the JDAP with its determination of a development application, and that it is not a resolution of Council.

Potential consequences if Council influences the RAR prepared by an authorising officer

- 3.10 If an RAR prepared by a planning officer is influenced by the Council, resulting in the planning officer modifying his or her recommendation, and that RAR is submitted to the JDAP, then the following consequences may arise:
- (a) the JDAP may:
 - (i) reject the RAR if it is apparent that the RAR does not comply with the DAP Regulations and Practice Note 5 (because it is not an RAR prepared independently by the planning officer); and
 - (ii) determine the development application in the absence of an RAR;²
 - (b) the Minister for Planning may become aware of the Council's conduct and intervene by issuing a direction requesting that the City's planning officers prepare an independent RAR that complies with the DAP Regulations and is not affected by the views of Council;³ or
 - (c) the RAR may be accepted by the JDAP in error and, as a consequence, the decision of the JDAP would be susceptible to legal challenge in the Supreme Court on administrative law grounds by the applicant whose interests might be adversely affected.

Council may approve or endorse the RAR prior to submission to the JDAP

- 3.11 In the present circumstances, the Delegation relevantly provides the CEO with the authority to make recommendations to the JDAP, subject to certain conditions. (See Delegation No. DA-020, last reviewed on 18 June 2019).
- 3.12 In our view, the Council may withdraw the current Delegation and require the CEO to present all RARs to the Council for:
- (a) its consideration and any comments that it may have on the assessment of the proposed development and relevant planning matters; and
 - (b) its approval to submit the RAR to the JDAP.
- 3.13 As explained above, the RAR is intended to be a technical report prepared by the City's planning officers and, consequently, in our view, it would be improper for the Council to require the author

² Regulation 12(7) of the DAP Regulations.

³ Regulation 52 of the DAP Regulations.

of the RAR to modified the findings of the planning assessment and the recommendations described in the RAR.

- 3.14 However, the position of the Council on a proposed development may still be provided to the JDAP. In our view, the proper process to achieve this outcome is for the Council to:
- (a) consider the assessment of the development application and pass a resolution commenting on the content and recommendations in the RAR prepared by the planning officer, including any alterations that the Council considers appropriate if its members form a different view to the planning officer; and
 - (b) require that the relevant officer attach the minutes of the meeting of Council to the RAR for consideration by the JDAP.

Potential consequences if Council does not approve the submission of the RAR to JDAP

- 3.15 If the Council decides not to approve the submission of the RAR to the JDAP (because it does not agree with the recommendation of the planning officer or otherwise), then:
- (a) the Minister for Planning may intervene by issuing a direction requesting documents or information from the City's planning officers to assist the JDAP with determining the development application;⁴
 - (b) the JDAP may request separate technical advice and assistance from the City's officers prior to determining the development application;⁵ or
 - (c) the JDAP may simply determine the development application in the absence of an RAR or any other advice,⁶ if it considers that it has sufficient information to make a decision.

Submission of RAR if current Delegation is withdrawn

- 3.16 If the current Delegation is withdrawn, the RAR may be submitted to the JDAP by the CEO after the RAR has been considered and approved for submission by a resolution of the Council.
- 3.17 From an administrative perspective, the City may wish to consider amending the Delegation to give the CEO the authority to submit an RAR to the JDAP subject to a condition stipulating that the RAR must first be approved or endorsed by the Council. The CEO may then sub-delegate to the City's planning officers the task of submitting the RAR to the JDAP.
- 3.18 If the City takes this approach to the submission of RARs, the City must ensure that it has sufficient time in the assessment process to hold a Special Council meeting to approve the submission of the RARs to the JDAP to comply with the periods prescribed in the DAP Regulations (being either 48 days or 78 days of the application being received by the City, with the longer period applying where advertising is required).

Should you wish to discuss this matter in more detail, please contact Nada Raphael.

Yours faithfully

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⁴ Regulation 52 of the DAP Regulation.

⁵ Regulation 13(1) of the DAP Regulations.

⁶ Regulation 12(7) of the DAP Regulations.