

Presented to	Ordinary Meeting of the Council 13 December 2022
Related to Item	UP22/4005 – Kardinya Activity Centre Plan and Associated Scheme Amendment
Submitted by	Gavin Ponton, Manager Strategic Urban Planning
Attachments	Nil.

BACKGROUND

The above item was deferred at the Ordinary Meeting of Council held 15 November 2022. Discussion on the item raised the following issues for further consideration:

- Implications of Council not progressing the advertising of the modification to the proposed Activity Centre Plan as directed by the Western Australian Planning Commission.
- Implications of Council not initiating the proposed amendment to Local Planning Scheme 6, to give effect to the proposed Activity Centre Plan (ACP).
- Further information on Restrictive Covenants proposed to be extinguished by the Scheme Amendment.

Further information on these matters is provided below.

DETAILS:

Implications of Not Progressing the Advertising of Modifications to the Proposed ACP

The City is required to advertise the proposed ACP with the modifications as identified by the Western Australian Planning Commission (WAPC). The WAPC direction does not provide for the Council to consider further changes to the ACP or to reach a decision not to advertise the ACP.

A decision to not undertake the advertising of the ACP would represent a non-compliance with the direction of the WAPC. Preparation of an ACP for a District Centre is a requirement of State Planning Policy and accordingly a decision to not progress an ACP for the site may be viewed as contrary to the State Planning Framework.

The Planning Regulations do not specifically envisage a local government not acting on a WAPC direction, however likely responses by the WAPC may involve:

- Intervention by the WAPC to progress the advertising of the ACP, with potential recovery of costs by the WAPC.
- Potential escalation of the issue to the Minister for Planning by the WAPC due to failure to implement or observe the local planning scheme, with subsequent intervention by the Minister for Planning, including the possibility of the Minister assuming the role of the local government to progress the determination of the ACP.
- The proponent seeking Application for Review to the State Administrative Title, due to non-determination of the ACP.
- The proponent seeking Ministerial intervention in the process on the basis that they are aggrieved by a failure to implement or observe the local planning scheme.

Each of the above identified scenarios are likely to diminish the Council's ability to influence the final content of the ACP.

In advertising the ACP, the Council and the community will have the opportunity to shape the final ACP through provision of additional feedback on the proposed modifications and to reiterate issues raised in the first round of advertising. In providing feedback to the WAPC following the advertising period, Council would also have an opportunity to highlight any specific issues with the process, the merit of the WAPC changes and the need for the further advertising period.

Implications of Not Initiating the Proposed Scheme Amendment Associated with the Kardinya ACP:

The City is required to make a decision to either initiate the scheme amendment, initiate the scheme amendment with modifications or to not initiate the scheme amendment. A scheme amendment is required in this case to give effect to the associated ACP. It would still be open to the Council to not initiate the scheme amendment if there were concerns regarding the content. The applicant would then have opportunity to respond to these concerns.

The Officer report on this item highlights that although the amendment is lawful and based on sound planning grounds, there are a number of matters that will require consideration by the Council ahead of a final decision on the amendment. These matters include a decision on the merits of the component of the amendment seeking to extinguish easements and restrictive contents. The officer recommendation is to initiate the amendment which will trigger an opportunity for stakeholder feedback on the amendment, which will in turn inform a final recommendation by the Council.

An amendment to LPS6 will ultimately be required to support the operation of the proposed ACP (which is also a requirement). If a suitable amendment is not able to be progressed in a timely manner, then the applicant may request involvement of the Minister for Planning in the process.

The Minister for Planning has specific powers under the Planning and Development Act to order a local government to prepare or adopt a scheme amendment where representation is made that the scheme amendment ought to have been made. The circumstances of the subject amendment would potentially meet the pre-requisites for the Minister to become involved. Under this response the Minister may direct the City to progress the amendment and specify a time limit for this to occur. A failure to meet the direction would allow the Minister to issue a notice ordering compliance with the direction within a further time-period. Non-compliance with the notice would allow the Minister the option of taking all steps to progress the amendment as if the Minister were the local government. All expenses incurred by the Minister under this scenario may be recovered from the local government as a debt.

The Minister's intervention in the scheme amendment process is likely to diminish the Council's ability to influence the final content of the scheme amendment. As noted above, in this case the recommendation is initiate the scheme amendment and commence advertising to enable understanding of issues amongst stakeholders and inform preparation of appropriate solutions. Following conclusion of the advertising period, it would be open for the Council to recommend modifications to the proposed amendment in response to any concerns.

Extinguishing of Restrictive Covenants/Easements Through Proposed Scheme Amendment

The report highlights that one outcome of the proposed scheme amendment is the extinguishment of a number of accessway easements and a restrictive covenant which apply to the site of the Kardinya Shopping Centre. The three specific items proposed to be extinguished by the amendment are:

- A restrictive covenant which limits the sale of alcohol on the Kardinya Shopping Centre site
- A north south easement which allows adjoining owners to traverse portion of the Kardinya Shopping Centre site
- An east-west easement which provides for access between North Lake Road and land east of the Kardinya Shopping Centre.

Details of these items and the implications of the proposed scheme amendment are discussed in the Council agenda item.

Planning legislation provides this opportunity to remove an encumbrance on land where that encumbrance impedes or conflicts with a purpose of the Scheme. The Planning legislation approach provides an alternative pathway to removing encumbrances other than through the land administration process – which generally involves obtaining the approval of all related owners of land.

As noted in the Agenda item the removal of the Restrictive Covenant and Easements is provided for under planning legislation and is considered to promote the planning objectives for the wider precinct.

Discussion in the report also acknowledges that the removal of existing rights of a property owner in favour of another property owner via the scheme amendment process warrants careful consideration. The recommended approach is to initiate the scheme amendment and commence advertising, which in turn will provide opportunity for all stakeholders to provide feedback on the content of the amendment. Feedback from stakeholders will then assist in informing future Council decisions on the proposal.