



Our Ref  
Your Ref

DM:SM:KALA:46349

7 September 2020

Ms Rhonda Hardy  
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Dear Rhonda

#### **Draft Metronet East Redevelopment Scheme Amendment**

I am writing to provide the advice sought by the City initially in the Mitchell Brooks email of 5 August, in regard to the draft Metronet Redevelopment Scheme, and the *Metropolitan Redevelopment Authority Regulations 2011 (MRA Regulations)* amendment relating to it.

The 5 August email having outlined the scope of the work sought a quote, and Chris Lodge's email of 20 August confirmed the instructions, provided further documents, and issued a purchase order.

#### **Background facts**

The background facts are set out in item 1-12 inclusive of the 5 August email. Those facts are supplemented by the Mitchell Brooks email of 27 August and the documents attached to that email, particularly the 10 March 2020 letter from Development WA to Peter Varelis, and the Peter Varelis reply of 19 March 2020. I have relied on those background facts in providing the advice in this letter, and it is unnecessary for me to repeat those facts, save for the following which provide a context for the advice and comments I provide below:

- (a) The Metronet East Redevelopment Scheme amendment incorporates the Metronet East Forrestfield Project Area (**Project Area**) into the Midland Redevelopment Scheme, now re-named the Metronet East Redevelopment Scheme (**MER Scheme**).
- (b) On 13 March 2020 Development WA (**DEVWA** or the **Authority**) referred a preliminary draft of the MER Scheme amendment to the City for comment. That version was not referred to the public, only relevant stakeholders including the City. This was presumably the local government consultation required by s.37(1)(a) of the MRA Act.

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- (c) On 15 April 2020, the City submitted its comments on the preliminary draft MER Scheme amendment to DEVWA.
- (d) On 3 August 2020, the City received a letter from DEVWA advising the City of the commencement of public comment on the draft MER Scheme amendment. Under s.43(3) of the *Metropolitan Redevelopment Authority Act 2011 (MRA Act)*, the public submission period must be not less than 60 days after the day on which the notice is published in the Gazette. As the City received the DEVWA letter advising of the commencement of public comment on 3 August, I assume the 60 day public notice period will expire on or about 2 October 2020.
- (e) I understand this advice is required to assist the City in preparing its comments on the draft MER Scheme provisions.
- (f) There has been agreement at officer level that the City will carry out work on common infrastructure within the LPS 3 Development Contribution Area (**DCA**), and that contribution from the Authority in respect of the Project Area will be appropriate. It appears from the documents that the principal infrastructure areas that may be the subject of contribution are in respect of roads, drainage and perhaps POS. The DEVWA email of 14 August 2020, amongst other things, confirms some of the other elements under consideration in regard to the CIW contribution.
- (g) It is contemplated that there will be a DCP prepared by DEVWA for the Project Area, under the MER Scheme, and a DCP for the Forrestfield North Residential Precinct (**Residential Precinct**) prepared by the City under the City's LPS 3.

**Advice required**

The City's 5 August 2020 email sets out the advice required as follows:

1. Advise any statutory or legal aspects of the draft MER Scheme that should be amended to ensure the City's and community interests in the planning and development process are protected and represented.
2. Advise whether the draft MER Scheme provides for an appropriate planning and assessment process. Provide any recommendations to improve the process to ensure the City's and community interests are protected.
3. Advise whether the draft MER Scheme provides a process for the City and the community to be appropriately consulted through the consideration of planning applications.
4. Advise whether the draft MER Scheme provides the City an appropriate opportunity to review designs for future infrastructure that will, at some stage in the future, be handed over to the City.

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5. Advise whether DCP programs are capable of allowing for common infrastructure arrangements to cross over the MER Scheme and the City's LPS 3, and if not, advise what needs to be amended to ensure appropriate and fair sharing of common infrastructure should apportionment analysis indicate a need for sharing of infrastructure costs of schemes.
6. Advise of any other relevant aspects of the draft MER Scheme which may adversely impact the City's and community's interests.

I offer my advice and comments as follows.

#### **Advice and comments**

##### **A. General comments**

- A.1 Ss.18 and 19 of the MRA Act provide support for the City's objective of achieving from the Project Area cost contributions for infrastructure provided in the Residential Precinct, but which provide benefit for development in the Project Area. In that regard, I mention the following:
  - (a) S.18 of the MRA Act gives power to the Authority, for the purpose of performing its functions, to amongst other things, alter, develop and improve land (s.18(1)(b)).
  - (b) S.19(3) of the MRA Act provides that the Authority may pay for the carrying out of any work on land that is contiguous with a Redevelopment Area if the work is, in the opinion of the Authority, directly related to the improvement of the Redevelopment Area or the functions of the Authority.
  - (c) It may be possible for the Residential Precinct to be treated as 'land' within the sense of that term in s.19(3), and as such it could be regarded as land that is contiguous with the Project Area, which is a Redevelopment Area under the MRA Act.
- A.2 S.7.3(3)(c) in Chapter 7 of the draft MER Scheme provides for DCPs to be prepared and reviewed generally in accordance with SPP 3.6, and to contain detailed information on matters including need and nexus, efficiency and certainty, and equity and consistency.
- A.3 There is nothing in the MRA Act or in the draft MER Scheme that would prevent provision being made under the MER Scheme for contribution to be made to the City for the benefit of a DCP prepared for the Residential Precinct, providing contribution to the cost of infrastructure works provided in the Residential Precinct, but which benefit the Project Area. In fact, s.19(3) gives support for the notion.
- A.4 The draft MER Scheme applies the power given to the Authority under s.19(3) of the MRA Act through s.7.3(4)(h) as follows:

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(a) S.7.3(1) provides –

‘1. The Authority may prepare a Development Contribution Plan to plan for the provision and funding of Development Infrastructure for any Development Contribution Area (referred to in this chapter as ‘the Contribution Area’).

(b) S.7.4(h) provides –

‘The Development Contribution Plan shall specify:

...

(h) the method of allocating and calculating the Development Contribution applicable to each land holding and land owner in the Contribution Area ... or if Development Infrastructure is shared within and outside of the Contribution Area/Scheme Area on the basis of the need and nexus of a Development Infrastructure; ...’.

A.5 While s.19 of the MRA Act offers support for the notion of reciprocity in contributions between the Project Area under the control of the Authority (through a DCP or otherwise), and a DCP in the Residential Precinct, under the control of the City, the potential for the City to extend its influence beyond the Scheme Area of LPS 3 into the Project Area is restricted having regard to the following:

- (a) Under s.51 of the MRA Act, upon the draft MER Scheme coming into effect, the City’s LPS 3 will cease to apply to land within the area of the MER Scheme (MRA Act s.51(1)).
- (b) Reg.70(1) of the *Planning and Development (Local Planning Schemes) Regulations 2015 (LPS Regulations)* provides that a local government may determine that an area of land within a Scheme Area (in this case the Scheme Area of LPS 3) is a Development Contribution Area if development or subdivision of land would require the provision of infrastructure or facilities in the area to support the development or subdivision.
- (c) Reg.71(1) provides that a LG must prepare a DCP for each area identified in a LPS as a DCA. Reg.71(3) provides that a DCP is prepared for the purpose of setting out who is to contribute to the cost of providing infrastructure or facilities in a DCA and how those contributions are to be determined.
- (d) Given that s.51(1) of the MRA Act would disapply the provisions of the City’s LPS 3 in the Project Area when the MER Scheme comes into

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operation, and would disapply also therefore the provisions of a DCP prepared for the Residential Precinct, it is not open to the City to make a provision in the DCP for the Residential Precinct that would have the effect of imposing a contribution obligation on land within the Project Area.

- A.6 The fact that the City is not able to impose a contribution obligation on land in the Project Area in my opinion does not prevent the Authority from making provision, pursuant to the power given in s.19(3) of the MRA Act and s.7.4(h) of the MER Scheme, to help pay for the carrying out of work within the City's Residential Precinct that in the opinion of the Authority directly relates to the improvement of the Project Area.
- A.7 The City's DCP would need to make provision for the DCP to receive contributions from the Authority in consideration of infrastructure benefits to the Project Area (or more appropriately, provided to a DCA established for the whole or a part of the Project Area). The value of the infrastructure benefits provided and the amount of the contribution received should directly or indirectly be related.
- A.8 I assume from copies of correspondence supplied to me that the infrastructure likely to be the subject of contribution would include infrastructure related to drainage, roads, and perhaps POS.
- A.9 I mention also that at present, the Project Area is within the Redevelopment Area of the Authority, and that does not disapply the City's LPS 3. It remains open for the City to continue with the preparation of an Activity Centre Plan (ACP) for the Project Area, and I note the intention to do so is specifically mentioned in the City's (P Varelis) letter of 19 March to DEVWA.
- A.10 Clearly also the Authority (DEVWA) in the second last paragraph of its letter of 10 March 2020, contemplates that a DCP will be prepared by the Authority for the Project Area, and a DCP will be prepared by the City for the residential precinct and further:
  - (a) the City will provide advice on the scope and costs to be included in each DCP;
  - (b) the proposed apportionment of contribution costs based on need and nexus;
  - (c) the proposed funding model;
  - (d) the priority and timing for staged delivery of the proposed infrastructure item;
  - (e) the proposed management and administration of the DCPs; and
  - (f) the proposed timing for the drafting and adoption of the DCPs.

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- A.11 That expectation at least indicates an acceptance by DEVWA that the reciprocal operation of DCPs between the residential precinct (under the City's DCP) and the Project Area (under the Authority's DCP) can be delivered, and it should be aimed at.
- A.12 In my opinion, having regard to s.19(3) of the MRA Act, a significant degree of reciprocity between parallel DCPs can be achieved, though it is likely to be in the form:
- (a) the City preparing the scope and costing for mutually beneficial CIWs; and
  - (b) the City carrying out the mutually beneficial CIWs within the Residential Precinct; and
  - (c) the City demonstrating to, and satisfying the Authority, as to the value of the work done by the City under its DCP that benefits the Project Area, perhaps having regard to need/nexus, and consistency/uniformity, and equity, considerations (as per LPS 3, cl. 6.5.6; and SPP 3.6, para 5.2 and model text cl. 6.3.6 principles).
- A.13 On the information presently available to me, it seems to me possible that the City may provide further contribution for a DCP prepared under the MER Scheme, by carrying out work perhaps under contract for the Authority, within the Project Area. From the time of the coming into operation of the Project Area amendments in the MER Scheme, the City's LPS 3 will disapply in the Project Area, and the City will have no authority under its LPS 3 to carry out work in the Project Area. If the City carries out work on CIWs, in particular in regard to common drainage issues, and common roads, it may make good sense from a planning and administrative point of view for the City to continue its work into the Project Area. Perhaps any work carried out by the City in the Project Area will need to be under a contract between the Authority and the City. I can at this stage contemplate the possibility of such a contract being made, but if the notion is to be pursued, I recommend that the City obtain further advice on the specific elements of any proposed contract. It may be relevant that the Project Area is within the district of the City, even if it will cease to be within the Scheme Area of LPS 3 from the time of the coming into operation of the MER Scheme amendment which incorporates the Project Area into the MER Scheme area.

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**B. Advice and comments on the questions in the Scope of Works**

**Question B1: Advising on statutory or legal aspects of the draft Metronet East Redevelopment Scheme that should be amended to ensure the City's and community's interests in the planning and development process are protected and represented**

**Advice and comments on question B1**

B1.1 In s.7.3(3) of the Draft MER Scheme it is provided –

‘(3) The Development Contribution Plans are to be prepared and reviewed generally in accordance with State Planning Policy 3.6 – Infrastructure Contributions and contain detailed information as required but not limited to the following:

- a) Need and nexus;
- b) Efficiency and certainty;
- c) Equity and consistency;
- d) ...
- e) ....’.

B1.2 In regard to that provision, I recommend consideration being given to the expansion of the equity and consistency principle so as to allow for the principles of equity and consistency to be considered across DCP boundaries, including boundaries between the City's DCP under LPS 3, and the Authority's DCP under the MER Scheme. Consideration as to whether that can and should be done, and how it should be done is a matter that would need to be discussed with the DEVWA representatives, and perhaps between lawyers representing both bodies.

B1.3 S.7.3(4)(h) of the MER Scheme provides –

‘(4) The Development Contribution Plan shall specify:

...

- (h) the method of allocating and calculating the Development Contribution applicable to each land holding and land owner in the Contribution Area ... or if Development Infrastructure is shared within and outside of the Contribution Area/Scheme Area on the basis of the need and nexus of a Development Infrastructure; ...’.

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I recommend in regard to that provision that consideration be given to specifically allowing for sharing of infrastructure costs and administration costs with a contiguous DCP within the Residential Precinct, under the City's LPS 3.

- B1.4 As to consultation, I refer to s.7.6 of the MER Scheme, dealing with consultation. In my opinion, the interrelationship and reciprocity between any DCP under the MER Scheme, and a DCP under the City's LPS 3, is a fundamental issue. The interrelationship and reciprocity issues should be discussed and settled if possible between the City and the DEVWA representatives, during the consultation phases on the City's and the Authority's DCPs. It seems likely at this stage that the City's DCP will come up for consideration before the Authority's DCP, and every possible opportunity for discussion of the interrelationship and reciprocity issues should be undertaken at that time.
- B1.5 In fact as there is presently an opportunity for consultation during the public consultation phase on the draft MER Scheme, it seems appropriate that the discussion of the interrelationship and reciprocity issues be advanced as far as possible at this stage, and before the MER Scheme provisions are finally crystallised.
- B1.6 Provisional arrangements should be worked out before publication of the MRA draft DCP for general public comment, but as suggested above, it would seem desirable for the provisional arrangements to be worked out during the public consultation period on the MER Scheme, and before the Scheme's terms are finally settled.
- B1.7 Changes to account for interrelationship and reciprocity between an Authority DCP and the City's DCP are potentially significant, and other stakeholders and affected landowners should be aware of those matters at the time of first publication of each of the DCPs for general public consultation.
- B1.8 I refer also to s.7.7 of the draft MER Scheme, dealing with final adoption of a DCP. I note that the Authority's actions following consultation on the DCP include:
- ‘...  
(d) Advise the relevant LG of the Authority's resolutions;  
...’.
- B1.9 In my view, it would be desirable for the Authority to give advance notification to the City of any part of its proposed resolution on a DCP that may affect the interrelationship with a DCP under the City's LPS 3.
- B1.10 In fact it may be appropriate for there to be a right of review to the SAT in the event of there being any element of the Authority's resolution that the City perceives as detrimental to a corresponding DCP under the City's LPS 3. If the Authority is receptive to the proposal for such a right of review to the SAT in the



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MER Scheme, that change should perhaps be made during the present public consultation period.

B1.11 I refer to s.7.8 of the MER Scheme relating to the amending of a DCP under that Scheme, and s.7.9 relating to the rescinding of a DCP under the MER Scheme.

B1.12 I recommend in regard to both the amending and the rescinding of a DCP under the MER Scheme, that there should be prior consultation with the City, while it has in its LPS a related DCP for the Residential Precinct. It seems appropriate there should be prior consultation with the City, and appropriate arrangements made to ensure protection of the City's interest in recovering outstanding contributions from a MER Scheme DCP, particularly in regard to the balancing of the burden of contributions between the Authority's DCP and the City's DCP if there is a proposal for amending or rescinding a DCP for the Project Area. I strongly recommend that if possible, provision should be made for such consultation in the MER Scheme when adopted, and therefore this matter should be pursued during the present public submission period.

B1.13 S.7.10 of the MER Scheme makes provision for liability for development contributions, and in subs.(1) provides as follows –

‘(1) An owner of land in a Development Contribution Area is required to make a Development Contribution in accordance with the applicable Development Contribution Plan. An owner's liability ... on the earlier of:

- a) ...
- b) ...
- c) ...
- d) ...’.

B1.14 In regard to that provision, I recommend that provision should if possible be made to ensure that liability can arise under the MER Scheme or under the LPS of a local government which has a contiguous DCP (such as the DCP proposed for the Residential Precinct under the City's LPS 3). At least that possibility should be considered.

B1.15 The City should seek to ensure that there will be no discharge of liability under an MER Scheme DCP until all contribution liability has been met, including an owner's liability under a local government DCP, in respect of any common or overlapping infrastructure costs or administration costs.

B1.16 S.7.13 of the MER Scheme provides for interest on outstanding development contributions.

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- B1.17 There is an issue in regard to the incurring of interest on outstanding contributions under an MER Scheme DCP, in that there is no corresponding provision for interest to be payable on outstanding contributions under the City's LPS 3 DCP.
- B1.18 I recommend that consideration be given as to whether adjustment may be required to deal with the fact that the model provisions for local government DCPs don't provide for interest on outstanding cost contributions. So far as the City is concerned, I recommend that the City give consideration to the possibility of amending the provisions in cl.6.5 of its LPS 3 so as to allow for interest to be payable on DCP contributions, corresponding to the provision in s.7.13 of the MER Scheme.

### **Question B2: Advise whether the draft MER Scheme provides for an appropriate planning and assessment process**

#### **Advice and comments on question B2**

- B2.1 Some of the advice and comments above are relevant to this question.
- B2.2 Part 5 of the draft MER Scheme deals with Development Management, and contains provisions in relation to subdivision, and the requirements for development approval. Although the provisions for development approval are not the same as the provisions in the City's LPS 3, including the deemed provisions in Schedule 2 of the LPS Regulations, they deal with similar issues in a similar way.
- B2.3 There is some provision for cross-referral to the City on development applications. In s.5.14(1) of the draft MER Scheme, it is provided –
- ‘Within 7 days of receipt of a Complete Application the Authority shall refer a copy of the application and all supporting information to the applicable Local Government and to relevant State Government bodies for their consideration and comment, in accordance with section 65 of the MRA Act.’
- B2.4 Subs.(2) of s.5.14 goes on to provide that no decision shall be made on a development application or other application until comment from ‘all referred government bodies’ has been received, or ‘until after the expiration of 42 days, whichever occurs first’. Subs.(3) goes on to provide that if a development application or other application is subsequently significantly revised, the Authority may again refer the application to the referred local government and public authorities for consideration and comment. I note that subs.(3) only provides that the Authority **may** refer the application again to the referred local government. In my opinion, the word ‘may’ should be replaced with the word ‘shall’, corresponding with the same term in subs.(1).
- B2.5 I note that special consideration is given to the Project Area in Chapter 3 of the draft MER Scheme, and more specifically in ss.3.4, 3.4.1 and 3.4.2. I note that in s.3.4.1 it is provided –

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‘Development east of Milner Road and bound by Sultana Road West, will have regard to the objectives of the adjacent low density residential land outside of the Project Area. Development on the periphery is to ensure the amenity of lots outside of the Precinct are not unduly impacted upon, while also acknowledging it represents a gateway to the project area.’

- B2.6 That of course is a broad statement of intent, but it is a provision contained in the MER Scheme, and may provide support for any representations or submissions by the City in regard to development within the Project Area that might impact upon land, and the development of land, in adjacent areas which remain under the City’s planning control under LPS 3.
- B2.7 I note that in s.5.18 of the draft MER Scheme, dealing with matters to which due regard are to be given in the determination of any application under the Scheme, reference is made in s.5.18(1)(c) in a fairly confused way, to any Structure Plan, Activity Centre Plan, etc. That provision is unclear. Ideally there should be a requirement for due regard to be given to any Structure Plan or Activity Centre Plan, and that should be done in a provision which is clear and unequivocal, which cannot be said for para.(c) as it presently stands. As the City will most likely be giving careful consideration to an Activity Centre Plan for the Project Area, the least that Chapter 5 of the MER Scheme should do is to ensure that due regard will be given to an Activity Centre Plan that is produced.
- B2.8 I mention also in that regard that in a recent announcement by the DPLH as to proposed amendments in the planning legislation, a comment was made suggesting to me that the term ‘Activity Centre Plan’ may be phased out. I suggest that enquiry be made with the Department as to whether any change is likely in the near future to the use of the term ‘Activity Centre Plan’, and if that is the case, then perhaps an appropriate change might be requested to s.5.18(1)(c) of the draft MER Scheme.
- B2.9 I note also that reference is made in s.5.18(1)(d) to ‘any relevant planning document adopted under the Scheme’, including amongst other things, ‘Development Contribution Plan’. Perhaps that provision should be amended so as to refer to a Development Contribution Plan under the MER Scheme and a DCP under a local government scheme dealing with a DCA in a contiguous area, in a local government planning scheme.

**Question B3: Advise whether the draft MER Scheme provides a process for the City and the community to be appropriately consulted through the consideration of planning applications**

#### **Advice and comments on question B3**

- B3.1 The provisions in the MER Scheme in relation to community consultation on development applications appear to be similar to provisions made under local planning schemes for public consultation. I have already mentioned above s.5.14(1) that requires the Authority to refer a copy of an application and all

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supporting information to 'the applicable local government' for their consideration and comment in accordance with s.65 of the MRA Act. It is difficult to see that any greater involvement of the affected local government in the application determination process would be contemplated.

**Question B4: Advise whether the draft MER Scheme provides the City an appropriate opportunity to review designs for future infrastructure that will, at some stage in the future, be handed over to the City**

**Advice and comments on question B4**

- B4.1 I note that s.7.3(4)(h) of the draft MER scheme provides that a DCP under that Scheme is to specify amongst other things the method of allocating and calculating the development contribution applicable to each landholding and landowner in a contribution area including whether any one of the Development Infrastructure are to be apportioned between precincts or landholdings within the Contribution Area 'or if Development Infrastructure is shared within and outside of the Contribution Area/Scheme Area on the basis of the need and nexus of a Development Infrastructure'. In my opinion that provision gives some recognition to the requirements of contribution between a MER Scheme DCP, and a related DCP operating under the City's LPS 3. Also the provisions under s.7.4 should be strengthened in regard to contributions needing to be provided to the City's DCP in respect of CIWs provided by the City but which benefit the Project Area.
- B4.2 In my opinion, the draft MER Scheme does not provide the City an appropriate opportunity to review designs for future infrastructure that will, upon the inevitable termination of the Redevelopment Scheme, be handed over to the City for ongoing maintenance. It seems obvious that the City, as the body which will have the obligation of maintenance in perpetuity of infrastructure provided within the Project Area, should be consulted as to design, and the requirement of consultation should be incorporated in the provisions of Chapter 7 of the MER Scheme, and should also be recognised in the provisions of any DCP prepared for the Project Area under the MER Scheme.

**Question B5: Advise whether DCP programs are capable of allowing for common infrastructure arrangements to cross over the MER Scheme and the City's LPS 3, and if not, advise what needs to be amended to ensure appropriate and fair sharing of common infrastructure should apportionment analysis indicate a need for sharing of infrastructure costs of schemes**

**Advice and comments on question B5**

- B5.1 Advice and comments on this issue have been provided in the general comments in Part A of this advice.

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**Question B6: Advise of any other relevant aspects of the draft MER Scheme which may adversely impact the City's and community's interests**

**Advice and comments on question B6**

B6.1 Advice and comments relevant to this question have been provided in Part A above.

I assume you will contact me if any further assistance is required in regard to the above advice and comments.

Yours sincerely



**Denis McLeod**  
**Partner**

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