



Our ref: AMG:PMQ:1170344  
 Your ref: PG-LPS-003/107

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12 August 2022

Ms Rhonda Hardy  
 Chief Executive Officer  
 City of Kalamunda  
 PO Box 42  
 KALAMUNDA WA 6926  
**By Email: enquiries@kalamunda.wa.gov.au**

**cc:**  
 Councillors

Dear Ms Hardy

**Amendment 107 – legal submission in support**

**Background**

- 1 Lavan acts for Ross Leighton, who is the owner of the property at 32 Gavour Road, Wattle Grove (**Property**).
- 2 The Property is zoned “special use” under the *Shire of Kalamunda Local Planning Scheme No 3 (Scheme)* and development at the Property is subject to the “SU20” conditions outlined in Schedule 4 of the Scheme.
- 3 My client, through its planning consultant, has proposed Amendment 107 to the Scheme, which contemplates the deletion of condition (d) of the “SU20” conditions in Schedule 4 of the Scheme, which currently reads:

*An integrated aged care facility is a development that shall not be strata titled.*

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4 Public advertising of Amendment 107 has occurred and Council is due make a determination on whether to support Amendment 107 (before it is forwarded to the Western Australian Planning Commission) at its meeting on 23 August 2022.

5 I provide this legal submission to Council in support of Amendment 107.

**Assessment of Amendment 107**

6 In addition to the justification put forward on behalf of my client, Amendment 107 is supported by:

6.1 a favourable report and recommendation from the assessing officers at the City of Kalamunda (**City**);

6.2 a favourable peer review report procured by the City from an independent planning consultant; and

6.3 legal advice obtained by the City.

7 There is accordingly a compelling basis for Council to comfortably conclude that supporting Amendment 107 is the correct and preferable decision and will protect the interests of both the City and the public in general.

**Objector submissions**

8 The officer report to Council refers to a number of submissions having been received during the public consultation period, to object to Amendment 107.

9 I have taken the time to review the published summary of these submissions, and with respect, I consider the objections in general to be misinformed or misconceived.

10 The objector submissions appear to fall into two broad categories, being:

10.1 objections to the proposed development of an integrated aged care facility on the Property generally; and

10.2 concerns that the removal of the current strata titling prohibition will somehow adversely change the nature of permitted development at the Property.

11 In relation to the first item above, through Amendment 107, Council is simply being asked to consider the proposed deletion of an existing planning condition that controls future development at the Property.

12 The question of the appropriateness of an integrated aged care facility at the Property has already been favourably and finally determined through an earlier amendment to the Scheme (being Amendment 57), which was approved by the Minister and has legal effect, so this is not something that can be revisited by Council at its upcoming meeting.

13 In relation to the second item above, it is important to understand that the removal of the current strata titling prohibition will not result in any physical change to how the Property is to be developed, as it only concerns matters of tenure and does not have anything to do with permissible development at the Property.

14 Future development of the Property will still be controlled by the various existing "SU20" conditions in Schedule 4 of the Scheme and by the adopted local development plan, so the reality is that Amendment 107 will not result in any change to the proposed future built form and land use for the Property that is already embedded within the planning framework.



- 15 With respect, nothing contained within the objector submissions should cause Council to second guess the reasoning and advice provided to Council by the assessing officers, by the independent peer reviewer and by the City's own lawyers.

**Proposed modifications**

- 16 Pursuant to regulation 50(3) of the *Planning and Development (Local Planning Schemes) Regulations 2015 (WA)*, Council may either:
- 16.1 support Amendment 107 without modification;
  - 16.2 support Amendment 107 with proposed modifications to address issues raised in submissions; or
  - 16.3 not support Amendment 107.
- 17 Amendment 107 as proposed by my client simply contemplated the deletion of condition (d) of the "SU20" conditions in Schedule 4 of the Scheme.
- 18 The officer report to Council however proposes a handful of other modifications.
- 19 My client does not have any difficulty with the proposed modifications that contemplate the deletion of existing superfluous content or that are otherwise inconsequential.
- 20 My client would however ask that Council not adopt the proposed modification to add the words "that complies with the requirements of the Government Sewerage Policy" to condition (b) of the "SU20" conditions in Schedule 4 of the Scheme, because my client would ideally prefer to avoid the introduction of any new content into what is already a rather onerous set of development conditions.
- 21 There is also some legal doubt, in my opinion, as to whether the inclusion of these additional words is permissible, considering that:
- 21.1 these words would arguably not constitute a modification "to address issues raised in submissions", given that no public submission has specifically requested the inclusion of these words; and
  - 21.2 these words would arguably not strictly speaking constitute a modification to Amendment 107 itself (which was originally confined to the proposed deletion of condition (d) of the "SU20" conditions in Schedule 4 of the Scheme) and would instead constitute a separate proposed amendment to the Scheme text.
- 22 The inclusion of these additional words would also appear to be practically unnecessary, in the sense that the provisions of the Government Sewerage Policy will be applied by decision-makers anyway during the subsequent planning stages of the proposed development of the Property.
- 23 For these reasons, my client would invite Council to adopt the officer recommendation, albeit without the proposed additional wording in condition (b) of the "SU20" conditions in Schedule 4 of the Scheme.

**Conclusion**

- 24 My client commends the assessing officers on the professionalism of their assessment and invites Council to now resolve to support Amendment 107, albeit without the proposed additional wording in condition (b) of the "SU20" conditions in Schedule 4 of the Scheme.



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25 Please let me know if you have any questions in relation to this submission.

Yours sincerely

A handwritten signature in blue ink that reads "Paul McQueen". The signature is stylized, with the first name "Paul" written in a large, flowing script, and "McQueen" written in a smaller, more compact script.

Paul McQueen  
General Counsel  
Partner