



## ITEMS FOR DEBATE

### COUNCIL MEETING 25 JANUARY 2023

#### **ADOPTION BY EXCEPTION RESOLUTION**

##### **RECOMMENDATION**

That the Committee Recommendations for items 12.1 and the Officer Recommendations for items 16.1, 16.2, 17.1 and 17.2 be adopted en bloc:

|      |  |
|------|--|
| 12.1 | Airport Advisory Committee – 14/12/2022 – BUSSELTON MARGARET RIVER AIRPORT – OPERATIONS UPDATE |
| 16.1 | FINANCIAL ACTIVITY STATEMENTS – YEAR TO DATE AS AT 30 NOVEMBER 2022                            |
| 16.2 | LIST OF PAYMENTS MADE – NOVEMBER 2022  |
| 17.1 | LOCALITY BOUNDARY AMENDMENT – VASSE/KEALY  |
| 17.2 | COUNCILLORS' INFORMATION BULLETIN  |

#### **ITEMS TO BE DEALT WITH BY SEPARATE RESOLUTION (WITHOUT DEBATE)**

| <b>Item No.</b> | <b>Item Title</b>  | <b>Reason</b>                                  |
|-----------------|--|--|
| 15.1            | BUSINESS DEVELOPMENT, EVENTS AND MARKETING PROGRAM (BDEMP) – BUSSELTON FRINGE FESTIVAL FUNDING 2022/23 - 2023/24 | Disclosure of Impartiality Interest – Cr Paine |
| 16.4            | ESTABLISHMENT OF CEO PERFORMANCE REVIEW COMMITTEE<br><i>Supplementary Agenda</i>                                 | Absolute Majority Required                     |

## ITEMS FOR DEBATE

|                                |   |                                    |                |
|--------------------------------|---|------------------------------------|----------------|
| <b>Item No.</b><br><b>12.2</b> | Policy and Legislation Committee - 9/11/2022 -<br>LOCAL PLANNING POLICY REVIEW : ADOPTION<br>FOLLOWING CONSULTATION - LPP 1.5 COASTAL<br>SETBACKS | <b>Pulled by</b><br><b>Cr Ryan</b> | <b>Page 13</b> |
|--------------------------------|---|------------------------------------|----------------|

### ALTERNATIVE RECOMMENDATION

That the Council:

- ~~1. Pursuant to Clause 4, Part 2 of Schedule 2 – Deemed Provisions for Local Planning Schemes of the Planning and Development (Local Planning Schemes) Regulations 2015 adopt as final LPP 1.5 Coastal Setbacks, as set out at Attachment A; and~~
  - ~~2. Publish a notice of adoption in a newspaper circulating within the Scheme area in accordance with Clause 4, Part 2 of Schedule 2 – Deemed Provisions for Local Planning Schemes of the Planning and Development (Local Planning Schemes) Regulations 2015 of the Policy set out in 1 above.~~
- 1. Retain the current existing policy;**
  - 2. Request a report comes back to Council within the next six months which addresses:**
    - a. Why LPP1.5 Draft Policy should/ should not be re-advertised and the cost (not only to advertise but the potential of any SAT appeal or legal ramifications if any from possible affected landholders;**
    - b. The rationale why the current policy should be revoked and ramifications to lots affected by relaxed setbacks;**
    - c. Why the Draft Policy, resolved to be advertised in November 2020, has taken so long to come to Council for final consideration;**
    - d. Why an approval was given by the City of Busselton based on a Draft Policy (or removal thereof).**
  - 3. Resolve that Planning Staff are not to be using Draft Policy LPP1.5 (or the removal thereof) under any circumstances until such time as Council has resolved its adoption; if in fact it does.**

### REASONS FOR ALTERNATIVE

Reason 1: Council has three options under the Planning and Development (Local Planning Schemes) Regulations 2015. It can retain the existing policy, modify the policy recommended to be adopted and for these changes to be re-advertised; or revoke the policy in its entirety.

Reason 2: Less than 2% response from 600/700 ratepayers was received on this issue. 12 submissions from 11 parties were received in relation to the proposed changes to LPP1.5. The properties affected are not insignificant.

Reason 3: It appears that 946B Geographe Bay Road Geographe has been approved pre-empting approval of this Draft Policy. Under the Planning and Development (Local Planning Schemes) Regulations 2015 “the local Government must first resolve to proceed with the policy and the local government must publish notice of the policy in accordance with clause 87. A policy has effect on publication of a notice...”. Considering this policy has not yet reached this point, delegated authority should not have been applied.

## **OFFICER COMMENT**

As well as providing some brief comment on the substantive issues, it is first considered necessary to comment on the drafting of the proposed alternative recommendation, as in its current form it would not appear to achieve its stated objectives.

With respect to the opening part of the proposed alternative motion, it needs to read 'that the Council', not 'that the City'. That is because it is intended as a resolution of the Council and, in addition, the powers of the local government in relation to local planning policies are powers of the Council.

With respect to points one and three of the proposed alternative motion, should the Council wish to retain the current policy and not have the draft policy considered in relation to the assessment of development applications, point one would need to be redrafted and, should that occur, point three would become redundant. Point one should be redrafted as follows –

*"1. Pursuant to Clause 4, Part 2 of Schedule 2 – Deemed Provisions for Local Planning Schemes of the *Planning and Development (Local Planning Schemes) Regulations 2015* resolve not to proceed with draft LPP 1.5 Coastal Setbacks, as set out at Attachment A;"*

That is because the Regulations set out that, when a draft local planning policy has been subject of consultation, and is being considered by a Council of a local government after consultation, the Council must (under Clause 4 (3) (b) of Schedule 2) –

*"b) resolve to –*

- (i) proceed with the policy without modification; or*
- (ii) proceed with the policy with modification; or*
- (iii) not to proceed with the policy."*

The effect of Cr Ryan's proposed wording would be such that the draft local planning policy would, in a formal sense, remain a draft local planning policy, and would therefore need to be considered by the City in relation to the assessment of development applications, notwithstanding any Council resolution consistent with point 3. That is because the provisions of the *Planning and Development (Local Planning Schemes) Regulations 2015* require consideration of draft local planning policies, as long as they remain draft local planning policies. Specifically, clause 67 (2) of the Regulations sets out that, amongst other things –

*"In considering an application for development approval...the local government is to have due regard to the following matters...including any...proposed planning instrument that the local government is seriously considering adopting or approving."*

A draft local planning policy that the Council has formally adopted as a draft, but not formally decided not to proceed with, would remain a draft local planning policy, and therefore would also remain a proposed planning instrument that the local government is seriously considering adopting or approving. Should the Council be so minded, that issue could be overcome by resolving not to proceed with the draft local planning policy, as set out above, and would then mean that it could not be considered in relation to the assessment of development applications, as it would no longer be a draft local planning policy. As already noted, that would also render point 3 redundant.

Such a decision would result in the existing LPP 1.5 remaining in effect. There are, however, elements of the existing LPP 1.5 that are no longer consistent with State level planning legislation and policy, and are therefore no longer able to be considered, as the State level documents prevail to the extent of the inconsistency. Most importantly, clause 4.3 of the existing LPP 1.5 sets out 'performance criteria' to be considered in applying the policy. Under the current version of Volume 1 of *State Planning Policy 7.3 – Residential Design Codes (R-Codes)*, however, local planning policies can only amend or replace the 'deemed-to-comply' provisions of the R-Codes, they cannot amend or replace the 'design principles' (which are the equivalent of what were called 'performance criteria' in an earlier version of the R-Codes).

With respect to point 2 of the proposed alternative motion, most of these matters have already been outlined and addressed in the report, and/or in response to questions from Councillors when the matter was considered by the Policy and Legislation Committee, and subsequently in response to questions from Councillors in association with the Council's 21 December 2022 and 25 January 2023 ordinary meetings. With respect to sub-points (c) and (d) specifically, however, it is advised that –

- The reason the draft local planning policy was not presented to the Council after advertising prior to December 2022 is simply down to resources, workload and prioritisation – there is no further information that can be provided with respect to that matter; and
- As noted above, pursuant to clause 67 (2) of the Regulations, draft local planning policies must be considered by the City in relation to the assessment of development applications, and the existing policy does not and in fact cannot set out inflexible or un-variable standards.

**LOCAL GOVERNMENT (ADMINISTRATION) REGULATIONS REQUIREMENT**

Pursuant to regulation 11(da) of the *Local Government (Administration) Regulations 1996*, if the amended recommendation is adopted by Council, the above Reasons will be recorded in the Minutes.

|                                |  |  |                |
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| <b>Item No.</b><br><b>12.2</b> | Policy and Legislation Committee - 9/11/2022 - LOCAL PLANNING POLICY REVIEW : ADOPTION FOLLOWING CONSULTATION - LPP 1.5 COASTAL SETBACKS | <b>Pulled by</b><br><b>Cr Riccelli</b> | <b>Page 13</b> |
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**ALTERNATIVE RECOMMENDATION**

**That the Council:**

- 1. Pursuant to Clause 4, Part 2 of Schedule 2 – Deemed Provisions for Local Planning Schemes of the *Planning and Development (Local Planning Schemes) Regulations 2015* resolve not to proceed with draft ~~adopt as final~~ LPP 1.5 Coastal Setbacks, as set out at Attachment A; and**
- 2. ~~Publish a notice of adoption in a newspaper circulating within the Scheme area in accordance with~~ Pursuant to Clause 4, Part 2 of Schedule 2 – Deemed Provisions for Local Planning Schemes of the *Planning and Development (Local Planning Schemes) Regulations 2015* adopt draft LPP 1.5 Coastal Setbacks as a draft for advertising, as set out at Attachment A. ~~of the Policy set out in 1 above.~~**

**REASONS FOR ALTERNATIVE**

Council resolved to initiate amendments to LPP 1.5 on Nov 11, 2020, whereby a public consultation period ensued, and letters were sent out in February 2021. Given that there is a delay of nearly two years and there appears to be confusion by affected parties, as to the intent and scope of these modifications, a second public consultation seems appropriate in this instance. As the legislation does not allow for readvertising of a draft local planning policy, in order to achieve that, the Council must close out the earlier process by resolving not to adopt the draft policy, and restart the process, by adopting the policy as a draft for consultation a second time – after which it can be further considered by the Council.

**OFFICER COMMENT**

The wording of the proposed alternative recommendation would enable the proposed change to planning controls to be readvertised and then further considered by the Council after advertising.

**LOCAL GOVERNMENT (ADMINISTRATION) REGULATIONS REQUIREMENT**

Pursuant to regulation 11(da) of the *Local Government (Administration) Regulations 1996*, if the amended recommendation is adopted by Council, the above Reasons will be recorded in the Minutes.

|   |                                       |   |                            |
|---|---------------------------------------|---|----------------------------|
| <p><b>Item No.</b><br/>16.3</p>   | <p>COUNCIL MEMBERSHIP – GEO CATCH</p> | <p><b>Pulled by<br/>Officers<br/>Disclosure of<br/>Financial<br/>Interest-<br/>Cr Paine</b></p> | <p><b>Page<br/>101</b></p> |
| <p><b><u>AMENDED RECOMMENDATION</u></b></p> <p>That the Council nominates Cr Ross Paine as an ex officio member of the GeoCatch board, <del>noting appointment is subject to approval of the minister.</del></p>  |                                       |   |                            |
| <p><b><u>REASONS FOR AMENDMENT</u></b></p> <p>The GeoCatch membership is reserved for the Mayor or their representative, and does not require Ministerial approval for appointment.</p> <p>The amended recommendation reflects the membership process.</p>                                    |                                       |   |                            |
| <p><b><u>OFFICER COMMENT</u></b></p> <p>As above.</p>   |                                       |   |                            |
| <p><b><u>LOCAL GOVERNMENT (ADMINISTRATION) REGULATIONS REQUIREMENT</u></b></p> <p>Pursuant to regulation 11(da) of the <i>Local Government (Administration) Regulations</i> 1996, if the amended recommendation is adopted by Council, the above Reasons will be recorded in the Minutes.</p> |                                       |   |                            |