



## ITEMS FOR DEBATE

### COUNCIL MEETING 27 OCTOBER 2021

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

##### **RECOMMENDATION**

That the Committee Recommendations for items 12.1 and 12.2 and the Officer Recommendation for item 17.1 be adopted en bloc:

- 12.1 Finance Committee - 13/10/2021 - LIST OF PAYMENTS MADE - AUGUST 2021
- 12.2 Finance Committee - 13/10/2021 - FINANCIAL ACTIVITY STATEMENTS - YEAR TO DATE AS AT 31 AUGUST 2021
- 17.1 COUNCILLORS' INFORMATION BULLETIN

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

Item No.	Item Title	Reason
12.3	Finance Committee - 13/10/2021 - BUDGET AMENDMENT REQUEST – HOSPITALITY WORKER TRAINING AND MARKETING GRANT AGREEMENT	Absolute Majority required
12.4	Finance Committee - 13/10/2021 - BUDGET AMENDMENT - INSTALLATION OF ADDITIONAL AUTOMATED WEATHER STATIONS	Absolute Majority required
12.5	Finance Committee - 13/10/2021 - SELF SUPPORTING LOAN APPLICATION – DUNSBOROUGH BAY YACHT CLUB INC.	Disclosure of Interest Cr Carter (impartiality)
12.6	Finance Committee - 13/10/2021 - BUDGET REQUEST - DESIGNATED AREA MIGRATION AGREEMENT - SOUTH WEST REGION	Absolute Majority required

## ITEMS FOR DEBATE

<p><b>Item No.</b> <b>13.1</b></p>	<p>AMENDMENT NO. 50 TO LOCAL PLANNING SCHEME NO. 21 (LOT 81 (18), STRATA PLAN 17588 (20), AND LOTS 115 TO 127 (26-50) GEOGRAPHE BAY ROAD, DUNSBOROUGH) - CONSIDERATION FOR ADOPTION FOR FINAL APPROVAL</p>	<p><b>Pulled by</b> <b>Cr Riccelli</b></p>	<p><b>Page 3</b> <b>Supplementary</b> <b>Agenda</b></p>
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### ALTERNATIVE RECOMMENDATION

**That the Council:**

- In pursuance of the *Planning and Development (Local Planning Schemes) Regulations 2015*, adopts Amendment 50 to Local Planning Scheme No. 21 for final approval, in accordance with the modifications proposed in the Schedule of Modifications shown at Attachment E, for the purposes of amending the Scheme map by modifying the residential density code from R80 to R60 over Lot 81 (18), Strata Plan 17588 (20) and Lots 115 to 127 (26-50) Geographe Bay Road, Dunsborough, **subject to deletion of Items 2, 3 and 4 in the Schedule of Modifications.****

For clarity set out below are the Items to be deleted in entirety:

Item 2:

That the Amendment be modified so that clause 4.3.2 of the Scheme is amended to state:

*Building height provisions as specified under –*

*(a) Table 3 ~~and Table 4~~, and Deemed-to-Comply provision 5.1.6 C6 ~~and 6.1.2 C2~~ of Volume 1 of the R-Codes (as amended), and*

*(b) Table 2.1, and Acceptable Outcome A2.2.1 of Volume 2 of the R-Codes (as amended);*

*do not apply, except for on land coded R-AC3, R80 or R60. In all other areas, maximum building height requirements are required to comply with **the provisions of clause 4.8** of the Scheme.*

Item 3:

That the Amendment be modified so that clause 4.8.1 of the Scheme is amended to state:

***Except where otherwise provided for in the Scheme, Aa** person must not erect any building that –*

*(a) contains more than two storeys or exceeds a height of 9 metres **above natural ground level**, where land is within 150 metres of the mean high water mark; or*

*(b) contains more than three storeys or exceeds a height of 12 metres **above natural ground level**, where land is within 150 metres of the mean high water mark, ~~except where otherwise provided for in the Scheme.~~*

Item 4:

That the Amendment be modified so that clause 4.8.3 of the Scheme is amended to state:

*In respect to clauses 4.8.1 and 4.8.2 above, the local government, upon receipt of an application for development approval, may approve building heights which exceed those maximum height limitations as specified, subject to the local government being satisfied that the building height is consistent with the relevant assessment criteria specified under*

clause 67 of the Deemed Provisions ~~and performance criteria specified under 5.1.6 (P6) and 6.1.2 (P2) of the R-Codes.~~ For a building that is proposed on land where a residential coding has been designated, the local government must also be satisfied that the building height is consistent with –

(a) the Design Principles specified under 5.1.6 P6 of Volume 1 of the R-Codes (as amended); or

(b) the Element Objectives specified under O2.2.1-O2.2.4 of Volume 2 of the R-Codes (as amended).

2. Advise the Western Australian Planning Commission that Amendment 50 is considered a 'standard' amendment pursuant to the *Planning and Development (Local Planning Schemes) Regulations 2015* as it is:
  - (a) an amendment relating to a zone or reserve that is consistent with the objectives identified in the Scheme for that zone or reserve;
  - (b) an amendment that would have minimal impact on land in the Scheme area that is not the subject of the amendment;
  - (c) an amendment that does not result in any significant environmental, social, economic or governance impacts on land in the Scheme area.
3. Pursuant to r.53 of the *Planning and Development (Local Planning Schemes) Regulations 2015*, endorses the Schedule of Submissions at Attachment D, which has been prepared in response to the public consultation process undertaken in relation to Amendment 50.
4. Upon preparation of the necessary documentation, refers the adopted Amendment 50 to the Western Australian Planning Commission for consideration and determination in accordance with the *Planning and Development Act 2005*.
5. Pursuant to r.56 of the *Planning and Development (Local Planning Schemes) Regulations 2015*, should directions be given that further or different modifications to Amendment 50 are required, ~~direct these modifications to be undertaken accordingly, on behalf of the Council, unless they are considered by officers likely to significantly affect the purpose and intent of the Amendment, in which case the matter they~~ shall be formally referred back to the Council for assessment and determination.

#### **REASONS FOR ALTERNATIVE**

The modifications proposed in items 2, 3 & 4 in the Schedule of Modifications (Attachment E) are new amendments and should not be included in Amendment 50 which has been professionally prepared and submitted by an independent Senior Planner.

If the modifications suggested in items 2, 3, & 4 were accepted they would ultimately eliminate the role of the 150m high water mark clause, thereby reducing our options to control the height. It will allow significantly more discretion for higher buildings.

The officers have advised in their reasoning that the "stated purpose of Amendment 50 (changing R coding along Geographe Bay Road from R80 to R60) was to apply a 3-storey height control by way of the R60 coding and that they believe this stated purpose **can only** be achieved by resolving the inconsistency between the R60 coding and the Clause surrounding land within 150 metres of the mean high-water mark, hence their suggested Schedule of Modifications as an addition to Amendment 50.

This appears to be contrary to the community's objectives. The Dunsborough community have clearly communicated their concern around building heights to the point of raising funds to initiate a Supreme Court Case. The community have indicated that 3 storey buildings are the highest they will accept, but preference is given to 1-2 storey building where possible.

### **Item 2 of Schedule of Modifications**

My reasons for removing Item 2 primarily involve the references to R80 and R60.

In Item 2 of the Schedule of Modifications, officers are suggesting that Amendment 50 be further modified so that clause 4.3.2 includes not just RAC3 coded land, but also R80 and R60. It is extremely important to understand that at present clause 4.3.2 **only includes RAC3** zoned land which allows for a lot of discretion in relation to height, **otherwise clause 4.8 applies and R codes are excluded entirely.**

By including R80 and R60 in item 2 of the modifications, you are removing the ability to be governed by **4.8.1 thereby reducing the capacity to limit heights. It allows for a Developer to put an DA in** again for a 4-storey building and even if the CoB refused to approve the DA, the JDAP can override this decision. I don't believe this is a policy neutral modification as it will have a major effect on future height controls.

### **Item 3 of Schedule of Modifications**

My reasons for removing Item 3 from the Schedule of Modifications are primarily around the officers' suggestion to move the phrase **"except where otherwise provided for in the scheme"** to include (a).

Below is the wording as it stands now **without** the Officer Recommendation to move the phrase **"except where otherwise provided for in the scheme"** to include (a).

#### **1. that Amendment 50 be modified so that clause 4.8.1 of the Scheme is amended to state: A person must not erect any building that -**

- a) contains more than two storeys or exceeds a height of 9 metres **above natural ground level**, where land is **within** 150 metres of the mean high-water mark: or
- b) contains more than three storeys or exceeds a height of 12 metres **above natural ground level**, where land is **more than** 150 metres of the mean high-water mark, **except where otherwise provided for in the scheme.**

Officers are suggesting moving the phrase **"except where otherwise provided for in the scheme"** from where it currently sits after point (b) in item 3 of the Schedule of Modifications to in front of point (a) i.e. to include (a) as well as (b).

If we were to move that phrase to include (a) as well as (b) it undermines the 4.8.1 regulation. The phrase is part of (b) because (b) is open ended i.e. it covers land **beyond** 150m, (a) however covers land **within** 150m and therefore should not include the phrase.

### **Item 4 of Schedule of Modifications**

My reason for removing Item 4 is due to the reference to land with a residential coding. It is in conflict with 4.3.2. As already advised, 4.3.2 currently only applies to R-AC3 land not residential land with R60 and R80 codings, therefore the discretion granted by 4.8.3 can only be exercised in respect of R-AC3 land. Item 4 includes modifications which may be in direct conflict with the findings from the Supreme Court decision.

### **Point 5 Alteration of Officer Recommendation**

My reasoning for my alteration to point 5 of the recommendation is to ensure that due to the importance and controversial nature of this issue and the effect that modifying the Amendment can have on height controls, all future modifications should come back formally to Council for consideration.

### **Supreme Court Decision**

Lastly and perhaps most importantly, no modifications that impact height control and the high-water mark clause, should be allowed until the outcome of the Supreme Court decision.

I have heard the argument that the Supreme Court Action is about the lawfulness of a past decision and not about the planning law that will guide future decision, however I disagree with this. The Supreme Court Decision **challenges** whether there is lawful discretion to build anything over 9 metres. It will determine whether clause 4.8.1 is absolute or if we can use the discretion of Clause 4.8.3. This **will** have a major impact on all future planning decisions around height control.

### **OFFICER COMMENT**

#### **R-Code References – Items 2 & 4**

The first half of Item 2 and the whole of Item 4 merely update references in the Scheme to the R-Codes, and clarify that references are to current versions of the R-Codes, as amended. Regardless of whether (or not) clause 4.8.3 only applies to land coded R-AC3 (clause 4.3.2), the proposed updating of these references does not alter the policy intent of each clause, as read.

Furthermore, it is the understanding of officers that the R-Code references in each clause, whether they be outdated or current, were not raised in oral submissions to the Supreme Court case (referred to above) as a reason for the discretion in clause 4.8.3 not applying to clause 4.8.1.

Officers therefore do not support the removal of Items 2 and 4 in their entirety.

#### **Removal of 'R60 or R80' - Item 2**

Notwithstanding comments contained in the original Notice of Motion, it is no longer clear that the stated purpose of the amendment was to, amongst other things, apply a three storey height control as per the current R60 coding.

When consultation occurred the community were asked to comment on R60 coding (implicit with a three storey height limit). They were not asked to comment on R60 coding with a two storey height limit. Should Council wish to explore restricting the subject lots to R60 coding with a two storey height limit, this would require further consultation which could be carried out as part of the Dunsborough Precinct Structure Plan advertising process.

Putting the uncertainty around this 'stated purpose' aside, officers advise that it is not clear whether a three storey height control can be achieved without resolving the inconsistency between the R60 coding and clause 4.8, with respect to land within 150 metres of the mean high water mark. That is the rationale for the proposed inclusion of reference to R60 coded land in clause 4.3.2.

On reflection, it is agreed that land which is to retain an R80 coding was not subject of this amendment, and therefore reference to R80 coded land should be removed as a modification to clause 4.3.2.

**Item 3**

The updating of this clause provides clarification that the words “except where otherwise provided for in the scheme” apply to both parts (a) and (b) of clause 4.8.1. Current practice by statutory planning officers is to apply the words to both parts of the clause; this practice has enabled officers to exercise discretion in regard to height on numerous occasions, relevantly for dwellings located on Geographe Bay Road.

Finally, it is the understanding of officers that the location of the words “except where otherwise provided for in the scheme” in clause 4.8.1 was not raised in oral submissions to the Supreme Court case as a reason for the discretion in clause 4.8.3 not applying to clause 4.8.1.

The proposed inclusion of reference to natural ground level is not in dispute. Officers therefore do not support the removal of Item 3.

**Point 5 Alteration of Officer Recommendation**

Officers agree that Council should be kept informed and provided with an opportunity for consideration, if the Minister for Planning directs that further or different modifications must be carried out to the Amendment.

**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.

<b>Item No.</b> <b>13.1</b>	AMENDMENT NO. 50 TO LOCAL PLANNING SCHEME NO. 21 (LOT 81 (18), STRATA PLAN 17588 (20), AND LOTS 115 TO 127 (26-50) GEOGRAPHE BAY ROAD, DUNSBOROUGH) - CONSIDERATION FOR ADOPTION FOR FINAL APPROVAL	<b>Pulled by Officers</b>	<b>Page 3 Supplementary Agenda</b>
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### ALTERNATIVE RECOMMENDATION

That the Council:

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  - (a) **Deletion of reference to ‘R80’ in Item 2; and**
  - (b) **Replacement of ‘within’ with ‘more than’ in clause 4.8.1 (b) in Item 3.**

For clarity those changes are set out below, with changes proposed shown in blue:

Item 2:

That the Amendment be modified so that clause 4.3.2 of the Scheme is amended to state:

*Building height provisions as specified under –*

- (c) *Table 3 ~~and Table 4~~, and Deemed-to-Comply provision 5.1.6 C6 ~~and 6.1.2 C2~~ of Volume 1 of the R-Codes (as amended), and*
- (d) *Table 2.1, and Acceptable Outcome A2.2.1 of Volume 2 of the R-Codes (as amended);*

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- (c) *contains more than two storeys or exceeds a height of 9 metres **above natural ground level**, where land is within 150 metres of the mean high water mark; or*
- (d) *contains more than three storeys or exceeds a height of 12 metres **above natural ground level**, where land is **within more than** 150 metres of the mean high water mark, ~~except where otherwise provided for in the Scheme.~~*

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*In respect to clauses 4.8.1 and 4.8.2 above, the local government, upon receipt of an application for development approval, may approve building heights which exceed those maximum height limitations as specified, subject to the local government being satisfied that the building height is consistent with the relevant assessment criteria specified under clause 67 of the Deemed Provisions ~~and performance criteria specified under 5.1.6 (P6) and 6.1.2 (P2) of the R-Codes~~. For a building that is proposed on land where a residential coding has been designated, the local government must also be satisfied that the building height is consistent with –*

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2. Advise the Western Australian Planning Commission that Amendment 50 is considered a 'standard' amendment pursuant to the *Planning and Development (Local Planning Schemes) Regulations 2015* as it is:
  - (a) an amendment relating to a zone or reserve that is consistent with the objectives identified in the Scheme for that zone or reserve;
  - (b) an amendment that would have minimal impact on land in the Scheme area that is not the subject of the amendment;
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5. Pursuant to r.56 of the *Planning and Development (Local Planning Schemes) Regulations 2015*, should directions be given that modifications to Amendment 50 are required, direct these modifications to be undertaken accordingly, on behalf of the Council, unless they are considered by officers likely to significantly affect the purpose and intent of the Amendment, in which case the matter shall be formally referred back to the Council for assessment and determination.

#### **REASONS FOR AMENDMENT / ALTERNATIVE**

Officers support the proposal to down-code the subject sites from R80 to R60 for all of the reasons outlined in the Background section of the Council report. Item 2 in the Schedule of Modifications proposes the introduction of "R80" to clause 4.3.2, however on reflection officers advise that this change does not relate to the Amendment, as a down-coding to R60 is recommended, and therefore should be removed as a modification to clause 4.3.2.



Item 3 of the Schedule of Modifications includes a typographical error, resulting in wording that is inconsistent with the current wording of the Scheme. While this altered wording is not actually a proposed modification, officers recommend that the typographical error be corrected to remove any doubt or misunderstanding during the further stages of assessment by DPLH/WAPC.

**OFFICER COMMENT**

As per Reasons above.

**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.