



**City of Kingston  
Special Council Meeting**

**Agenda**

**11 October 2010**

*of Barwon Street.*

*(2) Replace soil around the roots of tree No. 34.*

*(3) This, and other trees whose root systems have been damaged due to trenching,*

*should be watered in accordance with the arborist's recommendations.*

*(4) Replace the fence around the Manna gum located in E11 and remove the rubbish*

*skip.*

*• That the developer undertakes a regular watering program to ensure the survival of all vegetation to be retained on the site.*

*• That the landscape bond be increased to \$135,000 and that, in the event the developer causes further damage to sections of the site to be transferred to council and does not rectify the damage to Council's satisfaction, Council will utilise the bond to carry out the necessary rectification works.*

*• If Council initiates enforcement proceedings associated with a breach of this agreement or planning permit provisions and the proceedings are successful, Council to deduct its cost from the developers bond.*

*• Complete all works to the Scout Hall within 60 days of the approval of the plan of subdivision.*

*• That within 14 days of settlement the developer to provide a revised construction management plan incorporating recommendation of a new arborist's report.*

Special Council Meeting 20<sup>th</sup> October, 2008

Following the above mentioned report a subsequent report was presented to Council to provide an update on the negotiations with the developer of 20 Levanto Street, Mentone.

At this meeting Council resolved as follows:

*That Council continue to negotiate a revised position with the developer of the Chicquita site and report back to the October Council meeting.*

Ordinary Council Meeting 27<sup>th</sup> October, 2008

A report was presented to the Ordinary Council Meeting on the 27<sup>th</sup> October, 2008. At this meeting Council resolved as follows:

*That Council enter into an agreement with the developer of 20 Levanto Street, Mentone with the objective of facilitating the early completion of the project on the basis that:*

*1. Payment for land to be purchased by Council be deferred and the following payment schedule be adopted.*

- \$200,000 upon completion of Scout Hall works as set out in previous agreements.*

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- *\$500,000 on 30 June 2009 at which time all open space areas will be handed over to Council.*
- 2. *On 30 June 2009 the developer will provide Council with a bond to secure the completion of any outstanding landscaping works.*
- 3. *All outstanding landscaping works be completed within 90 days of the final handover of open space.*

Section 173 Agreement

Subsequent to the consideration by Council of the above reports the attached Section 173 Agreement (refer Attachment 1) was executed between the parties on the 28<sup>th</sup> November, 2008.

The executed agreement required that Council make two contributions towards the cost of the Open Space and Scout Hall Land as defined by the terms of the Agreement.

The first contribution of \$500,000 was paid to Chicquita Pty Ltd in December, 2009.

Subsequent to the above Section 173 agreement being executed it was agreed in December 2009 between that parties (refer Attachment 2) that the outstanding payment of \$200,000 for the Scout Hall Contribution would occur when:

- Scout Hall works completed to Council's satisfaction (refer 3.1)
- Open space works completed or payments in lieu of works agreed (refer 3.2)
- Offset calculations for works to be agreed by both parties (refer 3.3)
- Street lighting issue resolved (refer 3.4)

**3. Issues**

An update on those matters indicated above which relate to the agreements between the parties are outlined below.

3.1 Scout Hall works completed to Council's satisfaction

Council's Manager of Community Buildings has recently advised that the works required to the Scout Hall have been completed to the satisfaction of Council.

Chicquita Pty Ltd have provided copies of building inspection certificates of final inspection and supporting information from various trades involved in the works.

3.2 Open space works completed or payments in lieu of works agreed

It has been agreed between Council Officers and Chicquita Pty Ltd that a payment be made to Council in lieu of Chicquita Pty Ltd undertaking any additional landscaping

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works and that such works be undertaken by Council given the sensitive environment in which the works are proposed.

The agreement provides for a contribution of \$34,491 (inclusive of GST) which accounts for materials and labour that Chicquita Pty Ltd would have expended on the balance of the landscaping works on the subject land. This amount has been determined following consideration by representatives of Councils Parks and Depot Operations Department.

Chicquita Pty Ltd also undertook the following works requested by Council which were deemed to sit outside earlier agreements to the value of \$30,910.00:

- Installation of a Disabled Ramp to the Scout Hall
- Additional Restumping to the Scout Hall
- Request realignment of Barwon Street by Council
- Provision of Bollards

Council Officers had agreed to reimburse these costs to Chicquita Pty Ltd accordingly.

The above mentioned payments to Council for landscaping works and to Chicquita Pty Ltd for additional works it has undertaken would be offset against the payment required from Council of \$200,000.00 as outlined in the Section 173 Agreement.

3.3 Offset calculations for works to be agreed by both parties

As per previous advice a draft agreement has been prepared by Maddocks Lawyers which provides for a \$20,000 payment or 300 trees to be provided by Chicquita Pty Ltd to Council as an offset for the planting required as a consequence of the removal of native vegetation. The draft agreement also provides for discharging all requirements in relation to the Offset Management Plan including obligations to maintain vegetation. Subject to the payment being received existing charges alleging breaches of Condition 20 of the Planning Permit (relating to equipment and services namely hot water services erected above the ridge levels of dwellings approved under the said permit) and Condition 29 (relating to completing landscaping works in accordance with the said permit) would be withdrawn.

3.4 Street lighting issue

This issue detailed below requires direction from Council on whether it wants to pursue enforcement action or not.

Planning Permit KP110/2006/A contains the following conditions:

1e) the provision of details of the type of street lighting proposed throughout the development

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27) Outdoor lighting must be provided, designed, baffled and located to the satisfaction of the Responsible Authority to prevent any adverse effect on neighbouring land.

28) Exterior lights must be installed in such positions to effectively illuminate all pathways, car parks and other public areas to the satisfaction of the Responsible Authority.

Conditions 27 and 28 above are routinely placed on Planning Permits for such developments.

With respect to Condition 1e) the 'Civil siteworks services plan' endorsed to Planning Permit KP110/06/A has a notation which indicates that '*street lights are to be green Toorak Lanterns on green boulevard poles. Alternative lights may be used subject to approval by Council*'. An image of a Toorak Lantern is provided as an attachment to this report as is the actual form of street light which has been installed on the site.

The direction required from Council is to determine whether or not it is satisfied with the form of light which has been erected.

In examining this issue with Chicquita Pty Ltd a representative acting on its behalf has provided an email to Council dated 14<sup>th</sup> September, 2010, which is included as an attachment to this report. In relation to the street lighting the correspondence indicates:

*'In relation to the lighting, we will rely on the permit and the Section 173 Agreement. The lighting was accepted by Council at handover of the roads, Council have no right to delay payment of \$200,000 owing under the 173 agreement against any claim or action relating to the permit. If we are in breach of the permit, Council at all times has the right to prosecute and we will defend any action Council wishes to take. The 173 Agreement is clear, upon the compliance with Clause 4.2, Council **will pay without delay**. Council have no right of offset, if Council is not satisfied with the lighting, it has many remedies available to it, one of these is not offsetting or delaying a legitimate payment due under the 173 Agreement and as we are agreed on all terms, then payment must be made without delay'.*

Having investigated the potential breach of the Planning Permit KP110/2006/A with Chicquita Pty Ltd, the following is apparent:

1. Council records do not indicate any formal agreement between the parties to depart from the Toorak Lanterns on Green Boulevard Poles as is reflected in the approved planning documentation.
2. Council's correspondence to the developer at the time of construction and in outlining any construction defects, did not raise the issue of lighting.

Advice has been sought from the Manager Infrastructure with regards to the suitability of the lights which have been installed. The Manager Infrastructure has indicated that the lights which have been installed are standard Council streetlights

and can be readily replaced at a cost which is substantially less than the Toorak Lanterns and Green Boulevarde Poles. Investigations have also indicated that should the need exist to baffle the lights this can be achieved through the introduction of an alternate shield fitting.

Advice has also been sought from the Acting Manager of Statutory Planning in relation to whether an Amendment would be required to Planning Permit KP110/06/A should Council be of the view that it wished to retain the existing lighting. It has been advised that based on the wording of the Planning Permit Conditions and plans endorsed to the Planning Permit modifications would not be required to either the Planning Permit or endorsed Plans should Council in its capacity as Responsible Authority be satisfied with the lights which have been introduced.

Direction is therefore sought from Council as to whether it wishes to instigate proceedings to seek to enforce the Planning Permit noting the comments of Chicquita Pty Ltd that it believes the lighting was accepted by Council at the handover of roads and it would defend any action Council wishes to take.

#### **4. Conclusion**

Having considered that matters which remain outstanding in relation to the terms of the existing Section 173 Agreement direction is sought from Council in relation to the following recommendations.

#### **5. Recommendation**

That Council:

1. Accept a payment from Chicquita Pty Ltd of \$34,491.90 (inclusive of GST) in lieu of Chicquita Pty Ltd undertaking the landscape works.
2. Provide Chicquita Pty Ltd a payment of \$30,910 (inclusive of GST) for additional works it has undertaken on the subject land and to the Scout Hall at the request of Council.
3. Execute an agreement to provide for a payment from Chicquita Pty Ltd of an amount of \$20,000.00. And subject to executing the agreement with Chicquita Pty Ltd, Council will withdraw the charges relating to alleged breaches of Conditions 20 and 29 of Planning Permit KP110/06/A.
4. Subject to the above matters being resolved provide payment, to Chicquita Pty Ltd of the balance of \$200,000 outstanding from Council in accordance with the Section 173 dated 28 November 2008.
5. Accept that the existing street lighting is to its satisfaction.
6. Undertake consultation with the residents living on the former Chicquita Reserve on whether the existing street lights need to be modified where required by fitting baffles to reduce intrusive and unnecessary light spillage.

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