

Notice is given that a Special Meeting of the Kingston City Council was held 6.36pm at 1230 Nepean Highway Cheltenham on Monday 11 October 2010.

Business was as follows:

1. **Apologies**
2. **Disclosures of conflicts of interest**
3. **Reports by Officers**

M 202 **20 Levanto Street, Mentone**
Landscape Plan Implementation

M 203 **20 Levanto Street, Mentone**

4. **Urgent Business**

1. Apologies

Crs Brownlees/Peulich

That an apology for Cr Ronke and Cr Bauer be noted

carried

2. Disclosures of conflicts of interest

Cr Dundas disclosed a conflict of interest in relation to item M202 and M203

3. Reports by Officers

M 202

20 Levanto Street, Mentone
Landscape Plan Implementation

Approved by:

Tony Rijs, General Manager Environmental Sustainability

Author:

Jonathan Guttman, Manager City Strategy

1. Purpose

This report seeks direction from Council on the implementation of landscaping works on the Chicquita Park (non private land).

The report also seeks to inform Council of the manner in which members of Council's Parks and Depot Operations Department propose to schedule the proposed works and bring them to the attention of the community.

2. Background

Schedule 3 to the Development Plan Overlay

As a consequence of Planning Scheme Amendment C25 the subject land was rezoned to Residential 3 and included in schedule 3 to the Development Plan Overlay. Of particular relevance to this report which addresses landscaping issues was the inclusion into the Schedule to the Development Plan Overlay a plan titled '*Building Envelope and Tree Retention Plan*' which indicates those trees previously identified as significant and warranting retention (refer Attachment 1).

Planning Permit KP110/06/A

Subject to the gazettal of Planning Scheme Amendment C25 and its introduction into the Kingston Planning Scheme a Planning Permit was sought and subsequently granted which included permit conditions requiring the development of a landscape plan. A landscape plan was subsequently endorsed to Planning Permit KP110/06/A on the 16th March, 2007. A copy of the endorsed plan is included as part of Attachment 2 to this report. This plan should be used by Councillors in reviewing the recommendations provided below.

As identified in item No M203 also included on the agenda of this Council meeting, Council has previously agreed a cash in lieu payment being made for the outstanding landscape works.

Discussions with Ward Councillors

Council Officers have recently held a series of discussions with central ward Councillors in order to understand the views they have held in relation to the nature of the outstanding landscape works on the subject land.

Officers have suggested to Councillors that although the land in question is now zoned Public Park and Recreation and held under title by Council, it is not desirable to depart substantively from the approved landscape plan. The basis for this is that purchasers may have reviewed the endorsed landscape plans prior to making a decision on purchasing within the estate in order to understand what landscaping was intended.

This report now seeks to provide a summary of the key issues identified in the discussions with Councillors and recommendations in relation to responding.

3. Issues

3.1 Existing post and rail fence along Levanto Street

During the construction period a significant number of post and rails were placed along the Levanto Street frontage of the site to prevent construction vehicles from accessing areas where significant vegetation is prevalent. Officers believe that the post and rail fence in question are now redundant and should be removed as that the subject land had not been fenced during its time as a park. The landscape plan also proposed some bollard areas approximate to the Barwon Street exit.

Recommendation a) The existing post and rail fence along the Levanto Street frontage/Barwon Street approach of the site be removed.

3.2 Footpath Locations

As a consequence of discussions with Council, sections of the path network running parallel with Levanto Street between Lot 39 and Lot 45 were not constructed.

In addition it has been suggested that the proposed alignment of the as yet to be constructed path in the north west corner of the site be modified to run at a slight angle towards Levanto Street as a continuation of the existing footpath to the immediate north of the site to the intersection of Chicquita Circuit.

Recommendation b) That the landscape plan be modified to show the actual path alignment between lots 39 and 45 and that the path between the north west corner of the site and Chicquita Circuit be modified to appear as a continuation of the footpath and running at a slight angle to Levanto street.

3.3 Street Trees on Levanto Street

In addition to the trees identified on the landscaping plan to be planted on the nature strip, Council has undertaken some street tree planting in this area. It is appropriate that the approximate location of these trees be plotted on the landscape plan to enable Council Officers to then determine where the additional trees shown in the nature strip on the landscape plan need to be planted.

3.4 Existing native garden bed (south west)

At present an existing native garden bed (enhanced indigenous area) has been established in a generally rectangular form to the immediate west of lots 35 to 39. Council Officers consider that in this location it is not necessary to fence this bed despite this being indicated on the endorsed landscape plan. It is therefore recommended that Council do not proceed with the fencing however some supplementary planting should occur in this area.

Recommendation c) That the native garden bed located in the south west corner of the site not be provided with a post and wire fence as shown on the endorsed plan, though further supplementary planting occur in this area to replenish this garden bed.

3.5 Proposed native garden bed (west)

The endorsed plan indicates the establishment of an 'enhanced indigenous area' to the immediate west of Lots 45 and 56. This area is yet to have been established. At present this area contains many of the remaining Manna Gums located on the subject land as well as other vegetation which has been well established on the subject land. Officers believe that the principal of creating a fenced native garden bed in this area is consistent with the approved landscape plan and should be pursued.

Although the establishment of a fence and the consequential plantings will act to create a barrier between Lots 45 and 56 to Levanto Street the intention to establish a native garden in this area has been a consistent landscape theme developed during the initial planning stages of this project. Without the establishment of a fence in a form generally consistent with that shown on the landscape plan it is felt that the preservation of existing species and desire to create a garden bed area will be compromised.

It is also considered that given the width of the path as approved at 1.2 metres on the immediate western side of Lots 45 to 56 it is appropriate that the native garden bed be established along the alignment shown on the endorsed plan to provide some additional 'open area' on the western side of the path. It is considered that in this area it would be appropriate to seek to establish a native grass area to complement the proposed garden bed.

The native garden area will incorporate species consistent with the ecological vegetation class previously established in this area.

Recommendation d) That a fenced native garden bed be established in accordance with the previously endorsed landscape plan to the immediate west of the pathway adjacent to Lots 45 to 56.

Recommendation e) That a native grass lawn be established in the area between the existing pathway and the native garden bed.

3.6 Central Open Space Area

The endorsed landscape plan generally indicates that this area should be retained as an open area with limited planting. Advice from Council Officers is that some remediation work eg elimination of builder's rubble will be required to suitably prepare this area to establish a fully functional conventional lawn. In addition opportunity to introduce some additional soil to this area to create a more consistent grade may improve the runoff of water during significant rainfall events.

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Recommendation f) That the required remediation works and introduction of soil as required be introduced into this area to establish an open lawn environment and resolve any existing drainage related issues.

3.7 Scout Hall Works

Following discussions with Councillors it has been recommended that a series of bollards be established within close proximity to Chicquita Circuit to prevent vehicles (associated with the scout group) parking on the areas identified as open space. It has also been recommended that a gate be considered to restrict vehicular access to the rear of the scout hall. Bollards could then be established next to the gate to retain public access to the rear of the scout hall. Officers believe that it is appropriate that consultation occur with the scouts prior to the following recommendations being pursued:

Recommendation g) That a series of bollards be established immediately adjacent to the northern side of the Chicquita Circuit adjacent to the scout hall to prevent vehicles parking on the open space areas next to the scout hall.

Recommendation h) That a gate limited to the width of the existing driveway be installed to control vehicular access to the scout hall storage area and bollards be placed adjacent to the gate to retain public access to the rear of the scout hall.

3.8 Bins

Council's Team Leader Maintenance Contracts has reviewed the placement of garbage bins for the dwellings predominantly fronting Chicquita Circuit with a view toward seeking to limit the amount of garbage bins being placed on the Levanto Street nature strip on the allocated collection days. The advice which has been received from Council's rubbish collection contractors indicates that Council can modify its existing collection arrangements by utilising a smaller rear loader truck which is capable of travelling along Chicquita Circuit. The truck is also supported by workers who manually load the bins onto the truck rather than an automated system as is more commonly the case across Kingston.

Council Officers believe that rubbish bin collection should in the future be managed in the following manner:

- 1) Provide residents with the option of leaving bins on collection day contained on their property immediately adjacent to Chicquita Circuit.
- 2) Providing a dedicated bin collection point adjacent to Chicquita Circuit on the northern side of Lot 56 for those bins unable to be contained along Chicquita Circuit on private property. The landscape plan would require minor modifications in relation to the placement of two trees proposed trees to accommodate a temporary bin storage area.

Recommendation i) The two *Allocasuarina verticillata* (Drooping She Oak) trees proposed on the northern side of Lot 56 be slightly relocated to ensure that bins can be stored on collection day in this location. The existing chain must also be removed from the bollards to provide ease of access to the bins in this location.

Recommendation j) Council write to residents who obtain access to their properties from Chicquita Circuit to inform them that a smaller and manually operated garbage truck will be

used and that bins will now be collected either from immediately adjacent to their properties on Chicquita Circuit or in a dedicated collection area near lot 56 adjacent to Chicquita Circuit.

3.9 Other Bollard/Fence Proposals

To the east of the development there are a number of locations designated for bollard/fence installation. It is now not considered necessary for these installations.

4. Works Timing / Community Notification

November 2010 to February 2011 (Summer)

Tasks:

- Undertake weed removal
- Prepare and suitable mulch proposed for garden bed areas
- Remove existing bollard fencing along Levanto Street
- Establish perimeter fencing around the garden bed area
- Providing for required path works and establishment of bollards around the Scout Hall
- Provide for any required remediation and levelling of central open space area to reduce water runoff
- Commence sourcing planting stock

March to May 2011 (Autumn)

- Undertake proposed plantings and as necessary obtain additional ecological advice.
- Establish improved central grassed open space areas

Prior to works commencing Council should write to the residents of the estate outlining the above works program.

5. Conclusion

As identified Council Officers have now held discussions with Central Ward Councillors regarding the manner in which the subject land should be further landscaped. As identified in this report an approved landscape plan to Planning Permit KP110/06/A provides guidance on the landscaping intended for the subject land. This report presents a series of recommendations to Council seeking its direction in relation to undertaking the required landscaping works.

6. Recommendation

1. That Council resolve to make the following modifications to the approved landscape plan dated 16th March, 2007 and/or make the following changes to the existing conditions on the subject land:

Recommendation a) The existing post and rail fence along the Levanto Street frontage of the site be removed.

Recommendation b) That the landscape plan be modified to show the actual path alignment between lots 39 and 45 and that the path between the north west corner of the site and Chicquita Circuit be modified to appear as a continuation of the footpath and running at a slight angle to Levanto street.

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Recommendation c) That the native garden bed located in the south west corner of the site not be provided with a post and wire fence as shown on the endorsed plan, though further supplementary planting occur in this area to replenish this garden bed.

Recommendation d) That a fenced native garden bed be established in accordance with the previously endorsed landscape plan to the immediate west of the pathway adjacent to Lots 45 to 56.

Recommendation e) That a native grass lawn be established in the area between the existing pathway and the native garden bed.

Recommendation f) That the required remediation works and introduction of soil as required be introduced into this area to establish an open lawn environment and resolve any existing drainage related issues.

Recommendation g) That a series of bollards be established immediately adjacent to the northern side of the Chicquita Circuit adjacent to the scout hall to prevent vehicles parking on the open space areas next to the scout hall.

Recommendation h) That a gate limited to the width of the existing driveway be installed to control vehicular access to the scout hall storage area and bollards be placed adjacent to the gate to retain public access to the rear of the scout hall.

Recommendation i) The two *Allocasuarina verticillata* (Drooping She Oak) trees proposed on the northern side of Lot 56 be slightly relocated to ensure that bins can be stored on collection day in this location. The existing chain must also be removed from the bollards to provide ease of access to the bins in this location.

Recommendation j) Council write to residents who obtain access to their properties from Chicquita Circuit to inform them that a smaller and manually operated garbage truck will be used and that bins will now be collected either from immediately adjacent to their properties on Chicquita Circuit or in a dedicated collection area near lot 56 adjacent to Chicquita Circuit.

2. Council write to residents who obtain access to their properties from Chicquita Circuit to inform them that a smaller and manually operated garbage truck will be used and that bins will now be collected either from immediately adjacent to their properties on Chicquita Circuit or in a dedicated collection area near lot 56 adjacent to Chicquita Circuit.

Cr Dundas declared an interest and left the meeting prior to discussion on the item commencing at 6.37pm. Cr Dundas returned to the meeting at 6.37pm and remained in the gallery for the remainder of the meeting.

Crs Brownlees/West

1. That Council resolve to make the following modifications to the approved landscape plan dated 16th March, 2007 and/or make the following changes to the existing conditions on the subject land:

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Recommendation a) The existing post and rail fence along the Levanto Street frontage of the site be removed.

Recommendation b) That the landscape plan be modified to show the actual path alignment between lots 39 and 45 and that the path between the north west corner of the site and Chicquita Circuit be modified to appear as a continuation of the footpath and running at a slight angle to Levanto street.

Recommendation c) That the native garden bed located in the south west corner of the site not be provided with a post and wire fence as shown on the endorsed plan, though further supplementary planting occur in this area to replenish this garden bed.

Recommendation d) That a fenced native garden bed be established in accordance with the previously endorsed landscape plan to the immediate west of the pathway adjacent to Lots 45 to 56.

Recommendation e) That a native grass lawn be established in the area between the existing pathway and the native garden bed.

Recommendation f) That the required remediation works and introduction of soil as required be introduced into this area to establish an open lawn environment and resolve any existing drainage related issues.

Recommendation g) That a series of bollards be established immediately adjacent to the northern side of the Chicquita Circuit adjacent to the scout hall to prevent vehicles parking on the open space areas next to the scout hall.

Recommendation h) That a gate limited to the width of the existing driveway be installed to control vehicular access to the scout hall storage area and bollards be placed adjacent to the gate to retain public access to the rear of the scout hall.

Recommendation i) The two *Allocasuarina verticillata* (Drooping She Oak) trees proposed on the northern side of Lot 56 be slightly relocated to ensure that bins can be stored on collection day in this location. The existing chain must also be removed from the bollards to provide ease of access to the bins in this location.

Recommendation j) Council write to residents who obtain access to their properties from Chicquita Circuit to inform them that a smaller and manually operated garbage truck will be used and that bins will now be collected either from immediately adjacent to their properties on Chicquita Circuit or in a dedicated collection area near lot 56 adjacent to Chicquita Circuit.

Recommendation k) that some flexibility be allowed regarding the trees to be planted provided they all come from the trees already growing on the site or designated on the planting plan.

Cr West proposed the following amendments

Recommendation b: Delete words after 45.

Recommendation c:

Add 's' to beds;

After 'corner' 'and in other parts of'

Replace 'this area' with 'these areas',

Replace 'this garden bed' with 'these garden beds'

Add the words: 'that further supplementary planting occur among and around the manna gums between the garden beds on the Levanto St frontage, to be a natural unfenced bush play area.

Recommendation i

Delete the tree names

With the agreement of the Mover the amendments were incorporated into the substantive motion which was then put and carried.

The substantive motion reads in its entirety

Crs Brownlees/West

That Council resolve to make the following modifications to the approved landscape plan dated 16th March, 2007 and/or make the following changes to the existing conditions on the subject land:

Recommendation a) The existing post and rail fence along the Levanto Street frontage of the site be removed.

Recommendation b) That the landscape plan be modified to show the actual path alignment between lots 39 and 45.

Recommendation c) That the native garden beds located in the south west corner of the site not be provided with a post and wire fence as shown on the endorsed plan, though further supplementary planting occur in these areas to replenish these garden beds and that further supplementary planting occur among and around the manna gums between the garden beds on the Levanto St frontage, to be a natural unfenced bush play area.

Recommendation d) That a fenced native garden bed be established in accordance with the previously endorsed landscape plan to the immediate west of the pathway adjacent to Lots 45 to 56.

Recommendation e) That a native grass lawn be established in the area between the existing pathway and the native garden bed.

Recommendation f) That the required remediation works and introduction of soil as required be introduced into this area to establish an open lawn environment and resolve any existing drainage related issues.

Recommendation g) That a series of bollards be established immediately adjacent to the northern side of the Chicquita Circuit adjacent to the scout hall to prevent vehicles parking on the open space areas next to the scout hall.

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Recommendation h) That a gate limited to the width of the existing driveway be installed to control vehicular access to the scout hall storage area and bollards be placed adjacent to the gate to retain public access to the rear of the scout hall.

Recommendation i) The two trees proposed on the northern side of Lot 56 be slightly relocated to ensure that bins can be stored on collection day in this location. The existing chain must also be removed from the bollards to provide ease of access to the bins in this location.

Recommendation j) Council write to residents who obtain access to their properties from Chicquita Circuit to inform them that a smaller and manually operated garbage truck will be used and that bins will now be collected either from immediately adjacent to their properties on Chicquita Circuit or in a dedicated collection area near lot 56 adjacent to Chicquita Circuit.

Recommendation k) that some flexibility be allowed regarding the trees to be planted provided they all come from the trees already growing on the site or designated on the planting plan.

Carried

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M 203 **20 Levanto Street, Mentone**

Approved by: John Nevins, Chief Executive Officer

Author: Jonathan Guttman, Manager City Strategy

1. Purpose

This report provides an update to Council on outstanding matters with respect to the final required payment between the subject land developer (Chicquita Pty Ltd) and Council as outlined in a Section 173 Agreement between the parties dated 28th November, 2008.

2. Background

Special Council Meeting 6th October, 2008

Item K156 was considered by Council at this meeting and Council resolved to put the following resolution to the developer Chicquita Pty Ltd as follows:

That Council enter into an agreement with the developer at 20 Levanto Street, Mentone, to facilitate an enhanced construction timetable, and that the developer be advised that Council is prepared to enter into an agreement that will allow occupation of greater than 44.9% of the site for construction purposes providing the agreement is based on the following provisions:

- *That consideration for the land to be transferred at settlement be \$1,000 with the balance of \$699,000 being payable on the satisfactory completion of approved landscape works and the handover of all land in council ownership.*
- *The land coloured red on PS 606328M (attached) is to be handed over to council at settlement.*
- *That portion of the land coloured yellow on PS 606328M in the vicinity of the entrance road, and currently fenced to protect significant vegetation, be handed over to Council at settlement.*
- *That the portion of land coloured ochre on PS 606328M, and currently fenced to protect significant vegetation, be handed over to Council at settlement.*
- *That if the Council land is not landscaped in accordance with approved landscape plans and handed over to council by the 30 June 2009, the balance owing will be reduced from \$699,000 to \$574000.*
- *That within 14 days of the execution of this agreement the developer at his own cost will:*

- (1) Replace the Eucalypt tree removed without approval in the Eastern boundary, south 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.*

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- *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 20th 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 27th October, 2008

A report was presented to the Ordinary Council Meeting on the 27th 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.*
 - *\$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 28th November, 2008.

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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 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.

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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
- 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 14th 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

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*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 Boulevard 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.

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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.

Crs Brownlees/Peulich

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

The Mayor determined to put the motion in 6 parts

Crs Brownlees/Peulich

That Council:

Part 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.

Part 1 of the motion was put and carried

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Crs Brownlees/Peulich

Part 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.

An amendment to part 2 was moved

Crs West/Shewan

Part 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 less the cost of works that should have been paid for by the developer, including

- the re-stumping of the Scout Hall and
- the provision of a ramp accessible for disabled persons;
- the provision of any bollards shown in an endorsed plan or installed in compliance with Planning permit Condition 2(I) “the provision of ...bollards to prevent non-maintenance vehicles accessing the public open space land;.

The amendment to Part 2 was put and lost

The substantive Part 2 of the motion was then put and carried

Crs Brownlees/Peulich

Part 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.

Part 3 of the motion was put and carried

Crs Brownlees/Peulich

Part 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

Cr West proposed to amend the motion to read as follows

Part4 Subject to the above *or following resolution of outstanding costs and other matters outlined in this resolution* payment, to Chicquita Pty Ltd of the balance of \$200,000 outstanding from Council in accordance with the Section 173 dated 28 November 2008 *or withhold any outstanding amounts needed for council to complete these works.*

With the acceptance of the Mover and Seconder the amendment was incorporated into the substantive motion.

The Part 4 of the motion was put and carried

Crs Brownlees/Peulich

Part 5 Accept that the existing street lighting is to its satisfaction.

An amendment to Part 5 was moved

Crs West/Shewan

5 *Arrange for the developer to meet the cost of the following measures needed to meet acceptable standards and/or to comply with endorsed plans:*

5.1 *Fit baffles to all existing street lights to reduce intrusive and unnecessary light spillage;*

5.2 *Remove two of the streetlights not specified in the endorsed Civil Siteworks Plans, which have been the subject of complaints by residents;*

5.3 *Replace remaining streetlights with the green Toorak lanterns on boulevard poles that were specified in the endorsed civil siteworks plans*

5.4 *Make outstanding repairs to council property including:*

- *Broken edges and sections of gutter;*
- *Clean concrete splashes from gutters and lamp-posts;*
- *Fix shoddy edges and uneven levels of pathways.*

The Mayor determined that this motion needed to be voted on in parts as point 5.1 and 5.3 were contradictory.

Point 5.3 was put and lost

Point 5.1 and 5.2 were put and carried.

Point 5.4 was put and lost

The mayor determined that Part 5 and Part 6 should be determined together.

With the agreement of the Mover and Seconder Part 6 was modified to add after the words living on the words 'or adjacent to or across the road from' before the words the former Chiquita Reserve

The substantive Part 5 and Part 6 of the motion were then put and carried.

The substantive Part 5 and 6 read as follows

5. Arrange for the developer to meet the cost of the following measures needed to meet acceptable standards and/or to comply with endorsed plans:

5.1 Fit baffles to all existing street lights to reduce intrusive and unnecessary light spillage;

5.2 Remove two of the streetlights not specified in the endorsed Civil Siteworks Plans, which have been the subject of complaints by residents (subject to assurance by council officers that this would comply with safety requirements);

6 Undertake consultation with the residents living on or adjacent to or across the road from 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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A further amendment to add a Part 7 to the motion was moved

Crs West/Shewan

Part 7 that funds should also be withheld to compensate for land lost to the Council and community because:

- The public open space handed over to council (as shown by the surveyor's plan: Bosco Johnson, 14/8/08) is only 44.79% of the site, not 44.9% as it was required to be by the original Council decision to approve the development, and
- Encroachments by the developer, such as extra road space taken from the public open space because the developer's plans did not permit the resident of the lot abutting the public open space at the end of the Barwon Street extension to get their cars in and out of their garage.

The amendment was put and lost

A division was called

For Cr West, Cr Shewan

Against Cr Peulich, Cr Athanasopoulos, Cr Brownlees, Cr Staikos

The Mayor declared the amendment lost

The motion in its entirety reads

Cr Brownlees/Peulich

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 or following resolution of outstanding costs and other matters outlined in this resolution payment, to Chicquita Pty Ltd of the balance of \$200,000 outstanding from Council in accordance with the Section 173 dated 28 November 2008 or withhold any outstanding amounts needed for council to complete these works.
5. Arrange for the developer to meet the cost of the following measures needed to meet acceptable standards and/or to comply with endorsed plans:

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- 5.1 Fit baffles to all existing street lights to reduce intrusive and unnecessary light spillage;
- 5.2 Remove two of the streetlights not specified in the endorsed Civil Siteworks Plans, which have been the subject of complaints by residents (subject to assurance by council officers that this would comply with safety requirements);

- 6 Undertake consultation with the residents living on or adjacent to or across the road from 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.

4. Urgent Business

Nil

There being no further business the meeting closed at 7:28pm