

28 March 2022

Agenda Item No: 14.1

VCAT MATTER

Contact Officer: Alfred Carnovale, Planning Appeals Coordinator

VCAT Purpose of Report

The purpose of this report is to respond to point 4 of the Council Resolution 28 February, 2022 regarding confidential item 14.2.

Disclosure of Officer / Contractor Direct or Indirect Interest

No Council officer/s and/or Contractor/s who have provided advice in relation to this report have declared a Conflict of Interest regarding the matter under consideration.

OFFICER RECOMMENDATION

That Council determine, pursuant to Section 125 of the Local Government Act 2020, to make publicly available:

1. The following aspects of the settlement between the City of Kingston and Cavendish
 - Cavendish agrees not to commence or permit the commencement of any development of the 2018 development plans for 54 Pier One Drive and 115A McLeod Road, Patterson Lakes for a period of two (2) years from 7 March 2022.
 - The City of Kingston agrees not to exercise whatever power it might have to revoke the 2018 development plans for 54 Pier One Drive & 115A McLeod Road, Patterson Lakes.
 - The City of Kingston agrees to withdraw its declaration proceeding known as VCAT Reference P1995/2019 and as a result pay the legal costs of Cavendish associated with the proceeding in the amount of \$60,000.
2. This report (except for its appendices).

Background

On 28 February 2022 Council was presented with a confidential report relating to a proposed settlement with Cavendish Properties Pty Ltd (**Cavendish**) for an application for Declaration pursuant to Section 149A of the Planning and Environment Act 1987, VCAT Ref No. P1995/2019 (**declaration proceeding**).

Following the consideration of this report Council resolved:

That Council:

1. *Agree to settle the current VCAT proceeding known as VCAT reference No. P1995/2019 generally in accordance with the circulated consent position and to the satisfaction of Council's legal representative.*
2. *Delegate officers, through Council's legal representation, to withdraw the current VCAT proceeding known as VCAT reference No. P1995/2019 for the land located at 54 Pier One Drive and 115A McLeod Road, Patterson Lakes following an agreed consent position.*

3. *Determine, pursuant to Section 125 of the Local Government Act 2020, that this report and points 1 and 2 of this resolution be made publicly available following an agreed consent position, with the exception of Appendix 3.*
4. *That a further report be brought back to the March Council meeting to consider what aspect of any settlement be made publicly available.*

This report is in response to point 4. of the above resolution.

In accordance the abovementioned resolutions 1 and 2 from 28 February 2022, Council has now withdrawn the declaration proceeding scheduled for 10 and 11 March 2022 and paid legal costs to Cavendish in the amount of \$60,000.

Discussion

Council and Cavendish agreed to settle the declaration proceeding as per the attached confidential terms of settlement. Noting that the terms of settlement include banking details and other personal information Officers recommend that these documents remain confidential. Notwithstanding the above, Officers also recommend that Council should release the pertinent aspects of the settlement given the public nature of the declaration proceeding and the desire for Council to be as transparent as possible.

Officers recommend the following aspects of the settlement be made publicly available:

- a) Cavendish agrees not to commence or permit the commencement of any development of the 2018 development plans for 54 Pier One Drive and 115A McLeod Road, Patterson Lakes for a period of two (2) years from 7 March 2022.
- b) The City of Kingston agrees not to exercise whatever power it might have to revoke the 2018 development plans for 54 Pier One Drive & 115A McLeod Road, Patterson Lakes.
- c) The City of Kingston agrees to withdraw its declaration proceeding known as VCAT Reference P1995/2019 and as a result pay the legal costs of Cavendish associated with the proceeding in the amount of \$60,000.

It is also recommended that the report be made publicly available.

If the above information is made publicly available this will provide transparency to the community whilst also protecting the personal information of those involved in negotiating the agreement.

Importantly when releasing the above information, it should be made clear that the payment of \$60,000 to Cavendish was their legal costs incurred as a result of Council lodging the declaration proceeding with the VCAT.

The Tribunal's bar for the award of costs is slightly lower in its declaration jurisdiction (i.e. applications brought to amend or cancel a permit etc.), than it is in its review jurisdiction. Therefore, it is arguably more likely to have costs awarded against Council than other parties, due to its responsibility to be a model litigant, and given it was also Council who initiated the proceeding.

Had Council not agreed at the time of settlement to pay Cavendish's costs it is highly likely that it would have been ordered by the VCAT to pay costs, following a costs order application. If this had occurred Council would have also spent further significant funds considering and defending any such application for costs as well as covering additional costs incurred by Cavendish.

Furthermore, had Council not agreed to withdraw the declaration proceeding Council would have incurred further significant legal costs of its own to continue to a hearing, likely commensurate to

the costs already spent by Cavendish. If Council was directed by the VCAT to pay costs to Cavendish this would have also included the further legal costs of Cavendish relating to its preparatory work and involvement in hearing the declaration proceeding.

Appendices

Appendix 1 - Council Report Attachment 1 - HWLE Letter Council settlement terms to Cavendish 25.02.2022 (Ref 22/63644) - Confidential

Appendix 2 - Council Report Attachment 2 - Cavendish settlement terms 28.02.22 (Ref 22/63649) - Confidential

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