

## Public Release as per Council decision 20 November 2024 Item 18.1

### 18.1 Audit and Risk Committee - 8 May 2024 - Notice of Motion - Legal Advice

This item contains information of a confidential nature in accordance with sections 5.23(2)(d) of the *Local Government Act 1995*, as it contains information relating to legal advice obtained, or which may be obtained by the local government.

#### MOTION

That the ARC recommend the following motion to the Council:

1. The CEO source external alternative legal advice (to that provided in December 2020 by McLeods) to provide a second opinion on the statutory requirement to advertise the BPACC (now Saltwater) business plan pursuant to s3.59 (Major Land Transaction) Local Government Act 1995.
2. The brief for the external alternative legal advice to provide all of the information that was provided to McLeods causing its initial advice (to Dec 15, 2020 inclusive), and the new information causing subsequent advice (post 15 Dec, 2020) along with the Council's most up to date position for purposes of seeking advice in relation to:
  - a) The appropriateness (or otherwise) of including contracts including but not limited to; construction, management and leases together for a common overall purpose being that of contributing/combining to the implementation of the BEACH then BPACC (later to be described as Saltwater) project proposal for the purposes of forming a Major Land Transaction (s3.59 LG Act); and
  - b) The triggering of the need to re-advertise a business plan (under s3.59) when planned State funding of \$9.5m<sup>^</sup> did not eventuate (causing this amount to be replaced via further debt funding contributed by City ratepayers).

If the balance of the advice in the interests of transparency is to support public advertising under s3.59 at any time now or in the past then what options exist to ameliorate this situation from this point forward to mitigate risk (in a broad sense). Specific advice is required pursuant to LG Act s3.59(9).

*<sup>^</sup>\$9.5m exceeded the Reg 8 threshold of approx. \$7.7m at the time.*

#### NOTICE OF MOTION

Cr Andrew Macnish has given notice that at the Audit and Risk Committee meeting on 8 May 2024, he will move the motion as above.

## REASONS

It is appropriate that risk is to be considered in future decision making surrounding the Saltwater project (as described by the respective components of its business plan). A project review in relation to Saltwater serves to aid in the good governance of the City and the responsible use of ratepayer funds. (Ref: Strategic Context CEO comment 13-12-23).

The ARC, now with all elected members serving as Committee members, is best placed to consider the risk/s identified in the full rationale provided for the proposed motion (at this point treated as confidential). It is also noted the first and last time the project's business plan was resolved by the Council was June 2020 when it applied (unsuccessfully) for State Funding. The review of the project business plan by the new Council, understanding its history, will necessarily assist the CEO in complying with C2311/180 part 2.

LG Act s3.59 requires a local government to prepare a Business Plan (adopted by the Council) to be prepared before it commences a major land transaction (MLT) or LT that is preparatory to a MLT.

There is no doubt the BPACC was a MLT given that the construction element of the development alone was over the Regulated financial threshold. This was confirmed by McLeods.

A proposed MLT's Business Plan is required to be advertised ('Statewide public notice') if the MLT is not an exempt LT. This is a vital element of a local government's governance transparency. It is also noted there is nothing preventing the Council undertaking a s3.59 advertising of a business plan that is under the threshold or deemed exempt. An advertised business plan engages the public in the following formal manner (as a minimum), ref s3.59(3);

*(3) The business plan is to include an overall assessment of the major trading undertaking or major land transaction and is to include details of -*

- (a) its expected effect on the provision of facilities and services by the local government;*
- (b) its expected effect on other persons providing facilities and services in the district;*
- (c) its expected financial effect on the local government;*
- (d) its expected effect on matters referred to in the local government's forward plan;*
- (e) the ability of the local government to manage the undertaking or the performance of the transaction; and*

Documents reveal the City to have been alerted to the requirements of LG Act s3.59 on 15 Dec 2020 (after making enquiries on 2 December mainly seeking advice regarding Anti-Competitive Behaviour pursuant to the Competition and Consumer Act 2010 Cth) and then reacted the very next day to seek an opinion as to its status with respect to the BPACC. One could reasonably assume the City had not previously considered the application of the LG Act's requirements of s3.59. At that juncture, (business plan-related) information provided gave rise to the opinion that neither of the exemptions under Reg 8 applied (and thus that public advertising of the project's business plan was required).

This is evidenced by the excerpt on pg15 of the initial letter of 15 Dec 2020; JL:BUSS:46880 from McLeods;

Therefore, if the total value of the development of the BPACC is more or is worth more than this prescribed amount (which we understand from previous estimates for the development would exceed the prescribed amount), the City would be required to prepare a business plan and give Statewide public notice in accordance with section 3.59(2) – (5) of the *Local Government Act* and regulation 10 of the *Local Government (Functions and General) Regulations*. Based on the information provided, neither of the exemptions under regulation 8 of the *Local Government (Functions and General) Regulations* would apply to these circumstances.

For completeness sake, LG Act F&G Reg 8 states:

**8. Exempt land transactions prescribed (Act s. 3.59)**

- (1) *A land transaction is an exempt land transaction for the purposes of section 3.59 of the Act if the local government enters into it —*
  - (a) *without intending to produce profit to itself; and*
  - (b) *without intending that another person will be sold, or given joint or exclusive use of, all or any of the land involved in the transaction.*
- (2) *For the purposes of subregulation (1)(b) a person is given joint use of land if the land is to be jointly used for a common purpose by the local government and that person (whether or not other persons are also given joint use of the land).*
- (3) *A transaction under which a local government disposes of a leasehold interest in land is an exempt land transaction for the purposes of section 3.59 of the Act if —*
  - (a) *all or any of the consideration to be received by the local government under the transaction is by way of an increase in the value of the land due to improvements that are to be made without cost to the local government; and*
  - (b) *although the total value referred to in the definition of **major land transaction** in that section is more, or is worth more, than the amount prescribed for the purposes of that definition, it would not be if the consideration were reduced by the amount of the increase in value mentioned in paragraph (a).*

It seems reasonably clear F&G Reg 8(1)a) was not in play given the whole development in construction and operation was always acknowledged it would lose hundreds of thousands and perhaps millions of dollars. Reg 8(1)b) would require there to be no leases within the project however leases and their revenue contributions (ruling out the 8(3) exemption) were very much a part of the development/business plan at that time (and it is understood publicly communicated and mentioned in Public Question Time).

So McLeods had already been provided with BPACC information (from which an initial assessment all but stating there was a need to advertise a Business Plan as a MLT via s3.59) but subsequently, information was conveyed to McLeods whereby it appeared to change ('revise') its view. There was no Council meeting listed in this 24 hour period to re-authorise changes to the project business plan.

On 15 December 2020 we provided our advice to you on these matters. On 16 December 2020 you sent us further information, including a copy of each of the BPACC Business Case - August 2020 and the Draft BPACC Business Plan June 2020 -- 2025. You asked us to take this information into account in considering the possible application of section 3.59 of the *Local Government Act*. We have revised our initial advice to update part 3.2 in light of this further information.

It seems the new view (received on or about the 23 December 2020), relied upon separating the items of leases (which is a disposal of property) from the balance of elements comprising the overall development (far exceeding the threshold for development value and thus rendering the project a MLT).

The appropriateness of this 'disaggregation' strategy in the face of complying with the need to advertise the (Council endorsed) Business Plan under s3.59 warrants (prima facie) a second opinion. Any and all additional information supplied between 15 and 16 December 2020 (particularly that was so significant and so different to that previously supplied) must be revealed and re-assessed. The City cannot risk being seen to have avoided an obligation to engage with its public via Statewide public advertising of the project (via its endorsed business plan).

It is vital the Council leads by exhibiting an ethical approach to City transparency, (and adding to the recent decision on a model litigant policy). The Council has also commissioned an external review of the Saltwater business plan\* for its continuing applicability. The Council has not seen/endorsed a business plan for this project (then called BEACH) since June 2020 (C2006/066) but has resolved to fund and construct the building. The Council was presented with a project update on 15 November 2023 as a confidential item:

The construction of a performing arts and convention centre is a strategic priority contained within Item 2 (Lifestyle) of the City's Strategic Community Plan 2021 – 2031. The presentation of a formal project update report to Council, ensuring Council has appropriate levels of oversight over a significant project, is aligned to good governance practices and the responsible management of ratepayer funds.

There is a live resolution for a (public) communications plan regarding Saltwater matters and full and detailed information sharing with the public is a vital part of transparency. There is also a motion currently being implemented that requires a business plan review and that a sale option be explored.

#### **OFFICER COMMENT**

This Notice of Motion is in relation to the City's compliance with the requirements under section 3.59 of the *Local Government Act 1995* in relation to the Saltwater project. In essence section 3.59 requires from a local government to prepare a business plan and invite public submissions in relation thereto before it resolves to proceed with a major land transaction or trading undertaking. Officers sought advice from McLeods in December 2020 in relation to anti-competition provisions and, in general, the extent to which the proposed development of the performing arts and convention centre [Saltwater] is consistent with the City's powers under the Local Government Act.

The brief and request for the advice was sent to Mr Neil Douglas at Mcleods on 2 December 2020. The initial advice was received on 15 December 2020 - set out under 3 broad headings – 'the Competition and Consumer Act 2010 (Cth)', 'the Competition Principles Agreement', and 'issues under the Local Government Act 1995'. Under the heading 'issues under the local government act'

the advice included commentary in relation to section 3.59 considerations. In summary, this part of the advice indicated that the City may have to prepare and publicly invite submissions on the basis of the Saltwater development being a “major land transaction” and/or a “major trading undertaking.”

However as the initial brief from the City did not specifically seek advice on section 3.59, not all relevant information was provided in the initial brief. Therefore, upon receipt of the initial advice, the City provided Mcleods (on 16 December 2020) with all relevant information for purposes of a detailed assessment of the Saltwater project against the application of and requirements under section 3.59 and the exemptions under regulations 8 and 9 of the *Local Government (Functions and General) Regulations 1996*, and instructed Mcleods to review and, if necessary, update their initial advice accordingly. The information provided to Mcleods as part of this second brief included the Saltwater Business Case, the Business Operations Plan Draft 2020 V2, and information in relation to construction and leasing arrangements.

The final advice was provided to the City on 23 December 2020. Within the advice, on page 2, the above train of events is noted, with it noted that part 3.2 of the advice has been updated in light of the further information provided. The advice (relevantly) concluded in response to the question ‘The extent to which the proposed development of the BPACC (Saltwater) is consistent with the City’s powers under the Local Government Act 1995’:

*The extent to which the proposed development of the BPACC is consistent with the City's powers under the Local Government Act 1995*

*In general terms, the City's development of the BPACC would be within its functions (including its powers) under the Local Government Act.*

*In the course of exercising its functions and powers for that purpose, and subject to further details of the proposed development, the City may be obliged to comply with various procedural requirements and restrictions under the Local Government Act including –*

- (a) the public tender requirements of section 3.57 (and regulation 11 of the F&G Regulations); and*
- (b) the disposition of property requirements under section 3.58 of the Local Government Act.*

*In relation to the business plan and advertising requirements of section 3.59 of the Local Government Act.*

*In relation to the business plan and advertising requirements of section 3.59 of the Local Government Act, the City's implementation of the BPACC-*

- (a) would not be a 'major trading undertaking';*
- (b) subject to clarification of the total value of each proposed lease, would not involve a 'major land transaction'; and*
- (c) subject to the same qualification, the business plan and other requirements of section 3.59 would not apply.*

Officers were and are confident in the advice received, noting it is consistent with the officers’ interpretation and understanding of section 3.59, and is from one of the preeminent local government lawyers in WA. The City therefore proceeded on the basis of that advice.

However, even if there is scope for a different interpretation of the application of section 3.59 - that is, that the exemptions under the Regulations did not apply and therefore the City should have publicly invited submissions in relation to the Saltwater Business Plan, based on current WA case law it is highly unlikely that Council's resolution to undertake the Saltwater project and the contracts subsequently entered into, would be invalidated or compromised.

Officers refer to *Swan Foreshore Protection Association Incorporation v City of Melville* [2018] WASC 211:

In this case the applicant [a community group] brought an application for judicial review of a decision by the Melville Council to enter into a lease with a third party in relation to local government property. The application was brought on the grounds that the City had exceeded its jurisdiction by failing to comply with the public notice requirements for disposal of local government property and entering into a major land transaction under sections 3.58 and 3.59 of the Local Government Act respectively.

The court ruled that:

- The provisions in both sections 3.58 and 3.59 applied to the lease transaction between the City and the third party.
- None of the public notices that was required to be published by the City contained the details required by section 3.58(4), and were therefore non-compliant with the relevant statutory framework.
- Whilst the public notices published by the City did not comply with the relevant provisions under the Local Government Act, the failure did not affect the validity of the Council's decision to enter the lease.

In the reasons for the decision the judge stated that:

- The language of section 3.58 is not concerned with the local government's power and whether a transaction that does not comply with the section is legally effective, but rather with regulating process and accountability of local governments to their communities.
- The sanction or consequence for a failure of a local government to perform its functions properly [e.g failure to comply with sections 3.58 and 3.59], lies in part 8 of the Local Government Act which provides for scrutiny of the operations and affairs of a local government.
- The consequences of the court holding invalid any disposition of property where the local government did not comply with the requirements under sections 3.58 and 3.59:
  - Would potentially cause substantial public inconvenience; and
  - Would result in persons dealing with a local government, in good faith and on commercial terms, having no certainty if a disposition of property could be set aside for a technical non-compliance.

Ultimately, the court found that the only relief the applicant could be granted, would be a declaration [i.e confirmation] by the court regarding the failure of the City to comply with section 3.58. Since that failure did not affect the validity of the challenged local government decision, the application was dismissed by the court – in other words there were no legal consequences for the local government's non-compliance with sections 3.58 and 3.59.

The significance of this case is that, whilst compliance with both sections remains a mandatory legal requirement, where there is technical non-compliance with sections 3.58 or 3.59, this is unlikely to affect the validity of a local government's decision to dispose of property, enter into a lease [or other contracts] or to progress a land transaction or trading undertaking.

In summary, officers are of view that, based on the officers' interpretation and understanding of section 3.59 and the legal advice from Mcleods, the Saltwater project is consistent with the requirements under section 3.59.

Even if there is scope for a different interpretation of the requirements under section 3.59, the City's non-compliance will not invalidate the relevant Council decision(s). Sections 3.59(8) & (9) prescribes the process should circumstances change – if a trading undertaking or land transaction becomes a “major trading undertaking” or “major land transaction” [as defined in section 3.59] after it has commenced, the local government has to follow the process under sub sections 3.59(8) & (9) [preparation of a business plan and inviting public submissions before it continues with the project].

In view of the above, officers are of view that further legal advice is not required.



























































