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Chief Executive Officer
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Your ref:
Our ref: ALH/GAM 36945

16 July 2021

By email

Dear Mr Vuleta,

Proposed partial road closure of dedicated road adjoining 355 - 357 Shepperton Road

1. We refer to the public notice released by the Town of Victoria Park (**Town**) on 21 June 2021 in relation to the proposed closure of the laneway commonly referred to as Right of Way 54 (**ROW 54**) pursuant to section 58 and section 87 of the *Land Administration Act 1997* (WA) (**LA Act**). This followed a resolution at the Ordinary Council Meeting held by the Town on 15 June 2021 (**OCM Meeting**) at which information provided by the Town in relation to the closure was considered in Item 13.5 (**Agenda Item**).
2. In response to the proposal by the Town to close part of ROW 54 and its subsequent intention to realign part of ROW 54 and construct a new crossover and slip lane on Shepperton Road, we make the following comments.

Summary

3. The Town is not exercising its powers under section 58 of the LA Act for a public purpose because the proposed closure of part of ROW 54 is for the sole purpose of satisfying a condition precedent between the Town and a private entity.
4. Development approval must be obtained for the proposed crossover and slip lane to Shepperton Road. It is unclear whether a development application has been lodged for this or whether development approval has been granted. It is premature to progress the closure and realignment of ROW 54 whilst it is unclear if the crossover and slip lane on Shepperton Road will be approved.
5. Insufficient evidence has been provided by the Town in relation to the assertion that the realignment of ROW 54 is 'safer' and more 'compliant' than the current configuration. If any advice has been received in this regard, the Town should make it publicly available for review.

Ability of the Town to exercise powers under LA Act for the benefit of a private entity

6. The reason the Town resolved to carry out a consultation on its proposal to close part of ROW 54 is to satisfy a condition precedent contained in the contract of sale between

the Town and Fabcot Pty Ltd (**Fabcot**) for the sale and purchase of the parcel of land at 355-357 Shepperton Road (**Subject Land**).

7. In this regard, the Town has failed to demonstrate that its proposal to close part of ROW 54 would have been initiated even if it were not for this proposed transaction. This is because the Minister for Lands (**Minister**) should not be requested to apply the provisions of the LA Act purely to facilitate the satisfaction of a condition precedent contained in a contract of sale between the Town and a private entity.
8. It is a fundamental requirement that the processes and powers under the LA Act and the *Land Administration Regulations 1998* (WA) are exercised for a public purpose, rather than the benefit of a private entity.
9. We request that the Town provide an explanation as to the basis on which the Town considers that it is lawful and proper to use the processes contained in the LA Act to close part of ROW 54 for the benefit of Fabcot rather than for a public purpose.

Requirement to obtain approval for the construction of the new crossover and slip lane on Shepperton Road

10. The Town has stated that if its proposal to close ROW 54 is approved, then it will realign the remaining portion of ROW 54 and construct a new crossover and slip lane further west along Shepperton Road (see Item 10 under the heading 'Background' on the Agenda Item). At this stage, the Town has not released any plans which illustrate the design or the specification of the new crossover and slip lane that is proposed.
11. The proposed new crossover and slip lane require development approval. As far as we are aware, the Town has not submitted a development application to request this approval. Given that Shepperton Road is a 'Primary Regional Road', any such application is required to be referred to Main Roads WA (**MRWA**) in accordance with the requirements of the *Planning and Development Act 2005* (WA) under Instrument of Delegation PL403, Del 2017/02.
12. MRWA is then required to consider the development application to determine whether the proposed new crossover and slip lane satisfies the requirements of *Development Control Policy 5.1*.
13. In response to this requirement, it appears that the Town is relying on the following comments contained in the Agenda Item that:

'Main Roads WA have confirmed the repositioning of the new access point onto Shepperton Road will satisfy their Development Control Policy 5.1 requirements.' (see Item 17 under the heading 'Analysis' on the Agenda Item).
14. However, the Town has not released a copy of the purported (assuming it is in writing) advice from MRWA confirming that the '*repositioning of the new access point*' will '*satisfy the requirements of Development Control Policy 5.1*'.
15. If any such advice has been provided by MRWA, then it is also important to consider the context in which this advice was provided. For example, at the time of providing the advice, was MRWA aware that the ultimate purpose of the '*repositioning of the new access point*' was to facilitate the introduction of a significantly higher volume of traffic

as a result of the development of the Subject Land? As you are aware, this development currently comprises a retail and office complex which will include a supermarket, large format retail outlet, gym and office area (**Development Proposal**) and thereby has the potential to increase significantly the amount of traffic in the locality.

16. In any event, advice from MRWA on this matter should not be considered as a substitute for obtaining the requisite development approval. Because the crossover is between the Subject Land and Shepperton Road (which is a 'Primary Regional Road Reservation') it is necessary to obtain development approval from the Western Australian Planning Commission (**WAPC**).¹ This is because the construction of the crossover to a 'Primary Regional Road Reservation' is 'public work'.²
17. It is illogical and premature for the proposal to close part of ROW 54 to be progressed until this development approval is obtained. This is because the realignment of ROW 54 depends on the new crossover and slip lane to Shepperton Road being constructed (otherwise it would result in a cul-de-sac). Further, any development application for the construction of the new crossover and slip lane should only be progressed when a development application for the Development Proposal is made by Fabcot. This is so that MRWA can properly consider the context and potential impacts and consequences of the Development Proposal and the flow on effects of this on the development application for the proposed crossover and slip lane to Shepperton Road.
18. We have the following questions for the Town in relation to the above:
 - (a) Has the Town prepared any plans or a specification for the proposed new crossover and slip lane on Shepperton Road? If so, then can the TOVP release these for review? If not, then why not?
 - (b) Has the Town lodged a development application for the construction of the proposed new crossover and slip lane, as required by clause 29(1)(c) of the *Metropolitan Region Scheme*? If not, when does it intend to lodge this application?
 - (c) Has the Town obtained development approval from the WAPC (and any other relevant authority) for the proposed new crossover and slip lane on Shepperton Road?
 - (d) Will the Town release a copy of the advice that it has received from MRWA in relation to Development Control Policy 5.1? If not, then why not?
 - (e) What happens if the Town successfully progresses its proposal to close part of ROW 54 and then is unable to obtain approval from the WAPC (or any other relevant authority) to construct the proposed new crossover and slip lane on Shepperton Road?

¹ See clause 29(1)(c) of the *Metropolitan Region Scheme*.

² See the relevant instrument of delegation pursuant to section 16 of the *Planning and Development Act 2005* (WA), published in the gazette on 30 May 2017. This instrument explains that applications must be made to commence and carry out development in respect of 'public works undertaken by public authorities'. The construction of a crossover and slip lane is public work: see section 2 and 84 of the *Public Works Act 1902* (WA).

Purported safety issues associated with the current location of the crossover of ROW 54 on to Shepperton Road

19. The TOVP has relied on the following comments (contained in the Agenda Item) as part of its justification for its proposal to close part of ROW 54, realign it and to construct a new crossover and slip lane on Shepperton Road:

‘The existing connection with a crossover onto Shepperton Road is non-compliant and poses safety issues for motorists entering and exiting. The road realignment intends to create a safer design for the entry/egress by creating a slip lane and new access point further away from the bend and intersection.’ (see Item 10 under the heading ‘Background’ on the Agenda Item).

‘The outcome provides a continuation of the road network for the benefit of residents and local businesses as well as a safer cross over that is upgraded to a safer and compliant design standard.’ (see Item 12 under the heading ‘Background’ on the Agenda Item).

20. Despite these comments, the Town has not provided any objective analysis to support its position that a ‘safer’ and more ‘compliant’ crossover would be achieved by realigning ROW 54 to a different position further up Shepperton Road. At a minimum, any such analysis would need to consider the traffic volumes utilising ROW 54 in its current configuration as compared to realigning ROW 54 to facilitate the introduction of a significantly higher volume of traffic resulting from the Development Proposal. In addition, no traffic impact study has been publicly released by the Town in support of this position.
21. The Town has also not provided any objective information as to why the current configuration of ROW 54 is considered ‘unsafe’ and ‘inappropriate’ such as providing accident data history or other similar information to support its position. Even if the Town were able to objectively establish such a position, it has not investigated any other potential better options (such as removing the crossover onto Shepperton Road altogether) and only permitting access to ROW 54 from Oats Street.
22. In any event, it should not be the Town who solely determines whether the proposed realignment of part of ROW 54 (and the proposed new crossover and slip lane) is ‘safe’, ‘compliant’ and ‘appropriate’. Instead, this is a matter to be determined by the WAPC (on advice from MRWA) in response to a development application for any such proposal (see our comments contained in paragraph 16).
23. We have the following further questions for the Town in relation to the above:
 - (a) Does the Town have any information as to why the current configuration of ROW 54 is considered ‘unsafe’ and ‘inappropriate’? If so, what is this information and can this be provided? If not, then why not?
 - (b) Has the Town carried out any objective analysis to support its position that a ‘safer’ and more ‘compliant’ crossover would be achieved by realigning ROW 54? If so, then can this analysis be provided? If not, then on what basis does the Town consider that it is able to rely on its comments contained in the Agenda Item to support its proposal to close part of ROW 54?
 - (c) Has the Town considered the traffic volumes that would be generated as a result of the implementation of the Development Proposal when considering whether

it is appropriate to realign ROW 54 and construct a new crossover and slip lane on Shepperton Road? If so, then what information has been considered and can this information be provided? If not, then why not?

- (d) Has the Town carried out any traffic modelling and analysis to determine whether there is a better and safer alternative (such as removing the crossover from Shepperton Road altogether) and only permitting access to ROW 54 from Oats Street? If not, then why not?

Conclusion

24. The proposal to close part of ROW 54 is not supported for the reasons provided.
25. In addition, it appears that the Town is attempting to implement the realignment of ROW 54 (together with the construction of the new crossover and slip lane on Shepperton Road) as part of its proposal to close part of ROW 54.
26. Given the real and impending intention of Fabcot to lodge a development application for the Development Proposal, any decision in relation to the realignment of part ROW 54 (and the construction of a new crossover and slip lane) should be the subject of a separate development application which is considered and determined by the WAPC and any other relevant authority. Until such an application has been submitted (and approved) it is illogical and premature to progress the proposal to close part of ROW 54.

If you have any questions or wish to discuss the above, please let us know.

Yours sincerely, 