

**ORDINARY MEETING OF COUNCIL
23 JUNE 2008**

SUPPLEMENTARY

A10	PROPOSED TRANSFER OF 121 LIARDET STREET, PORT MELBOURNE TO PORT PHILLIP HOUSING ASSOCIATION; SALE OF 1 & 2/144 NOTT ST, PORT MELBOURNE; SALE OF 2/63 CARLISLE STREET ST KILDA
LOCATION/ADDRESS:	121 LIARDET STREET, PORT MELBOURNE 144 NOTT STREET, PORT MELBOURNE 2 / 63 CARLISLE STREET, ST KILDA
RESPONSIBLE EXECUTIVE DIRECTOR:	SALLY CALDER, EXECUTIVE DIRECTOR ORGANISATION SYSTEMS & SUPPORT
AUTHOR:	CATHY HENDERSON, MANAGER GOVERNANCE & COMMUNITY RELATIONS
FILE NO.:	3120/003-03
ATTACHMENTS:	1. PROPOSED TERMS OF REFERENCE 2. PROPOSED INSTRUMENT OF DELEGATION

1. EXECUTIVE SUMMARY

The Kyme Place affordable housing project is a proposal to build over a council car park in Port Melbourne. The proposal is for an affordable housing facility, which would retain public car parking on the ground level. Consultation processes around transfer of land were commenced, and there were local concerns raised about statutory planning issues such as parking and access. The Strategy & Policy Review Committee recommended on 2 June that the transfer of land process be deferred, and that the statutory planning processes proceed instead. This supplementary report provides an additional recommendation about establishing an independent panel to decide on the relevant statutory planning application.

2. BACKGROUND AND CONTEXT

- 2.1. Council is the freehold owner of the ground level car park at 121 Liardet St Port Melbourne (sometimes referred to as 3 Kyme Place). In a proposal similar to the Balaclava Woodstock development, the proposal would see the Port Phillip Housing Association building a four storey development over the car park, with notionally 27 studio units and 3 one bedroom apartments.
- 2.2. The proposal involves a land swap, as it would be contingent upon PPHA and Office of Housing agreeing to relinquish rights at two residential properties at 144 Nott St Port Melbourne and 2/63 Carlisle St St Kilda. If council later approved sale of these properties this would provide recompense for the transfer of air rights over the 121 Liardet St car park.
- 2.3. On 28 April 2008 the Council decided it intended to reconfigure the property boundary and to commence section 223 statutory consultation processes about the possible discontinuation of a portion of road and transfer of land, with a decision to be made following the consultation process. Following public advertisement, 51 submissions from the public were received including 45 objections.
- 2.4. Concerns raised in the objections principally related to statutory planning matters such as traffic circulation and amenity. On 2 June 2008, the Strategy & Policy Review Committee recommended that to best address concerns raised, the transfer of land process be deferred. If council accepts this recommendation, the statutory planning process can proceed and the Port Phillip Housing Association can proceed to prepare a statutory planning application, after considering and consulting with local residents. If a planning permit is issued, then the transfer of land process will be started again.
- 2.5. The Strategy & Policy Review Committee further requested that a supplementary report be brought to the Ordinary Council meeting on 23 June, setting out a proposal to appoint a committee under section 86 of the Local Government Act to decide on the anticipated planning application to be made by Port Phillip Housing Association in respect of the 121 Liardet St (Kyme Place) car park in Port Melbourne, with the membership to include appropriate councillor and community representation and planning expertise.

3. SUPPLEMENTARY INFORMATION

Establishment of Independent Panel

- 3.1. The City of Port Phillip is the land owner for the site in question. The Council has a significant and ongoing relationship with the Port Phillip Housing Association, in that a member of the council sits on the Board of the Association, the council has previously contracted housing projects and transferred property to the Association, and the council provides funding to the Association. The council also has a policy in favour of affordable housing programs.

- 3.2. Given the various safeguards and practices in place, including the provision of independent advice by statutory planning officers, it is likely that the council could still act as Planning Authority for the planning application submitted by Port Phillip Housing Association (although the councillor on the board of the Association would need to consider whether to declare a conflict of interest in line with the *Local Government Act*).
- 3.3. However, given the factors at 3.1, some members of the public may consider that the planning application assessment process would benefit from a body independent to the council making the planning decision.
- 3.4. The Council is able to delegate planning authority powers to a special committee established under section 86 of the *Local Government Act*.
- 3.5. So, if an independent panel was established it would be as a special committee under section 86 of the *Local Government Act*. The role of the panel would be to make a decision about whether to issue a planning permit and place conditions on such a permit, in line with the provisions of the *Planning & Environment Act* and with existing planning schemes and policies. It would not be a committee which set policy.
- 3.6. A name for the panel could be the Port Melbourne Affordable Housing Project Planning Assessment Panel.

Panel membership

- 3.7. If the panel was established, it could include community representatives, members with planning expertise, and councillor representation. The panel should have an odd number of members for voting purposes, so an appropriate makeup might be two community representatives, two members with planning expertise, and one councillor.
- 3.8. If a councillor is to be on the panel, the council should decide which councillor. Given that the panel can only make a statutory planning decision on statutory planning grounds, the representative could be the Chairperson of the Statutory Planning Committee.
- 3.9. Recently, following the November 2007 Supreme Court of Victoria case *Winky Pop Pty Ltd vs Hobsons Bay CC*, there has been debate in the local government sector about the need for natural justice when a council is making planning decisions. In the *Winky Pop* case, a Hobsons Bay councillor had himself made a submission in relation to proposed amendments to a planning scheme. The councillor had presented to the panel hearing submitters. In the final council decision on the planning scheme amendments the vote was 4-3 and the councillor's vote was decisive. The decision of the Supreme Court was that the councillor had sufficient prejudgement that he should not have voted; on the grounds that rules of natural justice had been breached, the decision of the council was quashed.

- 3.10. It should also be noted that part of the *Winky Pop* Supreme Court judgement by Justice Kaye reads:
- “In determining whether there was prejudgment on behalf of a councillor, it must be borne in mind that councils are democratically elected, and that councillors necessarily carry out political and legislative roles. Accordingly, a councillor is not necessarily disqualified from participating in a decision because the councillor, previously, has held and expressed views on the matter in question.”
- 3.11. It seems likely that the judgement made about councillor actions in *Winky Pop* could also be applied to other members of a committee or panel with statutory planning powers.
- 3.12. Therefore, if a panel was established to decide on the planning application for the Kyme Place site, then people who have fully prejudged the matter should not participate in the voting and decision making process (bearing in mind Justice Kaye’s words that previously holding or expressing views does not automatically constitute prejudgement).
- 3.13. Clearly, the council would want to include high quality community, expert and councillor representation on this panel to decide the planning application. It is likely that this representation would include people who have previously held an opinion or expressed a view.
- 3.14. However, it is also important that the panel’s decision be valid. The decision needs to be transparent and have followed the rules of natural justice. Real and perceived impartiality is critical.
- 3.15. It might therefore be necessary to ensure that the panel does not include in its membership any members who have pre-judged the issuing of a planning permit (as different from people who have previously held an opinion or expressed a view).
- 3.16. In appointing people to the panel, the council should be mindful that it not appoint people who have fully prejudged the matter of issuing a planning permit to the Port Phillip Housing Association. Two options would be:
- (a) Exclude from panel membership those who have previously made submissions to the sale/transfer of land process.
 - (b) Exclude from panel membership those who have made submissions to the sale/transfer of land process, where those submissions address statutory planning matters and would indicate prejudgement of the decision to issue a planning permit.

- 3.17. Option 3.16 (a) above is clearer and might be 'safer' in legal terms. However, it runs the risk of excluding from membership those whose appointment would not actually give rise to a reasonable apprehension of bias. Option 3.16 (b) is more open to interpretation, but is less liable to unnecessarily exclude candidates. The recommendation in this report applies Option 3.16 (b).
- 3.18. Clearly, anyone appointed to the panel should not make a submission to the statutory planning exhibition process which would take place after the council receives an application for a planning permit from the Port Phillip Housing Association or its agent.

Timeline

- 3.19. If the recommendations of this report are adopted it would be expected that the timeline would be as follows:
- *July*: resident/trader positions on the committee are advertised in local papers and Planning Panels Victoria is invited to nominate two experts.
 - *August*: Council appoints the five members to the panel and appoints one of the two independent members as chairperson.
 - *September*: the panel meets for the first time and decides upon any reports to be commissioned.
 - *After the planning application from Port Phillip Housing Association has been received and exhibited*: panel hears submissions from members of the public, considers reports and advice, and makes decision on the planning permit.

4. RECOMMENDATION

That the Council resolve:

- 4.1. That having commenced the statutory procedures for the sale of land and road discontinuance in respect of land at 121 Liardet Street and Kyme Place, Port Melbourne, 144 Nott Street, Port Melbourne, and 2/63 Carlisle Street, St Kilda, in accordance with the requirements of the Local Government Act and having received and considered submissions and heard from persons speaking in support of their submissions, to defer its decision.
- 4.2. To advise all persons who made a submission and the local community of its decision and the reasons for it.
- 4.3. To encourage the Port Phillip Housing Association to engage with the local community to explain its programs and plans and devise a revised plan for the proposed community housing project before making an application for a statutory planning permit.
- 4.4. To establish a Port Melbourne Affordable Housing Project Planning Assessment Panel as set out in the attached Terms of Reference
- 4.5. To approve the Instrument of Delegation to the Port Melbourne Affordable Housing Project Planning Assessment Panel as set out in the attached document
- 4.6. To invite Planning Panels Victoria to nominate two independent planning experts for consideration by the Strategy & Policy Review Committee in August
- 4.7. To advertise for expressions of interest in local newspapers in July for the resident and trader positions on the Port Melbourne Affordable Housing Project Planning Assessment Panel
- 4.8. That a report assessing applications for the resident/trader membership of the panel be brought to the August Strategy & Policy Review Committee, with assessment to be on the following criteria:
 - 4.8.1. Appreciation of land use planning, urban design or related matters
 - 4.8.2. An understanding and commitment to local community building
 - 4.8.3. An understanding of negotiating competing demands around public space