

**PALACIO PROPERTY GROUP PTY LTD V REDLAND CITY COUNCIL (PLANNING AND ENVIRONMENT COURT APPEAL 894/18)**

**Objective Reference:**

**Authorising Officer:** Louise Rusan, General Manager Community & Customer Services

**Responsible Officer:** David Jeanes, Group Manager City Planning & Assessment

**Report Author:** Christy Englezakis, Senior Appeals Planner

**Attachments:** 1. Report 3 April 2019 - Confidential

The Council is satisfied that, pursuant to Section 275(1) of the *Local Government Regulation 2012*, the information to be received, discussed or considered in relation to this agenda item is:

(f) *starting or defending legal proceedings involving the local government.*

**PURPOSE**

The purpose of this report is to provide updated information and advice in respect of the abovementioned appeal, and seek instructions from Council in the progress of the appeal.

**BACKGROUND**

The Appellant, Palacio Property Group Pty Ltd (**Palacio**), filed an appeal against Redland City Council's (**Council**) decision to refuse its conversion application for sewer infrastructure, for its development at 4-8 Rachow Street, Thornlands, in March 2018. A detailed history of the development and this appeal is set out in **Attachment 1**.

Palacio has made a number of settlement offers to Council – in December 2018, March 2019 and April 2019. On each occasion Council resolved to reject these offers and defend the refusal of the application.

**ISSUES**

The matter was previously set down for a hearing on 2 and 3 May 2019, however these dates were vacated to provide Council with time to consider Palacio's latest settlement offer. The Court made further orders that the appeal be allocated two days for a hearing in August 2019.

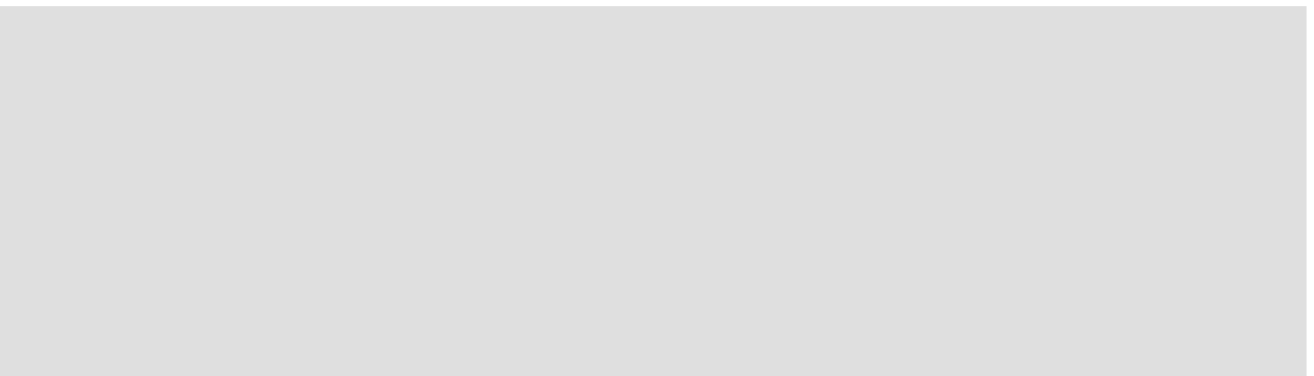
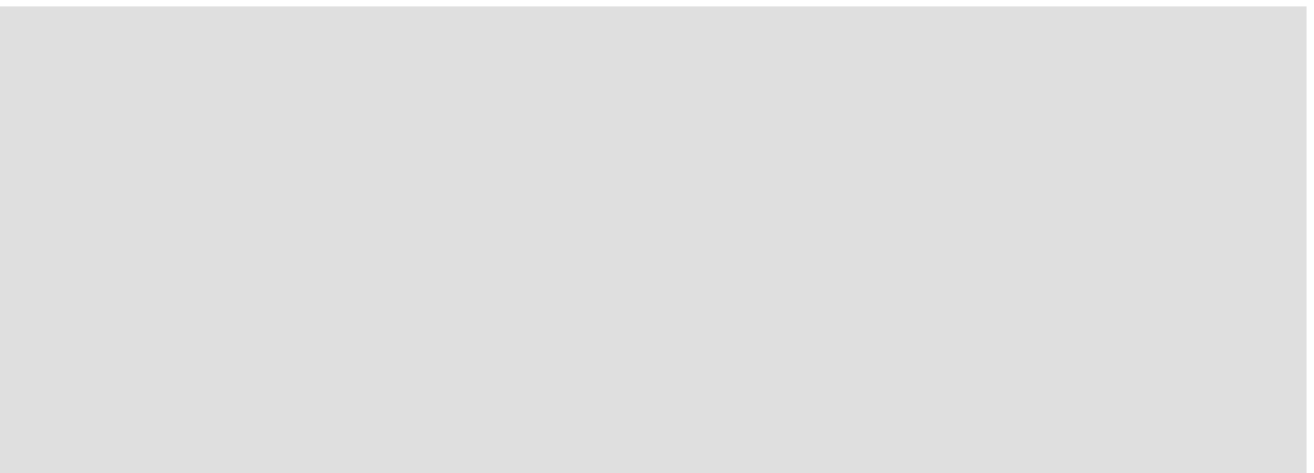
At a subsequent review on 17 May 2019, the Court unexpectedly set down the matter for trial on 13 and 14 June 2019, on the basis that there were few other matters ready for hearing and Court dates were available. This has resulted in a number of unforeseen issues for Council, the most significant of which are resourcing and cost.

  
Cost

As a result of the unexpected allocation of early hearing dates and subsequent recommendation to engage a QC, the prospective cost to Council of this appeal has increased considerably. To date, Council's legal and expert costs are [REDACTED]. Should Council resolve to proceed to a hearing, future estimated costs are in the range [REDACTED] a total indicative cost of [REDACTED]. This includes, for preparation and trial:

- External solicitor [REDACTED]
- Experts [REDACTED]
- QC [REDACTED]
- Barrister [REDACTED]

These costs are significantly higher than the previous estimate [REDACTED] of which Council was advised when the settlement offer was considered at the 3 April 2019 General Meeting (see Attachment 1).

## STRATEGIC IMPLICATIONS

### Legislative Requirements

The matter is listed for trial on 13 and 14 June 2019. The immediacy of the hearing means, even if Council resolves to settle the appeal, it must continue to prepare for trial whilst participating in settlement negotiations. Therefore, any settlement negotiations should occur as quickly as possible.

### Risk Management

If Council was to proceed to the hearing and be unsuccessful, it must pay its appeal costs (as outlined below in the 'Financial' section). [REDACTED] will be payable for the cost of the infrastructure, plus any potential adverse costs order. This could be in the range [REDACTED]. Council's may also be exposed to further conversion applications in similar circumstances.

### Financial

Total appeal costs have been calculated by Council's Legal Services team and are estimated to be [REDACTED] exclusive of any adverse costs order. Should Council lose the appeal, the additional costs will be in the [REDACTED]. Council's 2018/2019 legal budget is exhausted, therefore the cost of this appeal will impact Council's budget. Further detail in respect of costs is outlined in the 'Issues' section of this report.

### People

Not applicable.

### Environmental

Not applicable.

### Social

Not applicable.

### Alignment with Council's Policy and Plans

It is considered that electing to settle the appeal is inconsistent with Council's development assessment and infrastructure charging regime.

Conversely, resolving to proceed to the hearing in June will adversely impact Council's budget.

### CONSULTATION

Consulted	Consultation Date	Comments/Actions
Legal Services (Council)	Ongoing	<ul style="list-style-type: none"> <li>• Provided legal advice</li> <li>• Assessed the existing and future costs of the appeal</li> <li>• Facilitated advice from Counsel, Council's external solicitor and experts</li> </ul>
Counsel	Ongoing	<ul style="list-style-type: none"> <li>• Provided advice in respect of risks, costs and progress of the appeal</li> <li>• Coordinating trial preparation</li> </ul>
Solicitor (external)	Ongoing	<ul style="list-style-type: none"> <li>• Coordination of experts</li> <li>• Assisting with trial preparation</li> <li>• Provided legal advice</li> </ul>
Experts	Ongoing	<ul style="list-style-type: none"> <li>• Provided technical advice with respect to the development and relevant statutory regime</li> <li>• Trial preparation</li> </ul>

### OPTIONS

#### Option One

Council resolves to:

1. instruct its solicitors to take all necessary steps to resolve the appeal and negotiate the terms of a confidential settlement agreement; and
2. maintain this report and attachment as confidential until the conclusion of the appeal, subject to maintaining the confidentiality of legally privileged and commercial in confidence information.

#### Option Two

Council resolves to:

1. instruct its solicitors to take all necessary steps to defend the refusal of the application; and
2. maintain this report and attachment as confidential until the conclusion of the appeal, subject to maintaining the confidentiality of legally privileged and commercial in confidence information.

**OFFICER'S RECOMMENDATION**

Council resolves to:

1. instruct its solicitors to take all necessary steps to resolve the appeal and negotiate the terms of a confidential settlement agreement; and
2. maintain this report and attachment as confidential until the conclusion of the appeal, subject to maintaining the confidentiality of legally privileged and commercial in confidence information.

**PALACIO PROPERTY GROUP PTY LTD V REDLAND CITY COUNCIL - PLANNING AND ENVIRONMENT COURT APPEAL 894 OF 2018**

**Objective Reference:**

**Authorising Officer:** Louise Rusan, General Manager Community & Customer Services

**Responsible Officer:** David Jeanes, Group Manager City Planning & Assessment

**Report Author:** Charlotte Hughes, Principal Planner

**Attachments:** 1. Council resolution 2018/177 - Confidential

The Council is satisfied that, pursuant to Section 275(1) of the *Local Government Regulation 2012*, the information to be received, discussed or considered in relation to this agenda item is:

(f) *starting or defending legal proceedings involving the local government.*

**PURPOSE**

The purpose of this report is to firstly brief Councillors on the background to the infrastructure conversion application, the officers' decision and the subsequent appeal. Then secondly to seek Council direction on a settlement offer that has been presented by the appellant.

**BACKGROUND**

Proposed development

On 2 June 2017 officers approved an application for a Material Change of Use for Multiple Dwellings (22 single storey villas) at 4-8 Rachow Street, Thornlands (MCU013921). The Decision Notice included a condition that required the proponent to:

16. *Construct an uPVC 150mm diameter sewer line and manholes required according to "External Sewer Plan", Sheet 1 and 2, preliminary issue, prepared by BG Group Engineers, in accordance with the assessment criteria listed in Table 2: Compliance Assessment of this approval. A tunnel boring system must be used for the construction of the sewer line along Rachow Street and connection point to manhole 6/1 asset No.456367 to protect existing stormwater infrastructure, footpaths and trees along the alignment, due to the depth of the pipe.*

Additionally, an Adopted Infrastructure Charges Notice (AICN) was issued with the Decision Notice and detailed that [REDACTED] was payable over the two proposed stages. No offsets or refunds were applicable.

Infrastructure conversion application

On 22 August 2017 the proponent lodged an infrastructure conversion application seeking to convert the non-trunk sewer infrastructure referenced in condition 16 of the Decision Notice (see above) to trunk infrastructure in accordance with the *Planning Act 2016* Chapter 4 Part 2. Their representations specifically set out the following:

1. *The requirements of the approvals are that infrastructure is provided that services premises other than the subject premises.*
2. *Council is imposing full infrastructure charges for infrastructure it is not providing (i.e. double dipping).*

3. Council has zoned the land, within the PIA [Priority Infrastructure Area], for the intended use without providing trunk infrastructure.
4. It is appropriate that council agree to convert the infrastructure to trunk and offset or fund the full cost of its construction.

The sewer infrastructure the subject of the conversion application and the appeal is shown in **Attachment 3**.

On 1 March 2018 Council issued a Decision Notice refusing the conversion application on the following grounds:

*The proposed infrastructure:*

- (a) is not identified in the Redland Priority Infrastructure Plan (PIP);
- (b) the site is not within the Priority Infrastructure Area (PIA);
- (c) is not within a Wastewater Connection Area under the Redland Netserv Plan;
- (d) does not satisfy the identified trunk infrastructure criteria in Schedule 5 of Council's Adopted Infrastructure Charges resolution.
- (e) does not meet all the default conversion criteria as it:
  - i. is inconsistent with other trunk infrastructure as identified in Redland Priority Infrastructure Plan (PIP); and
  - ii. is consistent with non-trunk infrastructure for which conditions may be imposed in accordance with section 665 of the repealed Sustainable Planning Act 2009 (SPA).
- (f) Condition 16 for non-trunk sewer infrastructure is considered reasonable and relevant to connect the development to the external network and to maintain the efficiency of the infrastructure network.

An appeal against the decision regarding the infrastructure conversion application was filed with the Planning and Environment Court on 9 March 2018. The parties have subsequently appointed experts in the areas of Town Planning and Civil Engineering in relation to this matter and their joint expert reports (JER) were completed in February 2019.

## ISSUES

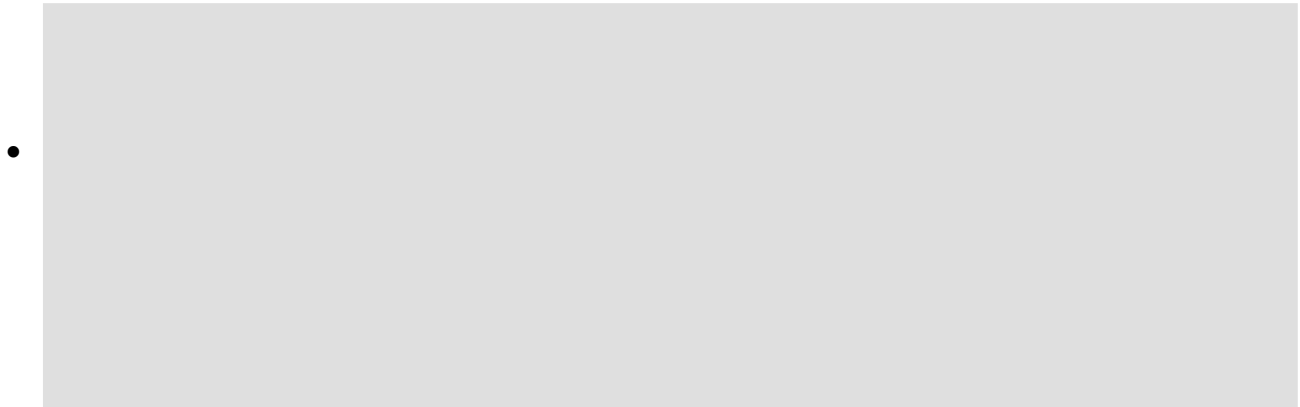
### Previous settlement offer

On 10 October 2018 officers presented a settlement offer to Council at the appellant's request, by which the appeal may be resolved. The offer comprised:

Council officers recommended that Council decline the settlement offer for the following reasons:

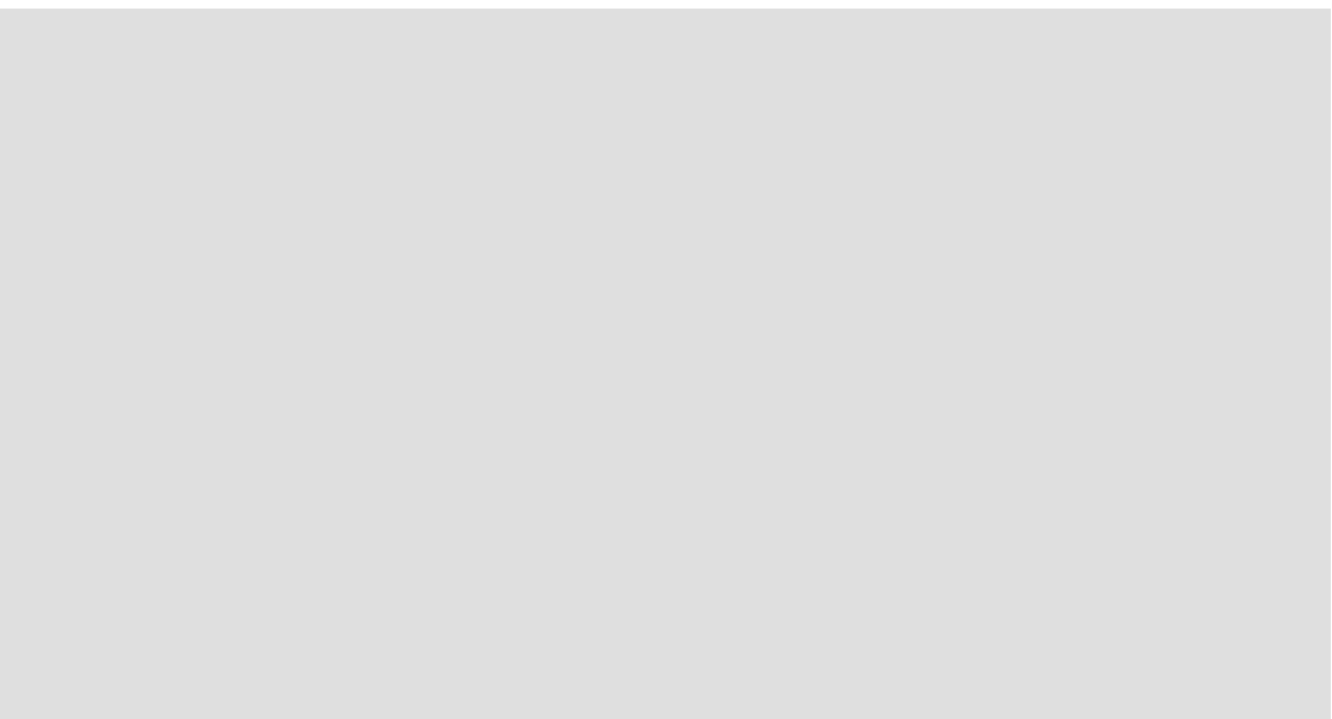
- The local government infrastructure plan (LGIP) in the Redlands Planning Scheme does not identify the need for trunk sewer upgrades to service the subject site.

- Council's Adopted Infrastructure Charges Resolution (AICR) sets out the criteria for determining whether infrastructure is trunk. In the Resolution Council has nominated that, in relation to gravity sewer on the mainland, trunk infrastructure is a pipe no less than 300mm in diameter and this is consistent with the desired standards of service set out in Redland Water's Netserv plans. Anything less than this is considered development infrastructure. The sewer the subject of this appeal is 150mm in diameter.
- While it was acknowledged that the sewer infrastructure required to service the subject development will service land beyond the development, this feature was not considered sufficient for the infrastructure to be considered trunk infrastructure.
- It was noted that in this case the distance of the sewer infrastructure from the appellant's development, means that an extension across Council-owned land (opposite) is required; being a costly process and a burden to the first developer within the catchment.



Council, in their resolution 2018/177 (see **Attachment 1**) resolved to:


1. Instruct its solicitors to decline the settlement offer and take all necessary steps to defend the refusal of the application; and
2. Maintain this report and attachments as confidential until the release of the report and attachments is determined to be in the public interest in accordance with the factors set out in the *Right to Information Act 2009*.



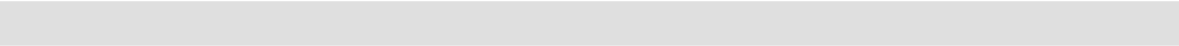


  
Amended settlement offer

At mediation on 26 March 2019 and following a change in circumstances since the refusal of the conversion application, Palacio have requested that a settlement offer be presented to Council in attempt to settle the appeal, prior to the hearing scheduled for 2 and 3 May 2019.

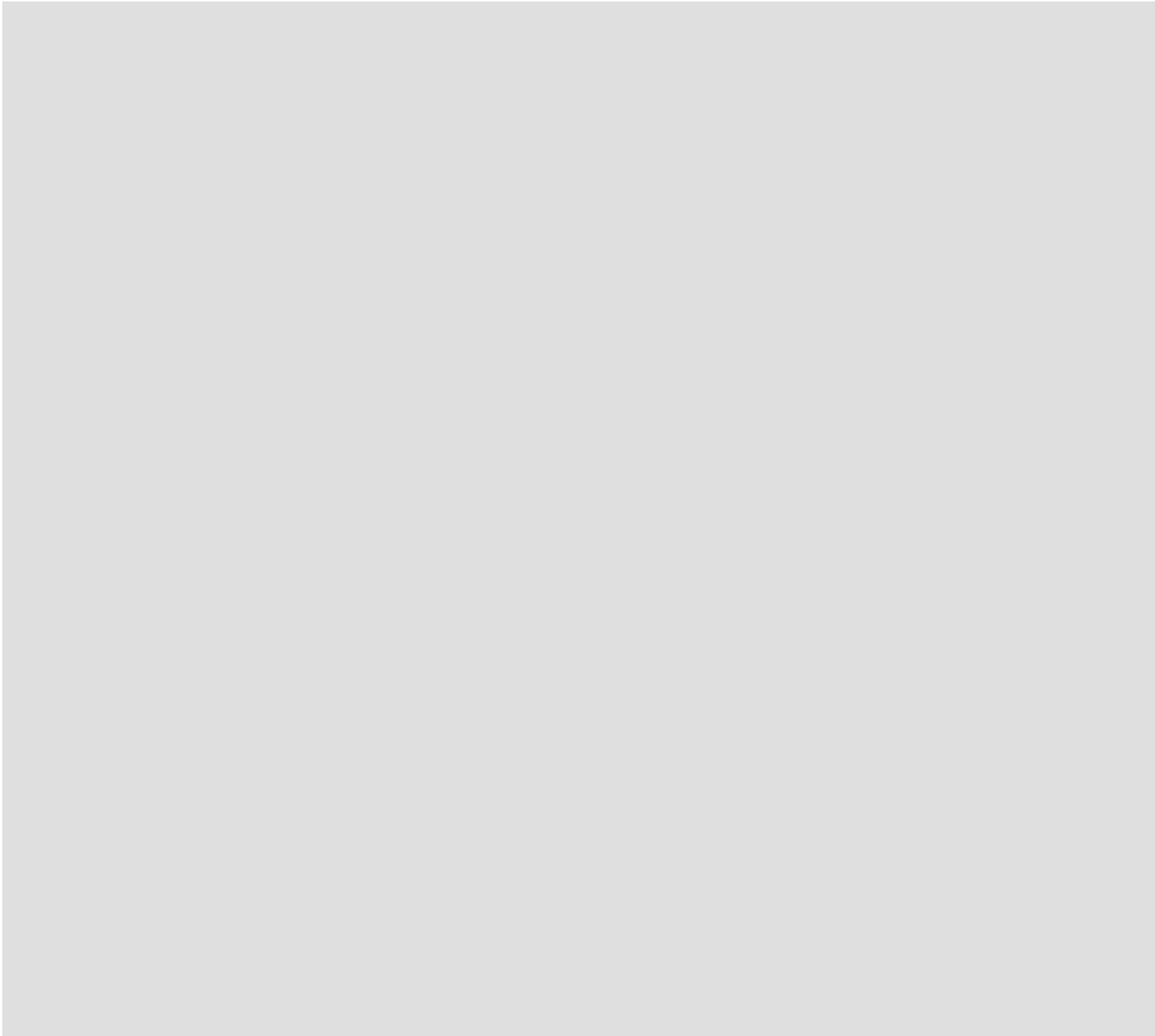
  
Changed circumstances

In re-considering the offer tabled by Palacio, the following circumstances have changed:

- The statutory framework relevant to the hearing will be the current laws and policies, not the laws and policies in place at the time the application was made. Relevantly;
  - the City Plan, with the adopted LGIP, now places the development site within the Priority Infrastructure Area (PIA).
- The JERs have now been completed and are available to both parties to consider.
- Council's engineering expert's argument in the JER relies heavily on the premise that the site is located outside of the PIA.
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Legal advice

Council officers have sought advice from Counsel on the implications of the changed circumstances

Officer's Assessment**Relevant laws and policies - Redland City Plan, LGIP (and PIP), *Planning Act 2016***

Council considered the effect of the provisions in the *Planning Act 2016* when considering the original settlement offer in October 2018 and therefore the only change in terms of legislation is the adoption of the LGIP on 1 July 2018. The LGIP does not identify this as trunk infrastructure, but does now include the area within the PIA.

**Location within the PIA**

Under S145 of the Planning Act, Council has the power to impose a condition requiring non-trunk infrastructure. S145(b)(ii) states:

- A development condition about non-trunk infrastructure that a local government imposes –*
- (b) may be about providing development infrastructure for 1 or more of the following:*
  - (ii) connecting the premises to external infrastructure networks.*

While Council's engineering expert relies heavily on whether the land is within the PIA in drawing his conclusion, he has also advised that he can still support Council's refusal of the conversion application, despite these changed circumstances. Additionally, Council's planning expert in the appeal considers that, whether the land is in the PIA or not is not critical to his view, and he continues to support Council's refusal of the conversion application.

Regardless of the site now being within the PIA, the original condition was imposed as, without it, the development could not proceed as it would not be legally able to connect to the external sewer network.

The 150mm diameter main is also of the minimum possible size for a development of this type and was the only option available to the developer to make a connection to the municipal system. It is therefore of no consequence that the main is large enough to service additional demand beyond the proposed development.

Officer's opinion therefore is that, regardless of the site being located within the PIA, the infrastructure remains non-trunk.

## OFFICERS RECOMMENDATION

It is also noted that Council's experts have indicated that their opinion does not change as a result of the land now being included in the PIA.

When this is considered against the impact any settlement may have on Council's ability to be consistent in its decision making for trunk infrastructure, it is officer's view that the settlement offer should be declined.

## STRATEGIC IMPLICATIONS

### Legislative Requirements

The matter is scheduled for a hearing on the 2 and 3 May 2019. The applicant is therefore seeking to settle the appeal, prior to this hearing date.

### Risk Management

Conversely, officers take the view that accepting the settlement offer would not be consistent with Council's Adopted Infrastructure Charges Resolution. As discussed in the body of the report, it is important that Council take a consistent approach to the identification of trunk infrastructure.

**Financial**

Should the matter progress to a hearing, further [REDACTED] will be incurred, exclusive of any costs order made against Council.

**People**

Not applicable.

**Environmental**

Not applicable.

**Social**

Not applicable.

**Alignment with Council's Policy and Plans**

Acceptance of the settlement offer is not considered to be consistent with Council's current AICR.

**CONSULTATION**

Consulted	Consultation Date	Comments/Actions
Senior Solicitor (Council)	Ongoing	Provided updated legal advice and facilitated advice from experts, external solicitors and Counsel.
Counsel (external)	Ongoing	Provided advice on the settlement offer being presented to Council, as outlined in the report.
Claire Lovejoy (Gadens)	Ongoing	Supports the legal advice from Counsel.

**OPTIONS****Option One**

That Council resolves to:

1. instruct its solicitors to decline the settlement offer and take all necessary steps to defend the refusal of the application; and
2. maintain this report and attachment as confidential until the conclusion of the appeal, subject to maintaining the confidentiality of legally privileged and commercial in confidence information.

**Option Two**

That Council resolves to:

1. instruct its solicitors to accept the settlement offer and take all necessary steps to negotiate the terms of a settlement agreement; and
2. maintain this report and attachment as confidential until the conclusion of the appeal, subject to maintaining the confidentiality of legally privileged and commercial in confidence information.

**Option Three**

That Council resolves to:

1. instruct its solicitors to write to the appellant with a counter settlement offer; and

2. maintain this report and attachment as confidential until the conclusion of the appeal, subject to maintaining the confidentiality of legally privileged and commercial in confidence information.

#### **OFFICER'S RECOMMENDATION**

**That Council resolves to:**

1. **instruct its solicitors to decline the settlement offer and take all necessary steps to defend the refusal of the application; and**
2. **maintain this report and attachment as confidential until the conclusion of the appeal, subject to maintaining the confidentiality of legally privileged and commercial in confidence information.**