
 <p>Adelaide Plains Council</p>	<p>21.5 Confidential Item</p>
<p>22 March 2021</p>	

21.5 Wheller Road, Two Wells - Land Division Application 312/357/2018

RECOMMENDATION

“that:

- 1. Pursuant to section 90(2) of the Local Government Act 1999, Council orders that all members of the public, except Chief Executive Officer, Acting General Manager – Governance and Executive Office, General Manager – Finance and Business, General Manager – Infrastructure and Environment, Administration and Executive Support Officer/Minute Taker and Information Technology Officer be excluded from attendance at the meeting of Council for Agenda Item 21.5 – *Wheller Road, Two Wells - Land Division Application 312/357/2018*.**
- 2. Council is satisfied that pursuant to section 90(3)(b) of the Local Government Act 1999, Item 21.5 – *Wheller Road, Two Wells - Land Division Application 312/357/2018* concerns commercial information the disclosure of which could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting business, or to prejudice the commercial position of Council, being a summary of correspondence received from the developer’s legal representatives; and**
- 3. Council is satisfied that the principle that Council meetings should be conducted in a place open to the public has been outweighed by the need to keep the information, matter and discussion confidential.”**

 Adelaide Plains Council	21.5	Wheller Road, Two Wells – Land Division Application 312/357/2018
	Department:	Governance and Executive Office
	Report Author:	Chief Executive Officer
Date: 22 March 2021	Document Ref:	D21/12372

OVERVIEW

The purpose of this report is to update the elected body on the status of negotiations for the upgrade of Wheller Road, Two Wells.

As members would recall, Council, at its January 2021 ordinary meeting, considered a recommendation from the Infrastructure and Environment Committee meeting and resolved as follows:-

12.2 Moved Councillor Daniele Seconded Councillor Maiolo 2021/ 005

“that Council endorses resolution 2020/038 of the Infrastructure and Environment Committee and in doing so instructs the Chief Executive Officer to continue to pursue an Infrastructure Agreement with the developer to detail the required infrastructure upgrades, being:

- upgrade to the existing portion of Wheller Road - 10m wide pavement with a 7.5m 14/7 two-coat spray seal and drainage swales on both sides of the road with 100% of cost borne by developer.”*

CARRIED

On 15 March 2021, the proponent’s legal advisor, Botten Levinson Lawyers, wrote to Council setting out their client’s position (see **Attachment 1**).

Management presented this letter under ‘Urgent Business’ to the Infrastructure and Environment Committee meeting held on 15 March 2021 and, while no formal resolutions were sought or adopted at this meeting, discussion ensued that the matter ought to now be duly considered by our Council Assessment Panel.

Provided for below is an overview of resolutions adopted in relation to this matter to assist members in their recollection of events and deliberations going forward:-

22- Jun-20	14.9	Wheller Road Land Division	<p>“that Council, having considered Item 14.9 – Wheller Road Land Division, dated 22 June 2020, receives and notes the report and in doing so:</p> <ol style="list-style-type: none"> 1. Instructs the Chief Executive Officer to continue to pursue an Infrastructure Agreement with the applicant to detail the required infrastructure upgrades, being: <ul style="list-style-type: none"> • upgrade to the existing portion of Wheller Road - 10m wide pavement with a 7.5m 14/7 two-coat spray seal and drainage swales on both sides of the road; • contribution to future upgrade/sealing of Coats Road - 100% contribution to the seal only component for 550m of 7.5m wide, 14/7 two-coat spray seal; and <p>Acknowledges that in the event that both parties are unable to enter into an Infrastructure agreement for works external to the subject land, the likely recommendation to the Council Assessment Panel regarding the merits of the Development Application will be one for refusal.”</p>	2020/199
26- Oct-20	Deputation	Giulietta Carbone	N/A	N/A
23- Nov-20		Notice of Motion - Rescind Resolution 2020/199	<p>"that the following Resolution be rescinded: Resolution 2020/199:</p> <p>“that Council, having considered Item 14.9 – Wheller Road Land Division, dated 22 June 2020, receives and notes the report and in doing so:</p> <ol style="list-style-type: none"> 1. Instructs the Chief Executive Officer to continue to pursue an Infrastructure Agreement with the applicant to detail the required infrastructure upgrades, being: <ul style="list-style-type: none"> • upgrade to the existing portion of Wheller Road - 10m wide pavement with a 7.5m 14/7 two-coat spray seal and drainage swales on both sides of the road; 	2020/416

			<ul style="list-style-type: none"> • contribution to future upgrade/sealing of Coats Road - 100% contribution to the seal only component for 550m of 7.5m wide, 14/7 two-coat spray seal; and <p>Acknowledges that in the event that both parties are unable to enter into an Infrastructure Agreement for works external to the subject land, the likely recommendation to the Council Assessment Panel regarding the merits of the Development Application will be one for refusal.””</p>	
23-Nov-20	18.1	MOTION REFUSED	“that Item 18.1 – <i>Rescind Resolution 2020/199 – Wheller Road Land Division</i> be brought back to the Infrastructure and Environment Committee for discussion.”	2020/417
14-Dec-20	7.1	Infrastructure and Environment Committee Meeting – Wheller Road Land Division	“that the Committee having considered Item 7.1 – <i>Wheller Road Land Division</i> , dated 14 December 2020, receives and notes the report and in doing so recommends to Council that it instructs the Chief Executive Officer to continue to pursue an Infrastructure Agreement with the developer to detail the required infrastructure upgrades, being: upgrade to the existing portion of Wheller Road - 10m wide pavement with a 7.5m 14/7 two-coat spray seal and drainage swales on both sides of the road with 100% of cost borne by developer.”	2020/038 (I&E)
27-Jan-21	12.2	Committee Meeting	“that Council endorses resolution 2020/038 of the Infrastructure and Environment Committee and in doing so instructs the Chief Executive Officer to continue to pursue an Infrastructure Agreement with the developer to detail the required infrastructure upgrades, being: upgrade to the existing portion of Wheller Road - 10m wide pavement with a 7.5m 14/7 two-coat spray seal and drainage swales on both sides of the road with 100% of cost borne by developer.”	2021/005
15-Mar-21	Late/Urgent Item	Infrastructure and Environment Committee Meeting	Verbal briefing in confidence – no substantive resolutions	N/A

Management will provide a further verbal update at the meeting touching on questions raised at the Committee meeting surrounding process, procedure, road status and risk.

RECOMMENDATION

“that Council, having considered Item 21.5 – *Wheller Road, Two Wells - Land Division Application 312/357/2018* dated 22 March 2021, receives and notes the report.”

Attachments

1. Letter from Botten Levinson Lawyers dated 15 March 2021

RECOMMENDATION

“that Council, having considered the matter of Item 21.5 – *Wheller Road, Two Wells - Land Division Application 312/357/2018* in confidence under sections 90(2) and 90(3)(b) of the *Local Government Act 1999*, resolves that:

- 1. The report and Attachment 1 pertaining to Item 21.5 – *Wheller Road, Two Wells - Land Division Application 312/357/2018* confidential and not available for public inspection until further order of the Council;**
- 2. Pursuant to section 91(9)(a) of the *Local Government Act 1999*, the confidentiality of the matter will be reviewed every 12 months; and**
- 3. Pursuant to section 91(9)(c) of the *Local Government Act 1999*, the Committee delegates the power to revoke this confidentiality order to the Chief Executive Officer.”**

Our ref: THG/221073

15 March 2021

Mr James Miller
Chief Executive Officer
Adelaide Plains Council
PO Box 18
MALLALA SA 5502

By email: jcmiller@apc.sa.gov.au

Dear James

DA 312/357/2018 –Council request for road upgrade - Lot 12A Wheller Road, Two Wells

This firm acts for Mr Guido Carbone in respect of the above development application which seeks to divide land at Wheller Road, Two Wells to create an additional 9 allotments (**the proposed development**).

The development application was lodged in November 2018.

It is understood that the only matter holding up the approval of the application is the Council's request that the applicant enter into an Infrastructure Agreement to fund an upgrade to Wheller Road. That appears to be the sole issue in dispute.

For the reasons which follow, there is no proper basis for the Council to seek to have the applicant fund any upgrade to Wheller Road or to withhold consent to the application.

Background

Wheller Road is an existing unsealed road. It has been in continuous use, and has been a Council-maintained road since at least the 1960s.

Wheller Road presently services 9 allotments. If the proposed development is approved, there will be an additional 7 allotments such that the road will service a total of 16 allotments.

No basis to require upgrade

It is well established that a Council cannot as part of a development application oblige a developer to upgrade an existing public road¹.

The Council however asserts that unless the upgrade is secured and funded by the applicant, the development application may, in reliance of generic traffic and access provisions in the Council's Development Plan, be refused on the basis that safe and

¹ *Twenty Seven Properties Ltd v Corporation of Noarlunga* (1975) 11 SASR 188;

convenient access is not available to the proposed allotments. The Council papers suggest that the upgrade is required “due to the increase in traffic volumes along the existing portion of Wheller Road, as a result of the eight new residences”.

The fundamental premise that the road upgrade is required by the proposed development is flawed.

The proposed development may lead to an additional 7 dwellings utilising Wheller Road. From a traffic modelling perspective, each dwelling might be expected to generate 8 trips per day. The proposed development would therefore lead to an additional 56 trips per day. When combined with the existing 5 dwellings using Wheller Road there will still be less than 100 trips per day on Wheller Road, equating to just over four trips per hour over a 24-hour period. By way of reference, a typical residential street might be expected to carry up to 2000 vehicle movements per day.

The additional vehicle movements generated by an additional 7 houses will be minor and will not exceed the capacity of Wheller Road.

There is nothing to demonstrate that the use of Wheller Road (a straight road of only 240m length) is either unsafe or inconvenient.

The Council also appears to be asking the applicant to bear the cost of stormwater drainage swales along Wheller Road. The proposed allotments do not rely on Wheller Road in any way for stormwater discharge and so there is simply no basis to require the applicant to fund an upgrade stormwater infrastructure on Wheller Road.

It is also to be observed that since 2015 the Council has approved the construction of at least four dwellings as well as dog kennels with the capacity for up to 100 dogs without requiring any upgrade to Wheller Road.

The most recent dwelling appears to have been approved in 2020.

Clearly, the Council formed the view at the time of assessment of those applications that Wheller Road provided safe and convenient access to those properties.

There does not appear to be any basis to require an upgrade to Wheller Road as part of the proposed development.

The Council's roles, functions and responsibilities

To the extent that the Council considers an upgrade to Wheller Road is required, that is appropriately a matter for the Council to fund and coordinate.

The control, management and responsibility for public roads are key functions of a council under the *Local Government Act*. The Council is vested with a broad range of powers in respect of the public roads within its area. The Council alone has power to carry out roadwork to public roads in its area.² Further, section 6 of the LG Act provides that one of the principal roles of a council is to:-

... provide and co-ordinate various public services and facilities and to develop its community and resources in a socially just and ecologically sustainable manner.

(my underlining)

² See section 212 of the *Local Government Act 1999 (LG Act)*.

Section 7(f) relevantly provides that the functions of the Council include:-

...to provide infrastructure for its community and for development within its area (including infrastructure that helps to protect any part of the local or broader community from any hazard or other event, or that assists in the management of any area).

When sections 6 and 7 are read together with the Council's power to carry out roadwork, it is clear that an important function of the Council is to develop and maintain infrastructure, including public roads, in a socially just manner.

While the proposed development will not of itself require any upgrade to Wheller Road, nor place any additional strain on the Council's road resources, the Council ought to budget appropriately for upgrades, rather than holding developers at ransom and delaying the approval of developments that clearly warrant approval. That outcome is hardly fair or just on our client.

While proper budgeting in accordance with sections 6 - 7 of the LG Act (above) could have avoided the present dispute in the first place, the proposed development does not in any event necessitate an upgrade to Wheller Road.

The situation in the present case is to be contrasted with the scenario where a developer seeks to rely upon an unmade public road or where a development will generate such additional traffic volumes that it is necessary for example to upgrade an existing intersection to accommodate the increased traffic.

Offer

Notwithstanding that the proposed development does not necessitate an upgrade to Wheller Road, the applicant is prepared to make a contribution of \$34,000 to the Council towards a future upgrade of the road.

If the offer is not accepted, we ask that the Council proceed to determine the application as soon as possible so that our client can, in the event of a refusal, commence an appeal against that decision.

Should the offer not be accepted we also ask that the Council provide to us a copy of the legal advice referred to in the Agenda report for the Council's Infrastructure and Environment Committee meeting of 14 December 2020 given that the Council has clearly waived privilege in that advice.

I look forward to your response.

Yours faithfully



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