

CITY OF WEST TORRENS



Confidential Report Item 21.1

of the

COUNCIL MEETING

of the

CITY OF WEST TORRENS

will be held in the Council Chambers, Civic Centre
165 Sir Donald Bradman Drive, Hilton

on

TUESDAY, 6 AUGUST 2019
at 7.00pm

Pursuant to Section 83 (5) of the *Local Government Act 1999* the Confidential Item for the Council meeting is delivered to the Council Members upon the basis of my recommendation that the matters to which the Agenda relates be received, considered and discussed by the Council in confidence under Part 3 of the Act.

Terry Buss PSM
Chief Executive Officer

City of West Torrens Disclaimer

Please note that the contents of these Council and Committee Agendas have yet to be considered by Council and officer recommendations may be altered or changed by the Council in the process of making the formal Council decision.

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Released

21 CONFIDENTIAL

21.1 Amazone Tower Legal Advice

Reason for Confidentiality

The Council is satisfied that, pursuant to Section 90(3)(h) and (i) of the *Local Government Act 1999*, the information to be received, discussed or considered in relation to this agenda item is:

- (h) legal advice.
- (i) information relating to actual litigation, or litigation that the Council or Council committee believes on reasonable grounds will take place, involving the council or an employee of the Council.

RECOMMENDATION

It is recommended to Council that:

1. Pursuant to Section 90(2) of the *Local Government Act 1999*, Council orders, that the public, with the exception of the Chief Executive Officer, members of the Executive and Management Teams in attendance at the meeting, and meeting secretariat staff, be excluded from attendance at so much of the meeting as is necessary to receive, discuss and consider in confidence, information contained within the confidential report Item 21.1 Amazone Tower Legal Advice, attachments and any associated documentation submitted by the Chief Executive Officer, specifically on the basis of the provisions of Section 90(3)(h) and (i) because of the threat of litigation and the Council's consideration of related legal advice.
2. At the completion of the confidential session the meeting be re-opened to the public.

Brief

This report provides legal advice to Council in relation to the threat of litigation by WRP Legal & Advisory, lawyers acting on behalf of Kevin and Kath Benson seeking removal and relocation of the Amazone Tower from the Jubilee Park playground, Glandore.

RECOMMENDATION

It is recommended that:

1. Council notes the legal advice provided by Kelledy Jones Lawyers in relation to the threat of litigation against Council by WRP Legal & Advisory acting on behalf of Kevin and Kath Benson relative to their request to remove and relocate the Amazone Tower from Jubilee Park, Glandore.
2. Council instructs Kelledy Jones Lawyers to write to WRP Legal and Advisory to:
 - a. Advise that an appeal under the Development Act will be incompetent and is unlikely to be accepted by the ERD Court. In the event that an appeal is commenced, the Council will apply to have it dismissed with costs; and
 - b. Seek confirmation as to whether additional privacy treatments to the Tower would assist in alleviating the Benson's concerns in respect of overlooking and loss of privacy.
3. Council not consider any further possible remedial actions in respect of the Benson's concerns with the Tower until a response is received relative to point 2 above.

FURTHER

1. In accordance with Sections 91(7) and 91(9) of the *Local Government Act 1999* the Council orders that the Item 21.1 Amazone Tower Legal Advice, the Minutes arising, attachments and any associated documentation, having been considered by the Council in confidence under Section 90(3)(h) and (i), be kept confidential and not available for public inspection for a period of 12 months from the date of this meeting, on the basis that of the threat of litigation and the Council's consideration of related legal advice.
2. Council delegates the power of review, but not the extension, of the confidential order to the Chief Executive Officer on a monthly basis in accordance with the provisions of Section 91(9)(c) of the *Local Government Act 1999*.

Introduction

The issue of the Amazone Tower (the Tower) at Jubilee Park has been a matter of discussion by Council, both the currently elected Council and its predecessor, for the past year initially discussing a motion to relocate the Tower at the meeting of Council on 7 August 2018.

The various decisions and actions by Council regarding the Tower has been provided to our lawyer Michael Kelledy of Kelledy Jones Lawyers for him to get an appreciation of Council's decisions and actions thus far and is set out in his advice to Council (refer **Attachment 1**). That chronological order of decisions and actions is not repeated in the body of this report however, the matter of the Tower was last presented to Council at its meeting held 16 July 2018 when two separate and varying motions with notice to revoke or amend the previous decision(s) of Council were listed for consideration in the agenda.

At the time of the 16 July 2019 Council agenda being released, correspondence was also received from WRP Legal & Advisory, lawyers acting on behalf of Kevin and Kath Benson seeking removal and relocation of the Amazone Tower from the Jubilee Park playground, Glandore. The correspondence advised that unless corrective action was taken by Council to remove and relocate the Tower from Jubilee Park, legal proceedings against Council may commence (refer **Attachment 2**).

In light of this threat of litigation against Council, legal advice was sought by the Chief Executive Officer in terms of providing Council with its own legal advice, particularly given the threats and assertions made in the letter from WRP Legal & Advisory. Interim legal advice to Council was that in the absence of substantive advice addressing the threats and assertions in the WRP Legal & Advisory correspondence, Council was not able to reasonably and meaningfully consider the two motions on notice to revoke or amend the previous decision(s) of Council.

Based on that advice, the two movers of the two motions with notice sought and were granted leave to withdraw their motions.

The substantive legal advice has now been provided (refer **Attachment 1**) and Council is now better placed to further consider its position on the Tower in an informed and responsible manner.

An interim response has been provided to WRP Legal & Advisory from Kelledy Jones Lawyers (see **Attachment 3**).

Discussion

The Benson's have been seeking removal and/or relocation of the Tower over the past year and the basis of their claim is that the Tower:

- Impacts on their privacy;
- Is affecting the visual amenity of, and outlook from, their property;
- Has resulted in a reduction of the value of their property; and
- Is unsafe for children to use.

The Administration has proposed a number of possible measures to address their concerns around privacy and amenity however, none of the possible measures have been acceptable to the Benson's. It has been evident from the outset, and this is reinforced by the correspondence received from the lawyers acting for the Benson's, that the only acceptable remedy is for the Tower to be removed and relocated elsewhere. Should Council fail to comply with this request then the Benson's have threatened legal action against Council. The Benson's lawyer also suggests that the cost of defending such action will be better spent by Council on simply relocating the Tower.

Without repeating the various concerns and grounds for their claim as expressed by the Benson's lawyers, they basically assert (refer **Attachment 2** for full details);

- That the installation of the Tower is development;
- Accordingly, they have appeal rights via the ERD Court for a review of the matter.

Council's own legal advice refutes these claims indicating (see **Attachment 1** for full details):

- That installation of the Tower is not 'development' within the meaning of the *Development Act 1993* and *Development Regulations 2008*;
- An appeal by the Benson's under the provisions of the *Development Act 1993* is unlikely to be entertained by the ERD Court;
- Even if an appeal were to be entertained by the ERD Court, it cannot succeed;
- Third party appeal rights are not available to the Benson's given that the Tower is not 'development';

At clause 15 of Council's legal advice, Michael Kelledy points out that while Council cannot prevent the Benson's from attempting an appeal or the commencement of civil proceedings, he is of the view that such proceedings will fail.

Michael Kelledy further advises that the approach taken by Council to resolve this matter needs to be balanced by taking into account the needs of the Council area as a whole along with the concerns of the Benson's.

The issue of what Council does with the Tower set aside, Michael Kelledy recommends that he be instructed to write to WRP Legal & Advisory advising:

- That an appeal under the Development Act will be incompetent and unlikely to be accepted by the ERD Court and in the event that an appeal is commenced, Council will apply to have it dismissed with costs; and
- Seek confirmation as to whether additional privacy treatments to the Tower would assist in alleviating the Benson's concerns in respect of overlooking and loss of privacy.

In respect of the two separate and varying motions with notice withdrawn at the 23 July meeting, it would appear appropriate that Council not consider taking any action relative to the Tower until we hear back from the Benson's lawyers in respect of any action they may propose to commence legal proceedings and the view of the Benson's around additional privacy treatments.

Feedback has filtered back to the Administration indicating that the Benson's will not be happy with additional privacy treatments (tree plantings, screens) and as mentioned earlier in this report, the only remedy acceptable to the Benson's is removal and relocation of the Tower. That said, it is worthwhile asking that question formally of the Benson's and obtaining their response before Council considers what further action, if any, it takes in relation to the Tower.

Michael Kelledy has also suggested that Council may consider at some point undertaking an internal review of the decision process relevant to the Tower and that such a review be undertaken by an external investigator. While such a process of internal review will prove invaluable if the matter is referred to an external agency for review (e.g. Ombudsman SA), it is recommended that an internal review not be undertaken at this stage unless an external agency review process is initiated. It is clear from the Benson's apparent doggedness with this matter and the tone of the letter from their lawyer that they have a particular and unwavering mind-set about the Tower and no amount of convincing them otherwise (by way of an internal review to assist their understanding of the Council's obligations and decision-making process) will change their view.

Conclusion

Council has been dealing with the concerns raised by the Benson's about the Tower for the past year and on the cusp of Council considering its position in relation to what action, if any, it will take to alleviate the concerns of the Benson's, a threat of legal action was received from lawyers acting on behalf of the Benson's if the Tower was not removed or relocated from Jubilee Park.

The Administration sought legal advice relative to the threat of litigation and that advice is provided as part of this report.

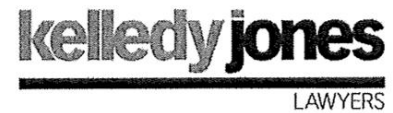
Council's own legal advice indicates that any possible legal action as communicated in the letter from WRP Legal & Advisory acting on behalf of the Benson's is unlikely to be accepted or successful in the ERD Court and that if an appeal was commenced, Council should apply to have it dismissed with costs.

Council's own legal advice addresses a number of other issues relative to the Benson's concerns and threat of legal action including how Council should deal with the motions on notice that were withdrawn from the 26 July meeting and some alternative avenues or review for the Benson's. The legal advice also recommends that Council's lawyer writes to the Benson's lawyer indicating that an appeal is unlikely to succeed and to seek confirmation of the Benson's views on Council potentially providing additional privacy treatments to the Tower.

This advice forms the basis of the Administration's recommendation to Council as well as postponing any further consideration of remedial actions by Council to the Benson's concerns about the Tower until a response is received from the communication between Council's lawyer to the Benson's lawyer.

Attachments

- 1. Correspondance from Kelledy Jones Lawyers to Council providing advise on the letter from WRP Legal & Advisory**
- 2. Correspondance from WRP Legal & Advisory acting on behalf of K & K Benson seeking removal and relocation of the Amazone Tower**
- 3. Interim response provided to WRP Legal & Advisory from Kelledy Jones Lawyers**



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Dear Terry

THREAT OF LEGAL ACTION – AMAZONE TOWER JUBILEE PARK

You have requested advice concerning the "Amazone Tower" ("the Tower") installed within Jubilee Park Reserve in Glandore ("Jubilee Park").

I have considered the history, documents and letter from WRP Legal dated 12 July 2019 and the complaints made by Mr and Mrs Benson ("the Bensons"). My advice is below.

EXECUTIVE SUMMARY

- The Tower constitutes "playground equipment". Accordingly, it is exempt from the definition of "development" and does not require development approval under the *Development Act 1993* ("the Development Act"). For this reason, an appeal under section 86 the Development Act, is unlikely to be entertained by the ERD Court and, even if it were to be entertained, cannot succeed.
- The Council may, notwithstanding previous rejections from the Bensons, wish to consider other options to resolve their concerns, including the installation of privacy treatments to the Tower to prevent overlooking, in lieu of relocating the Tower to another location, within Jubilee Park or elsewhere.
- The Council is not required to further consider the matter but, if it should choose to do so, should not make any further resolutions until it has had the opportunity to consider the financial implications of each option.
- Any further consideration of this matter by the Council should occur in confidence in accordance with sections 90 and 91 of the *Local Government Act 1999* ("the LG Act"), having regard to the unequivocal threat of litigation against the Council.

My detailed advice is set out below.

Lead	Reason	Advise
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ADVICE**The Bensons' complaints**

1. The Bensons claim that the Tower:
 - 1.1 impacts on their privacy due to the distance of the Tower from their property boundary and because of overlooking into their rear yard;
 - 1.2 is unsafe for use by children;
 - 1.3 is affecting the visual amenity of, and outlook from, their property; and
 - 1.4 has resulted in a reduction of the value of their property.
2. The appearance of the Tower and any reduction in the value of the Benson's property are not relevant considerations for the Council. This is because the Tower does not change the nature of the use of Jubilee Park as a recreation area accessible to the public. The Bensons, in purchasing their property, would have been aware that it adjoins a Council reserve and they may, reasonably, be assumed to have accepted the risk that the Council may, at some point, undertake works at its reserve.
3. I also consider that the Benson's claims regarding the safety of the Tower to be implausible given that the Tower was designed for use as playground equipment by children and as part of this design would have been subject to safety requirements and standards. If, contrary to this position, the Council has any concerns, it could seek further advice from the manufacturer regarding the safety of the Tower.
4. The overlooking and impact of privacy concerns raised by the Bensons is a relevant consideration for the Council. In this regard overlooking could be resolved by the installation of privacy treatments which obscure views into rear yards.

Appeal rights under the Development Act 1993

5. The Tower was installed in Jubilee Park in approximately May 2018. It comprises a partially enclosed climbing tower, approximately 5.4 metres in height with an attached tubular enclosed slippery dip. The Jubilee Park playground upgrade was included in the Council's 2017/2018 Annual Business Plan. The installation of the playground upgrade was overseen by the Council's Urban Services Committee ("the Committee").
6. Schedule 3 of the *Development Regulations 2008* ("the Regulations") provides for acts and activities that are excluded from the definition of "development" within the meaning of the Development Act. Specifically, clause A1 of Schedule 3 of the Regulations states that the acts or activities listed in Schedule 3 are excluded from the definition of "development", other than in respect of a State Heritage place or as otherwise defined in Schedule 3. Jubilee Park is not a State Heritage Place.
7. Part 2 of Schedule 3 of the Regulations provides for works, being the construction, reconstruction, alteration, repair or maintenance, carried out by a council. In accordance with clause 1(f) of Part 2 of Schedule 3 of the Regulations the "*placement, installation or construction of playground equipment on or in a recreation area*" (my emphasis) is an act

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or activity that does not constitute 'development'. Clause 1(e) of Part 2 of Schedule 3 of the Regulations also excludes a recreation area, or a building within a recreation area exceeding 30 square metres in total floor area.

8. In accordance with Schedule 1 of the Regulations a "recreation area" is defined to mean "any park, garden, children's playground or sports ground that is under the care, control and management of...a council, and is open to the public without payment of a charge". Jubilee Park is a "recreation area" within the meaning of the Development Act and Regulations. "Playground equipment" is not defined in the Development Act or Regulations. The Macquarie Dictionary (6th Edition) defines a "playground" to mean:

1. a ground used specifically for open-air recreation, as one attached to the school;
2. a place or area frequented for recreation pleasure;
3. an area where swings, etc. are provided for children.

9. The meaning of "playground equipment" as used in Schedule 3 of the Regulations was considered in *Hyams v City of Onkaparinga*¹. In this case the Supreme Court considered whether the construction of a skate park was excluded by clauses 1(e) or 1(f) of Part 2 of Schedule 3 of the Regulations. The Court found, at [25], that (my emphasis) "the expression "playground equipment" refers to things such as swings, see-saws, slippery dips and climbing apparatus which may often be found in playgrounds." The Court also found that there was a distinction between playground equipment, which generally refers to "equipment for a children's playground" and equipment in a recreation area. The decision of the Court was upheld on appeal to the Full Court.

10. Having regard to the available definitions and the case law, it is my advice that the Tower:

10.1 is appropriately defined as "playground equipment", as it is intended to be used for a children's playground within a "recreation area" in accordance with clause 1(f) of Part 2 of Schedule 3 of the Regulations;

10.2 is excluded from the definition of "development" in section 4 of the Development Act; and

10.3 does not require development approval in accordance with section 32 of the Development Act.

11. Even if the Tower was not considered to fall within the definition of "playground equipment" (which, in my opinion, it clearly is) it would still, likely, to fall within the exemption contained in clause 1(e) of part 2 of Schedule 3 of the Regulations as a "building" in a recreation area with a total floor area less than 30 square metres. Relevantly, a building is defined in section 4 of the Development Act as a "building or structure or a portion of a building or structure" (my emphasis).

12. Third party appeal rights are contained within sections 86(1)(b) and (f) of the Development Act and are limited to:

¹ [2005] SASC 123

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- 12.1 a person who receives or is entitled to be given notice of a decision in respect of category 3 development; or
- 12.2 a person who can demonstrate an interest in a matter relevant to the determination of an application for a development authorisation (my underline) (for example, a development application is lodged and a neighbour seeks to challenge the category of the development).
13. As the Tower is not "*development*" it does not require development approval and it is not subject to any form of public notification under the Development Act. Therefore, an appeal in respect of section 86(1)(b) or (f) would be incompetent.
14. The only avenue open to the Bensons to pursue an argument that the Tower is a development requiring approval and, therefore, its construction without approval was unlawful, is to pursue civil enforcement proceedings against the Council under section 85 of the Development Act. Before such proceedings are formally commenced, the applicant is required to file an application with the ERD Court seeking leave for a summons to issue. This application must be accompanied by affidavit evidence establishing the alleged breach of the Development Act and that the proposed respondent has a case to answer. Given that the Tower is clearly not a "*development*", any such application filed by the Bensons is, in my opinion, unlikely to pass the threshold test for the issue of a summons.
15. Whilst the Council cannot prevent the Bensons from attempting an appeal or the commencement of civil proceedings, I consider that any such proceedings will fail. If any proceedings were to make it past the initial stages such that the Council is served with the proceedings, my recommendation is that the Council then apply to have the proceedings dismissed with costs on the basis that they are frivolous and/or vexatious and entirely without basis pursuant to section 17 of the *Environment, Resources and Development Court Act 1993*.

The Council's decisions and actions regarding the Tower

16. On 7 August 2018 a motion was moved at the Council meeting for the relocation of the Tower. The motion was lost.
17. On 21 August 2018 Mr Benson made a deputation to the Council about the Tower. The Council resolved to consider a report about options and costs to relocate the Tower.
18. On 15 January 2019 the Council considered the report setting out options and costs to relocate the Tower and the following options:
 - 18.1 the Tower be retained and the Council do nothing;
 - 18.2 the Tower be retained and improvements made to vegetation to provide screening of the Tower;
 - 18.3 the Tower be retained, improvements made to vegetation and shade structures installed for additional screening; or
 - 18.4 the Tower be moved to another park within the Council area and alternative playground equipment installed at Jubilee Park.

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The Council resolved to defer the matter to allow for further negotiations between the Council and the Bensons.

19. On 31 January 2019 Councillors Woodward and Papanikolaou met with the Bensons and Council staff at Jubilee Park to discuss the Tower.
20. On 4 June 2019 the Council received a further deputation from Mr Benson regarding the Tower. The recommendation before the Council at this meeting included:
 - 20.1 the Tower be retained and the Council do nothing;
 - 20.2 the Tower be retained and improvements made to vegetation and shade structures installed to provide screening of the Tower; or
 - 20.3 consultation with adjoining residents of the Reserve be undertaken relating to a proposed new location of the Tower within Jubilee Park and subject to no adverse feedback being received, the Tower be relocated within Jubilee Park once appropriate funding in the order of \$35,000 is approved at the next available budget review. Should any adverse feedback be received, a further report be presented to Council to seek direction on the next steps to be undertaken for the Tower.

A motion was moved that the Council resolve to consult with the community (in accordance with point 3 above). This motion was lost. A 'foreshadowed' motion was moved in favour of improvements to vegetation and shade structures. A formal motion was put that *the question lie on the table*, this was also lost. The substantive motion then before the meeting was carried ("the 4 June Resolution").

21. At the Council meeting on 2 July 2019, Cr Woodward sought and was granted leave to make a personal statement about the Tower. This included discussion about photographs of children. A motion was put that the 4 June Resolution be revoked. This motion was withdrawn. A further motion was put that the Council instruct the Administration to delay the implementation of the 4 June resolution until 6 August 2019. This motion was carried.
22. At the Council meeting on 16 July 2019, two motions on notice were included in the agenda. The first motion was a revocation of the 4 June Resolution and if it succeeded, a motion that the Tower remain, vegetation be planted but no shade structure installed, would be moved. The second motion on notice was a revocation motion of the decision on 4 June Resolution and, if successful, foreshadowed the following motion:
 - 22.1 That \$16,000 allocated for shade and screening at Jubilee Park be used to move the Tower to Camden Oval, and is in addition to the recently approved \$140,000 for the Camden Oval playground upgrade in the 2019-20 Budget.
 - 22.2 That replacement equipment is installed in Jubilee Park and aligned to the already completed community survey for new equipment. E.g. Slippery Dip, Monkey Bars and Climbing Structure.
 - 22.3 The total cost of relocating the Tower and installation of new equipment at Jubilee Park and Camden Oval does not exceed \$156,000.

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Decisions of the Council and dealing with the motions on notice

23. When the Council makes decisions, it must have regard to its the functions and principles set out in sections 7 and 8 of the LG Act, including that it must seek to ensure that its resources are used "fairly, effectively and efficiently" (refer section 8(h) of the LG Act). The overarching functions and principles are to ensure that decisions of the Council are made having regard to the Council area as a whole.
24. The Council was not required to undertake public consultation in respect of the Jubilee Park playground upgrade. Although, I understand that on 23 April 2018 the Council provided information to nearby residents of Jubilee Park, by way of a circular informing that the playground upgrade was going to take place. The Jubilee Park playground upgrade was also included in the Council's 2017/2018 Annual Business Plan and Budget that was the subject of consultation as per section 123 of the LG Act.
25. From the information available, the Council has fulfilled its statutory obligations and has acted appropriately in upgrading the playground equipment at Jubilee Park, by installing the Tower. The Council has also attempted to work with the Bensons, and continues to work with them to alleviate their concerns in respect of the Tower. Arguably, the Council is not required to do anything further in respect of this matter.
26. There are two motions on notice currently before the Council, each of which proposes the revocation of the 4 June Resolution and alternative options in relation to the Tower (as set out above).
27. The expense to relocate the Tower, either within Jubilee Park or to another recreation area of the Council, is not insignificant. Whilst re-locating the Tower may resolve the concerns of the Bensons, it will have financial implications for the Council, the effect of which is not fully known at this time. The Council also must consider the implications of supporting a motion of this nature, including that of public perception that it is looking to alleviate the concerns of two individuals, rather than considering the benefit/detriment to the Council as a whole.
28. The Council has an obligation to make decisions for the benefit of the Council area as a whole and any decision made by the Council to appease the concerns or complaints of one or two residents is not to be made lightly. Therefore, the approach taken by the Council to resolve this matter needs to be balanced by taking into account the needs of the Council area as a whole along with the concerns of the Benson's.
29. Also, the Council, if it is so inclined, should not resolve to relocate the Tower until such time as further information can be prepared and considered about the cost implications should relocation of the Tower be the preferred option of the Council.

Alternative avenues for review

30. As an alternative to an appeal under the Development Act which, in my opinion, is unlikely to be successful, the Bensons could request an internal review of the Council's decision(s) regarding the Tower under section 270 of the LG Act (assuming this has not already occurred). Alternatively, the Council could determine to undertake its own internal review of the decision(s) and provide a copy of the outcome of the review to the Benson's. If the

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Council determined to undertake an internal review, I recommend that it be undertaken by an external investigator to ensure demonstrable impartiality and objectivity in the review process and the findings.

31. There are a number of benefits for the Council if it determines to undertake an internal review, including that:
- 31.1 it would provide a detailed assessment of all of the decisions made by the Council, including the Council's Administration, in relation to the Tower;
 - 31.2 the findings could be provided to the Bensons, which may assist their understanding of the Council's obligations and decision-making processes; and
 - 31.3 the report could be provided to an external review agency (e.g. the Ombudsman) should an external review be instigated by the Bensons (as below).
32. The Bensons could request an external review of this matter by the Ombudsman.

RECOMMENDATION

33. Having regard to the above, I recommend that we be instructed to write to WRP Legal to:
- 33.1 advise that an appeal under the Development Act will be incompetent and is unlikely to be accepted by the ERD Court. In the event that an appeal is commenced, the Council will apply to have it dismissed with costs; and
 - 33.2 seek confirmation as to whether additional privacy treatments to the Tower would assist in alleviating the Benson's concerns in respect of overlooking and loss of privacy.
34. Further consideration of this matter by the Council needs to be undertaken in confidence, in accordance with section 90(3)(h) and (i) of the LG Act. This is due to the threatened litigation by the Bensons and the Council's consideration of related legal advice. To ensure the confidentiality of information is maintained, the Council must also make an order preventing the release of the agenda report, minutes and other information in accordance with section 91(7) of the LG Act.

Let me know if you have any questions.

Yours sincerely
KELLEDYJONES LAWYERS



MICHAEL KELLEDY

12 July 2019

PRIVATE AND CONFIDENTIAL

Terry Buss
City of West Torrens Council
165, Sir Donald Bradman Drive
Hilton Adelaide SA 5033

Without prejudice, save as to costs

Dear Sir

Removal and relocation of Amazone adventure tower in Jubilee Park playground

We act for Kevin and Kath Benson, residents of the City of West Torrens (**our clients**).

As you may be aware, we have instructions to commence legal proceedings against the City of West Torrens Council (**WTCC**) to seek the removal and relocation of the Amazone adventure tower located at the Jubilee Park playground (**Tower**).

We understand that there appears to be conjecture as to whether the Environment, Resources and Development Court (**ERD Court**) would have the appropriate jurisdiction to hear this matter.

Please note that our client has standing to institute proceedings achieve this outcome through an application to the Environment, Resources and Development Court (**ERD Court**) under section 86 of the *Development Act 1993 (SA)* and section 16 of the *Environment, Resources & Development Court Act 1993 (SA)* (**ERD Court Act**).

By way of a background:

1. A City of West Torrens circular dated April 23, 2018 was sent out to our clients and neighbouring residents, which outlined plans for a playground upgrade at Jubilee Park. The installation was conducted without proper consultation from the community as the circular failed to specify that the height of the Tower was to be at 5.4 meters. This would have alerted our clients and fellow local residents to the size of the Tower and problems associated with such a structure.
2. In response to concerns of the safety of children, privacy of local residents and the negative impact on the park's aesthetics, a motion was put forward by Cr John Woodward at the City of West Torrens Council Meeting on 7 August 2018 although this motion was rejected by 8 votes to 7 votes.
3. A subsequent deputation given by our client to the WTCC on 22 August 2018, for the relocation of the Tower was successful. However, on 4 June 2019, a motion put forward by Cr John Woodward was rejected in favour of an option to retain the Tower with improvements to be made to provide better natural screening of the neighbouring property. As described in the outline of concerns below, this is not a viable solution.

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Liability limited by a scheme approved under Professional Standards Legislation



Our client would like to outline the following concerns relating to the Tower:

1. The size of the structure is oversized for the space and presents a serious safety hazard for children. Although it may be compliant with current playground standards, any unsupervised child who climbs the outside of the slide and falls from that height may suffer serious injuries.
2. The Tower presents a serious invasion of our client's right to privacy as well as those of the surrounding residents. At a height of 5.4 meters, users of the Tower are able to look into neighbouring properties which has negatively affected our clients and other residents' use and enjoyment of their land.
3. The Tower, in itself, is not visually pleasing and ruins the aesthetic appeal of the residential park by obstructing the views of the surrounding neighbourhood and land. Hence, alternative options proposed by the Council such as the provision of shades and natural screening would prove ineffective and may likely exacerbate this problem.
4. Further attempts to remedy this problem through incremental changes have been futile and additional measures to provide more natural screening estimated at a cost of \$16,000 would result in only further wastage of taxpayer money. The Tower's removal and relocation will likely be the most cost-effective solution in the long-run.
5. Significantly, it is important to note that our client, and the properties surrounding the Tower have suffered a loss in value to their respective properties due to their loss of privacy and surrounding amenity. You will appreciate that the Tower is an incredibly large and distracting sight from our client's property which our client considers devalues its property by no less than \$50,000. This will be raised with the Court and an appropriate valuation furnished to the Court by our client. The cost of the valuation and subsequent devalue to our client's property will be claimed against the Council.

Our clients would like to state the grounds on which they are seeking their claim:

1. As a party to a dispute with the WTCC in relation to the development of the Tower, our clients have standing to apply to the ERD Court for determination of this dispute under section 86(1)(e)(iv) of the *Development Act*.
2. As persons who have interest in the matter relating to the Tower's removal and relocation by virtue of being owners of adjacent land to the Jubilee Park, our clients have standing to apply to the ERD Court for a review of the matter under section 86(1)(f) of the *Development Act*.
3. Our clients have standing to apply for the matter to be referred in the first instance to a conference with the ERD to assist with its resolution under section 86(6) of the *Development Act* pursuant to section 16 of the ERD Court Act.

Our clients' position remains that the Tower should be removed from Jubilee Park and relocated to a more suitable playground. There remains no reasonable justification not to proceed with this approach, certainly when the cost of this is dwarfed by the subsequent devaluation of our client's and the surrounding neighbours' properties.

Per section 86(4) of the *Development Act*, our clients are well within the time period (2 months from the date of the decision) to lodge an application with the ERD court. Assuming the date of the decision was 4 June 2019 which was the date of the last motion passes, this gives our clients until 4 August 2019 to lodge an application.

Accordingly, we hereby request the WTCC undertakes the following corrective action within 21 days of this letter (**Corrective Action**):

1. rescinds its decision to retain the Tower within Jubilee Park and its plans to provide shade structures and natural screening with the neighbouring property; and
2. proceeds with plans to remove the Tower from Jubilee Park and relocate it to a more suitable playground.

Should you fail to undertake the Corrective Action within 21 days of this letter, our client puts you on notice that it may commence legal proceedings against the WTCC in the ERD Court for the removal and relocation of the Tower as outlined in this Letter.

Finally, as you may be aware, our client has advised that in the event the Council object any application to have this matter heard in the ERD Court, our client reserves its rights to institute immediately proceedings in the District Court to have an application to have this matter referred to the ERD Court.

For the avoidance of doubt, and to ensure that our client's position is made abundantly clear, our clients feel very strongly that the Tower has significantly diminished their rights to privacy and associated amenity. They are determined to pursue every option available to them and apply very significant resources to achieve the removal of the Tower from Jubilee Park.

We trust that the cost of defending any such action that our client proposes to make will be better spent by the Council on simply relocating the Tower.

Our client reserves all rights available to it.

Yours faithfully



Dimitris Parhas
Director
WRP Legal & Advisory



18 July 2019

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Dear Dimitris

REMOVAL AND RELOCATION OF AMAZONE ADVENTURE TOWER JUBILEE PARK PLAYGROUND

We refer to your letter dated 12 July 2019, in relation to your client's concerns regarding the Amazone Adventure Tower Jubilee Park Playground.

We have recently been instructed by the Council in relation to this matter, and are currently in the process of obtaining our instructions.

It would be premature for your client to commence legal proceedings, until such time as we have had the opportunity to obtain those instructions, and provide our client's response.

We will revert to you shortly in this regard.

In the interim, please do not hesitate to contact me if you have any questions.

Yours sincerely
KELLEDYJONES LAWYERS

A handwritten signature in black ink, appearing to read 'M J Kelliedy', written over a large, light grey watermark that says 'RELEASED'.

MICHAEL KELLEDY

Lead

Reason

Advise