

**REPORT REFERENCE:  
CITY OF MARION  
COUNCIL ASSESSMENT PANEL AGENDA  
FOR MEETING TO BE HELD ON  
WEDNESDAY 04 May 2022**

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**Originating Officer:** Nicholas Timotheou  
Senior Development Officer – Planning

**Applicant:** Future Urban Pty Ltd

**Development Description:** Construction of a childcare centre with associated advertising, masonry walls and ancillary storage shed.

**Site Location:** 10 Renown Avenue Clovelly Park; and  
12 Renown Avenue Clovelly Park

**Zone & Policy Area:** General Neighbourhood Zone

**Lodgement Date:** 22/07/2021

**Planning and Design Code:** Version 2021.9 (Operational 15 July 2021 to 28 July 2021)

**Referrals:** Internal  
Development Engineer

**Application Type:** Performance Assessed

**Relevant Authority:** The Panel is assigned as a 'Relevant Authority' in its own right pursuant to Section 82 of the Planning, Development and Infrastructure Act 2016 and therefore will be the respondent to appeals against their decisions.

**Application No:** 21012625

**Recommendation:** That the Panel either:

1) Notes this report and instructs the Assessment Manager to advise Council's solicitors they wish to continue the appeal.

OR

2) The Panel authorises the Assessment Manager to instruct Council's solicitors to make a settlement offer to the appellant in attempt to resolve any outstanding traffic related concerns. The Panel;

a) Must consider the final scheme prior to advising the ERD Court it accepts the compromise.

OR

b) The Panel authorises the Assessment Manager to resolve the acceptance of a subsequent settlement offer for the appeal, on the basis of the Assessment Manager being satisfied the traffic related matters are appropriate for the land and locality.

OR

- 3) The Panel resolves to accept the compromise offer submitted by the appellant and advise the ERD Court accordingly.

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***Attachments***

*Attachment I: Decision Notification Form*

*Attachment II: Compromise Proposal Plans and Supporting Documentation*

## BACKGROUND

The subject application for “construction of a childcare centre with associated advertising, masonry walls and ancillary storage shed” was delegated to the Council Assessment Panel pursuant to Instrument of Delegation – CAP, Clause 5.1.1.1, which states:

*The delegation of the power to grant or refuse planning consent pursuant to Section 102(1)(a) of the Act is limited to applications in relation to which:*

*Any Performance Assessed application that has undergone Public Notification where at least one representor has expressed opposition to the proposed development and has expressed their desire to be heard by the Panel.*

The application was previously presented to the Council Assessment Panel (CAP) at the meeting held on 3 November 2021 and was refused for the following reasons:

1. *Does not satisfactorily meet the desired outcome of the General Neighbourhood Zone as expressed in DO 1 and PO 1.1;*
2. *Does not satisfactorily take into consideration Design in Urban Areas DO 1 (a), (c) and (d);*
3. *Building footprint and site coverage is not consistent with the character and pattern of a low density suburban neighbourhood as expressed in General Neighbourhood Zone PO 3.1;*
4. *Building does not contribute to the low rise suburban character and does not compliment the height of nearby buildings as expressed in General Neighbourhood Zone PO 1.3 and 4.1;*
5. *Does not provide sufficient detail on landscaping to reduce urban heat Design in Urban Areas PO 3.1;*
6. *The size, scale of the proposed development and vehicle access point to Renown Place will compromise the safety of pedestrian and road users, thus conflicting with General Policies - Transport, Access and Parking DO 1 and PO 3.4.*

Through the appeal process, the following key events occurred:

- A preliminary conference was held on 10 December 2021
- The applicant requested a Directions Hearing in order to identify a suitable hearing date
- A Hearing date was set for 30 March 2022
- The applicant requested an adjournment to the hearing date in order to submit a compromise plan before the Council Assessment Panel
- The ERD Court granted an adjournment and set a Directions Hearing for 11 April 2022
- The applicant provided amended plans for consideration as a compromise prior to the conference
- On 4 May 2022 the Panel considered the amended plans and resolved not to support the compromise plans and advise the ERD Court accordingly
- A full Court Hearing has been set for 14 June 2022.

## DISCUSSION

Following the Panel's initial refusal of the application, Administration canvassed a number of independent experts in order to gauge whether they could defend a refusal of the application and subsequently act for the Panel as an expert witness.

Administration resolved to engage:

- Town Planning: Mr Phil Brunning of Phil Brunning and Associates
- Traffic Engineer: Mr Phil Weaver of Phil Weaver and Associates
- Landscape Architect: Mr Heath Edwards of Tract Architects.

Mr Brunning and Mr Edwards consequently carried out a review of both the original application plans, together with the compromise offer. They identified that on balance, the proposed compromise warranted the granting of Planning Consent.

Mr Weaver noted a number of outstanding concerns with the development from a traffic, parking and access perspective. Subsequently, Mr. Weaver advised he would remain in a position to defend refusal of the application and act as an expert witness on the Panel's behalf.

Since the receipt of this advice, the matter has been listed for a full hearing for 14 June 2022. Administration has sought both internal and independent planning experts to review the Panel's position to refuse the application.

Administration sought advice from a number (more than 10) of well-known and reputable planning consultancies. The advice received was that although some concerns were noted with the development, in their expert opinion, the compromise proposal was such that they were unable to defend a refusal of the application and the development illustrated sufficient merit to warrant Planning Consent.

Given Administration has been unsuccessful in sourcing a planning expert to support refusal of the application, the following options remain available to the Panel for consideration:

- 1) The appeal may continue, noting planning evidence will not be called upon. Traffic evidence will remain relevant to Council's strategy in defending the refusal. Council's solicitor shall also cross-examine the appellant's experts.
- 2) The Panel authorises the Assessment Manager to instruct Council's solicitors to make a settlement offer to the appellant in attempt to resolve any outstanding traffic related concerns. We contemplate this option being resolved through negotiations between Council's independent traffic engineer and the appellants traffic engineer. The outcome of this option can either:
  - a) Return to the Panel for consideration  
OR
  - (b) The Panel authorises the Assessment Manager to resolve the acceptance of a subsequent settlement offer for the appeal, on the basis of the Assessment Manager being satisfied the traffic related matters are appropriate for the land and locality.
- 3) The Panel resolves to accept the compromise offer submitted by the appellant and advise the ERD Court accordingly.

## RECOMMENDATION

Noting the matter has currently been listed for a full hearing, Option 2 (b) is recommended. This option provides opportunities for the independent experts to resolve any traffic related concerns and subsequently avoids the need for the matter to proceed to a full hearing. This option also provides the opportunity for the Assessment Manager to finalise any associated processing of the application, while updates can be provided at the next available Council Assessment Panel meeting.

## **RECOMMENDATION**

**Having considered all relevant planning matters in relation to the subject development application:**

- (a) The Panel note this report and concurs with the findings and reasons for the recommendation;**
- (b) The Panel concurs that the proposed development is not seriously at variance<sup>1</sup> to the Planning and Design Code, in accordance with Section 126(1) of the Planning, Development and Infrastructure Act 2016; and**
- (c) Notes this report and instructs the Assessment Manager to advise Council's solicitors they wish to continue the appeal.**

**OR**

- (d) The Panel authorises the Assessment Manager to instruct Council's solicitors to make a settlement offer to the appellant in attempt to resolve any outstanding traffic related concerns. The Panel;**
  - a. Must consider the final scheme prior to advising the ERD Court it accepts the compromise.**

**OR**

- b. Authorises the Assessment Manager to resolve the acceptance of a subsequent settlement offer for the appeal, on the basis of the Assessment Manager being satisfied the traffic related matters are appropriate for the land and locality.**

**OR**

- (e) The Panel resolves to accept the compromise offer submitted by the appellant and advise the ERD Court accordingly.**

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<sup>1</sup> Pursuant to Section 107(2)(c) of the *Planning, Development and Infrastructure Act 2016* (or Section 35(2) of the *Development Act 1993* for applications under that Act), a "*development must not be granted planning consent if it is, in the opinion of the relevant authority, seriously at variance with the Planning and Design Code*" (or the Development Plan if under the Development Act).

What is 'seriously at variance' is not a defined legislative term and is not synonymous with a proposal that is merely 'at variance' with certain provisions of the Code (or Plan), which many applications will be. Instead, it has been interpreted to be an important or grave departure in either quantity or degree from the Code (or Plan) and accordingly not worthy of consent under any circumstances and having the potential to undermine the objectives of the Code (or Plan) for the land or the Zone.