

Special Council Minutes – 26 October 2004

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CITY OF FREMANTLE

Minutes of the Special Meeting of Council

Held on Tuesday 26 October 2004 at 7.30 pm

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REPORTS BY THE MAYOR OR OFFICERS OF COUNCIL

<a href="#">C0410-05</a>	Consideration of a Request for Council's assistance to the Residents regarding an Appeal to the Supreme Court by the Mustang Bar ( <b>COUNCIL DECISION - ABSOLUTE MAJORITY REQUIRED</b> ) Confidential Attachment Numbers C0410-05, 5a, 5b	5 and 14 in Confidential section
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CLOSURE OF MEETING

MINUTES

**DECLARATION OF OPENING/ANNOUNCEMENT OF VISITORS**

THE MAYOR, MR PETER TAGLIAFERRI DECLARED THE MEETING OPEN AT 7.38 PM  
AND WELCOMED MEMBERS OF THE PUBLIC TO THE MEETING

**ATTENDANCE AND APOLOGIES**

Present: The Mayor, Mr Peter Tagliaferri in the Chair and Councillors

**East Ward**

Cr Kathy Anketell

**Beaconsfield Ward**

Cr John Alberti

**Hilton Ward**

Cr Tony Miosich

**City Ward**

Cr Steve Gorman

**South Ward**

Cr Geoff Graham; Cr Helen Hewitt

**North Ward**

Cr Doug Thompson; Cr Bob Williams

Acting Chief Executive Officer, Mr Graeme Mackenzie; Director Cultural and Community Services, Mr Ken Posney; Manager Environmental Control; Mr Bob Caporn and the Minute Secretary and Mayor's Civic Appointments Secretary, Mrs Nellene Hill.

Approximate number of members of the public present - 12

Media present - 1

**LEAVE OF ABSENCE**

Nil

**APOLOGIES**

Cr Phil Douglas

Cr Shirley Mackay

Cr Bob smith

Director Urban Management, Jayson Miragliotta

## DISCLOSURE OF INTEREST

AT THIS POINT IN THE MEETING BEING 7.38 PM MAYOR TAGLIAFERRI DECLARED A FINANCIAL INTEREST IN THE FOLLOWING ITEM NUMBERED C0410-05 AS HIS FAMILY HAVE OWNED A LIQUOR LICENCE BUSINESS FOR 60 YEARS WITHIN CLOSE PROXIMITY TO THE BUSINESS IN QUESTION VACATED THE CHAMBER AT THIS JUNCTURE BEING 7.38 PM AND DID NOT RETURN.

AT THIS POINT IN THE MEETING BEING 7.39 PM THE ACTING CHIEF EXECUTIVE OFFICER, MR GRAEME MACKENZIE CALLED FOR NOMINATIONS FROM ELECTED MEMBERS FOR A PRESIDING MEMBER TO BE ELECTED AS THE DEPUTY MAYOR WAS NOT PRESENT

CR STEVE GORMAN NOMINATED CR TONY MIOSICH

CR KATHY ANKETELL NOMINATED CR GEOFF GRAHAM

CR GRAHAM DID NOT ACCEPT THE NOMINATION AND SUPPORTED CR TONY MIOSICH AS PRESIDING MEMBER

CR TONY MIOSICH TOOK THE CHAIR AT THIS JUNCTURE BEING 7.39 PM

## PUBLIC QUESTION TIME

1. Mr D Cake  
C0410-05

### Summary of Question

Mr Cake spoke of the issue of tactics of intimidation of residents, public threats and asked Council to stand firm alongside the residents and reject these tactics of intimidation.

### Summary of Response from PRESIDING MEMBER Cr Tony Miosich

Thank you.

2. Mr J Strachan  
C0410-05

### Summary of Question

Mr Strachan spoke of the intimidation issue of the community and asked Council to send a message to the business world that this form of intimidation is not the Fremantle way. He also asked Council to look long and hard at this issue and make representation to the Supreme Court so this application does not go ahead and asked Council it needs to get behind its residents and give them the support they require.

Mr Strachan also asked if the Acting Chief Executive Officer, Mr Graeme Mackenzie had looked into his question from Council Meeting on 18 October 2004 of whether lawyers have a Code of Practice and whether this may be an avenue to take.

### Summary of Response from Acting Chief Executive, Mr Graeme Mackenzie

Mr Mackenzie will respond to Mr Strachan shortly once his investigations are finalised.

3. Ms A O'Sullivan  
C0410-05

**Summary of Question**

Ms O'Sullivan spoke on this matter and asked lets back to basics, lets work together, lets not be hijacked, lets be local, lets work as a community.

**Summary of Response by PRESIDING MEMBER Cr Tony Miosich**

Thank you.

AT THIS POINT IN THE MEETING BEING 7.45 PM THE PRESIDING MEMBER MOVED A MOTION TO MAKE THE DISCUSSION OF ITEM NUMBERED C0410-05 CONFIDENTIAL UNDER SECTION 5.23 2 (d) OF THE LOCAL GOVERNMENT ACT

SECONDED BY CR D THOMPSON

MOTION TO DECLARE THE ITEM CONFIDENTIAL WAS PUT AND CARRIED 5/3

<b>For</b>	<b>Against</b>
Presiding Member Cr Tony Miosich	Cr Kathy Anketell
Cr Geoff Graham	Cr Helen Hewitt
Cr Steve Gorman	Cr Bob Williams
Cr Doug Thompson	
Cr John Alberti	

**C0410-05**                      **Consideration of a request for Council's assistance to the residents regarding an appeal to the Supreme Court by the Mustang Bar (Council Decision) Confidential Attachment No. C0410-05, 5a, 5b**

**DataWorks Reference:**                      Bob Caporn;122/007  
**Author:**    **Bob Caporn Manager Urban Environment & Control**  
**Actioning Officer:**                              **Bob Caporn Manager Urban Environment & Control**

**DECISION MAKING AUTHORITY**

Council Decision                      ABSOLUTE MAJORITY REQUIRED

**PURPOSE**

Consideration of a request for Council's assistance to the residents regarding an appeal to the Supreme Court by the Mustang Bar. (Applicant being Highmoon Pty Ltd), copy of the request can be seen as Confidential Attachment No. SDRCP0410-111c

**EXECUTIVE SUMMARY**

The application for planning approval for this development was refused by Council which then resulted in an appeal being lodged by the applicant to the Town Planning Appeals Tribunal. The Tribunal supported the appeal. In the mean time the applicant submitted an application to transfer the liquor license. This application was considered by Judge Greaves in the Liquor Licensing Court and was refused.

The applicants have now lodged an appeal to the Supreme Court. The papers served on the respondents have prompted them to seek support from Council.

The respondents believe that they acted in good faith and lodged their objection to the Liquor Licensing Court on behalf of a wider community interest, they did not have the expectation that the matter would be appealed.

This item contains two alternative recommendations that offer a degree of support and should satisfy the respondents needs.

**REPORT**

***Background***

In September 2003 the Town Planning Appeal Tribunal upheld an appeal against Council's refusal of planning approval for the proposed "Mustang Bar" development at 33 South Terrace, Fremantle.

The Tribunal found that the Mustang Bar development could be approved on planning grounds subject to a number of conditions, including the preparation of a comprehensive Management Plan. The Management Plan was subsequently prepared in close consultation with the City.

Following the Town Planning Appeal Tribunal decision, the proponents of the Mustang Bar were able to proceed with an application before the Liquor Licensing Court to remove the Tavern Licence of the former Coakleys Tavern at 24 High Street, Fremantle to the proposed Mustang Bar premises.

As a result of the Town Planning Appeal Tribunal decision and the preparation of the Management Plan, the City took a limited role in relation to the Liquor Licensing application. The City appeared at the hearing before the Liquor Licensing Court, but only:-

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- to protect the City from any reduction in the minimum requirements resulting from the Town Planning Appeal Tribunal's decision and the Management Plan; and
- out of respect for the Liquor Licensing Court, so that the City could provide relevant information to the Judge for his consideration.

A number of residents continued to object to the Liquor Licensing application.

On 1 July 2004 the Liquor Licensing Court handed down its decision in respect to the Liquor Licensing application. The Liquor Licensing Court refused the application, based on the following findings:-

- that residents of the locality *"have for some time been unduly affected by the conduct of intoxicated customers of licensed premises"*;
- that the Mustang Bar application would introduce 500 to 600 customers to the locality;
- that the introduction of premises of the size of the proposed Mustang Bar in the particular location, where there is already a large number of licensed premises, is *"likely to contribute to the undue offence, annoyance, disturbance or inconvenience to residents by intoxicated persons in the vicinity of the premises"*; and
- the Liquor Licensing Court's view, based on the evidence of two resident witnesses, that on the balance of probabilities the Management Plan jointly prepared by the City and the proponents of the Mustang Bar is unlikely to be effective to reduce offence, annoyance, disturbance or inconvenience to nearby residents.

The judgement from the Liquor Licensing Court (Judge Greaves) states in the concluding paragraphs 36 and 37:  
*" I find that the removal of this licence to this proposed location is likely to cause undue offence, annoyance, disturbance or inconvenience by intoxicated persons in the vicinity of the premises that those who reside nearby should not reasonably be expected to tolerate in the interests of the need of the community for the removal of this licence to this part of the affected area as contemplated.*

*In my opinion, therefore, the objection under s 74 (1) (g) of the Act has been made out and the application should be refused "*.

The proponents of the Mustang Bar have now lodged an appeal to the Full Court of the Supreme Court of Western Australia against the Liquor Licensing Court's decision.

The Notice of Appeal names 12 residents and the City of Fremantle as respondents – these being the formal parties before the Liquor Licensing Court.

The Notice of Appeal seeks to overturn the Liquor Licensing Court's decision and also gives notice that the unsuccessful party or parties will be required to pay the costs of the appeal, as is ordinarily the case, please refer to Confidential Attachment No. C0410-05.

There are two questions that need to be addressed. One is whether the City wishes to contest the appeal itself and the other is the City's position in regards to the resident objectors.

### ***Comment***

Council's solicitors have provided some legal advice in a letter dated 10 August 2004 , attached to this item as Confidential Attachment No. C0410-05a.

In considering the request from the residents the following issues should be taken into account:

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Issue	Argument to support this position	Argument to refuse this position
<p><u>The initial objection</u> - The residents are of the view that they are fairly representing up to 400 petitioners who originally objected to the application for the transfer of the liquor licence;</p>	<p>The residents believe that by lodging the objection they did not expect to be drawn into further legal action. The residents thought they were protecting their amenity for themselves and the wider community.</p>	<p>The objections were lodged with Liquor Licensing Authority by residents in their own right. There was no approach by the residents to the City Of Fremantle to underwrite any costs prior to the case being heard by Judge Greaves. Also refer Confidential Attachment C0410-05 page 1, paragraph 4</p>
<p><u>Residents entered into proceedings in good faith</u> - The residents would consider that they were acting in good faith and with the assumption that up to shortly before the hearing before the Liquor Licensing Court that their views were fairly reflective of the City's position;</p>	<p>Whilst the assumption is correct as soon as the decision of the Town Planning appeals Tribunal was known a decision was made by the Manager of Urban Environment for the city to remain represented to protect the position determined by the Tribunal and to contain costs</p>	<p>The residents had the same opportunity to either withdraw from the hearing or endeavour to negotiate an outcome acceptable to them.</p>
<p><u>Resident support in the future</u> - Future support from residents could be jeopardised if they thought that support from the City would be limited;</p>	<p>It is always of tremendous benefit to have residents prepared to give their time and effort to support the City in objections or complaints about licensed premises.</p>	<p>Residents should not assume that their position is the same as elected members of Council. In this instance Council refused the initial planning application but this refusal was overturned on appeal.</p>
<p><u>Costs</u> -To date there has been no estimate of the amount of costs which may apply in respect to this appeal. There is a potential for this matter to be referred to a higher court if the applicant loses this appeal.</p>	<p>If the outcome of the appeal is supporting Judge Greaves and the residents point of view then the costs would probably be awarded against Highmoon. If lost the costs could be between \$5,000 and \$40,000 Residents should not be expected to contribute to any costs when they are acting to protect their amenity.</p>	<p>It is unreasonable to expect the wider community to pay for costs in a retrospective manner. General practice would be that people or groups would approach council at an early stage and have the matter considered through the Committee process. Also refer Confidential Attachment C0410-05a pages 2 and 3.</p>
<p><u>Precedent</u> - There is a risk that in approving this request that future objectors would expect the same financial support from Council.</p>	<p>It is Councils prerogative to support residents in any way they see appropriate. In some cases the views of the resident/s may reflect the opinion of the Council. In this case the residents have achieved an outcome that was not expected by the City.</p>	<p>Other residents may expect the same consideration in the future. Retrospective support particularly of a significant financial nature is unwise.</p>

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<u>The intimidating tone of Highmoons appeal</u>	Residents resent the tone of the correspondence from Highmoons solicitors. Out of common courtesy the Appellants Solicitors William Ellison could have communicated with the respondents to explain the process better.	Legal correspondence can be blunt and very forthright. The appellant is exercising their legal rights Refer Confidential Attachment C0410-05a page 2 paragraph 8
<u>The likelihood of success</u>	Refer Confidential Attachment C0410-05a page 3 paragraph 7	Refer Confidential Attachment C0410-05a page 3 paragraph 7

The Council's solicitors have suggested that if the Council is minded to provide some form of indemnity to the resident objectors in regards to the costs of the appeal, then limitations should be placed on the extent of the indemnity and/or on how the residents pursue their opposition to the appeal.

There are a number of recommendations that would be appropriate considering the complexity of this matter the following recommendations could be considered by Council:

Recommendation A - The City maintain a position in relation to the appeal to the Full Court of the Supreme Court by Highmoon Pty Ltd against the decision of the Liquor Licensing Court consistent with the position taken by the City before the Liquor Licensing Court.

The City instruct Council's solicitors, McLeods Barristers & Solicitors, to act for the residents named as the Second to Thirteenth Respondents to the appeal for the purposes of the appeal, and the City enter into an agreement with the second to thirteenth respondents to pay any costs of the appeal ordered to be paid by the second to thirteenth respondents.

Or Alternatively Recommendation B - The City enter into an agreement with the residents named as the second to thirteenth respondents to the appeal to pay any costs of the appeal ordered to be paid by the second to thirteenth respondents, limited to an amount of \$ (to be determined by Council).

**STRATEGIC & POLICY IMPLICATIONS**

To date the Manager or Urban Environment and Control has exercised his discretion in objecting to Liquor License applications where it is in the community's interest to do so. There is no policy that provides for financial recompense to other objectors.

**TRIPLE BOTTOM LINE IMPLICATIONS**

***Economic***

For Council to fund the respondents legal costs is not in keeping with usual practice and would impose a financial cost to the City the extent of which is not yet known.

***Environmental***

Not applicable

***Social***

The residents as respondents consider that they are opposing the transfer of the Liquor License in the interest of the community.

### BUDGET IMPLICATIONS

The unknown financial commitment is of concern and has not been factored into the 2004-2005 budget. If Council supports any financial contribution, the amount of the contribution will need to be considered at budget review. Solicitors advise that this could be in the region on \$5,000 - \$40,000

### LEGISLATIVE AND LEGAL CONSIDERATIONS

This matter is being pursued by Highmoon Pty Ltd as a matter of course by them exercising their rights. The City of Fremantle is very much a respondent.

### PRECINCTS AND OTHER COMMITTEES RECOMMENDATIONS PLUS OTHER CONSULTATION

The resolution from the South City Precinct at their meeting of 3 August 2004 is as follows "That the precinct request that the that the Council resolve to indemnify resident respondents in the Mustang Bar appeal if the appeal is successful and costs are awarded against the resident respondents".

**Cr. D Thompson moved that the legal aspects of this matter be discussed confidentially.**

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<b>Moved:</b>	Cr. D Thompson	<b>Carried:</b>	6/0
	<b>For:</b> Cr. K Anketell Cr. S Gorman Cr. H Hewitt Cr. S Mackay Cr. B Smith Cr. D Thompson		<b>Against:</b>

The Mayor P. Tagliaferri returned to the committee meeting and took the chair at this juncture being 5.50 pm. To continue with the balance of the committee agenda.

Mayor P Tagliaferri again declared an interest and left the meeting at 6.55p.m. the public was also excluded from the meeting at this time to allow confidential debate on the legal aspects of this item at the committee meeting.

Cr. Shirley Mackay assumed the chair at the committee meeting.

Confidential discussions took place following which the public were invited back to the meeting at 7.15pm to hear the balance of the discussions on this item at the committee meeting.

### OFFICER'S RECOMMENDATION

**The City enter into an agreement with the residents named as the second to thirteenth respondents to the appeal to pay any costs of the appeal ordered to be paid by the second to thirteenth respondents, limited to an amount of \$ (to be determined by Council).**

**The respondents be informed that this resolution should not be seen to set a precedent in respect to supporting this type of action taken that has been taken by the respondents.**

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<b>Moved:</b> Cr. H Hewitt  <b>For:</b> Cr. H Hewitt	<b>Lost:</b> 1/5  <b>Against:</b> Cr. K Anketell Cr. S Gorman Cr. S Mackay Cr. B Smith Cr. D Thompson
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### COMMITTEE RECOMMENDATION

That the City not enter into an agreement with the residents named as the second to thirteenth respondents to the appeal to pay any costs of the appeal ordered to be paid by respondents.

<b>Moved:</b> Cr. D Thompson  <b>For:</b> Cr. K Anketell Cr. S Gorman Cr. S Mackay Cr. B Smith Cr. D Thompson	<b>Carried:</b> 5/1  <b>Against:</b> Cr. H Hewitt
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### REASONS FOR CHANGE TO RECOMMENDATION

- 1) Because of the precedent set for other action groups.
- 2) Because there was a digression of the positions between the residents and council of which the residents were aware, and at which part of the residents could have withdrawn their objections.

### ADDITIONAL INFORMATION PROVIDED

As Bob Caporn is on leave this week, I have contacted Julius Skinner at McLeods (Julius represented the council on this matter) to clarify the timing of the events leading up to the liquor licensing court hearing. He has confirmed to me that the residents were advised by letter dated 29th April 2004 that the council was withdrawing its objection to the liquor licence as the management plan had been accepted.

That letter was hand delivered (not sure whether it was Thursday or Friday) to the residents. The hearing in liquor licencing court was on Monday 3rd May 2004, so residents did not have a lot of time to consider their position in relation to this hearing. It is true that a couple of the residents, on receiving the letter did ring Julius and advise they would not continue their objections. However, without Mr Caporn, I am unable to answer some other queries that have been raised since the SDR&CP meeting.

Given the above information, I am of the view that elected members are not fully informed on all matters on this item, sufficient to make a properly informed decision. I am therefore recommending that the matter be deferred to allow elected members to be briefed by Mr Caporn and Julius Skinner from McLeods. As far as urgency

surrounding this matter is concerned, the Supreme Court appeal is not expected to be heard until at least early 2005. Elected members may also wish to invite representatives of the residents involved to the briefing as well.

**SUGGESTED ACTING CEO RECOMMENDATION**

**That this matter be deferred to the next Ordinary Council meeting of council to allow elected members to be briefed by council's Manager Urban Environment and Control, and legal representative on this matter Julius Skinner from McLeods.**

Cr H Hewitt Moved The Following Alternative Recommendation Be Adopted At Council Meeting 18 October 2004

Seconded By Cr Bob Williams

1. **The City enter into an agreement with the residents named as the second to thirteenth respondents, limited to an amount of \$30,000.**
2. **That the residents involved in this action and other complainants keep a logged record of incidents which cause offence, annoyance, disturbance or inconvenience to them and which they believe are attributable to licensed premises in the CBD.**

Cr G Graham Vacated The Chamber At This Juncture Being 8.38 Pm At Council Meeting 18 October 2004

Cr G Graham Re-Entered The Chamber At This Juncture Being 8.41 Pm At Council Meeting 18 October 2004

Cr D Thompson Moved A Motion To Defer This Item To Allow Councillors To Be Briefed By The Director Urban Management And Legal Representatives

Seconded By Cr S Mackay

Council Officer Mr Jayson Miragliotta Re-Entered The Chamber At This Juncture Being 8.47 Pm At Council Meeting 18 October 2004

Motion To Defer This Item Was Put And Carried 8/2

<b>For</b>	<b>Against</b>
Cr Bob Smith	Cr Helen Hewitt
Cr Shirley Mackay	Cr Bob Williams
Cr John Alberti	
Cr Geoff Graham	
Cr Phil Douglas	
Cr Steve Gorman	
Cr Kathy Anketell	
Cr Doug Thompson	

AT THIS JUNCTURE IN THE MEETING BEING 8.22 PM THE PUBLIC WERE INVITED TO RETURN TO THE CHAMBERS TO HEAR THE RESULTS OF RECOMMENDATION NUMBERED C0410-05

PRESIDING MEMBER CR T MIOSICH ANNOUNCED THE RESULTS AS FOLLOWS

PRESIDING MEMBER CR T MIOSICH MOVED PART 1 AS FOLLOWS BE ADOPTED

1. That the City not enter into an agreement with he residents named as the second to thirteenth respondents to he appeal to pay any costs of the appeal ordered to be paid by respondents.

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SECONDED CR D THOMPSON

PART I WAS PUT AND RESULTED EQUALLY 4/4

<b>For</b>	<b>Against</b>
Presiding Member Cr Tony Miosich	Cr Kathy Anketell
Cr Steve Gorman	Cr Helen Hewitt
Cr Doug Thompson	Cr Bob Williams
Cr John Alberti	Cr Geoff Graham

THE PRESIDING MEMBER CR T MIOSICH USED HIS CASTING VOTE IN FAVOUR OF PART 1 OF THE RECOMMENDATION

PRESIDING MEMBER CR T MIOSICH MOVED PART 2 AS FOLLOWS BE ADOPTED

2. Council authorise the Manager urban Environment and Control to arrange a meeting between the respondents in this matter and the City's Solicitors as soon as practicable

SECONDED BY CR D THOMPSON

PUT AND CARRIED UNANIMOUSLY AND BY AN ABSOLUTE MAJORITY 8/0

<b>For</b>	<b>Against</b>
Presiding Member Cr Tony Miosich	
Cr Geoff Graham	
Cr Steve Gorman	
Cr Doug Thompson	
Cr John Alberti	
Cr Kathy Anketell	
Cr Helen Hewitt	
Cr Bob Williams	

PRESIDING MEMBER CR T MIOSICH MOVED PART 3 AS FOLLOWS BE ADOPTED

3. The cost of City's Solicitors to attend the meeting to be borne by the City.

SECONDED BY CR D THOMPSON

PUT AND CARRIED UNANIMOUSLY AND BY AN ABSOLUTE MAJORITY 8/0

<b>For</b>	<b>Against</b>
Presiding Member Cr Tony Miosich	
Cr Geoff Graham	
Cr Steve Gorman	
Cr Doug Thompson	
Cr John Alberti	
Cr Kathy Anketell	
Cr Helen Hewitt	
Cr Bob Williams	

**CLOSURE OF MEETING**

The Ordinary Meeting of Council concluded at 8.24 pm.

