

Council Member
Councillor Martin2019/00951
PublicReceiving Officer:
Mark Goldstone, Chief Executive
Officer

MOTION ON NOTICE:

Councillor Martin will move a motion and seek a seconder for the matter shown below to facilitate consideration by the Council:

'That Council:

Noting the St Ann's College ERD Court Appeal, instructs the CEO to consider lodging an appeal in the Supreme Court of South Australia by the deadline of May 29th, 2019 against the ERD Court decision to grant permission to St Ann's College to construct a four storey student accommodation building which residents believe will compromise views and set a significant precedent that could lead to further erosion of the protections the City of Adelaide secured on their behalf. The consideration and subsequent decision of the CEO on the appeal is to be informed by specialist legal advice on the reasonable prospect of success, based on legal merits and in context of the cost of and risks associated with litigation.'

ADMINISTRATION COMMENT:

1. The decision in the matter of St Ann's College Inc v The Corporation of the City of Adelaide was handed down on 8 May 2019 by the Environment, Resources and Development Court. The Court allowed the appeal therefore overturning Council's decision to refuse the application.

During the appeal, and prior to the Court hearing, the applicant reduced the height of the proposed building to lessen the impact of loss of views from neighbouring properties. The Court therefore considered a different proposal to that refused by the Council Assessment Panel.
2. The judgement concluded that:
 - 2.1 *"It would be unusual for any development at St Ann's to not impact, in some way, on surrounding land.*
 - 2.2 *Where the Plan anticipates the undertaking of development, it must anticipate that there will be some consequences of that development.*
 - 2.3 *In the context of the policy changes introduced for St Ann's little more than two years ago, the undertaking of the proposed building additions to create a four-level building, will have an impact and it is hard to construct a scenario where views from somewhere will not, in some way be impacted.*
 - 2.4 *The available City views, for all the above reasons, on our planning assessment, are suitably protected and while there will be changes to these views, the impacts are considered to be not unreasonable.*
 - 2.5 *Similarly, while the proposed building will impact on the limited glimpses of the Church as are currently available from a limited section of Melbourne Street, these changes are acceptable as the Church's landmark contribution and heritage value will essentially be undiminished.*

2.6 *We have decided, for these reasons, that the development application should be granted Development Plan consent.”*

3. For Council to appeal the decision of the ERD Court, there would need to be an argument that there was an error of law or fact (that is, Council could not lodge an appeal on planning merits). The Full Court of the Supreme Court would not seek to interfere with subjective planning decisions or provide input into matters that go to the merits of a decision.
4. In the first instance, there appears to be no clear error in law or fact in the reasoning of the ERD Court judgment. We cannot, therefore, provide any assurance or comfort that Council would be successful if it did appeal.
5. The costs of an appeal may be significant. If the appeal was unsuccessful, Council would be obliged to pay the costs of the respondent for the appeal as well. Of course, if the appeal was successful, the opposite would apply and the matter remitted to the ERD Court for a further trial.
6. A preliminary legal opinion has been obtained from a Senior Partner in planning law who is familiar with the relevant Council Development Plan policy applying to St Ann's College and the specific facts of this case. We recommend that Council does not lodge an appeal to the Full Court of the Supreme Court
7. If Council wishes to appeal the decision, it has 21 days from the date of judgment (8 May 2019) to do so, i.e. any appeal must be lodged no later than 29 May 2019.

- END OF REPORT -