

# Adelaide Botanic High School Expansion – Memorandum of Understanding

Thursday, 13 October 2022  
Council - Special

Strategic Alignment - Enabling Priorities

Public

**Program Contact:**

Sarah Gilmour, Associate  
Director Park Lands, Policy &  
Sustainability

**Approving Officer:**

Ilia Houridis - Director City  
Shaping

## EXECUTIVE SUMMARY

At its meeting held on 12 July 2022 Council authorised the Chief Executive Officer (CEO) to negotiate the final terms of a Memorandum of Understanding (MoU) with the Department for Education in connection with the transfer of a portion of Allotment 22 in Certificate of Title 5696/850 in Deposited Plan 51367 (Allotment 22), owned by the City of Adelaide, to the State Government.

The decision set out principles to be used by the City of Adelaide in the negotiation to finalise the MoU and to follow into formal negotiations. The Administration has acted on the decision and progressed negotiations in accordance with the Council decision.

On 13 September 2022, the Department for Education wrote to the CEO seeking execution of the MoU by the City of Adelaide. The Local Government election caretaker period commenced on 6 September 2022 and as a result the matter is being brought back to Council for decision.

The rationale for needing to seek a decision of Council is due to the determination that execution of the MoU and provision of certain statutory concurrences/requests in connection with the MoU meet the definitions outlined in the *Local Government (Elections) Act 1999 (SA)* for designated decisions.

For Council to progress the matter, it will need to first resolve that the execution of the MoU is a decision it seeks to progress during the caretaker period. In order for the CEO to enter into the MoU during the caretaker period, first the Council would need to apply for (and obtain) a Ministerial exemption through the Minister for Local Government; and second the Council would need to consider a significant decision report from the CEO under the Council's Caretaker Policy.

This report considers the MoU execution and associated statutory decisions against the caretaker provisions, noting its receipt during the caretaker period.

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## RECOMMENDATION

### THAT COUNCIL

1. Notes the assessment by the Chief Executive Officer in relation to a designated decision under the City of Adelaide Caretaker Policy.
2. Notes that outcomes sought through Council's decision on 12 July 2022 have been achieved resulting in a net gain of Park Lands in the care and control of Council and guaranteed future investment in the Park Lands, should the current Memorandum of Understanding be progressed.
3. Resolves to apply to the Minister for Local Government under section 91A(3) of the *Local Government (Elections) Act 1999 (SA)* to make designated decisions to:
  - 3.1. Execute a Memorandum of Understanding with the Department for Education and Department for Environment and Water under delegation as provided by Council resolution dated 12 July 2022.

- 3.2 Provide the necessary concurrences/requests pursuant to all relevant legislative requirements to enable the vesting of the relevant land portions or other adjustment of rights between the State Government and the City of Adelaide as envisaged by the Memorandum of Understanding.
  4. Requests the Chief Executive Officer to write to the Minister for Local Government to seek the exemptions under section 91A(3) of the *Local Government (Elections) Act 1999 (SA)* set out above.
  5. Notes the assessment by the Chief Executive Officer in relation to a significant decision under the City of Adelaide Caretaker Policy.
  6. Resolves to approve the Chief Executive Officer to make significant decisions (under the Caretaker Policy) to:
    - 6.1. Enter into a Memorandum of Understanding with the Department for Education and Department for Environment and Water under delegation as provided by Council resolution dated 12 July 2022.
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## IMPLICATIONS AND FINANCIALS

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| City of Adelaide<br>2020-2024<br>Strategic Plan                        | <b>Strategic Alignment – Enabling Priorities</b><br>The Strategic Plan states that: <i>‘Council will continue to work innovatively and collaboratively with partners and the community’</i> to achieve <i>‘Bold leadership and strategic partnerships to meet challenges and take up new opportunities.’</i> The proposal aligns with action item 5.3 <i>‘Build on effective advocacy and partnerships locally, nationally and globally.’</i>  |
| Policy   | This report is consistent with the City of Adelaide’s Caretaker Policy dated 15 March 2022. Reference has been made to Council’s Community Consultation Policy dated 16 July 2019, Acquisition and Disposal of Land and Assets Policy dated 27 January 2022 and the relevant Community Land Management Plan.   |
| Consultation   | The Administration has been in negotiation with the State Government through the Department for Education.   |
| Resource   | The negotiations with the Department for Education are being undertaken within existing Council resources.   |
| Risk / Legal /<br>Legislative  | The Administration has sought legal advice on Council’s ability to execute the MoU during the election period. If Council does not apply for an exemption to the Minister for Local Government to make a significant decision, the execution of the MoU cannot progress during the caretaker period and would be delayed to the new term of Council. This would put the outcomes of the negotiation at risk and the timing of the project at risk. The State Government has mechanisms available to proceed without Council agreement which may forego a negotiated outcome for the community. |
| Opportunities  | The MoU reflects the current negotiated position between the City of Adelaide and the State Government based on Council’s principles for the negotiation resolved by Council at its meeting on 12 July 2022.   |
| 22/23 Budget<br>Allocation   | Legal costs incurred for advice on the caretaker provisions are accommodated within the existing enterprise budget allocation for legal advice.  |
| Proposed 23/24<br>Budget Allocation                                    | Not as a result of this report   |
| Life of Project,<br>Service, Initiative<br>or (Expectancy of)<br>Asset | Not as a result of this report   |
| 22/23 Budget<br>Reconsideration<br>(if applicable)                     | Budget implications are dependent on formal legal agreements yet to be determined.   |
| Ongoing Costs<br>(eg maintenance<br>cost)                              | Not as a result of this report   |
| Other Funding<br>Sources   | Not as a result of this report   |

# DISCUSSION

## Background

1. At its meeting held on 12 July 2022 Council authorised the Chief Executive Officer to negotiate the final terms of a Memorandum of Understanding (MoU) with the Department for Education in connection with the transfer of a portion of Allotment 22 in Certificate of Title 5696/850 in Deposited Plan 51367, owned by the City of Adelaide, to the State Government.
2. The decision set out principles to be used by the City of Adelaide in the negotiation to finalise the MoU and to then follow into formal negotiations.
3. The Administration has acted on the decision and progressed negotiations in accordance with the Council decision.
4. Alignment of the negotiated outcome with Council's negotiating principles endorsed on 12 July 2022 is provided below.

| <b>Council negotiating principles</b>  | <b>Administration comment</b>   |
|--|---|
| 2.1 The proposal does not remove any land from designation as Adelaide Park Lands (no net loss of Park Lands).   | No land is removed from designation as Adelaide Park Lands.   |
| 2.2. A process for transfer of land will ensure any returning land is of equal or greater area than the parcel of land to be transferred.  | The proposal is for transfer of two allotments that combined are in excess of the land being transferred, totalling a net gain of 91m <sup>2</sup> .  |
| 2.3. Any returning land is to be of a commensurate financial value and/or additional State Government investment is made in the Adelaide Park Lands to compensate land value.  | The offer includes transfer of land and significant future investment in the Park Lands in lieu of payment.   |
| 2.4. A process for transfer of land will be fair and transparent and ensure that Council obtains not less than fair and agreed market value from the disposal, unless there are reasons for Council accepting a lesser value.  | The State Government has valued the land at less than the current offer.  |
| 2.5. The fair market value of the land is to be determined by an independent valuation obtained from a suitably qualified Certified Practising Valuer based on the highest and best use of the site taking into consideration:<br><br>2.5.1 The recent rezoning of the land and proposed use for multi-storey built-form development.<br><br>2.5.2. The contamination status of the land is not a contributing factor to the fair market value and is excluded from the valuation process as it will be resolved through subsequent development. | The State Government valuation, undertaken by Knight Frank excludes consideration of the rezoning of the land and makes a discount for site contamination.<br><br>The offer includes transfer of land and significant future investment in the Park Lands in lieu of payment. |

| <b>Council negotiating principles</b>  | <b>Administration comment</b>   |
|--|---|
| <p>2.6. Detail on the returning land and process such as:</p> <p>2.6.1. The terms for the transaction required to transfer of land on the returning land is agreed.</p> <p>2.6.2. The land parcels 'short-listed' by the State Government that are subject to negotiations.</p> <p>2.6.3. Formalising a process in the circumstance that the Council and the State Government cannot reach agreement on the returning land.</p> <p>2.6.4. Seeks to coincide land transfer of Allotment 22 and the returning land.</p> <p>2.6.5. Negotiates remediation standard of any returning land and makes clear that remediation obligations rest with the State and not the Council (even in the circumstance Council is the identified owner).</p> | <p>Based on the draft MoU dated 1 September 2022:</p> <p>2.6.1 The terms for transaction will be set out in the MoU.</p> <p>2.6.2 The returning land parcels are identified in the MoU.</p> <p>2.6.3 The returning land parcels are identified in the MoU.</p> <p>2.6.4 Land transfers will not coincide however, the returning land is identified.</p> <p>2.6.5 The returning land is developed and therefore remediation for its current use is not required. Council could seek from the State Government any known reports and documentation on the site condition.</p> |
| <p>2.7. The process will not comprise the application or otherwise, of any prudential requirements under Section 48 of the <i>Local Government Act 1999 (SA)</i>, with specific reference to part 2(j) in relation to land valuation.</p>  | <p>The State Government valuation, undertaken by Knight Frank excludes consideration of the rezoning of the land and makes a discount for site contamination.</p> <p>The offer includes transfer of land and significant future investment in the Park Lands in lieu of payment.</p> <p>The requirements under Section 48(1) of the <i>Local Government Act 1999 (SA)</i> have been assessed and do not apply.</p>  |
| <p>2.8. Any returning land provides for commensurate or enhanced social, environment and cultural value for the Adelaide Park Lands consistent with the statutory principles of the <i>Adelaide Park Lands Act 2005 (SA)</i>.</p>  | <p>Administration has negotiated an outcome of a consolidated returned park as a commensurate outcome to the school expansion.</p>  |
| <p>2.9. The Adelaide Botanic High School should also consider and prioritise spending in the precinct surrounding the expansion site to ensure its fit within the location.</p>  | <p>Outside of current negotiations.<br/>This consideration to be further progressed through the formal State Commission Assessment Panel process.</p>   |
| <p>2.10. The State Government assumes all responsibility for site contamination, including capping or remediation of adjoining land to remain within Allotment 22, and heritage protection associated with the site.</p>   | <p>The State Government is responsible for contamination and cultural sites on the expansion land only.</p>   |
| <p>2.11. The State Government bears the costs for any dealings on the land.</p>  | <p>Addressed in the MoU.</p>  |
| <p>2.12. An undertaking that the existing city-based public schools have reached capacity and that future school capacity will be achieved outside of the City of Adelaide or as a new school and location within the city.</p>  | <p>Assurance provided via correspondence from the Minister.</p>   |

| <b>Council negotiating principles</b>   | <b>Administration comment</b>  |
|---|--|
| 2.13. Notes the requirement in the next stage for Term Sheets or equivalent for the sale contracts for both that portion of Allotment 22 and the returning land to enable a legally enforceable contract to be. | Outside of current negotiations.<br>The negotiated outcome is for transfer of land in return for land as well as investment in the Park Lands. |

5. The local government election caretaker period commenced on 6 September 2022 and the conduct of Council and the Administration is governed by the Council's Caretaker Policy.
6. On 13 September 2022, the Department for Education wrote to the Chief Executive Officer seeking execution of the proposed final MoU by the City of Adelaide.
7. Further, on 29 September 2022, the Department for Education wrote to the Administration seeking that the MoU itself remain in confidence.

### **Designated Decision**

8. A decision to enter the MoU and make associated statutory concurrences/requests during the election period is assessed as a 'designated decision' for the purposes of section 91A of the *Local Government (Elections) Act 1999 (SA)* (LGE Act) and the Council's Caretaker Policy, on the basis:
  - 8.1. The decision is to enter into an 'understanding' with the State Government, with reference to section 91A(8) of the LGE Act
  - 8.2. The value of the understanding is greater than 1% of Council's 2021/22 rates revenue
  - 8.3. No exception under the LGE Act or the *Local Government (Elections) Regulations 2010* applies to the decision.
9. The Minister for Planning has provided a letter to the Chief Executive Officer seeking Council's concurrence (Link 1 view [here](#)).
10. A designated decision is invalid unless the Minister for Local Government (the Minister), first grants an exemption under section 91A(4) of the LGE Act.
11. The Minister can only consider granting an exemption if the Council forms the view that there are extraordinary circumstances which require the making of the relevant designated decision during the election period and makes an application to the Minister under section 91A(3) of the LGE Act.
12. Bases on which the Council may form a view there are extraordinary circumstances to make a decision include:
  - 12.1. Ability to negotiate an outcome with the State Government that is consistent with Council's decision on 12 July 2022.
  - 12.2. There are likely to be time delays in completing the project if the decisions are not made promptly.
  - 12.3. There are likely to be cost escalations and the potential for penalty payments for State Government regarding construction timelines.
  - 12.4. The State Government has alternative mechanisms available to it to deliver the school expansion which may forego opportunity for a negotiated outcome.
13. The extraordinary circumstances in this instance impact both Council and the State Government. To that end, the Department for Education has provided the impacts that inform some of the extraordinary circumstances to be considered. These are outlined below:
  - 13.1. Council will forego the outcomes sought through the negotiation process, which include transfer of land to meet the stated intent for no net loss of park lands and net gain of park lands;
  - 13.2. Council will forego future investment in the park lands;
  - 13.3. The Department for Education will incur penalty payments in its contractual agreements related to the program of works;
  - 13.4. The Department for Education will face cost escalation for future delivery of the project;
  - 13.5. The Department for Education will have significant time impacts and will be at risk of failing to meet critical project deadlines;

- 13.6. The Department for Education will not meet its publicly stated intent to open the Adelaide Botanic High School expansion for the commencement of the 2024 school year.
14. The extraordinary circumstances result in significant financial, policy, time and outcome impacts for Council and the State Government and ultimately the broader community.
  15. If an application for an exemption is made to the Minister, it is then a matter of discretion for the Minister as to whether and on what conditions (if any), to grant the exemption. If the Minister refuses to grant the exemption, then the Council's consideration of the MoU effectively can go no further.
  16. If the Minister does grant an exemption, the Council must turn its attention to whether the decision to enter the MoU is a significant decision for the purposes of the caretaker policy.
  17. Should Council decide to seek an exemption, the following steps are outlined:
    - 17.1. A letter will be sent to the Minister for Local Government seeking a determination.
    - 17.2. The Department for Education will be formally contacted to advise them of the process.
    - 17.3. Following receipt of the exemption from the Minister for Local Government the City of Adelaide through its Chief Executive Officer will:
      - 17.3.1. Execute the MoU with the State Government under delegation.
      - 17.3.2. Proceed to formalise the documentation as set out in the MoU.
      - 17.3.3 A further report to Council will be presented to enable Council to give the necessary concurrences/requests for the purposes of the *Adelaide Park Lands Act 2005* (SA) and/or any other Acts for the purposes of the MoU.
    - 17.4. It should be noted the current terms and timeframes relating to issue of a construction licence referenced as 1 October 2022 will be amended to meet revised timelines.
    - 17.5. Proceed to formalise the documentation as set out in the MoU.

### **Significant Decision**

18. While noting the 'decision' to enter the MoU is a designated decision, there are also considerations from a significant decision perspective.
19. The CEO has determined that entering into the MoU during caretaker is a significant decision (as per the Caretaker Policy) given the decision:
  - 1.1. *will (arguably) significantly affect the Council area*
  - 1.2. *will (arguably) 'bind' the incoming Council*
  - 1.3. *may result in unplanned public consultation*
  - 1.4. *may result in disposal of Council land*
  - 1.5. *may be a decision to 'progress any matter which has been identified as an election issue'.*
  - 1.6. *Any other issue that is considered a major policy decision by the CEO.*
20. The CEO in consultation with the Lord Mayor has determined the matter to be a significant decision. It is recommended that Council authorise the matter to proceed notwithstanding its determination as a significant decision for the reasons set out below.
21. In accordance with the Caretaker Policy, the following information is provided to assist the Council in assessing whether the decision should be deferred for consideration by the incoming Council.

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| Why the matter is considered 'significant'   | The MoU does not create formal legal relations between the parties but does identify a negotiated outcome and will (arguably) bind the incoming Council.   |
| Why the matter is considered urgent  | The State Government has alternative mechanisms available to it to deliver the school expansion which may forego an opportunity for a negotiated outcome.  |
| What are the financial and other consequences of postponing the matter until after the election, both on the current Council and on the incoming Council | The City of Adelaide and State Government have been working toward a negotiated outcome which includes return of Park Lands to Council and investment in the Park Lands which may be foregone if the matter is postponed until after the election.<br>Whilst the Adelaide Botanic High School Expansion is a State Government project a decision to defer consideration of the MoU will impact the current proposed timeframes for the State Government to construct the school. |
| Whether deciding the matter will significantly limit options for the incoming Council  | The matter seeks to coincide a decision on the outcome for the community in accordance with the Council on 12 July 2022 in return for the transfer of a portion of Allotment 22.   |
| Whether the matter requires the expenditure of unbudgeted funds  | The matter does not require the expenditure of unbudgeted funds.   |
| Whether the matter is the completion of an activity already commenced and previously endorsed by Council   | The matter follows negotiations between the City of Adelaide and the State Government in accordance with the Council decision of 12 July 2022.   |
| Whether the matter requires community engagement   | There is no requirement to consult on the MoU.   |
| Any relevant statutory obligations or timeframes   | Council cannot make a designated decision without the granting of an exemption by the Minister for Local Government pursuant to section 91A of the <i>Local Government (Elections) Act 1999 (SA)</i><br>Statutory processes under the <i>Local Government Act 1999 (SA)</i> (LG Act) and the <i>Adelaide Park Lands Act 2005 (SA)</i> (APL Act), apply to processes for land tenure and construction.  |
| Whether dealing with the matter in the election period is in the best interests of the Council area and community  | The State Government is committed to delivering the expansion of the Adelaide Botanic High School.<br>Dealing with the matter in the election period ensures Council secures a negotiated outcome in accordance with the Council decision of 12 July 2022.   |

### MoU and Construction Licence

22. The MoU envisages the granting of a construction licence to the State Government by 1 October 2022 and these references must be amended for practicality of issuance of a licence and noting the MoU was received during the caretaker period on 13 September 2022.
23. At the time of negotiating the MoU the Department for Education was in the process of progressing a number of approvals relating to the Public Works Committee, a State Government Parliamentary Committee that approves public works and the necessary development approvals through the State Commission Assessment Panel.
24. These approvals are yet to be received, however are expected to occur during October and early November 2022 and impact Council's ability to issue a construction licence until achieved.



## DATA AND SUPPORTING INFORMATION

**Link 1** – Letter from Minister for Planning

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## ATTACHMENTS

Nil

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- END OF REPORT -