

74 Attachment 5 Legal Advice

Email advice from: Peter Psaltis, Principal Norman Waterhouse Lawyers
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'You have sought advice about whether the Council has power to relocate the point of access to the church site. Currently the access is from Chapel Street. The proposal is to relocate the access point around the corner, on Milton Street.

In summary, our view is that the Council does have the requisite power.

Brief reasons, together with some advice of a more strategic nature, follow below:

1. Even if the church was to violently object to the proposal (to the point of refusing to allow the Council or its contractors to have any access to its land, and refusing to co-operate at all with the project), the Council can legally close the existing access by preventing vehicles being able to use it.
2. Preventing vehicle access may be achieved in various ways, including by installation of a traffic control device under section 32 of the *Road Traffic Act 1961 (RTA)*. This is the Council's present intention. Of course, in acting under s 32, the Council would need to validly exercise power, including by following the relevant statutory steps and process (including public notification, giving due consideration to any written submissions and a majority vote). Specific advice can be provided on the process under s 32, if necessary.
3. The Council would also need to ensure that it is acting reasonably, and in accordance with the objects and purpose of the RTA and other requirements of section 32.
4. Of course, an important aspect of acting reasonably involves the Council providing a safe and convenient alternative access point to the rear of the church site. As a matter of common law, the owner of land abutting a public road has a right to take vehicular access to, and egress from, their land via the public road.
5. It will be a matter of engineering and design (including the width and configuration of the access point, the arrangement of on-street car-parking spaces, sight distances etc as per Australian road standards) as to whether the proposed new access will be safe and convenient, having regard to the church's specific requirements and usage.
6. Provided these things are done, in effect, the church may be forced into a situation where its only option is to utilise the new access point on Milton Street. Further, providing a new access in this way does not rely on any work being carried out on the church's land (noting, however, the current design of the Chapel Street Plaza project does include use of church land).
7. Of course, one hopes and expects that the church will not be in violent opposition such that it would withdraw its co-operation completely. Complete withdrawal from the project would likely have adverse impacts on the project (in so far as a substantial re-design would be necessary) and the church (in so far as the church will fail to realise other benefits from the project, including new boundary fencing, better lighting, improved security etc). This would be disadvantageous for both parties. The church has given no indication that it intends resorting to such radical

measures, or that it intends mounting any form of legal resistance. However, it remains a risk for the project, which is hopefully a slight risk.

8. In its written submission in response to the s32 consultation, the church expresses anxiety about the safety and convenience of the new access point, having regard to the proximity of on-street car-parking spaces. It also requests permission to exit the carpark to the east of Milton Street, before continuing south along Chapel Street (i.e. that Milton Street be converted from one-way to two-way traffic, which I assume is unlikely to be practically achievable). Finally, it requests that if agreement can't be reached following the trial period, that the existing access be maintained.
9. Following the trial arrangement, the Council would be well advised to continue to work with the church to attempt to address concerns about safety and convenience. In this regard, it does not appear that the church is opposed in principle to the proposed new access point. Rather, its position seems to be driven by uncertainty about the arrangement of on-street car-parking spaces, and a lack of trust in the engineering design and advice. It may be that facilitating some direct communication between the church and Council engineers, and providing more detailed plans of what is proposed both on and off street, would go a long way to appeasing the church's concerns.
10. Having said this, given contractual and timing pressures, any further discussions or negotiations with the church should probably be conducted in a tightly controlled framework. That framework should make it clear to the church that i) the Council has legal power to proceed and that ii) subject to the appropriate resolution under s 32, that it intends proceeding with the project in its current form. By making that framework clear, it should help steer the church towards a practical outcome that is most advantageous for both parties, and that does not result in unnecessary delay or endless rounds of discussion and negotiation. The church has not given any indication that it intends mounting any sort of legal resistance, and therefore a 'firm but fair' approach from the Council is likely to be the most effective strategy.

I trust this advice addresses your issues in adequate detail, but please contact me if you would like discuss the matter further.

Regards

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