

The Quadrant
1 William Street, Perth
Western Australia 6000
GPO Box F338, Perth
Western Australia 6841
Tel +61 8 9288 6000
Fax +61 8 9288 6001
www.lavanlegal.com.au

URGENT

Our ref: BRF:CHW:1143920
Contact: Brendan Foley
Direct Line: (08) 9288 6828
Email: brendan.foley@lavanlegal.com.au
Partner: Craig Wallace
Direct Line: (08) 9288 6828
Email: craig.wallace@lavanlegal.com.au

LAVAN LEGAL
Leaders in Law

28 August 2013

Mr Mal Osborne
Chief Executive Officer
Town of Port Hedland
PO Box 41
PORT HEDLAND WA 6721
By Email: council@porthedland.wa.gov.au

cc:
Client


Dear Sir

Urgent request for deferment of Council's consideration of item 15.2 – Private Treaty proposal to lease Lots 437, 438, and 439 and Part Lot 436 within the Kingsford Business Park – to Finance Unlimited Pty Ltd (File No.:08/03/005)

- 1 I act on behalf of a four hotel owners in Port Hedland who have serious concerns relating to the operation of, and competition from, Transient Workers Accommodation (TWA) with existing and approved hotel land uses in Port Hedland.
- 2 It has come to my clients' attention that the abovementioned item (Item) may relate to a lease for the purpose of establishing a TWA.
- 3 My clients question whether the Town of Port Hedland (TOPH) has considered the need for another TWA in Port Hedland, given the significant reduction in room occupancy in the last 12 months, and the seemingly illegal, and unenforced practice among TWA operators to advertise rooms for rent to the general public, in contravention with planning approvals.
- 4 As rate payers, my clients' request that the Item be deferred until such time as the TOPH provide:
 - 4.1 details of the proposed land uses anticipated under the lease;

- 4.2 details of the financial costs/benefits of the lease to the TOPH;
 - 4.3 details of any investigations conducted by the TOPH into the implications of the proposed lease on existing land uses;
 - 4.4 details of the consultation which the TOPH has conducted prior to considering the Item;
 - 4.5 details of the consultation procedure which the TOPH are required to undertake prior to considering the Item under relevant legislation; and
 - 4.6 an opportunity for my clients to review the abovementioned information and sufficient time to make a formal submission on any proposal.
- 5 I await urgent confirmation that this matter will be deferred in order to allow consultation and these investigations to be carried out.
- 6 If you have any questions relating to the above request, please contact Brendan Foley or me.

Yours sincerely



Craig Wallace
Partner – Planning and Environment

The Quadrant
1 William Street, Perth
Western Australia 6000
GPO Box F338, Perth
Western Australia 6941
Tel +61 8 9288 6000
Fax +61 8 9288 6001
www.lavanlegal.com.au

By Email

Our ref: BRF:CHW:1144318
Contact: Brendan Foley
Direct Line: (08) 9288 6828
Email: brendan.foley@lavanlegal.com.au
Partner: Craig Wallace
Direct Line: (08) 9288 6828
Email: craig.wallace@lavanlegal.com.au

LAVAN LEGAL
Leaders in Law

22 November 2013

Mr Mal Osborne
Chief Executive Officer
Town of Port Hedland
PO Box 41
PORT HEDLAND WA 6721
By Email:
council@porthedland.wa.gov.au

cc Minister.day@dpc.wa.gov.au
Minister.simpson@dpc.wa.gov.au
mayorkellyhowlett@porthedland.wa.gov.au
crdaccache@porthedland.wa.gov.au
crgillingham@porthedland.wa.gov.au
crhooper@porthedland.wa.gov.au
crhunt@porthedland.wa.gov.au
crjacob@porthedland.wa.gov.au
crtaylor@porthedland.wa.gov.au
crbutson@porthedland.wa.gov.au
crmelville@porthedland.wa.gov.au
crvanvugt@porthedland.wa.gov.au
Clients

Dear Sir

Submission on proposal by the Town of Port Hedland to enter into a major land transaction with Finance Unlimited Pty Ltd for the development of a 14.5ha TWA within the Kingsford Business Park, being Part Lot 436 and all of lots 437-439.

- 1 We act on behalf of a number of hotel owners (**Clients**) with properties located within the boundaries of the Town of Port Hedland (Town).
- 2 Our Clients have instructed us to write to the Town in order to make a submission on the advertised proposal by the Town to enter into a major land transaction with Finance Unlimited Pty Ltd (**Finance Unlimited**) for a 4.5ha unidentified portion of Lot 436, and all of Lots 437, 438 and 439 (**Land**) within the Kingsford Business Park (**Proposal**).

Summary

- 3 Our Clients have significant concerns in relation to the Private Treaty Proposal submitted by Finance Unlimited to the Town on 31 July 2013, and the business plan, prepared and released for public comment for the Proposal (**Business Plan**).

- 4 Our Clients' concerns with the Proposal and the Business Plan can be broadly classified into 4 distinct categories, these include:
- 4.1 Finance Unlimited's Proposal letter.
 - 4.2 errors of fact in the Business Plan and Finance Unlimited's Proposal letter.
 - 4.3 references in the Business Plan giving rise to a reasonable apprehension that the Town is, and potentially may be in the future, biased and unable to objectively assess the Proposal, or any subsequent planning, building, health, liquor and environmental applications on the Land; and
 - 4.4 failures of the Town to comply with the requirements of producing a Business Plan as set out in the the *Local Government Act 1995 (WA) (LG Act)*;

Submissions

- 5 Our detailed submissions in relation to the Proposal and the Business Plan are as follows:

Errors of fact in the Business Plan and Finance Unlimited's Proposal letter

Approved land use

- 6 Page 3 of the Business Plan indicates that the Land has planning approval for use as a Transient Workers Accommodation (TWA) facility.
- 7 According to the Town of Port Hedland Town Planning Scheme No.5 (TPS5), the land is zoned "Airport".
- 8 Under TPS5 "Transient Workers Accommodation" is classed as an "AA" use in the Airport zone. This means that the use is not permitted unless the Council has granted planning approval.
- 9 Our Clients are unaware of any such planning approval ever being granted.
- 10 The land use "transient workforce accommodation" is defined under TPS5 as:
"Dwellings intended for the temporary accommodation of transient workers and may be designed to allow transition to another use or may be designed as a permanent facility for transient workers and includes a contractors camp and dongas".
- 11 A "transient worker" is not defined under TPS5 and the only Town documents which attempt to classify a transient worker are the Town's Draft FIFO and TWA Strategy and the Town's Pilbara's Port City Growth Plan, which both provide by implication that transient workers are "operational and construction FIFO workers".
- 12 Operational workers are defined as skilled workers which are required on an ongoing basis whereas construction workers are required for a certain aspect of a project only.

- 13 **Additionally, in all circumstances where a TWA land use is proposed, there should always be consideration given to effects on the amenity of the locality, and accordingly, all such applications may only be determined by the Council (and not by delegation).**

- 14 **As the Proposal has failed to identify what specific business or project the TWA will be catering to (ie, it has failed to identify an operational or construction workforce), it is questionable if the landuse proposed will meet the definition of a TWA.**

- 15 **A lease with a 20 year potential is not temporary in nature, and as there is no identification of an operational or construction workforce to which the facility will cater, the landuse is likely to best resemble a Motel Use (which is an "SA" use under the TPS5 and requires advertising prior to Council exercising its discretion).**

- 16 **Accordingly, unless the Town can produce a valid planning approval for the development of the Land, which has been advertised in accordance with TPS5, then the statement at Page 3 of the Business Plan is misleading and not true.**

- 17 **Additionally, page 2 of Finance Unlimited's Proposal letter worryingly indicates that Finance Unlimited intend to develop a facility that accommodates functions such as aged care and retirement homes. Both land uses are not compatible with a TWA and are not permitted within the Airport zone.**

- 18 **Permanent accommodation is not permitted in the Airport Zone, nor in an area where there are high levels of noise and lack of proximity to key services. The Council should not have permitted this proposal to have been advertised given the clear indications of disregard to the zoning and land uses permissible on the land.**

Sale of Land

- 19 **My clients note the following concerns in relation to the sale of land:**
 - 19.1 **the first paragraph of page 1 of Finance Unlimited's Proposal letter indicates the intention of Finance Unlimited to purchase the Land.**
 - 19.2 **page 2 of Finance Unlimited's Proposal letter indicates an intention to enter into a contract of sale for the Land.**
 - 19.3 **section 3.7 of Page 9 of the Business Plan indicates an intention of the Town to negotiate the terms of the sale of the Land.**

- 20 **These statements are contrary to other representations made in the Business Plan which indicate an intention to lease the Land.**

- 21 **These oversights demonstrate the lack of proper consideration given by the Town in preparing the documents for public advertising.**

- 22 **These relatively simple oversights add to the argument that the Town does not have the ability to manage complex undertakings as required to be considered under s.3.59(e) of the LG Act.**

Land Valuation

- 23 Page 3 and page 5 of the Business Plan provides that Finance's proposed offer to lease the Land for \$14/m² is more than the current valuation as determined by Australian Property Consultants in August 2013 (**APC Valuation**). This statement is incorrect.
- 24 Section 3.58(3) of the LG Act provides that the Town may dispose of property, otherwise than by highest bidder at public auction or by public tender, if it gives public notice of the proposed disposition, including a description of the property concerned, details of the proposed disposition, and inviting submissions from the public on the proposal.
- 25 The details of the proposed disposition that are required under section 3.58 (3) of the LG Act include, as provided under section 3.58(4) of the LG Act, among other things, a market valuation of the disposition, as ascertained by a valuation carried out not more than 6 months before the proposed disposition.
- 26 Page 13 of the APC Valuation provides that the market ground rent for Lots 437-439 is \$15/m². The value of this land is actually greater than the \$14/m² offered.
- 27 Page 13 of the APC Valuation also provides a valuation for the market ground rent of Lot 436. The \$12/m² valuation of the Lot 436 is on the basis that, among other things, the whole 10ha of the Land be leased for TWA purposes.
- 28 Page 12 of the APC Valuation also provides that as land area increases the per square metre rate decreases.
- 29 Accordingly, as the proposed lease area of Lot 436 is only 4.45ha, out of a possible 10ha, the valuation rate for that portion of the lot should be more comparable to the valuation for Lots 437-439, namely \$15/m² (see page 13 of the Valuation).
- 30 It is evident therefore that an accurate valuation of that part of the disposition (namely the 4.5ha portion of Lot 436) has not been conducted correctly as required under s.3.58(4)(c) of the LG Act.
- 31 It is also evident that the value of Finance's offer at \$14/m² is likely to significantly undervalue, rather than overvalue the value of the disposition as misleadingly stated by the Town at page 3 and page 5 of the Business Plan.
- 32 The impact of this 9.3% reduction in rent on the Town's long term financial viability is compounded by the relatively long lease period (up to 20 years) and the fixing of rent to CPI, and not local market changes.
- 33 Any arguments by Finance Unlimited that as they are leasing a large 14.5 ha parcel the rate/m² should be reduced can be easily countered by the argument that the lots have been designed to be a marketable size, and accordingly have the capacity to be leased to separately for significantly more than is being offered.

Land Valuation – Issue 2

- 34 Page 5 of the Business Plan provides under paragraph 3.2 that the current market value of the land is \$10/m².
- 35 This statement is clearly inconsistent with all of the documents attached to the Business Plan. It appears that this may have been cut and pasted from a previous proposal considered by the Town and unrelated to the Land or the Proposal.
- 36 These oversights demonstrate the lack of proper consideration given by the Town in preparing the documents for public advertising.
- 37 These relatively simple oversights add to the argument that the Town does not have the ability to manage complex undertakings as required to be considered under s.3.59(e) of the LG Act.

Land Valuation – Issue 3

- 38 Page 5 of the Business Plan provides under paragraph 3.2 that Finance Unlimited will pay a voluntary community contribution of \$5.00 per room for every occasion the facility reaches at least 75% capacity for that portion of rooms over the threshold.
- 39 This wording of this statement is different to the offer proposed by Finance Unlimited at page 1 of Finance's Proposal letter.
- 40 Of concern to my clients::
- 40.1 the wording of both statements is unclear and could be the subject of challenge if incorporated into a final agreement. It is unclear whether:
- 40.1.1 the payment will be made only on rooms occupied over 75% capacity;
- 40.1.2 the payment will be made on all rooms if the facility is over 75% occupied;
- 40.1.3 the payment will include rooms occupied by workers who reside in the development;
- 40.1.4 the payment will be made annually or at the conclusion of the term of the lease;
- 40.1.5 the payment will be subject to CPI increases or otherwise; and
- 40.2 they have been advised that it is rare in the current market for any TWA to be operating above 75% capacity given the significant increase in supply and the significant drop in workforce demand.
- 41 These oversights demonstrate the lack of proper consideration given by the Town in preparing the documents for public advertising.

- 42 These relatively simple oversights add to the argument that the Town does not have the ability to manage complex undertakings as required to be considered under s.3.59(e) of the LG Act.

Land fully serviced

- 43 Paragraph 1 of page 5 of the Business Plan states that the Land will be fully serviced. This implies that the land will be provided with reticulated sewer.
- 44 This is contrary to Page 2 of Finance Unlimited's Proposal letter which states that future development will be serviced by ATU facilities.
- 45 These oversights demonstrate the lack of proper consideration given by the Town in preparing the documents for public advertising.
- 46 These relatively simple oversights add to the argument that the Town does not have the ability to manage complex undertakings as required to be considered under s.3.59(e) of the LG Act.

Bias & fettering of discretion

- 47 The rule against bias will be offended, and open to legal challenge, in situations where there is a reasonable apprehension of bias.
- 48 The test for whether there is a reasonable apprehension of bias is to ask whether a fair minded observer, who is familiar with all the facts and circumstances of a case, would apprehend that there was bias, that is, when there is a reasonable apprehension that the decision maker might not bring an impartial and unprejudiced mind to the resolution of the question involved in it: *Laws v Australian Broadcasting Tribunal* (1990) 10 CLR 70; *Livesey v NSW Bar Association* (1983) 151 CLR 288.
- 49 The Proposal and the Business Plan provide a number of examples through which a legal challenge to the ultimate decisions of the Council, under both the LG Act and the *Planning and Development Act 2005 (PD Act)*, on the basis of a reasonable apprehension of bias, may be made.

Finance's Proposal letter

- 50 The Proposal letter states that Finance have been negotiating with the Town and with the Airport Development Committee to enter into a Private Treaty for the Land since December 2011.
- 51 Without providing detail as to what these negotiations entail, when they took place, or whether the Council have given any undertakings to Finance regarding the terms of the Proposal, the decision of the Town and the Council will be potentially tainted due to the reasonable apprehension that details of the required approvals may have been pre-approved by the Council or the Town prior to formal consideration of submissions contrary to provisions of the LG Act and the PD Act.

Lack of Planning Approval

- 52 Both the Business Plan and the Proposal contemplate the entering into of a lease for the purposes of a TWA facility prior to planning approval under TPS 5 being granted.
- 53 Page 5 of the Business Plan correctly states that *"Finance Unlimited will be responsible for obtain[ing] statutory planning and building approvals"*.
- 54 In our submission, neither the Business Plan nor the Proposal should suggest conditions of the lease which are ultimately the subject of other approval mechanisms, such as the requirement for future planning approval under TPS5.
- 55 Not only does the imposition of these types of conditions give rise to a reasonable apprehension that the Council will be biased in determining any planning (or other) applications, it also amounts to fettering the Town's and the Council's discretion to determine the applications under TPS5 (and would therefore provide a separate head to challenge the decision).

Motive

- 56 The wording at page 8 of the Business plan reads:

"The funds derived from the lease will also pay for significant redevelopment improvements to the Port Hedland International Airport"
- 57 We have been informed by our Clients that the Town requires circa \$2.5m in new funding to pay for its promised upgrading of the Port Hedland International Airport (Airport).
- 58 At the same time the Business Plan, the Proposal and the APC valuation all question the viability of the proposed TWA facility (and the viability of other accommodation providing facilities in the Town of Port Hedland) given the significant increase in room vacancy rates and oversupply of housing (over 500 houses for rent or sale) which has developed over the past 12 months.
- 59 If the Council agree to enter into the Proposal, the decision of the Town or the Council will be potentially tainted due to the reasonable apprehension that any approval was granted for the improper sole purpose of requiring money to upgrade the Airport, while at the same time failing to take into account other material considerations, including the effect of the Proposal on the viability of existing accommodation providers within Port Hedland (as required by 3.59(3)(b) of the LG Act.

Failures of the Town to comply with the basic requirements of producing a Business Plan as set out in the the *Local Government Act 1995* (WA);

General

- 60 Clause 3.2 of the Business Plan refers to clause 3.58 (30)(2a) and 3.59(4)(2a) of the LG Act. No such sections of the LG Act exist.

- 61 It also appears that Clause 3.2 of the Business Plan is attempting to quote directly from the LG Act, but does so inaccurately.
- 62 Clause 3.7 of the Business Plan refers to a terms and conditions of a sale.
- 63 These mistakes are exactly the same as those highlighted in the business plan for the Ausco Modular Pty Ltd proposal.
- 64 It appears that this has been cut and paste from a previous application and therefore the Town may have failed to turn its mind to (and consider to the relevant standard) a relevant consideration as required under section 3.59(3)(e) of the LG Act.
- 65 These oversights demonstrate the lack of proper consideration given by the Town in preparing the documents for public advertising.
- 66 These relatively simple oversights add to the argument that the Town does not have the ability to manage complex undertakings as required to be considered under s.3.59(e) of the LG Act.

Failure of the Town to describe the property concerned

- 67 The Town has failed to adequately describe the property the subject of the disposition as required under section 3.58 (3)(a)(i) of the LG Act.
- 68 The Business Plan loosely defines the land as a 4.45ha portion of the 10ha Lot 436.
- 69 No plan has been provided which demonstrates what 4.45ha portion of the 10ha lot 436 is the subject of the Proposal and the Business Plan.
- 70 Additionally, no consideration has been given by the Town to the impact of this proposal on the viability of leasing the remainder of lot 436, particularly as previous proposals before the town have indicated a desire to lease another 4.5ha of the 10ha Lot 436.
- 71 This would leave a land parcel of just 1ha remaining, too small to market independently for TWA uses, and likely to be unproductive and a drain on the Town's finances up to 20 years.

Failure of the Town to describe the name of all other parties concerned

- 72 The Town has failed to adequately describe all other parties concerned with the Proposal as required under section 3.58 (4)(a) of the LG Act.
- 73 The Business Plan and the Proposal do not detail what specific project or business the proposed residents of the TWA will identify with, as required to be considered a TWA under TPS5.
- 74 The Business Plan and the Proposal do not detail who the financiers, or end users of the Proposal are.
- 75 The Business Plan and the Proposal do not detail whether Finance Unlimited intend to utilise any contractors in effecting the lease (including on an ongoing basis).

- 76 The Business Plan fails to identify which Town officer/ officers prepared the Business Plan.
- 77 As none of this information has been provided, there is no way to ascertain whether the Town, its officers or Councillors have any conflicts of interest with Finance, its contractors, or the businesses who's staff will utilise the TWA, contrary to the requirements of the LG Act.

Failure of the Town to detail the consideration to be received by the Town for the disposition

- 78 The Town has failed to adequately detail the value of the consideration to be received by the Town for the disposition as required by s.3.58(4)(a) of the LG Act.
- 79 The Proposal details a \$rate/m², a "voluntary contribution" as well as numerous conditions, all of which make up the consideration to be received by the Town for the disposition.
- 80 The Business Plan only details a \$14/m² figure, it fails to detail the other relevant considerations.

Failure of the Town to detail the market value of the disposition

- 81 As detailed at paragraph 19 – 42 above, the Town has failed to properly detail the market value of the disposition as required by s.3.58(3)(c) of the LG Act.
- 82 The APC Valuation provides a \$12/m² valuation for Lot 436 on the basis that, among other things, the whole 10ha of the Land is to be leased for TWA purposes only.
- 83 Page 12 of the APC Valuation also provides that as land area increases the per square metre rate decreases.
- 84 Accordingly, as Lots 437, 438 and 439 are significantly smaller (3.5ha) than Lot 436 (10ha) the valuation rate for those lots is significantly higher at \$15/m² (see page 13 of the Valuation).
- 85 It is evident therefore that a true valuation of the Lot 436 part of the disposition (the land the subject of the Proposal, namely the unidentified 4.45ha portion) has not been conducted to the standard required by s.3.58(4)(c) of the LG Act.
- 86 Further, even if the Proposal included the whole of Lot 436, the APC Valuation is flawed in any event.
- 87 The APC Valuation mistakenly assumed that the only use permitted on the Land was for TWA developments.
- 88 The land is zoned "Airport" under TPS5 where a variety of uses are permitted on the land subject to approval by the Council. There is no development plan or otherwise which restricts the use of the Land to TWA landuse only.
- 89 Accordingly, it does not appear that the APC Valuation has been prepared to consider the potential value of other land uses on the land and therefore has failed

to conduct the valuation on highest and best use principles, as detailed at page 9 of the APC Valuation.

- 90 As the Town has based its Business Plan on the false assumption that the land has been properly described and valued, there is the potential that the Land has been undervalued.

Failure of the Town to detail an overall assessment of the major land transaction

- 91 Due to all of the failures of the Town in preparing the Business Plan, as detailed above and below, the Town has failed to provide an overall assessment of the major land transaction in accordance with s.3.59(3) of the LG Act.

Failure of the Town to consider the Proposals expected effect on the provision of facilities and services provided by the Town for the extent of the lease term and extensions

- 92 The Town is required to detail its consideration of the Proposal's expected affect on the provisions of facilities and services provided by the Town for the extent of the lease term and extensions in accordance with s.3.59(3)(a) of the LG Act.
- 93 Clause 3.3 of the Business Plan (page 7) is deficient in achieving the minimum standards expected by s.3.59(3)(a) as:
- 93.1 It cites "adverse effect" yet the LG Act requires a consideration of both positive and negative effects;
 - 93.2 it is obvious that the proposal will not have any adverse effect on the current provision of facilities and services in the the Town as the TWA is not currently built;
 - 93.3 the Business Plan therefore fails to consider the effect (both positive and negative) of the proposal on the provision of facilities and services provided by the Town for the extent of the lease term and extensions; and
 - 93.4 The Town has failed to consider the "development costs" and "financial risks" for the development, and the effect that these will have on the provision of services by the Town, such as, among other things:
 - 93.4.1 the risk of the development not completing the first stage, as required by the condition at dot point 13 of Page 2 of the Submission;
 - 93.4.2 the risk of the development not achieving 75% occupancy for a significant proportion of the lease term;
 - 93.4.3 the risk of the development not being completed;
 - 93.4.4 The risk that over 20 years the Airport runways may need to expand, and as a result the Town may have to terminate the lease. If this is the case will the Town be llable for remediation.

- 93.4.5 The risk of a challenge to the Business Plan and subsequent planning application (if any), including significant legal costs likely in defending the Town's position; and
- 93.4.6 The potential risk that the Town will be unable to market, or will only be able to market at reduced rates, the remaining 5.55/ 1ha portion of Lot 436.
- 93.5 The Town has failed to detail what "satisfactory" means in the context of a credit valuation conducted by Dun and Bradstreet.

Failure of the Town to consider the Proposals expected affect on other persons providing facilities and services in the district for the extent of the lease term and extensions:

- 94 The Town is required to detail its consideration of the Proposal's expected effect on the provisions of facilities and services provided by the other persons in the district for the extent of the lease term and extensions in accordance with s.3.59(3)(b) of the LG Act.
- 95 Clause 3.4 of the Business Plan (page 7) fails to consider, in any way, the requirements under s.3.59(3)(b) of the LG Act.
- 96 The APC valuation made it very clear to the Town that there is currently a significant oversupply of TWA accommodation in Port Hedland and that this is unlikely to change in the foreseeable future.
- 97 Further, the oversupply of TWA accommodation is having detrimental effects on the viability of existing permanent hotel and motel accommodation providers within Port Hedland. This is due to the failure of the Town to properly condition, and subsequently enforce against TWA operations under, among other things, the *Planning and Development Act 2005 (WA)*.
- 98 This failure to properly condition or enforce provisions of TPS5 has lead to TWA operators advertising, and catering, to the general public in contravention of their planning approvals.
- 99 The only way that the Town can demonstrate the effect of the proposed development on other persons providing facilities and services in the district is to obtain a commercial needs assessment for the proposed development.
- 100 The Town has fails to include a commercial needs assessment for the proposed development and therefore has failed to demonstrate that the proposed development will not have a detrimental effect on the viability of existing accommodation providers in the district.

Failure to consider the Proposals expected financial effect on the local government:

- 101 The Town is required to detail its consideration of the Proposal's expected financial effect on the Town for the extent of the lease term and extensions in accordance with s.3.59(3)(c) of the LG Act.

- 102 The Town has failed to adequately detail the value of the consideration to be received by the Town for the disposition as required by s.3.58(4)(a) of the LG Act.
- 103 The Proposal details a \$rate/m², a "voluntary contribution" as well as numerous conditions, all of which make up the consideration to be received by the Town for the disposition.
- 104 The Business Plan only details a \$rate/m², it fails to detail the other consideration.
- 105 As detailed at paragraph above, the Town has failed to consider the "development costs" and "financial risks" for the development, and the potential financial effect that these will have on Town, such as, among other things:
- 105.1 the financial risk of the development not achieving 75% occupancy for a significant proportion of the lease term,;
 - 105.2 the financial risk of the development not being completed;
 - 105.3 The financial risk that over 20 years the Airport runways may need to expand, and as a result the Town may have to terminate the lease. If this is the case will the Town be liable for.
 - 105.4 The financial risk that the Town's incompetence in preparing the Business Plan and subsequent planning application (if any), will open the Town to significant legal costs in defending un-defendable positions;
 - 105.5 The financial risk that the town will be unable to market, or will only be able to market at reduced rates the remaining 5.5ha/1ha portion of Lot 436, due to the Proposal accounting for a 4.45ha portion; and
 - 105.6 The financial risk to the Town, by flooding the market with TWA developments in circumstances where there is an oversupply, which has the potential to cause legitimate, long term, high quality accommodation providers, who provide services not only to transient workers, but also to visitors and tourists, to close their doors.

Failure to consider the Proposals expected affect on matters referred to in the local government's current plan prepared under section 5.56;

- 106 The Town is required to detail the Proposal's expected affect on the matters referred to in the Strategic Community Plan in accordance with s.3.59(3)(d) of the LG Act.
- 107 The Town has failed to identify how, under clause 3.6 of the Business Plan, the Proposal will comply with the Strategic Community Plan for the following 1-4 years.
- 108 The Town has failed to identify how the Proposal will comply with the Strategic Community Plan for the following 5-20 years under which the lease may be in operation.
- 109 The Town has failed to consider how the TWA Proposal helps to retain a permanent population in the Port Hedland, *"a place that residents are proud to call home and*

establish themselves as permanent fixtures in the landscape", as required under the Environmental strategic theme of the Strategic Community Plan.

- 110 The Town has failed to consider how the TWA Proposal encourages families to grow and prosper in the community, as required under the Economic strategic theme of the Strategic Community Plan.
- 111 The Town has failed to consider how the TWA Proposal, which is located next to the Airport's runway, and isolated from the rest of the residents in the Port Hedland, help to unify and connect the community, as required under the Community strategic theme of the Strategic Community Plan.
- 112 The Town has failed to consider how the implementation of the Proposal, and the preparation of a Business Plan deficient in a number of respects, will help the Town demonstrate to the community that the Town is meeting its *"ethical and legislative obligations"*, as required under the Local Leadership theme of the Strategic Community Plan.

Inability of the Town to manage the undertaking or the performance of the transaction.

- 113 The Town is required to detail how it has the ability to manage the Proposal over the extent of the lease term and the extensions in accordance with s.3.59(3)(e) of the LG Act.
- 114 The Town has failed to demonstrate how the management of the offer is within the resources and capacity of the Town as alluded to at clause 3.7 of the Business Plan.
- 115 The inadequacies and deficiencies identified in the Business Plan draw into question the Town's ability to manage complex, long term lease arrangements.

Conclusion

- 116 In light of the above, we demand that the Town and the Council:
- 116.1 refuse the Proposal;
 - 116.2 carefully consider the issues outlined above;
 - 116.3 seek the advice from the Town's solicitors regarding the ability of the Town and/or the Council to approve the proposal (and subsequent applications) given the content of the Business Plan; and
 - 116.4 introduce an urgent moratorium to refrain from determining any further development approvals or lease arrangements incorporating TWA facilities in the district until the Town can competently deal with the issues that inevitably arise.
- 117 Our Clients are willing to having frank and open discussions with Town and/or Councillors to address their concerns.

- 118 We have provided copies of this correspondence to the Minister for Planning, Minister for Local Government and all Councillors in order to make them aware of the issues.
- 119 In the event that the Council does not promptly attend to our requests, or seek to take further action with respect to this or any TWA development before due consideration of the issues have been made, we have been instructed to immediately seek ministerial intervention.
- 120 My clients reserve all of their rights with respect to future legal challenges to your decisions in accordance with the relevant legislation, on, among other things, the grounds set out above.
- 121 If you have any questions relating to the above request, please contact Brendan Foley or me.

Yours sincerely



Craig Wallace
Partner – Planning and Environment



PO Box 61 WEST PERTH 6872
Level 2, 16 Parliament Place
WEST PERTH WA 6005
AUSTRALIA

Enquiries: paul.trotman@pdc.wa.gov.au
Our ref: A3731486

By email: council@porthedland.wa.gov.au

Mal Osborne
Chief Executive Officer
Town of Port Hedland
PO Box 41
PORT HEDLAND, WA 6721

Dear Mal,

Business Plans for Major Land Transactions - Finance Unlimited and Ausco Modular

I refer to the Town of Port Hedland's public notice to undertake a major land transaction as defined under s3.58 of the Local Government Act. We note that the proposed transaction involves the disposal of all or part of Lots 436, 437, 438 and 439 within the airport precinct for the purposes of Transient Workforce Accommodation. Our understanding is that you have received two proposals: one from Ausco Modular to lease a 4.5 hectare portion of Lot 436 and one from Finance Unlimited to lease a portion of Lot 436 and all of Lots 437, 438 and 439 with both proposals being for Transient Workforce Accommodation. Our comments in this letter relate to both proposals.

As you will recall the issue of Temporary Worker Accommodation was raised at the 30 May 2013 Town of Port Hedland Steering Committee meeting in relation to hotel developments in the town. The Minutes show that the "...ToPH reported on current position: up to 5,000 beds available in TWA's which are impinging on hotel demand; could have another 4,000 beds if planned TWAs come on stream; noted possible ToPH sites perpetuate existing problems but Council reliant TWA funds to redevelop airport ...". The Minutes also note that the Department of Land's policy on the temporary workforce accommodation would be provided to the Committee.

The Lands policy was provided to the 5 September 2013 meeting of the Steering Group who also noted the airport redevelopment in the following terms: "...Council have varying views on provision of TWA space but have agreed to initiate Business Case for 4.5ha TWA site with Finance Unlimited as proponent and for "city building" projects rather than resource sector. Noted that draft Business Case for TWA should be public by end September 2013."

I have returned to the Steering Group Minutes as they articulate the issue the Council faces, namely to what extent obtaining funds for airport development through a TWA offer would adversely impact on the interests of Hedland businesses and residents. It is clear from the above quotes that the Town is aware that existing TWA facilities are already adversely impacting on hotel operations in Hedland and that the Town recognize the addition of further beds, in particular ones advanced by the Town, would perpetuate if not exacerbate the problem.

pdc@pdc.wa.gov.au | www.pdc.wa.gov.au
(+61) 1800 THE PILBARA | (+61) 1800 843 745

The way Council should go on this issue is, to some extent, guided by the arguments in each of the two Business Plans under review. At page eight of both documents your *Strategic Community Plan 2012-2022* is referred to and quotes four tests that these TWA proposals would need to meet. I have addressed those tests below.

Facilitate commercial, industry and town growth

1. The PDC is seeking to implement the Government's Pilbara Cities vision through substantial investment in a variety of land development projects in Port and South Hedland. In particular, LandCorp are seeking to encourage private investment in strategically placed short-stay accommodation areas such as Finbar's Sutherland Street development, the Spillbank Marina and South Hedland Town Centre. The addition of further TWA facilities at the airport has the ability to undermine the financial viability of these existing, town-building, initiatives and as such would work against 'facilitating commercial, industry and town growth'. This view is given substance through the recent unsuccessful attempts by Mirvac to secure a hotel development at the old Port Hedland Hospital site.
2. In light of the recent unsuccessful Mirvac hotel deal, LandCorp commissioned Dubois Group Pty Ltd (May 2013) to undertake a study on the current short stay accommodation market in Port Hedland. Part of this study focused on the "Impact of TWA's on the Commercial Short-Stay Accommodation market". Some of the findings of this report are outlined below. What is clear is that the addition of new TWA facilities to the market at this time has the potential to be counterproductive and work against 'facilitating commercial, industry and town growth'.
 - a) It is clear that some TWA's in Port Hedland are actively securing business that typically is accommodated in hotels and motels and are offering highly competitive rates to these facilities.
 - b) In Dubois' view, with the softening market conditions, TWA's are having some adverse impact on the town's hotels and motels and in doing so, the TWA's may be operating outside of their permitted terms of use.
 - c) Whilst the provision of this form of accommodation (TWA's) may have been of assistance in dealing with the acute shortage of accommodation during the past two-three years, given the recent change in market conditions, this is now having an adverse effect on the hotels and motels of Port Hedland.
 - d) In Dubois' view, the current situation with respect to the hotel market in Port Hedland is very unsettled and presents an extremely challenging market to attract hotel developers who would have the capacity to proceed to finance and develop a major hotel or other short stay facility.
 - e) Dubois are aware of one or two parties who are persevering with proposed short stay developments in Port Hedland, which if they proceed, would in their view significantly diminish the appetite for any new hotel development.
 - f) In Dubois' view the key to the development of any major new short stay accommodation facility is dependent on the situation with respect to TWA's and the respective employment policies of the major mining houses with respect to FIFO operational staff.
3. The proposal has the potential to significantly dilute activity and investment in Port and South Hedland and as such would, again, have the capacity to work against 'facilitating commercial, industry and town growth'.

4. Draft work undertaken by the Commission in September 2012, which has been shared with the Town, shows existing and planned TWA provision reaching over 12,000 beds by 2014, which includes 2,000 beds for BHP at the airport. Given the substantially changed market conditions, and the deferral of the Outer Harbour construction, it is not clear why additional TWA beds at the airport would be required at this time. Karratha's experience is salient: recent work by the Shire of Roebourne indicates that their long-term TWA need is in the order of 3,000 to 4,000 beds and that supply is well in excess of this. Before committing to the proposals Council should consider reviewing the TWA supply/demand equation in Port Hedland – we would be happy to assist with this.
5. A new TWA facility is likely to add to the perception that Port Hedland is an industrial town populated by temporary fly-in/fly-out workers and as such would not be supportive of 'town growth'.
6. The Business Cases do not demonstrate that there are no other available or planned TWA facilities in Hedland, nor do they demonstrate what legacy city-building benefits would arise from acceptance of one of these proposals. This then makes it difficult to determine if the proposals 'facilitate' or hinder 'town development.'

Develop the Port Hedland airport as a leading regional airport

7. It is not clear to us how the proposed TWA facilities would contribute, in a physical sense, to making Port Hedland a leading regional airport. TWA facilities are reasonably flexible in their locational needs – as evidenced above, there are already proposals for similar facilities elsewhere in Hedland – and such facilities might also be used to make some marginal residential developments viable. In contrast land close to the airport, by definition, is limited and may be better used to support businesses (e.g. inter-modal freight operations, logistics, aircraft servicing) that rely on proximity to an airport for their operations. The case for a TWA use to support 'developing Port Hedland airport as a leading regional airport' is not made in the Business Plans.
8. We accept that the income the Town would receive from the proposed deal would assist in the redevelopment of the airport. However, the Business Plan does not explore other funding options such as loans, public-private partnerships, grants from bodies such as Infrastructure Australia or municipal bonds. In our view these options should be explored before committing to a proposed deal.

Address housing shortage and affordability through using Council land

9. The *Pilbara's Port City Growth Plan* demonstrates a land supply timeline that is capable of releasing significant volumes of permanent residential development to deliver a Town of 50,000 people by 2035: examples of current residential projects include the Western Edge, Hamilton Precinct, Project Osprey, the Town's own Eastern Gateway work, Athol Street in East Port Hedland and the South Hedland Town Centre.

Clearly the provision of a Temporary Worker Accommodation facility at the airport would not address residential housing issues as the facility targets a totally different market segment. It might be argued that such a facility would assist by providing accommodation for construction workforces, but this case is not explored in the Business Plans and may be not be supportable in light of other TWA provision elsewhere in the Town.

Even if an argument could be mounted to view the proposed facility as being suitable for long-term residential purposes, it is arguable as to whether or not the airport is an appropriate location for such a use, especially given the volume of residential developments elsewhere in the Town.

10. The draft *Hedland Infrastructure Capacity Study and Action Plan*, which the Town has contracted NS Projects to prepare, states that, in relation to housing mix, "... the primary focus should be on delivering 3 bedroom and 4+ bedroom stock to the Hedland market" with "... a lesser focus on 1 bedroom and 2 bedroom stock." By way of volume, the draft *Action Plan* states (pg. 20) that the demand for one bedroom apartments to 2018 is no more than 134 units. Given this, it is difficult to see how the airport TWA proposal would 'address housing shortage and affordability' in Hedland.

Create local employment and investment and diversify the economy

11. We share the Town's vision for growing Port Hedland into a city of some 50,000 people. Our concern is that support for a new Temporary Worker Accommodation facility at the airport will discourage public and private investment in permanent development outcomes in Port and South Hedland.
12. The addition of a new TWA facility has the ability to further undermine existing local short-stay businesses and the ability to discourage new private investment in short-stay accommodation in strategic locations throughout Port and South Hedland. The table below illustrates the significant amount of rooms available within TWA's in Port and South Hedland in comparison with hotels and motels.

**Port Hedland Accommodation Market
Key Accommodation Providers
As at May 2013**

Hotels & Motels		
	Location	Keys
Upper Scale		
ibis Styles	Port	65
Esplanade Hotel	Port	108
Budget		
Hospitality Inc	Port	40
Walkabout	Airport	61
South Hedland Motel	South Hedland	104
The Lodge	South Hedland	135
Cooke Point	Port	53
Total		569
TWA's		
	Location	Keys
Upper Quality		
Hemlock Motel	South Hedland	800
Port Haven	Airport	1,200
Basic		
Beachfront Village	Port	438
Wedgetel	South Hedland	700
Mia Mia	Airport	192
Kings at the Landings	Airport	600
Moola	26kms South	518
Total		4,549

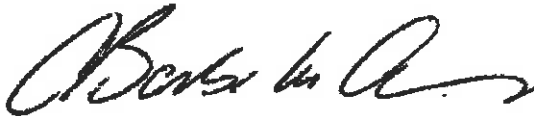
Source: Doherty Group Pty Ltd

13. In order to ensure that the proposed Temporary Worker Accommodation facility at the airport will 'create local employment and investment and diversify the

economy' and not adversely impact on existing businesses, the Council should undertake an Economic Impact Analysis.

As you can see from the above discussion we do not agree that the proposals before Council adequately address the tests established by Council, are inconsistent with the State's view on how Temporary Workforce Accommodation should be approached and do not evidentially address the requirements established by the Local Government Act for a Business Case. Before proceeding with any decisions we would encourage you to engage with us in reviewing the TWA supply/demand equation in Port Hedland.

Yours sincerely



Anne Banks-McAllister
A/Chief Executive Officer

18 October 2013