

17. CORPORATE SERVICES REPORTS

17.9 Forrest Beach Determination and Fence

Location:	Forrest Beach Locality
Applicant:	Shire of Capel
File Reference:	Nil
Disclosure of Interest:	Nil
Date:	09.03.12
Author:	Governance Officer, D Freeman
Senior Officer:	Director Corporate Services, P Anastasakis
Attachments:	<ol style="list-style-type: none">1. Schedule of submissions received relating to the proposed Determination amendment2. Aerial photograph showing possible emergency access route3. Draft amendment to the Determinations under the Shire of Capel Local Government property Local Law (Amendment shown highlighted in red)4. Aerial Photograph showing ownership of various land parcels at Forrest Beach and alignment of unauthorised fence

MATTER FOR CONSIDERATION

To consider the following two separate, but related issues relating to vehicle usage at Forrest Beach:

1. An amendment to the Determinations within the Shire of Capel Local Government Property Local Law to clarify Council's intention that vehicles are prohibited on the beach north of the prolongation of Forrest Beach Road and, south of a point 300 metres south of the prolongation of Forrest Beach Road; and
2. Whether the current fencing erected on the boundary between private property and Council Reserve 25427, but extending beyond the private land boundary can be permitted to remain.

BACKGROUND / PROPOSAL

Background

In December 2009, and commensurate with confirmation of the legality of the private ownership of land formerly thought to be public beach, Council amended the Determinations under the Shire of Capel Local Government Property Local Law to remove any inference that driving vehicles on the portion of the beach north of Forrest Beach Road under the control of the Shire was permitted. This was done by removing reference to the portion of the beach north of Forrest Beach Road as an area in which the driving of vehicles was permitted.

In 2010, the owners of land at Forrest Beach erected fencing to prevent vehicles from travelling on that portion of the beach north of the prolongation of Forrest Beach Road which is privately owned.

The aerial photograph at Attachment 4 seeks to show the ownership or management responsibility for the various parcels of land at Forrest Beach. Lot 807 is privately owned land. Reserve 25427 is vested in the Shire of Capel for the purposes of Recreation and Camping. There is a break in the land holding that is Reserve 25427 for the extension of the Forrest Road road reserve before Reserve 25427 then continues southwards.

At the Council meeting held on 18 January 2012 Council resolved (resolution OC0106) as follows:

That Council:

1. in accordance with the Shire of Capel Local Government Property Local Law gives local public notice of the intention to amend the Determinations under the Local Law to prohibit vehicles from driving on the beach north of the prolongation of Forrest Beach Road, and south of the southern car park at Forrest Beach.
2. allows that portion of the boundary fence for Lot 807 Forrest Beach Road extending beyond the western boundary of Lot 807 to remain in place subject to the fence being maintained by the owner of Lot 807 to the satisfaction of the Council on condition that emergency vehicle access be provided by the Forrest's from their property onto the beach

Proposal

That Council consider the public submissions received on the proposal to prohibit vehicles on the beach north of the prolongation of Forrest Beach Road, and consider whether Council can permit to remain the private fence erected on Unallocated Crown Land extending from the southern boundary of Lot 807 to the low water mark.

STATUTORY ENVIRONMENT

The Shire of Capel Local Government Property Local law PART 2 - DETERMINATIONS IN RESPECT OF LOCAL GOVERNMENT PROPERTY provides as follows:

Procedure for making a determination

- 2.2 (1) The local government is to give local public notice of its intention to make a determination.
- (2) The local public notice referred to in subclause (1) is to state that –
 - (a) the local government intends to make a determination, the purpose and effect of which is summarised in the notice;
 - (b) a copy of the proposed determination may be inspected and obtained from the offices of the local government; and
 - (c) submissions in writing about the proposed determination may be lodged with the local government within 21 days after the date of publication.
- (3) If no submissions are received in accordance with subclause (2)(c), the Council is to decide to –
 - (a) give local public notice that the proposed determination has effect as a determination on and from the date of publication;
 - (b) amend the proposed determination, in which case subclause (5) will apply;
or
 - (c) not continue with the proposed determination.
- (4) If submissions are received in accordance with subclause (2)(c) the Council is to–
 - (a) consider those submissions; and
 - (b) decide

- (i) whether or not to amend the proposed determination; or
 - (ii) not to continue with the proposed determination.
- (5) If the Council decides to amend the proposed determination, it is to give local public notice:
- (a) of the effect of the amendments; and
 - (b) that the proposed determination has effect as a determination on and from the date of publication.

Legal advice has been obtained from McLeods Barristers and Solicitors to assist in establishing an understanding of the legislative authority and responsibility of Council in regard to this matter.

Land Administration Act 1997

Section 3(2) of the *Land Administration Act 1997* provides:

"All land below high water mark, including the beds and banks of tidal water, is Crown land unless that land is inundated or other alienated land."

Section 3(3) of the *Land Administration Act 1997* also provides:

"When tidal waters form the boundary of a parcel of land or a person holds the freehold of parcels of land adjoining tidal waters –

- (a) the land below high water mark (except for land which was alienated land immediately before the appointed day) is Crown land;...*"

Section 3 of the *Land Administration Act 1997* defines Crown land as –

"Crown land –

- (a) in which no interest is known to exist, but in which native title within the meaning of the Native Title Act 1993 of the Commonwealth may or may not exist; and*
- (b) which is not reserved, declared or otherwise dedicated under this Act or any other written law;"*

Following the assessment of aerial photographs, a title search, a review of boundaries of adjoining Reserve 25427 and Lot 807, and legal advice, it has been confirmed that the fence erected by the owner of Lot 807 is located outside the boundaries of Lot 807, between the high water mark and low water mark, and is located on Crown land within the District of the Shire of Capel.

Our legal advice confirms that as the fence is situated on unallocated Crown land, the Shire does not have any legal authority under the Land Administration Act 1997 to exercise care, control and management over the land in question. Accordingly, the Shire is not in a position to provide authorisation for the fence, at least for the purposes of the Land Administration Act 1997. The fence would constitute an unauthorised structure under the Land Administration Act 1997 and would require a suitable form of tenure to be granted by the relevant state government agency if the fence were to remain (ie:licence).

This legal opinion is contrary to earlier advice provided through the Department of Local Government which referred to the Shire being vested with general powers of care, control and management over public land within the boundaries of its district. This earlier advice from the Department of Local Government was the basis upon which the report was formulated and considered by Council on the 18th January 2012.

Local Government Act 1995

Section 3.53(2) of the *Local Government Act 1995* provides:

"A local government is responsible for controlling and managing every otherwise unvested facility within its district..."

"otherwise unvested facility" means a thoroughfare, bridge, jetty, drain, or watercourse belonging to the Crown, the responsibility for controlling or managing which is not vested in any person other than under this section."

As the land upon which the fence is situated does not comprise a thoroughfare, bridge, jetty, drain, or watercourse, it is not regarded as an "otherwise unvested facility".

Nonetheless, as the land is within the district of the Shire, it is still subject to local laws made by the Shire under the Local Government Act 1995.

Local Laws

The Shire of Capel Fencing Local Law does not in this circumstance impose the requirement for consent to be obtained prior to the erection of a fence.

The Shire of Capel Property Local Law provisions do not apply to the fence as it is located in part on unallocated Crown land.

Planning and Development Act 2005

Greater Bunbury Regional Scheme and Town Planning Scheme No. 7:

The WA Planning Commission have confirmed that the development (fence) is located upon regional open space designated under the Greater Bunbury Regional Scheme. A development approval is required.

The Shire is the responsible authority under Town Planning Scheme No. 7 which has force as a local planning scheme under the *Planning and Development Act 2005* (PD Act). Clause 1.3 of TPS No. 7 provides that the Scheme Area comprises the whole of the land within the district of the Shire.

Our advice purports that the fence would constitute 'development' for the purposes of the PD Act and Scheme, and planning approval would be required to be obtained for the portion of fence located on UCL.

In order for the owner of Lot 807 to lodge an application with the Shire for retrospective approval of the fence, the consent of the owner of the land would be required (State Land Services on behalf of the Crown).

The Shire is able to enforce Scheme provisions by:

- issuing a direction under S214 of the PD Act requiring removal of the fence; or
- prosecute under S218 of the PD Act

Local Government (Miscellaneous Provisions) Act 1960

Section 374 of the *Local Government (Miscellaneous Provisions) Act 1960* (LGMP Act) requires the specifications and plans of a proposed building to be approved by the local government in whose district the building is proposed to be erected.

Our advice purports that the fence does constitute a "building" for the purposes of the LGMP Act, and a building licence is therefore required.

The Shire is able to enforce the Building licence requirement through S374(1) of the LGMP Act.

The owner of Lot 807 is able to make application for retrospective approval of the unauthorised structure through the issuance of a building approval certificate pursuant to S374AA of the LGMP Act. The consent of the owner of the land would be also required (State Land Services on behalf of the Crown).

POLICY IMPLICATIONS

There are no policy implications associated with this matter.

FINANCIAL IMPLICATIONS

Budget

Costs may be incurred in giving local public notice should the amendment to the determination come into effect, as required under the local law. Costs have been incurred in seeking advice, researching and enabling public comment on this matter.

Long Term

If Council does not accept the proposition to allow the fence extending beyond the private property boundary to remain, this will provide an opportunity for vehicles to travel north along the beach contrary to Council's previous position and likely result in repeat calls for Council to enforce the provisions of the Local Law. Council will incur ongoing costs through the Community Rangers needing to patrol this section of beach to prevent unlawful vehicle activity. This additional patrolling will reduce the availability of the Community Rangers to patrol in other areas of the Shire.

Whole of Life

There are no "whole of life" costs associated with this matter.

SUSTAINABILITY IMPLICATIONS

This matter has environmental implications on the coastal dune system and beach areas in the Shire. Unrestricted access to beaches enables some elements in the community to drive in areas with unwanted consequences to the dunes, vegetation and animals.

This matter has social implications in respect to the amount and type of public access to beaches in the Shire. Beaches, as any other areas of public open space within the Shire, are venues for people to meet and recreate. This needs to be encouraged but in a manner which does not impact upon the quiet enjoyment of the beach by the majority of users.

Some of the submissions received state that restricting vehicle access at Forrest Beach will reduce the number of visitors to the Shire of Capel resulting in loss of business opportunities within the Shire of Capel, providing an economic impact.

It is considered that as no camping or like activity is permitted at Forrest Beach, this location is only a day trip destination. Given that there are no businesses providing services to people at the beach, it is considered there are no significant economic implications associated with this matter.

STRATEGIC IMPLICATIONS

Consideration of this matter is consistent with Key Focus Area 2 – Community Experience, objectives:

- 2.1 Provide social, recreational and cultural opportunities for our communities
- 2.2 Provide facilities and services which recognise the diverse needs of the community, and

Key Focus Area 3 – Environmental Experience, objective 3.1 - Protect and promote the natural and built environment, of the Shire of Capel Strategic Plan 2009 – 2020.

CONSULTATION

In accordance with the requirements of the Shire of Capel Local Government Property Local law and the Local Government Act 1995, local public notice was given of the proposal to make a Determination.

Arising from the notice given, Council has received 81 submissions regarding the proposed determination. These submissions comprised:

1. 8 individual submissions
2. 5 joint or family submissions, and
3. 68 individual "pro forma" submissions.

These submissions together with a précis of the content as well as officer comment on the matters raised are presented in the table at Attachment 1.

No assessment as to the locality/identity of the persons submitting the assessments has been undertaken. It is considered that as the beaches are available for use by all members of the public and not just Shire of Capel residents, that no weighting should be attached to any submission on this basis.

It is also noted that only one submission was received expressing the view that Council should still retain areas where quad bikes could be ridden on the beach.

COMMENT

It is clear from the submissions received that there is strong opposition to the proposed amendment to the Local Law as well as allowing the fence to remain in situ.

There are three primary issues to be considered:-

- The legal authority of Council to make a decision regarding the fence erected, and any related approvals, determinations or functions required as outlined within this report;
- Whether Council wishes to allow vehicles north of the prolongation of Forrest Beach Road; and
- Whether the Council having committed to banning vehicles in this area, will then allow the fence to remain subject to an alternative emergency vehicle access to the beach being provided.

With regard to whether Council wishes to allow vehicles north of the prolongation of Forrest Beach Road, this can be done and will only necessitate the removal of the portion of the fence which extends seaward from the western boundary of Lot 807.

This will then enable persons to lawfully traverse the beach between the water and the private property boundary only. If vehicles, due to tidal movements or soft surfaces enter onto the private property, then this becomes a matter of trespass which is not of Council's control but will need to be resolved by the landowner with the assistance of the WA Police.

Should however the landowner seek to fence the seaward boundary of their property as is their entitlement, then any vehicle access from the wider area of public beach to the north will be highly unlikely at high tide resulting in persons being trapped on the beach until the next low tide.

The need for signage warning against this possibility was raised in one of the submissions received. The likelihood of persons unable to exit the beach via the gap between high and low tide is also likely to lead to people illegally trying to cross the adjoining private property back to Hurford Brae resulting in damage to the vegetation and sand dunes.

On this basis, Council now needs to consider whether emergency access can be provided by the Forrest's from their property onto the beach.

Cornerstone Legal, acting on behalf of the Forrest family, in relation to the amendment to the staff recommendation; "on the condition that emergency vehicle access be provided by the Forrests from their property onto the beach" has asked that the following matters be considered by Council:

From our perusal of the relevant Minutes, it appears that the underlined portion of the Motion was a last minute addition essentially "tacked on" to the substantive Motion without due (or any) consideration.

In this respect, we have been instructed to outline a number of matters which Council should properly have regard to at its next meeting prior to adopting the Motion:

- 1. Existing Access Points: There are already three (3) tracks/roads that run parallel to the beach in a Northerly direction. The first goes all the way to the boundary of the Roberts' property, and is a well maintained fire break that can be driven on by 4 WD vehicles. The second is the lime sealed and Council maintained Hurford Brae that runs up onto Mr Bax's property. The third is the Forrest' private drive way that is also gravel/lime sealed and well maintained, both of these latter potential emergency access points are a .short (100m) walk to the beach, and there are several worn walking tracks (from the houses across) that would easily accommodate pedestrian access with a stretcher. Finally Gordon Roberts has for many years had a private vehicle access on the boundary of his property which intersects with our clients' fire break.*
- 2. Environmental Issues: To construct an access road as proposed by Council would involve significant environmental damage, in terms of having to clear coastal vegetation and dune formations. The already existing access points have been there for years, some built around trees and vegetation.*
- 3. Practical Considerations: There are a number of pragmatic factors which must be considered, including:*
 - a. Likelihood of emergency: Currently there should be no vehicles, horses, dogs or commercial operators north of the car park and horses should vacate the beach by 9am. This significantly reduces the likelihood of an emergency event occurring in the vicinity. Can the Shire demonstrate that an official Risk Assessment has been conducted in terms of the type and likelihood of accident/injury occurring under the current management plan of the area?*
 - b. Security issues: If constructed, the access point would have to be kept locked and then, in the event of an emergency, keys would have to be found. We understand that the Shire of Busselton has several similar access points, and have never been able to secure them - their chains, locks and gates are constantly being removed or damaged allowing vehicle access to prohibited areas.*
 - c. Limited utility: In an accident scenario (with or without a specially constructed access road), emergency services will generally work independently of local council/(neighbours). Consequently, it is likely that, if an accident did occur, emergency services would arrange transport without liaising with the Shire of Capel or nearby residents. In most cases an emergency rescue boat (available in Busselton) or a helicopter would be called before the 'locals' would even hear of the event.*
 - d. Cost: The cost of constructing and maintaining an access point as proposed would be prohibitive.*

Conclusion

We ask that Council carefully consider the above matters prior to the next meeting on 21 March 2012, and confirm that a representative from the Forrest family and our office will be present at that meeting.

At Attachment 2 - Aerial photograph showing possible emergency access route, Council can see a possible route from the beach to the car park. This route seeks to make use of the current fire break and former beach access ramp as a route that minimises further impact upon the dunes as well as providing direct access to the car park being the most suitable place for a 2wd ambulance to collect a patient.

In any emergency event, it is highly likely that the services of the Capel Sub branch of St John Ambulance will be engaged as the branch located closest to this location. Provision of access in the form of keys/combination to the Capel sub branch should facilitate emergency access even if local property owners are not present.

If Council considers that this access route is satisfactory, then subject to the agreement of the Forrest family to construct the access point and matters relating to security of the gate can be addressed, then it is considered that requirement of Council is achievable.

With regard to the single submission relating to the matter of banning of quad bikes, it is considered that this is not a strong enough indicator of community support to warrant Council allowing these vehicles to be ridden on any beaches within the Shire.

A number of options are available for Council's consideration and have been presented below for deliberation.

Option 1

The Council not proceed with the proposed Local Government Property Local Law Determination Amendment March 2012 to prohibit vehicles from driving on the beach north of the prolongation of Forrest Beach Road, and south of the southern car park at Forrest Beach.

That Council advise the owners of Lot 807 that they are required to obtain the consent of the State Land Services to place the portion of the boundary fence for Lot 807 Forrest Beach Road, extending beyond the western boundary to the low water mark, on Unallocated Crown Land.

Option 2

The Council not proceed with the proposed Local Government Property Local Law Determination Amendment March 2012 to prohibit vehicles from driving on the beach north of the prolongation of Forrest Beach Road, and south of the southern car park at Forrest Beach.

That Council advise the owners of Lot 807 that they are required to obtain the consent of the State Land Services to place the portion of the boundary fence for Lot 807 Forrest Beach Road, extending beyond the western boundary to the low water mark, over Unallocated Crown Land.

That Council advise the owners of Lot 807 that the portion of the boundary fence for Lot 807 Forrest Beach Road extending beyond the western boundary is an unauthorised 'development' and 'building' under the Shire of Capel Town Planning Scheme No. 7 and the *Local Government (Miscellaneous Provisions) Act 1960*, and they are therefore required to lodge an application with the Shire for retrospective development and building approval of the fence or remove the unauthorised portion fence.

Option 3

The Council not proceed with the proposed Local Government Property Local Law Determination Amendment March 2012 to prohibit vehicles from driving on the beach north of the prolongation of Forrest Beach Road, and south of the southern car park at Forrest Beach.

That Council advise the owners of Lot 807 that they are required to obtain the consent of the State Land Services to place the portion of the boundary fence for Lot 807 Forrest Beach Road, extending beyond the western boundary to the low water mark, over Unallocated Crown Land.

That Council advise the owners of Lot 807 that the portion of the boundary fence for Lot 807 Forrest Beach Road extending beyond the western boundary is an unauthorised 'development' and 'building' under the Shire of Capel Town Planning Scheme No. 7 and the *Local Government (Miscellaneous Provisions) Act 1960*, and they are therefore required to either lodge an application with the Shire for retrospective development and building approval of the fence or remove the unauthorised portion fence.

That Council authorise Council staff to examine the development of a local law to regulate and manage foreshore reserves and beaches.

VOTING REQUIREMENTS

Simple majority

OFFICER'S RECOMMENDATIONS – 17.9

That Council:

- 1. not proceed with the proposed Local Government Property Local Law Determination Amendment March 2012 to prohibit vehicles from driving on the beach north of the prolongation of Forrest Beach Road, and south of the southern car park at Forrest Beach.**
- 2. for information purposes advise the owners of Lot 807 that they are required to obtain the consent of the State Land Services to place the portion of the fence for Lot 807 Forrest Beach Road, extending beyond the western boundary to the low water mark, over Unallocated Crown Land, and once this consent is obtained make the necessary applications for development approval under the relevant schemes identified in resolution 3.**
- 3. advise the owners of Lot 807 that the portion of the fence for Lot 807 Forrest Beach Road extending beyond the western boundary is an unauthorised 'development' under the Shire of Capel Town Planning Scheme No. 7 and Greater Bunbury Regional Scheme, and they are therefore required with the consent of the State to either lodge the applications with the Shire for retrospective development approval of the fence or within 60 days remove the unauthorised portion of fencing.**
- 4. authorise Council staff to examine the development of a local law to regulate and manage foreshore reserves and beaches within the District of Capel through a dedicated Local Law or an amendment to the Property Local Law.**