



# **DISTRICT PLANNING SCHEME No. 2**

Amendment No. 185

**Planning and Development Act 2005****RESOLUTION TO ADOPT AMENDMENT TO  
LOCAL PLANNING SCHEME****CITY OF WANNEROO****DISTRICT PLANNING SCHEME NO. 2 - AMENDMENT NO. 185**

RESOLVED that the local government pursuant to section 75 of the *Planning and Development Act 2005*, amend District Planning Scheme No. 2 by:

- a) Replacing Clause 9.13.3 with the following.

*9.13.3 In the event that upon the subdivision, development or strata subdivision of all the land in the Cell, or closure of a Cell in accordance with clause 9.13.4 and the Infrastructure Contributions received by the Local Government exceeds the amount necessary to complete the Cell Works and meet all of the Cell Costs, the amount of such excess will be distributed amongst the owners who made Infrastructure Cost payments to the Cell Account in accordance with subclause 9.6.3.*

*The amount of any excess that an owner may be entitled to receive shall be in the same proportion to the total value of contributions paid by the landowner to the total value of the contributions received in a Cell. The amount payable to an owner under this clause shall be reduced by the amount of any shortfall in the payments made by that owner to their assessed Infrastructure Costs.*

*If an owner or other person or persons, corporation or other legal entity entitled to an interest in a Cell cannot be located by the Local Government after the giving of public notice by way of an advertisement in a local, state or national newspaper circulating in the area on at least two occasions, writing by registered mail to their last known address as shown in the Local Government records and on the City's website and no request for a claim is received by the Local Government within a period of six months from a decision being made by the Local Government to distribute excess funds, that owner's proportion of the surplus funds may be expended, subject to the approval of the Minister of Planning, either towards further improvements and facilities within the Cell or transferred to the Cell Account of an abutting Cell where insufficient funds will be received to complete Cell Works that are common to both Cells and thereafter such an owner shall have no claim in respect to such money.*

- b) Adding a new Clause 9.13.4, as per the following.

*9.13.4 - The Local Government may, subject to the approval of the Western Australian Planning Commission, close a cell prior to the development of all the land in the Cell as defined in clause 9.13.3, providing.*

- The developable land within a Cell is more than 90% developed;*
- The remaining Cell Works have been accurately estimated to the satisfaction of the Local Government;*
- Where all major infrastructure in the Cell has been completed or is substantially complete, and all major POS has been acquired, to the satisfaction of the Local Government;*
- Adequate funds have been allocated to complete the Cell works (including administration costs); and*
- All major land acquisition for Cell Works has been finalised.*

- c) Amending Clause 9.10.9 of DPS2 to replace reference to *Section 142 of the Supreme Court Act* and insert the *Civil Judgement Enforcement Act (2004)* and the associated Regulations.
- d) Amend all sections of Part 9 of DPS2 by replacing reference to '*Council*' with '*Local Government*'.

The amendment is complex under the provisions of the *Planning and Development (Local Planning Schemes) Regulations 2015* for the following reasons:

- a) Under Regulation 34(e) a complex amendment is "*an amendment to identify or amend a development contribution area or to prepare or amend a development contribution plan*".

Date of Council Resolution 30<sup>th</sup> June 2020

.....  
(Chief Executive Officer)

Dated this ..... day of ..... 20.....

## CITY OF WANNEROO

### DISTRICT PLANNING SCHEME NO 2 - AMENDMENT NO. 185

#### SCHEME AMENDMENT REPORT

##### Background

Administration has recently completed the annual review for the developer contribution arrangements for East Wanneroo Cells 1, 2 and 4-9. The annual review highlighted a number of issues associated with the now outdated provisions in Part 9 of DPS 2, which require changes in order to improve the City's management of the developer contribution arrangements for the Cells to finalisation.

At the meeting of Council on 4 June 2019 (PS03-06/19) the Council resolution noted that Administration intends preparing an amendment to DPS 2 to consider a range of recommended improvements to the East Wanneroo Cost Sharing Arrangements, including greater clarification on the methodology for return of excess funds.

The annual review process has highlighted a number of additional issues associated with the provisions of DPS 2 that need to be considered for a scheme amendment to improve the statutory provisions for the East Wanneroo Cells, including:

1. Closure of a Cell prior to full development;
2. Return of excess funds;
3. Charging of interest on deferred contributions; and
4. Delegation to Administration of a number of Part 9 - DCP operational requirements.

##### Detail

The proposed improvements to the administration of developer contribution arrangements is recommended to apply to the East Wanneroo (Cells 1-9) Agreed Structure Plans, as shown in **Attachment 1**.

In order to make improvements, an Omnibus Amendment to DPS 2 is recommended to address the following:

1. Closure of a Cell prior to full development

The provisions of DPS 2 do not include a procedure on the closure of the developer contribution arrangements of a Cell prior to the development of all the land in a particular Cell. This would mean that every area of land needs to be developed before the City could close the Cell, which could be decades. This is an unreasonable position, particularly where the vast majority of land in a Cell has been developed and the infrastructure has been delivered or is accurately costed and planned to be delivered. Administration is therefore recommending that an additional clause be inserted after clause 9.13.3 of DPS 2 to provide the ability for Council to close a Cell under particular circumstances. The following are the recommended criteria for considering the closure of a Cell:

- Where the developable land within a Cell is more than 90% developed;
- Where the remaining Cell Works have been accurately estimated to the satisfaction of Council;
- Where all major infrastructure in the Cell has been completed or is substantially complete, and all major POS has been acquired, to the satisfaction of Council;
- Where adequate funds have been allocated to complete the Cell works (including administration costs); and

- All major land acquisition for Cell Works has been finalised.

Refer Point a) of Amendment 185 to DPS2.

## 2. Return of excess funds

Clause 9.13.3 of DPS 2 sets out the procedure for returning excess funds at full development of a Cell, excess funds are returned on the basis of the number of lots produced by an owner to the total number of lots produced in a Cell.

The above clause omits consideration for contributions that are required to be paid for group housing and commercial lots, which tend to be much larger in area and contributions are calculated based on the lots potential. These landowners have paid a significant amount of contributions towards the Cell infrastructure; however the current wording of clause 9.13.3 excludes these landowners from the return, which would otherwise result in a disproportionate return to those landowners who created freehold lots.

This issue was identified by Council in June 2019 as part of the Annual Review for the East Wanneroo Cell 1, where an alternative methodology was approved to address the issue of inequity by apportioning the excess returns on the 'value' of the Infrastructure contributions paid by a landowner to the total contributions received.

Paragraph three of the current wording of Clause 9.13.3 requires Council to give public notice where a landowner entitled to an interest in the Cell cannot be located. The public notice requires advertisements in the newspaper and writing to the last known address, and subject to the approval of the Minister for Planning, after six months Council may utilise the funds in the manner described in this clause. This clause has been amended to expand the public notification requirements to include an advertisement in a local, state or national newspaper, writing by registered mail to their last known address and placing information on the City's website.

It is recommended that the above be formalised by amending DPS 2 to clarify this approach to ensure a consistent and equitable return of excess funds for all Cells.

Refer Point b) of Amendment 185 to DPS2.

## 3. Charging of interest on deferred contributions

The City often receives requests from landowners to defer contributions under Clause 9.10.8 of DPS 2 and has on numerous occasions agreed to clear conditions of subdivision subject to:

- The payment of interest on deferred amounts in accordance with clause 9.10.9 of DPS2, which refers to interest being paid (6%) as previously pursuant to Section 142 of the *Supreme Court Act 1935 (and associated Regulations)*;
- The landowner and the City entering into a Deed of Agreement and an absolute caveat being lodged over portion of the subdividers land to secure the liability; and
- Payment is made within 12 months of the execution of the Deed (plus interest).

Clause 9.10.9 allows Council to suspend or waive interest or any part thereof if satisfied that it would be fair and equitable to allow such as request. Administration has not previously supported such a request because the waiving or suspending of interest may be inequitable to other contributing landowners.

It has now been identified that Clause 9.10.9 of DPS 2 refers to the payment of interest on outstanding contributions being charged in accordance with *Section 142 of the Supreme Court Act*, which was repealed in 2004.

To maintain consistency with previous agreements and the original requirement of DPS2, Council is to determine whether it is appropriate to replace reference to *Section 142 of the Supreme Court Act 1935* with the *Civil Judgement Enforcement Act (2004)* to enable interest to be charged (6%) pursuant to this Act and the associated *Regulations (2005)*. In this regard, it is noted that both of these Acts relate to interest payable on a judgement debt rather than an interest charge on an outstanding contribution liability. The Regulations currently specifies the rate of interest for the purposes of the Act in Section 8(1) (a) to be 6.00% per annum, which is consistent with the previous agreements with landowners and the previous *Section 142 of the Supreme Court Act 1935*.

Refer Point c) of proposed Amendment 185 to DPS2.

#### 4. Delegation to Administration of a number of Part 9 - DCP operational requirements

Administration has identified that there are certain operational decisions in Part 9 of DPS2 that are not able to be delegated as these are specifically defined as a Council decision. This may be an unintended consequence embedded in the drafting of DPS2 but it cannot be interpreted differently until such time that DPS2 is amended to replace, where appropriate, the term "Council" with "local government" to enable those discretionary operational matters to be capable of future delegation. This change is only being proposed for that section of the scheme (Part 9) that relates to the East Wanneroo Cells and will not affect the other sections of DPS2.

Refer Point d) of proposed Amendment 185 to DPS2.

### **Comment**

A range of amendments to DPS2 are being recommended to improve the City's management of DCP's and to address the issues identified in this report, as depicted below.

#### 1. Closure of a Cell prior to full development

The provisions of DPS 2 do not currently provide adequate clarity on how to close a cell prior to the development of all land, should the need arise.

If Council agrees to close a Cell prior to full development, it may raise questions around fairness and equity because the landowners who have not yet developed in the Cell would not be required to make a developer contribution. The counter argument is that the closure of the Cell would also mean that any surplus Cell funds could be returned to contributing landowners. Administration is recommending this option to address the likelihood that some landowners may never develop and to enable the City to mitigate the ongoing liabilities of managing the Cells for an indefinite period. Further, the relevance of the infrastructure may diminish over time to the point where contributions charged on a landowner may not have a direct relationship or relevance (nexus) to the infrastructure due to asset dilapidation or replacement. It should be noted that draft SPP 3.6 indicates that a DCP should have a specified operation period to ensure the relevance of the infrastructure being funded by the contributing landowners. The East Wanneroo cost sharing arrangements do not specify an end date and therefore it is necessary to consider an appropriate mechanism to finalise and close the DCP.

On this basis an amendment is recommended to clause 9.13.3 to allow Council to consider the closure of a Cell subject to certain criteria, including that the Cell is at least 90% developed, the major items of infrastructure have been completed or are substantially complete and adequate funds are have been retained by the City to complete the remaining Cell works. In this regard, the closure of a cell would require a thorough review of the outstanding works estimates, consideration for financial impacts and risk levels to inform Council in making this decision.

2. Return of excess funds when a Cell is closed

The methodology for returning excess funds in DPS2 results in only some contributing landowners receiving a return of excess funds based on the number of lots created; and excludes all landowners that contributed for either group housing sites or commercial centres. It is recommended that clause 9.13.3 be amended to apportion the excess return based on the total value of the contributions received. This is the same approach as Council adopted when funds were returned to the Cell 1 landowners as part of a Tranche 1 payment.

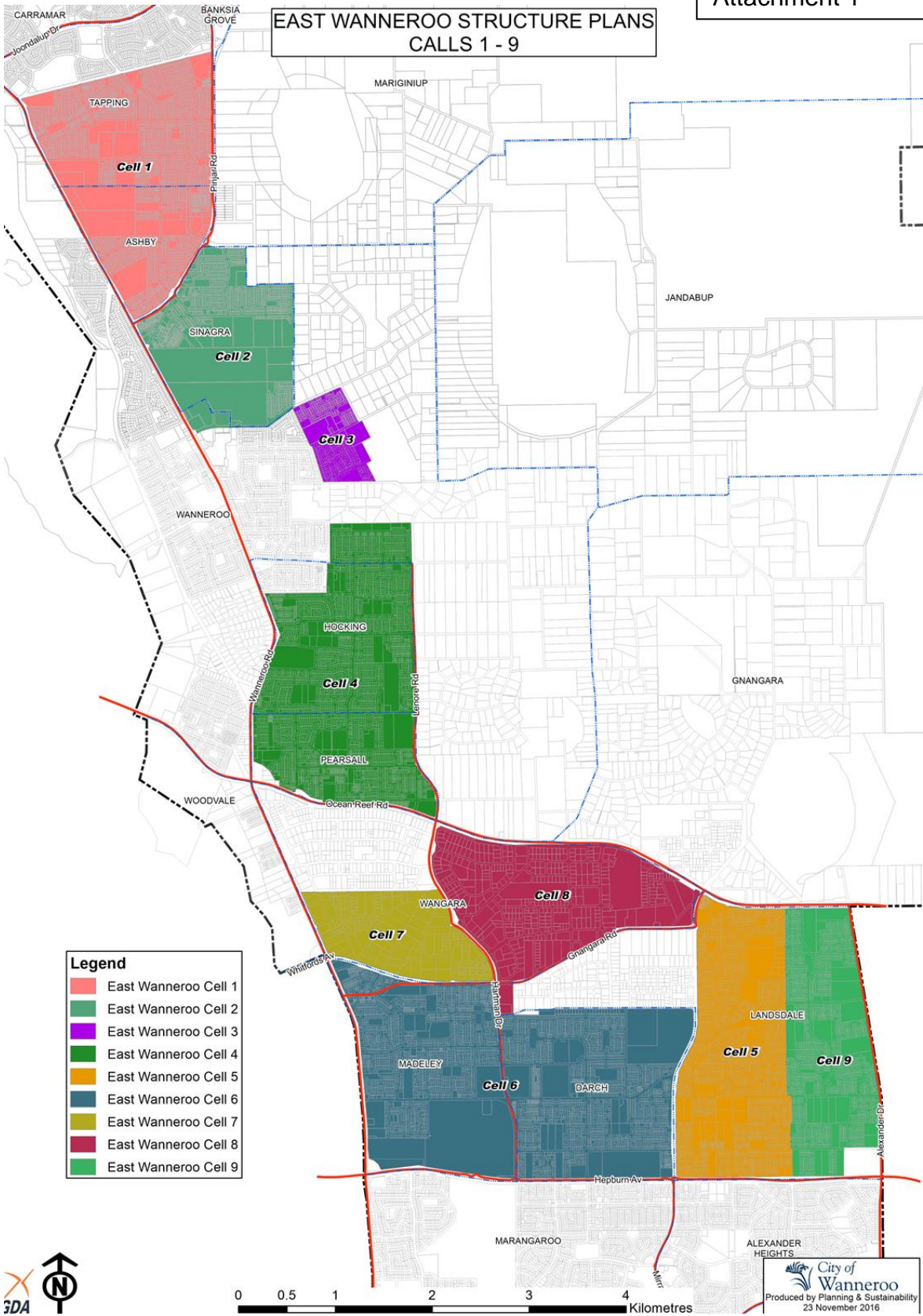
3. Charging of interest on deferred contributions

To maintain consistency with existing deeds and the original intent of DPS2, it is recommended that Clause 9.10.9 of the scheme be amended to refer to the *Civil Judgement Enforcement Act (2004)* and the associated *Regulations*.

4. Delegation to Administration of a number of Part 9 - DCP operational requirements.

To enable delegation of certain operational aspects of DCP management to the Chief Executive Officer or the CEO's delegate, references to "*Council*" in Part 9 of DPS2 are recommended to be amended to "*Local Government*" and that upon gazettal of the scheme amendment, Administration will pursue delegation (and sub-delegation) through a subsequent report to Council for consideration. Until this occurs, Council has no ability to delegate any such function and Administration will be required to refer a range of DCP operational decisions to Council in the form of a regular report to authorise various operational actions.

### EAST WANNEROO STRUCTURE PLANS CALLS 1 - 9





## TEXT MODIFICATION FORM

### PLANNING AND DEVELOPMENT ACT 2005

#### CITY OF WANNEROO

#### DISTRICT PLANNING SCHEME NO. 2 - AMENDMENT NO. 178

The City of Wanneroo under and by virtue of the powers conferred upon it in that behalf by the Planning and Development Act 2005 hereby amends the above local planning scheme by.

- a) Replacing Clause 9.13.3 with the following.

*9.13.3 In the event that upon the subdivision, development or strata subdivision of all the land in the Cell, or closure of a Cell in accordance with clause 9.13.4 and the Infrastructure Contributions received by the Local Government exceeds the amount necessary to complete the Cell Works and meet all of the Cell Costs, the amount of such excess will be distributed amongst the owners who made Infrastructure Cost payments to the Cell Account in accordance with sub clause 9.6.3.*

*The amount of any excess that an owner may be entitled to receive shall be in the same proportion to the total value of contributions paid by the landowner to the total value of the contributions received in a Cell. The amount payable to an owner under this clause shall be reduced by the amount of any shortfall in the payments made by that owner to their assessed Infrastructure Costs.*

*If an owner or other person or persons, corporation or other legal entity entitled to an interest in a Cell cannot be located by the Local Government after the giving of public notice by way of an advertisement in a local, state or national newspaper circulating in the area on at least two occasions, writing by registered mail to their last known address as shown in the Local Government records and on the City's website and no request for a claim is received by the Local Government within a period of six months from a decision being made by the Local Government to distribute excess funds, that owner's proportion of the surplus funds may be expended, subject to the approval of the Minister of Planning, either towards further improvements and facilities within the Cell or transferred to the Cell Account of an abutting Cell where insufficient funds will be received to complete Cell Works that are common to both Cells and thereafter such an owner shall have no claim in respect to such money.*

- b) Adding a new Clause 9.13.4, as per the following.

*9.13.4 - The Local Government may, subject to the approval of the Western Australian Planning Commission, close a cell prior to the development of all the land in the Cell as defined in clause 9.13.3, providing.*

- The developable land within a Cell is more than 90% developed;*
- The remaining Cell Works have been accurately estimated to the satisfaction of the Local Government;*
- Where all major infrastructure in the Cell has been completed or is substantially complete, and all major POS has been acquired, to the satisfaction of the Local Government;*

- *Adequate funds have been allocated to complete the Cell works (including administration costs); and*
- *All major land acquisition for Cell Works has been finalised.*

c) Amending Clause 9.10.9 of DPS2 to replace reference to *Section 142 of the Supreme Court Act* and insert *the Civil Judgement Enforcement Act (2004) and the associated Regulations*.

d) Amend all sections of Part 9 of DPS2 by replacing reference to 'Council' with '*Local Government*'.

**COUNCIL ADOPTION**

This Complex Amendment was adopted by resolution of the Council of the City of Wanneroo at the Ordinary Meeting of the Council held on the 30<sup>th</sup> day of June, 2020.

.....  
MAYOR

.....  
CHIEF EXECUTIVE OFFICER

**COUNCIL RESOLUTION TO ADVERTISE**

By resolution of the Council of the City of Wanneroo at the Ordinary Meeting of the Council held on the 30<sup>th</sup> day of June, 2020, proceed to advertise this amendment.

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MAYOR

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CHIEF EXECUTIVE OFFICER

**COUNCIL RECOMMENDATION**

This Amendment is recommended for \_\_\_\_\_ by resolution of the City of Wanneroo at the Ordinary Meeting of the Council held on the \_\_\_\_\_ day of \_\_\_\_\_ and the Common Seal of the City of Wanneroo was hereunto affixed by the authority of a resolution of the Council in the presence of:

.....  
MAYOR

.....  
CHIEF EXECUTIVE OFFICER

**WAPC RECOMMENDATION FOR APPROVAL**

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DELEGATED UNDER S.16 OF  
PD ACT 2005

DATE .....

Approval Granted

.....  
MINISTER FOR PLANNING, LANDS AND  
HERITAGE

DATE .....