



Our Ref

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Your Ref

27 May 2019

Mr Philip St John  
Chief Executive Officer  
City of Fremantle  
PO Box 807  
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*By email: PhilipSJ@fremantle.wa.gov.au*  
*cc: glend@fremantle.wa.gov.au*

Dear Philip

**City of Fremantle v Imago Holdings Pty Ltd & Anor: Lots 9, 10 & 123 High Street, Fremantle**

I am responding to the request to provide an explanation of the principal elements of the legal dispute between the City and Imago Holdings Pty Ltd (**Imago**) in the Supreme Court, and the current proceedings in the State Administrative Tribunal concerning the proposed bicycle parking structure.

**Background facts**

The road and footpath on the northern side of High Street, Fremantle, between Parry Street and Queen Street, have been widened for many years by an extra width of 5.87m. That includes the portion in front of the shopping centre commonly known as '142 High Street', which has an area of approximately 330m<sup>2</sup>.

As a bit of history, this road widening portion was vested in the Crown back in 1962, under the combination of a road widening By-law made in 1955, and the effect of s.364 of the *Local Government Act 1960*.

The City provided evidence in the Court proceedings that the vesting of the road widening portion in 1962 had been accepted by the owner of the land at that time, Mr WJ Hughes. Also there was no evidence of the vesting being challenged by the next two sets of owners of the shopping centre. Those three successive ownerships during which there was no challenge to the vesting, covered the period of 32 years from 1962 to 1994.

Unfortunately it appears that the vesting was not effectively recorded at the Titles Office, so that when Imago purchased the shopping centre land in 1994, because the road widening portion was still shown as part of the land on the certificates of title, Imago claimed that it was also the purchaser of the road widening portion for value, without notice of the vesting in the Crown, notwithstanding that the road widening portion had for many decades included road and footpath pavements with underground drainage and other utility services



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constructed on and in it, together with a bus stop, a public telephone box and postal pillar box, as well as street trees and street furniture.

This issue came to a head in late 2017 when Imago claimed that it wished to construct a bicycle parking structure on the road widening portion. The City at all relevant times has taken the position that it is not opposed in principle to a bicycle parking structure being erected on the land, provided that issues as to design, location and materials are resolved. When the proceedings concerning the bicycle parking structure were commenced in separate proceedings in the State Administrative Tribunal (SAT), the issue as to the road widening portion being Crown land surfaced. That was when the SAT, not the City of Fremantle, referred the matter of ownership to the Supreme Court to be resolved.

### **Supreme Court proceedings**

The above was the background to the Supreme Court proceedings which have been running for the last 12 months, between on the one hand the City of Fremantle which claims the land is part of High Street and as such Crown land, and on the other hand Imago as owner of the 142 High Street shopping centre, which claims the land as owner by reason of the land remaining on its certificates of title for the lots on which the shopping centre is located.

The Judge who dealt with the Supreme Court action, in his 18 April 2019 decision, recognised the vesting of the road widening portion in the Crown in 1962 as claimed by the City, but upheld the claim of the shopping centre owner that because the land remained in the original certificates of title, the new 1994 owner of the shopping centre (Imago), by purchasing the land without notice of the Crown's ownership of the road widening portion, acquired an indefeasible title to that portion.

### **Appeal**

The City is concerned that the decision is subject to one or more errors, and has commenced an appeal to the Court of Appeal. The City amongst other things relies on the exception to indefeasibility applicable to public rights of way, that includes roads.

The appeal to the Supreme Court of Appeal and the proceedings in the SAT are ongoing. We will shortly be filing the Appellant's Case in the Court of Appeal proceedings. The proceedings in the SAT concerning the bicycle parking structure have been referred to mediation.

Yours sincerely



**Denis McLeod**

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