



Our Ref

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Your Ref

12 April 2017

Mr Phil Melling
Director Development & Community Services
City of Greater Geraldton
PO Box 101
Geraldton WA 6530

By email: phil@m@cgg.wa.gov.au

Dear Phil

Point Moore Residential Onsite Effluent Treatment and Disposal Study Report

Thank you for your instructions in your letter dated 4 April 2017, emailed to me on 6 April 2017.

You have sought my advice on 6 questions that relate to the City's concerns arising out of a series of meetings that the City held on 23 February 2017 with representatives from the Department of Health, Department of Environment, LGIS, Water Corporation and Department of Water. You informed me that the discussions at those meetings centred on the GHD report dated November 2016 entitled 'Point Moore Residential Onsite Effluent Treatment and Disposal Study' (which you have referred to as the **ROETD Study**).

1. Question 1 – the City's enforcement obligations

1.1 Details of question

Your first question is –

'The Department of Health provided the advice that Section 26 of The Health Act 1991 states that every Local Government is directed to carry out within its district the provisions of this Act and the Regulations, Local laws, and Orders made thereunder. Could you please provide clarification as to, if the City and/ or its officers are bound to act in regards to the above-mentioned section of the Health Act and Regulations regarding the enforcement of failing septic systems in the Point Moore area? If no enforcement action is taken, can the Local Government be held criminally liable now and into the future for not exercising that right to act (assuming there are no public health risks and the lessee has taken steps to make good the system, with no application to the City)?'



Stirling Law Chambers
220 Stirling Highway
Claremont WA 6010
Tel (08) 9383 3133
Fax (08) 9383 4935
Email: mcleods@mcleods.com.au

1.2 Relevant legislative provisions

It appears that the reference in your question to ‘Section 26 of The Health Act 1991’ was intended to be a reference to section 26 of the *Health (Miscellaneous Provisions) Act 1911 (Health (MP) Act)*. The latter section relevantly states –

‘Every local government is hereby authorised and directed to carry out within its district the provisions of this Act and the regulations, local laws, and orders made thereunder ...’.

The nature and scope of a local government’s powers and duties under section 26 need to be considered in the context of the Health (MP) Act as a whole, including section 35 which provides for the actions that may be taken where a local government is in ‘default’ of its obligations and section 37 which allows the Minister for Health to intervene.

Section 35(1) and (2) states –

- ‘(1) Where in the opinion of the Chief Health Officer any local government has made default in enforcing or carrying out or complying with any provisions of or in the exercise of any power conferred by this Act, or any local law or regulation thereunder, or of any order of the Chief Health Officer, which it is the duty of such local government to enforce, carry out, comply with, or exercise, the Chief Health Officer may make an order limiting a time for the performance of the duty of the local government.
- (2) If such duty is not performed within the time limited in such order, the performance of such duty may be enforced by writ of mandamus, or the Chief Health Officer may appoint some person to perform such duty, and shall order that the expenses of performing the same, together with a reasonable remuneration to the person appointed for superintending such performance, and amounting to a sum specified in the order, together with the costs of the proceedings, be paid out of the funds by the local government in default; and any order made for the payment of such expenses and costs may be removed into the Supreme Court, and be enforced in the same manner as if the same were an order of such Court’.

Section 37 empowers the Minister for Health –

- (1) to exercise any of the ‘powers, rights, and authorities’ that are vested by the Act, regulations or local laws in the Chief Health Officer or a local government (among others); and
- (2) to give orders or directions to the Director Public Health, a local government or employee of a local government (among others) in relation to those powers, rights and authorities.

Under section 367 of the Health (MP) Act, all expenses incurred by the Chief Health Officer on behalf of a local government, or for which a local government is liable under the Act, are recoverable as a debt due to the Crown (ie the State).

1.3 Scope of the City's obligations

The 'default' provisions of section 35 of the Health (MP) Act apply in situations where 'it is the duty' of a local government to enforce or carry out or comply with, or to exercise any power conferred by, a provision of the Act, the regulations or a local law, or any order of the Chief Health Officer.

Whether a particular legislative provision imposes a duty on a local government to enforce or carry it out or comply with it or, where it confers a power, it also imposes a duty on a local government to exercise that power, depends on the terms of that legislative provision and how it is properly construed. Not all provisions are of that nature. For example, many powers under the Health (MP) Act are expressed in discretionary terms and enable a local government to determine for itself, having regard to the circumstances of a particular case, whether to exercise the power. Enforcement powers, in particular, are rarely mandatory. They enable the relevant enforcement authority (such as a local government) to exercise a wide discretion in determining whether they should be exercised in a particular case (and, if so, how they should be exercised).

The first step in ascertaining the City's legal position in relation to the legislative provisions 'regarding the enforcement of failing septic systems in the Point Moore area' (as described in your question) is to identify the particular legislative provisions.

Your letter refers to sections 99, 135 and 354 of the Health (MP) Act.

Before dealing specifically with those sections of the Health (MP) Act, I note that your letter also refers generally, as does the ROETD Study (at 4.1-4.4), to –

- (1) the current Draft Country Sewerage Policy; and
- (2) the *Health (Treatment of Sewage and Disposal of Effluent and Liquid Waste) Regulations 1974 (Treatment of Sewage Regulations)*.

The ROETD Study also refers to the Australian Standard AS1547:2002 (On-site domestic wastewater management). If there are particular provisions of the Treatment of Sewage Regulations (or of the Draft Country Sewerage Policy or AS1547:2002) that you would like me to consider, please let me know.

Your reference to sections 99, 135 and 354 of the Health (MP) Act is in the following paragraph in your letter –

'It is the City's understanding that it is not able to approve a non-complying system under the Regulations. The Department of Health have stated that if a property is non-complaint with Section 99 and 135 of the Health Act and any part of the Regulations an improvement order must be issued in accordance with section 354

Point Moore Residential Onsite Effluent Treatment and Disposal Study Report

of the Health Act 1911 to bring the system into compliance. As the system cannot be made to comply with the Act and Regulations the only option for the lessee is to vacate the premises leaving it either vacant and/or demolish after notices are issued’.

Section 99 of the Health (MP) Act states –

‘99. Houses to have sanitary conveniences

- (1) No person shall erect, rebuild, maintain, or use any house, or keep or use or suffer to be kept or used any public place or private place without providing for the same sanitary conveniences, and also bathroom and laundry and cooking facilities, to the number prescribed, constructed and equipped in accordance with the local laws of the local government.
- [(2) deleted]
- (3) If it appears to the local government to be advisable that any house, public place, or private place should be provided with an apparatus for the treatment of sewage, it may cause written notice to be served on the owner of the house or place requiring him within a time specified in the notice to provide and install such apparatus for and in connection with such house or place, and such owner shall comply with such notice, and shall observe in connection with the provision and installation of the apparatus the provisions of section 107 and of the relative local laws.
- (4) A person who neglects or refuses to comply with the requirements of a notice served on him under subsection (3) commits an offence.
- (4a) When a person neglects or refuses to comply with the requirements of a notice served on him under subsection (3), the local government may do the work required by that notice to be done and provide the material or apparatus required to be provided to carry out the requirements of the notice in respect of which default has been made, and may recover from the person so in default the expense incurred by it in so doing.
- (5) Such expenses, until paid, shall be and remain a charge upon the land, notwithstanding any change that may take place in the ownership thereof’.

The obligation under section 99(1) is based on ‘the local laws of the local government’. On the information that you have provided, it is not apparent whether, and if so how, this would be relevant for the purposes of the dwellings on the Point Moore site.

Section 99(3) is expressed in terms that gives the City a wide discretion in determining whether a written notice should be served in a particular case. In the exercise of that discretion it would be relevant to consider the terms of section 107(1) of the Health (MP) Act which are –

Point Moore Residential Onsite Effluent Treatment and Disposal Study Report

‘The local government shall provide that all drains, sanitary conveniences, and any apparatus for the treatment of sewage within the district are constructed and kept so as not to be a nuisance or dangerous or injurious to health’.

The remainder of section 107 deals with the construction or installation of an apparatus for the treatment of sewage.

Section 135 of the Health (MP) Act states –

‘135. Dwellings unfit for habitation

- (1) Any local government may, of its own motion, and shall, when required by order of the Chief Health Officer by notice in writing, declare that any house, or any specified part thereof, is unfit for human habitation.
- (2) The notice may direct that such house or part thereof shall not, after a time to be specified in the notice, be inhabited or occupied by any person.
- (3) The notice shall be affixed to some conspicuous part of the house, and a copy of such notice shall be served upon the owner or occupier thereof’.

Under section 135, the City would be required to declare that a house is unfit for human habitation if it is required by order of the Chief Health Officer – but otherwise it would have a discretion whether or not to make a declaration of that type, even if it was satisfied that the house was in fact unfit for human habitation.

Section 354 of the Health (MP) Act deals with how notices issued under the Act (including notices under section 135) are to be served.

For the purposes of the operation of section 26 of the Health (MP) Act, the only relevantly material ‘duty’ on the City arising from sections 99, 135 and 354 of the Health (MP) Act is the duty to ‘provide that ... any apparatus for the treatment of sewage are ... kept so as not to be a nuisance or dangerous or injurious to health’.

In relation to the situation that you have described as ‘failing septic systems in the Point Moore area’, it is not apparent to me (from the ROETD Study or otherwise) whether, and if so to what extent, any of the ‘failing septic systems’ are ‘a nuisance or dangerous or injurious to health’. Nor, on the information available to me, would the City be able (let alone required) to exercise the power under section 135 to declare a particular house in the Point Moore area ‘unfit for human habitation’.

On this basis, in relation to the ‘failing septic systems’ in the Point Moore area, the City does not have any duty, within the terms of section 35 of the Health (MP) Act, to enforce or carry out or comply with, or to exercise any power under, any of the provisions under sections 99, 135 or 354 of the Health (MP) Act.

If, perhaps after obtaining further information from the Department of Health, you identify any other provisions under the Health (MP) Act or the Treatment of Sewage Regulations

that may impose a duty on the City in relation to the 'failing septic systems', please let me know.

1.4 Consequences of breach of City's obligations

If a situation were to arise where the City failed to act in accordance with an identified 'duty' to enforce or carry out or comply with any provision of, or the exercise of any power conferred by, the Health (MP) Act, the Treatment of Sewage Regulations or a local law, or any order of the Chief Health Officer, it would be open to the Chief Health Officer or the Minister for Health (or both) to take action under section 35 and section 39 respectively. In essence, this would involve either the Chief Health Officer or the Minister for Health ordering or directing the City to take action, or making other arrangements for the action to be taken (at the City's cost). I am not aware of any basis on which the City could be held criminally liable for a breach of that duty.

2. Question 2 - 'owner' of Point Moore land

Your second question is –

Provide advice that if the City has to act and an officer issues an order on a property for a non-compliant system and/or an unfit for habitation order under the Health Act (Miscellaneous Provisions) Act 1911, to whom should the order be issued on? This specifically relates to the Point Moore situation where the land is owned by the Crown with a management order in favour of the City. The home "owner" is leasing the land upon which the dwelling sits, but "owns" the dwelling'.

Some notices under the Health (MP) Act are required to be served on the 'owner'; others may be served on the 'owner' or the 'occupier' or both. Section 3(1) of the Health (MP) Act defines 'owner' to mean –

'the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack-rent'.

Relevant for the purposes of that definition, section 3(1) defines 'rack-rent' to mean –

'... rent which is not less than two-thirds of the full net annual value of the property out of which the rent arises; and the full net value shall be taken to be the rent at which the property might reasonably be expected to let from year to year, free from rates and taxes and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain the same in a state to command such rent'.

As I understand the position, the City receives the lease payments made by each of the lessees of sites within the Point Moore area. Even if the amount of those lease payments does not constitute 'rack-rent', as I understand the position, the City is entitled to the lease payments and would receive the rack-rent 'if such premises were let at a rack-rent'.

Point Moore Residential Onsite Effluent Treatment and Disposal Study Report

It follows that, for the purposes of the Health (MP) Act, the City is the 'owner' of the leased sites within the Point Moore area.

You say that a lessee 'owns' the dwelling on the leased site. At least some of the current leases contain provisions allowing the lessee to take down, remove and carry away the buildings and other improvements comprised in the leased premises within 28 days of the end of the lease (otherwise they become the property of the City).

In this situation, it may be thought that the lessee of a Point Moore site on which the house is erected is 'the owner of the house' within the meaning of that expression where it is used in the Health (MP) Act, such as in section 99(3). However, that interpretation would not be consistent with the definition of 'owner' in section 3(1). Nor would it be consistent with the definition of 'occupier' which is defined in section 3(1) of the Health (MP) Act to include –

'a person having the charge, management, or control of premises, and in the case of a house which is let out in separate tenements, or in the case of a lodging-house which is let to lodgers, the person receiving the rent payable by the tenants or lodgers, either on his own account or as the agent of another person; and in the case of a vessel, the master or other person in charge thereof; the term also includes any person in occupation of the surface of any lands of the Crown, notwithstanding any want of title to occupy same'.

In my view, a lessee of land within the Point Moore area who, under the terms of the lease, is entitled to take down, remove and carry away the buildings and other improvements comprised in the leased premises would be the 'occupier', not the 'owner' of the buildings and other improvements comprised in the leased premises.

Therefore, where under the Health (MP) Act –

- (1) a notice is to be served on the 'owner' of the building or premises, the notice should be served on the City itself; and
- (2) a notice is to be served on the 'occupier' of the building or premises, the notice should be served on the relevant lessee.

3. Question 3 – tenure status of Point Moore land

Your third question is –

'In relation to an option to provide reticulated sewer to the Point Moore area Water Corporation stated in the meeting that due to the Point Moore area being a single Crown Reserve that they would only install one connect in point for the whole area. It would be the City's responsibility as the manager of the Crown Reserve to install the infrastructure to permit connection to each property. Could you please provide an opinion on the tenure status at Point Moore given that the land is a Crown Reserve (Reserve No.25459) which has an overall Management Order but additionally, each lease area also has an individual Qualified Certificate of Crown Land Title allotted as per the attached. Water Corporation have also taken a similar

stance on the water services to the area advising that if the water reticulation system requires replacement (due to its age) they will again only provide a single connect point, the City being responsible for the water system at Point Moore. The City is attempting to determine the Qualified Certificate of Crown Land Title status against that of a freehold lot'.

As discussed with you, Fiona Grgich is undertaking property title searches and will respond separately to you in relation to this question.

4. Question 4 – duty to notify leaseholders

Your fourth question is –

‘Provide advice on the obligation on the City for notifying leaseholders of the potential for them to vacate their property should the septic system fail’.

There is no legal obligation on a local government to notify a person about the law or its potential administration or enforcement. In part, this is because there is a legal presumption that each person knows, or should know, what the law is, including its administration and enforcement.

The potential for a lessee to be required to vacate his or her leased premises if the septic system fails arises as a result of the terms of the Health (MP) Act and associated legislation, and the administration and enforcement of those terms. In this situation, there is no legal obligation on the City to notify lessees of the potential for them to vacate their property if the septic system fails.

However, once you have clarified the legal position with the Department of Health, there may be good governance grounds for the City to notify lessees of the legal position that would apply if the septic system fails.

5. Question 5 – duty to inform sublessees

Your fifth question is –

‘Provide advice on obligation of the City to inform sub-lessees (renters/ short term holiday accommodation) regarding the potential public health risks of the area’.

My advice to the City on 11 January 2017 (at 3.1-3.4) dealt with the City’s general duty of care obligations and the application of those obligations in addressing health risks associated with the Point Moore land, as identified in the ROETD Study.

In those circumstances, I recommended that one of the measures that the City should consider was to ensure that, as far as practicable, lessees of the Point Moore land (and others) are aware of all information available to the City that is relevant to the health risks and that they are given appropriate opportunities to assess those risks and determine their own responses to those risks.

Point Moore Residential Onsite Effluent Treatment and Disposal Study Report

I expect that there would be significant practical difficulties in the City attempting to communicate with others who proposed to rent, or are renting, leased premises as beach cottage accommodation. Under the terms of at least some of the current leases, the lessees are entitled to 'sublet the leased premises for the purpose of use by persons as beach cottage accommodation'. No consent of, or even notice to, the City is required for these purposes.

In these circumstances, given the relatively low level of health risk as identified in the ROETD Study, I do not think that it would be reasonable or necessary for the City to attempt to inform each person who proposes to sublet, or is subletting, one of the leased premises of the potential public health risks to the area. However, I think that it would be prudent for information about the health risks associated with the Point Moore land, and for access to the ROETD Study, to be publicly available – such as from the City's website.

6. Question 6 – liability for subletting

Your sixth question is –

'Provide advice on the liability on the City by allowing sub-leases/short to long-term rentals to occur'.

As I understand the position, under the terms of the current leases in respect of the Point Moore land –

- (1) a lessee is entitled to sublet the leased premises for the purpose of use by persons as beach cottage accommodation without obtaining the approval of, or giving notice to, the City; and
- (2) a lessee cannot assign or transfer the lease without the consent of both the City and the Minister for Lands.

I also understand that the City does not intend to grant new leases, or renew any leases, after the current leases expire.

In these circumstances, it is not apparent how the City would be in a position of 'allowing sub-leases/short to long-term rentals to occur'. Please let me know if my understanding of the position is not correct or if there are any other matters you would like me to consider.

7. Conclusions

In my view, on the information that you have provided and for the reasons that I have set out –

- (1) in relation to the 'failing septic systems' in the Point Moore area, the City is not under any legal obligation to take enforcement action under any of the provisions in sections 99, 135 and 354 of the Health (MP) Act;
- (2) if, in relation to the 'failing septic systems' in the Point Moore area, the City –

Point Moore Residential Onsite Effluent Treatment and Disposal Study Report

- (a) were under a duty to take enforcement action under the Health (MP Act) or subsidiary legislation; and
- (b) failed to take that enforcement action,

it would be open to the Chief Health Officer or the Minister for Health to order or direct the City to take action (or arrange for someone else to take action and for the City to pay the costs);
- (3) I am not aware of any basis on which the City could be held criminally liable for failing to take enforcement action of that kind;
- (4) for the purposes of the Health (MP) Act (and the Treatment of Sewage Regulations), including the services of notices –
 - (a) the City is the ‘owner’ of each of the Point Moore sites and the buildings on those sites; and
 - (b) each lessee is an ‘occupier’ of the leased premises and any building on those premises;
- (5) there is no legal obligation on the City to notify the lessees of a particular property of the potential for them to vacate the property if the septic system for that property fails but, once the City has clarified the legal position with the Department of Health, there may be good governance grounds for the City to notify lessees of a legal position that would apply if the septic system fails; and
- (6) it would not be necessary for the City to attempt to inform each person who proposes to sublet, or who is subletting, one of the leased premises of the potential public health risks to the area – but it would be prudent for information about those health risks to be publicly available, such as from the City’s website.

I trust that this is sufficient for your present purposes but please let me know if you need anything further.

Yours sincerely



Neil Douglas
Partner

Contact: Neil Douglas
Direct line: 08 9424 6210
Email: neil.douglas@mcleods.com.au