



11.1 – Urgent Business - Invalidity Complaint Determination regarding Costs (SJ2762)

Responsible Officer:	Manager Governance and Strategy
Senior Officer:	Chief Executive Officer
Disclosure of Officer's Interest:	No Officer involved in the preparation of this report has an interest to declare in accordance with the provisions of the <i>Local Government Act 1995</i> .

Authority / Discretion

Executive	The substantial direction setting and oversight role of the Council such as adopting plans and reports, accepting tenders, directing operations and setting and amending budgets.
-----------	---

Report Purpose

The purpose of this report is to enable Council to resolve a position in relation to costs in the matter of the invalidity complaint into the 2021 local government ordinary election for the North Ward, to be presented to the Court, noting that the final determination will be made by the Court.

Relevant Previous Decisions of Council

Special Council Meeting – 15 June 2022 - SCM014/06/22 - COUNCIL RESOLUTION

That Council:

1. *RESOLVES a position that the question of the awarding costs in the Invalidity Complaint into the 2021 Local Government Election in the North Ward be determined following submissions by the parties to the Magistrate after a ruling on the Invalidity Complaint is made.*
2. *REQUESTS the Chief Executive Officer make a request to the Court for any available transcripts.*
3. *REQUESTS the Chief Executive Officer provide information to Council regarding explanations for Court adjournments when a report is presented to Council on consideration of costs.*

Special Council Meeting – 11 July 2022 - SCM017/07/22 - COUNCIL RESOLUTION

That the Council DEFER the matter to the July Ordinary Council Meeting.

Contact Us

Enquiries

Call: (08) 9526 1111
Fax: (08) 9525 5441
Email: info@sjshire.wa.gov.au

In Person

Shire of Serpentine Jarrahdale
6 Paterson Street, Mundijong WA 6123
Open Monday to Friday 8.30am-5pm (closed public holidays)





Background

On 1 July 2022 the Court of Disputed Returns, constituted by the Magistrates Court of Western Australia, declared the result of the October 2021 Serpentine Jarrahdale Council election for the North Ward to be invalid.

In the orders made by the Court, the Court determined that liberty was to apply in respect of costs within 21 days.

Community / Stakeholder Consultation

Policy Concept Forum

Meeting Date	4 July 2022
Councillors in Attendance	Cr Rich, Cr Atwell, Cr Byas, Cr Duggin, Cr Strange

Statutory Environment

Regulation 87 of the *Local Government (Election) Regulations 1997* (the Election Regulations) states that:

- (1) *The Court can make any order as to costs that the magistrate thinks just but an order cannot be made for the payment of costs by a candidate other than the person who made the invalidity complaint unless it is proved to the Court that the candidate, or the candidate's agent, has contravened Part 4 of the Act.*
- (2) *An order for costs can be enforced as an order of a court of summary jurisdiction.*

Part 4 of the Act relates to the conduct of elections and includes 12 divisions, including, but not limited to, Division 11 which relates to Electoral Offences. The legislation only permits the Magistrate to make an order related to the Court costs. There are no provisions in the Act enable the Court to make an order related to the costs of the previous election or the fresh election.

Comment

At the 11 July 2022 Special Council Meeting, Council resolved to defer consideration of the question of costs to enable clarification of information provided to Council on the reason for the 5 May 2022 adjournment of the Court.

In the Officer's report a chronological summary of the reasons for adjournment was provided per Council's previous requests provided by the Shire's lawyers in a letter dated 24 June 2022 (**CONFIDENTIAL attachment 1**). The entry for the 5 May 2022 hearing in both the Shire's lawyer and Officer Report stated:

"On 5 May 2022, the parties attended, and Mr Singh was available, but the Court was not able to find an orderly, and the Court was bound to follow a policy which precluded the possibility of any hearing, where there is no orderly available, if any person appearing at the hearing was not a legal practitioner. As no orderly had been found by approximately the time for the luncheon adjournment, the matter was adjourned to 2 June 2022 without any further evidence being taken."



Following the meeting on 11 July 2022, Officers sought clarification from the Shire lawyers who attended the 5 May 2022 hearing, which was conducted behind closed doors, with the self-represented parties attending via telephone, owing to unavailability of a Court orderly on the day.

The Shire's lawyers advised in an email dated 12 July 2022 (**CONFIDENTIAL attachment 2**) that:

"I believe that at the time the Court convened, in view of the unavailability of an orderly, the options at that time were:

- 1. Continuing to wait for the availability of an orderly; or*
- 2. Adjourn the hearing to a specified later date.*

I believe that in connection with the first option, counsel for Mr Singh pointed out that at that time it was approximately 12 midnight in New York where Mr Singh at that time was located, and if there was to be a hearing even later than that, then the potential prejudice to Mr Singh, due to the lateness of the hour where he would be giving his video evidence, could be significant."

In the 12 July 2022 correspondence, the Shire's lawyer goes on to reiterate their view that a finding of costs against any candidate at the 2021 ordinary election in the North Ward would be unlikely, owing to the requirement in Regulation 87 of the *Local Government (Election) Regulations 1996*. This has been the consistent position of the Shire's lawyers, as reflected in Officer reports regarding the matter.

Options and Implications

Option 1

That Council:

1. RESOLVES a position that the Shire's Court costs be met by the persons named in the written reasons for decision as being responsible for the theft of mail; and
2. REQUESTS that the Chief Executive Officer present this position to the Court of Disputed Returns and in the event that the Court does not concur, that the position of the State Solicitor's Office is presented.

Option 2

That Council:

1. RESOLVES a position that each party meets its own costs in relation to this matter; and
2. REQUESTS that the Chief Executive Officer present this position to the Court of Disputed Returns.

Option 1 is recommended.

Conclusion

As noted above, Officers recommended that Council commence an invalidity complaint as a result of the conviction for stealing mail, including ballot packages, during the 2021 local government election in the North Ward, with the Court determining that the election was invalid as a result of this theft. Officers now recommend that Council resolve a position that the Shire's costs be paid



by the persons named in the written reasons for decision as being responsible for the theft of mail.

Attachments (available under separate cover)

- **11.1 – CONFIDENTIAL - attachment 1** – Correspondence from McLeods Lawyers dated 24 June 2022 (IN22/13909)
- **11.1 - CONFIDENTIAL - attachment 2** – Correspondence from McLeods Lawyers dated 12 July 2022 (IN22/13908)

Alignment with our Strategic Community Plan:

Outcome 4.2	A strategically focused Council
Strategy 4.2.3	Provide clear strategic direction to the administration

Financial Implications

At the time of writing this report, the cost to the Shire of the invalidity complaint to date has been approximately \$83,798 (ex GST). This figure accounts to the period ending 31 May 2022.

Risk Implications

Risk has been assessed on the Officer Options and Implications:

Officer Option	Risk Description	Controls	Principal Consequence Category	Risk Assessment			Risk Mitigation Strategies (to further lower the risk rating if required)
				Likelihood	Consequence	Risk Rating	
1	The Court may look unfavourably on the request and result in a counter claim.		Financial	Possible	Minor	MODERATE	
2	Criticism from the community as a result of the Shire being required to meet its own costs despite the action being no fault of the Shire.		Reputation	Likely	Minor	MODERATE	



Continued

**Ordinary Council Meeting – 18 July 2022 – 11.1 –
Urgent Business – Invalidity Complaint
Determination regarding Costs (SJ2762)**

Voting Requirements: Simple Majority

Officer Recommendation

That Council:

1. **RESOLVES** a position that the Shire's Court costs be met by the persons named in the written reasons for decision as being responsible for the theft of mail; and
2. **REQUESTS** that the Chief Executive Officer present this position to the Court of Disputed Returns and in the event that the Court does not concur, that the position of the State Solicitor's Office is presented.