Our Ref: DF:M171953
Your Ref: FXD\M00290403F04843263

1 August 2017

Ms Felice D'Agostino
Norman Waterhouse
Level 15, 45 Pirie Street
Adelaide SA 5000

**By hand delivery**

**By Email : fdagostino@normans.com.au**

Dear Madam

**Section 270 - Black Point Land Revocation**

We act for Black Point Progress Association Incorporated in relation to the above matter.

Attached are submissions prepared by Mr Brian Hayes QC on behalf of our client for your consideration as part of your review of the Council's decision in relation to the above matter.

We would be grateful if you would please inform us of the outcome of your review when you have completed your review.

Yours faithfully
MELLOR OLSSON

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**Submissions of the Black Point Progress Association Inc.**

**to Norman Waterhouse, Lawyers**

**Appointed by the Yorke Peninsula Council**
**as its internal reviewer of Council decisions**

## History

1. When the land at Black Point was originally subdivided in the 1900s the developer was required by the Council to provide a reserve allocation over and above the statutory 12.5% required under the Legislation.
2. This requirement was against the background of a proposal for the freeholding scheme for Black Point then being promoted by the State Government. The reason for this "non-negotiable condition placed upon the developer" by the Council was because of the Council's strong desire to open the beach to the public and provide sufficient space and orderly breaks in the freeholding allotments so that the long linear nature of the shack environment would be broken and the area made more public friendly with car parking areas and public access.
3. Allotments 201, 202, 203 and 204 Black Point Drive, Black Point were allotments provided for the reserve requirement and allocation.
4. Under section 193 of the Local Government Act all local government land either owned by the Council or under the Council's care, control and management is classified as community land.
5. Under section 194 of the, Act the Council may revoke this classification, but

before doing so is required to prepare a report on the proposal containing the matters set out in sub-section (2) of section 194. The Council must also follow the relevant steps set out in its public consultation policy and after it has complied with that section of the Act and the policy, may submit the proposal and the report on all the submissions made on it, as part of the public consultation process to the Minister, who is then required to approve the revocation of the classification of the land as community land before it takes effect.

6. The Council has embarked on the steps necessary to revoke the classification of this land as community land and prepared a report in September 2016 which is headed Community Engagement Report. That report has a series of headings which include Purpose of the Report, Background, Reason for Proposal, Proceeds of Sale, and Property Details.

7. It appears that public notice was given pursuant to section 194(2)(b) of the Act of the proposed revocation of classification and in that notice it referred to "a detailed report in relation to the proposed revocation and future intentions of the land is available at the Yorke Peninsula Council offices and on its website." The report referred to in the notice available on the website is in fact, the report of September 2016 outlined above.

8. Pursuant to the notice and the community engagement report, the Council received 51 submissions from 38 individuals and a petition from 100 Black Point rate payers. Opposition to the proposed revocation was approximately 97% of the submissions as part of the community consultation.

9. At its meeting on 8 February 2017, the Council received a report from its

Director of Development services in relation to this matter. The Council was advised in that report that it must, before revoking the community land classification, make publicly available a report containing the matters prescribed in section 194(2)(a) of the Act. It appears that at a meeting of the Council on 14 September 2016, after considering reports from its Director of Development Services, it resolved to commence the community engagement process for the revocation of the classification. The Director's report to the Council states that the report required by the Act was prepared and made publicly available in accordance with and containing the matters prescribed in section 194(2)(a) of the Act.

10. The report goes on to state that community consultation in accordance with the community engagement policy of the Council, was undertaken which was a level 2 engagement process. The report in the same format and content (with two exceptions), was provided by the Council in relation to each allotment. However, in relation to the community engagement plan referred to in each of these reports for allotments 201 and 202, community engagement was stated to be at level 2, but in relation to allotments 203 and 204 it states that the community engagement was at level 3. In relation to each of the allotments it states that the consult was completed.

11. On 8 February 2017 it appears that Council released a document headed "Presentation of Key Issues and Council Comments" in relation to the submissions it had received pursuant to the public consultation. In this document it identified eight key issues.

12. The community engagement process was extended to provide an

opportunity for additional submissions and the Council received 13 written submissions from authors of the original submissions and 12 new submissions from Black Point property owners in response to the extension. All bar two of the original and additional submissions were opposed to the revocation. The two in favour were ones from those who wished to purchase a site adjoining their Crown Lease.

13. At its meeting on 10 May 2017 the Council considered the submissions and in addition heard oral submissions from members of the community. At this meeting the Council resolved to seek Ministerial approval for the revocation of the community land classification over all of the allotments.

14. It is that decision which has now been referred to Norman Waterhouse for review.

**Discussion**

15. The review came about by way of an application from one of the persons who made submissions requesting such a review pursuant to Council's policy P0037. The policy statement provides for a three tier process for managing customer complaints and in this case it appears that at least for two of the allotments a tier 2 process was chosen whereas for two of the allotments it was a tier 3 process. There is under the policy a significant difference between the nature of the consultation

16. The community engagement policy provides for four levels of consultation and as stated earlier it appears that in relation to two allotments, level 2 was chosen and in relation to the remaining two, a level 3 consultation tier

was chosen.

17. Council policy P0037 dealing with an internal review of a Council decision states that an application for a review of a Council decision, provides Council with an opportunity to revisit a decision which has aggrieved a customer which might include an individual, group, rate payer, resident or business owner. The policy provides that the reviewer's role is to review the decision in question, to ensure that the decision maker complied with the following requirements and made the best possible decision in the circumstances;

- The decision was within delegated authority
- All relevant matters were considered
- A decision was made based on good faith and for proper purposes
- The findings were based on evidence
- The decision was reasonable
- The complainant was treated with fairness and in keeping with the principles of natural justice
- That a discretionary power was not exercised at the discretion of another
- Existing policies were adequately considered and applied

18. Clause 4.5 of the policy is as follows:

> "The reviewer will consider all of the information and material that was before the original decision maker and any additional relevant information or material provided by the applicant and determine whether a different decision would be more appropriate based on the evidence.

This means the reviewer will do more than simply consider whether the decision is legally and procedurally correct. The reviewer will also consider whether a different decision would be better based on the evidence. The process of merits review, as described above, will typically involve a review of the facts that supported the decision including any new evidence that may come to light".

**Errors of Process**

19. Section 194(2)(a) provides that a Council must prepare and make publicly available a report on the proposal containing the matters set out in that subsection. In this case the only report that the Council prepared and made publicly available, was its report in September 2016 entitled "Community Engagement Report". That report appears to have been prepared pursuant to the Council's policy number P0057 relating to community engagement. The Council appears to have equated this report, with the report referred to in sec. 194(2)(a) of the Act, when in fact the two are quite different documents. Under the community engagement policy it is required to carry out a level of consultation based upon which level it chooses. Compliance with the policy is required under sec.194(2)(b). The Act in sub-section (2)(a), requires specific matters to be included in the report on the proposal which is made publically available .It is clear that, for example, there is no reference in the community engagement report in relation to placitum (iv) namely, an assessment of how, implementation of

the proposal will affect the area and the local community.

20. Nor has the Council complied with section 194(2) (b) namely, following the relevant steps set out in its public consultation policy. The public consultation policy referred to in the Act is presumably, the council policy on community engagement and that requires it to follow the level of engagement chosen. In this case in relation to allotments 201 and 202, level 2 was chosen, and it will be seen from the policy, that level 2 is irrelevant for the purposes of consultation in this case, because it is concerned with a choice between several options which are available. In relation to allotments 203 and 204, which the Council says was part of level 3 consultations it did not comply with the policy, because the Council has not embarked upon level 3 participation. Clearly the entire process should have been part of the level 3 consultation process because of the high level of interest and the need for community knowledge to influence the decision. Had it been a level 3 consultation, the Council would have been obliged to recognise the extent of community opposition to this proposal and act accordingly.

21. The Council has received no report in relation to the impact that this decision will have on Black Point's infrastructure being its sewerage and water systems, as a result of creating nine additional residences.

22. The Director's report to the Council referring to 2.4% of total reserve land at Black Point being the amount Council wishes to sell, is misleading when the fact is it is 100% of the beachfront land in the bay at Black Point.

**Merits Review**

23. Because the freeholding process had just been enacted when the original subdivision took place, the evidence would suggest the council was opposed to this freeholding taking place. This opposition caused the council at the time to expressly require the developer to provide at no cost to council, the allotments the subject of the current application to revoke their classification, notwithstanding that such a requirement, was over and above that which the developer was statutorily required to provide. Accordingly it is not correct to suggest, as is suggested in the Director's report, that the Council negotiated to acquire these allotments.

24. Thus the Council required these allotments then, expressly for the purpose of reserve space and car park area and access to the beach, which need has not changed and indeed, might be considered even more important now, with the increase in the popularity of this area of the Council. It is difficult to understand why retention of the public open space which the Council thought so desirable when the subdivision was developed is no longer the case. The case put by the council for additional funds, cannot be justified in these circumstances.

25. Furthermore, when the Local Government Act was amended in 1999, to classify all council reserves as community land, the Council could then have, if it felt that these reserves were not necessary, exempted the land from the classification as community land, which would have then enabled the Council to dispose of them as it saw fit. It specifically chose not to do so and hence the classification was placed on the land as community land. To seek to revoke the classification now is not only unconscionable; it is

unjustifiable, because nothing has been put by way of reasons or justification for the revocation other than financial gain, which would meet community expectations.

26. In this case, there is not just widespread, but virtually total opposition, from the community to the revocation. The Council it appears in its reasoning looks to the wider community, as justification to benefit from the windfall it will receive from the sale of these allotments. However, that approach is flawed. In the only Supreme Court decision which has dealt with section 194 of the Local Government Act ,*Penola & District Ratepayers and Residents Association Inc & Butler v Wattle Range Council (2010)* SASC 218, the Court was called upon to consider the scope of section 194(1). The argument was put that this section contemplated the community at large and not the benefit of the local community. The Court had this to say in relation to that argument.

> *"In my view there is no justification for reading into section 194(1) a requirement that the trust be for the benefit of the wider community. The objects of the Local Government Act as stated in section 3 are related to the governance and needs of "local communities". It is unlikely that the aim of preserving a benefit conferred by an instrument of trust which is evident in sec. 194(4), is intended to apply, only if conferred on the broader community as opposed to the local community as defined."*

That being the law and the fact that the local community is totally opposed to revocation of the classification, the Council's decision is not supported in any way by the evidence or the law.

27. The reviewer has before it all of the submissions made and arguments put against the revocation and will have regard to those in determining whether the Council's decision should stand or should be revoked.

28. It is submitted that having regard to 4.4 of the Council's policy P0037 relating to an independent review, the best possible decision in the circumstances based on the evidence, must be to advise the Council that its decision to revoke the classification of community land in relation to each of the allotments cannot stand.

Brian Hayes. 1 August 2017

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**Brian Hayes QC**