

By Email: andrew.cameron@yorke.sa.gov.au
Ref: FXD\M00290403F04996217.DOCX

9 November 2017

Mr A Cameron
Chief Executive Officer
Yorke Peninsula Council
PO Box 57
MAITLAND SA 5573

Dear Andrew

Section 270 - Black Point Land Revocation

The Council has received from Greta Lake (**the Applicant**) a request pursuant to Section 270 of the *Local Government Act 1999* (**the Act**). The Applicant seeks a review of the Council's decisions made at its meeting of 10 May 2017 regarding the proposed revocation of the community land classification of land located at Black Point (**the Review Application**).

The Council has sought advice to assist it with its consideration and determination of the Review Application.

1. Section 270 Local Government Act 1999

- 1.1 Section 270 of the Act requires the Council to, amongst other things, establish procedures for the review of decisions of the Council, employees of the Council and other persons acting on behalf of the Council.
- 1.2 The then Ombudsman stated in 2011:

*'Internal review is a key accountability mechanism for local government. It enables people to test the merits of decisions that affect them.'*¹
- 1.3 The current Ombudsman has confirmed that Section 270 of the Act requires councils to consider the merits of the decision.² Therefore, in the Ombudsman's view, a review of a decision under Section 270 of the Act must include a review of the merits of the decision.
- 1.4 A merits review requires all aspects of a decision to be reviewed and a determination to be made as to the correct and preferable decision. All the evidence is considered as well as any new evidence.
- 1.5 Accordingly, taking on board the Ombudsman's views, a review of a decision under Section 270 of the Act should encompass a review of the legality of the decision as well as whether the decision was the best or preferable decision.

¹ Valuing Complaints: An Audit of Complaint Handling in South Australian Councils, November 2011, page 61.

² Right of Review: An Audit of Local Government Internal Review of Council Decisions Procedure, November 2016, page 44.

- 1.6 In reviewing the merits of a decision, the Council ought to reconsider all the information that it considered in making the original decision from a fresh perspective as well as any new information to determine the best or preferable decision. This may result in the Council affirming, varying or setting aside the original decision.

2. Background

2.1 14 September 2016 Council Meeting

2.1.1 At the Council meeting of 14 September 2016, the Council considered four reports of the Director Development Services regarding the proposed revocation of the community land classification of four allotments at Black Point (**the Revocation Matter**) described as:

- Allotment 201 Plan 41613 Certificate of Title Volume 5294 Folio 896 (**Allotment 201**);
- Allotment 202 Plan 41613 Certificate of Title Volume 5294 Folio 897 (**Allotment 202**);
- Allotment 203 Plan 41613 Certificate of Title Volume 5294 Folio 898 (**Allotment 203**); and
- Allotment 204 Plan 41613 Certificate of Title Volume 5294 Folio 899 (**Allotment 204**),

collectively referred to herein as '**the Four Allotments**'.

2.1.2 A separate report was presented to the Council for each of the Four Allotments (collectively referred to as the **September 2016 Reports**). The September 2016 Reports are for all intents and purposes identical save for minor differences relating to specific characteristics of each of the Four Allotments. The officer recommendation appearing in the September 2016 Reports was identical for each of the Four Allotments.

2.1.3 The September 2016 Reports include a discussion of the background to the Four Allotments being in the Council's ownership. In particular, the September 2016 Reports include information that at the time the road reserve at the rear of the beach front shacks at Black Point was sold to the then developer Prodec Pty Ltd, the Council negotiated to obtain several reserve areas '*so that public access to the beach could be secured for the future and the balance of the land could be utilised for recreation purposes. This resulted in four reserves being created along Black Point Drive being allotments 201, 202, 203 and 204.*'

2.1.4 The September 2016 Reports also provided the following information:

- 2.1.4.1 the Four Allotments are not subject to any dedication, additional reservation or trust other than being vested to the Council as a reserve;
- 2.1.4.2 there has been significant interest expressed by adjoining property owners and others regarding the possibility of purchasing the Four Allotments;

- 2.1.4.3 the primary use of the Four Allotments has been by adjacent shack owners for access and storage of vehicles and boats;
 - 2.1.4.4 the Four Allotments have minimal value from a recreational or leisure perspective with little or no impact on future recreational opportunities for the local or wider community;
 - 2.1.4.5 the Four Allotments are not being utilised in a recreational or leisure manner due to their location at the rear of existing lease hold shacks and adjoining properties being residential;
 - 2.1.4.6 there is no strategic or operational need to retain ownership of the Four Allotments and accordingly they have been identified as being surplus to Council's needs;
 - 2.1.4.7 disposal of the Four Allotments with a view to sale is considered to be appropriate;
 - 2.1.4.8 the proposed proceeds from the sale of the Four Allotments is as follows:
 - (a) \$150,000 towards to the Black Point boat ramp;
 - (b) \$150,000 towards community projects on application from the Black Point community;
 - (c) the balance of the proceeds to be put towards the Council's unsealed road works above and beyond those currently identified and projected in Council's long term financial plan;
 - 2.1.4.9 the Four Allotments are listed on the Council's community land register as Category 2 Recreation and Sport;
 - 2.1.4.10 the Four Allotments are located within the Council's settlement zone;
 - 2.1.4.11 the Four Allotments are governed by planning controls of the Policy Area 3 Black Point in the Council's development plan;
 - 2.1.4.12 all Four Allotments have electricity, water and telecommunication underground lines running along the front of each allotment;
 - 2.1.4.13 all Four Allotments have a community wastewater management scheme line running through each allotment.
- 2.2 The Council resolved at its meeting of 14 September 2016, as follows in relation to Allotment 201 (with identical resolutions being passed in relation to Allotments 202, 203 and 204):
- 'That Council:*
- 1. *proceed with the revocation of the Community Land classification over the Council owned property located on Black Point Road, Black Point being allotment 201 Plan 41613, Certificate of Title: Volume 5294 Folio 896 for the purpose of Council selling the land;*

2. *commence the community engagement process being the initial step to the revocation of Community Land classification for allotment 201 Plan 41613, Certificate of Title Volume 5294 Folio 896 for the purpose of Council selling the land.'*

(the September 2016 Resolutions).

- 2.3 A report titled 'Community Engagement Report Revocation of Community Land Classification Black Point Reserve' was prepared and made publicly available for the period 21 September 2016 to 25 November 2016 (**the Community Engagement Report**).

- 2.4 **Public Consultation**

- 2.4.1 The Council undertook the following by way of public consultation following the Council meeting of 14 September 2016:
 - 2.4.1.1 a public notice was published in the Yorke Peninsula Country Times on 20 September 2016 and 18 October 2016 regarding the Revocation Matter and seeking written submissions by Friday 25 November 2016 (**the Public Notice**). The Public Notice advised that '*a detailed report in relation to the proposed revocation and future intentions of the land is available for viewing at the Yorke Peninsula Council offices at Maitland, Minlaton, Yorketown and Warooka and on Council's website*'. We understand this report to be the Community Engagement Report;
 - 2.4.1.2 by letter dated 15 September 2016, the Council wrote to all Black Point ratepayers and the Black Point Progress Association Inc (**the BPPA**) advising of the September 2016 Resolutions and enclosing a copy of the Public Notice;
 - 2.4.1.3 signage was erected on each of the Four Allotments advising of the proposed revocation of the community land classification of the Four Allotments;
 - 2.4.1.4 notice was placed on the Council's website and the Council's Facebook page,

(the Initial Public Consultation).

- 2.5 **Council Meeting 14 December 2016**

- 2.5.1 At the Council meeting of 14 December 2016, the Council resolved to receive and note a petition received from Graham Dickson on behalf of '*Ratepayers in relation to the proposal for revocation of community land status with 104 signatures*'.

- 2.6 **Council Meeting 8 February 2017**

- 2.6.1 The Council considered a report of the Director Development Services titled 'Revocation of Community Land Black Point – Allotment 201'. Reports in relation to Allotments 202, 203 and 204 which were for all intents and purposes identical to the report regarding Allotment 201, were also considered by the Council (referred to together with the report regarding Allotment 201 as **the February 2017 Reports**).

- 2.6.2 The February 2017 Reports provided the following information:
- 2.6.2.1 community consultation was undertaken in accordance with the Council's Community Engagement Policy and in particular a level 2 community engagement process was undertaken;
 - 2.6.2.2 a nine week period was provided for submissions to be made to the Council;
 - 2.6.2.3 26 written submissions were received by the Council and four persons indicated they wished to make verbal presentations to the Council;
 - 2.6.2.4 a petition with 104 signatures was received and presented to the Council at its meeting of 14 December 2016.
- 2.6.3 The February 2017 Reports attach:
- 2.6.3.1 a summary of the submissions received;
 - 2.6.3.2 a location map of the submissions received;
 - 2.6.3.3 the community engagement plan;
 - 2.6.3.4 comments from Council administration regarding the key issues raised in the submissions;
 - 2.6.3.5 the Community Engagement Report;
 - 2.6.3.6 image of the signage located on each of the Four Allotments; and
 - 2.6.3.7 a copy of the Public Notice.
- 2.6.4 The Council resolved as follows in relation to Allotment 201 (and passed identical resolutions in relation to Allotments 202, 203 and 204):
- 'That Council:*
1. *receives written submissions received in relation to the proposed revocation of the classification as community land Allotment 201, Certificate of Title 5294 Folio 896 provided to the Council under separate cover to the report of the Director Development Services in relation to item 6.4 (the submissions);*
 2. *having considered the submissions, defers the further consideration of this matter to the May 2017 Ordinary Council Meeting.'*
- (the February 2017 Resolutions).**
- 2.6.5 Four members of the public made presentations to the Council at the Council meeting of 8 February 2017.

2.7 **Workshop 22 March 2017**

- 2.7.1 A public elected member's workshop was held on 22 March 2017 to further consider and analyse the submissions received. Council administration presented comments in relation to the key issues identified from the submissions received.

2.8 **Further Consultation**

- 2.8.1 On or about 7 April 2017, the Council by letter, invited those persons who had made submissions during the Initial Public Consultation and all other ratepayers at Black Point to make a further written submission or a verbal submission to the Council at its meeting of 10 May 2017 and provided with that letter a document titled 'Presentation of Key Issues and Council Comments' (**the Further Consultation**).
- 2.8.2 The Council received 13 additional submissions from those persons who had already made a submission and 12 new submissions from persons who had not previously made a submission.

2.9 **Council Meeting 10 May 2017**

- 2.9.1 The Council considered a report of the Director Development Services titled 'Revocation of Community Land Black Point – Allotment 201'. Reports in relation to Allotments 202, 203 and 204 were also considered by the Council and for all intents and purposes are identical to the report regarding Allotment 201 (referred to together with the report regarding Allotment 201 as **the May 2017 Reports**). The submissions received from the Further Consultation were attached to the May 2017 Reports.
- 2.9.2 At the Council meeting of 10 May 2017, three members of the public made presentations in relation to the Revocation Matter.
- 2.9.3 At the Council meeting of 10 May 2017 the Council resolved as follows in relation to Allotment 201 (and passed identical resolutions in relation to Allotments 202, 203 and 204):

'That Council:

1. *receive the 13 written submissions from authors of the original submissions and the 12 new submissions received from Black Point property owners in response to the extension of the community engagement process for the proposed revocation of community land;*
2. *give approval to proceed with seeking Ministerial approval for the revocation of community land classification over the Council owned property located on Black Point Road, Black Point, being allotment 201, Plan 41613, Certificate of Title: Volume 5294 Folio 896;*
3. *authorise the Mayor and Chief Executive Officer to sign and affix Council's common seal to the relevant documents necessary to execute the revocation, transfer of properties and licence.'*

(the May 2017 Resolutions).

3. LEGISLATIVE REQUIREMENTS

3.1 Community Land

3.1.1 The Act provides at Section 193(1) that:

(1) *All local government land (except roads) that is owned by a council or under a council's care, control and management at the commencement of this section (**the commencement date**) is taken to have been classified as community land unless –*

(a) *the council resolves to exclude the land from classification as community land within three years after the commencement date; and*

(b) *the land is unaffected by the provisions of a reservation, dedication, trust or other instrument that would prevent or restrict its alienation.*

3.1.2 Local government land is defined in the Act as land owned by a council or under council's care, control and management.

3.1.3 Section 194 of the Act provides that the Council may revoke the classification of land as community land in accordance with the procedure set out in that section.

3.1.4 Section 194(2) of the Act provides that before the Council revokes the classification of land as community land:

(a) *the council must prepare and make publicly available a report on the proposal containing:*

(i) *a summary of the reasons for the proposal; and*

(ii) *a statement of any dedication, reservation or trust to which the land is subject; and*

(iii) *a statement of whether the revocation of the classification is proposed with a view to sale or disposal of the land and, if so, details of any Government assistance given to acquire the land and a statement of how the council proposes to use the proceeds; and*

(iv) *an assessment of how implementation of the proposal would affect the area and the local community;*

(v) *if the council is not the owner of the land - a statement of any requirements made by the owner of the land as a condition of approving the proposed revocation of the classification; and*

(b) *the council must follow the relevant steps set out in its public consultation policy.*

- 3.1.5 After the Council has complied with the requirements of Section 194(2) of the Act, the Council must submit the proposal with a report on all submissions made as part of the public consultation process to the Minister and, if the Minister approves the proposal, the Council may make a resolution revoking the classification of the land as community land.

3.2 Public Consultation

- 3.2.1 The Council's Community Engagement Policy that applied in September 2016 (**the CEP**) provided for four engagement levels. The Community Engagement Plan Level 2 means '*obtain feedback on preferences when there are options available*'.
- 3.2.2 The CEP provides that in relation to a Community Engagement Plan Level 2, the Council will consult through:
- 3.2.2.1 Council's website;
 - 3.2.2.2 media releases;
 - 3.2.2.3 letter or survey to primary and/or secondary properties;
 - 3.2.2.4 letter/email or survey to Progress Association;
 - 3.2.2.5 copies of major reports or plans made available at Council offices;
 - 3.2.2.6 report to Council summarising submissions for formal Council decision.
- 3.2.3 Further, the CEP provides for a minimum three week period in relation to a Community Engagement Plan Level 2.

4. Review

4.1 Process of Review

- 4.1.1 The decisions the subject of the Review Application are the May 2017 Resolutions.
- 4.1.2 We have considered and set out our advice in relation to the legality and merits of the May 2017 Resolutions for the purposes of assisting the Council to deal with the Review Application in accordance with the Council's Internal Review of a Council Decision Policy (**the Review Policy**).
- 4.1.3 Clause 4.3 of the Review Policy provides:
- 'The Elected Council is the Reviewer and/or a person appointed by the Elected Council as the Reviewer, when the decision being reviewed was made by the Elected Council or a Committee of the Council.*
- ...'
- 4.1.4 Clause 4.5 of the Review Policy provides:

'The Reviewer will consider all 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 purpose of merits review, as described above, will typically involve a review of the facts that support a decision, including any new evidence that may come.'

- 4.1.5 The Applicant was invited to provide further material or information in relation to the Review Application. The Applicant responded by email dated 28 July 2017.
- 4.1.6 The Black Point Progress Association and Dr John Gray provided submissions which they have requested be considered as part of the Council's consideration of the Review Application.

4.2 Applicant Submissions

- 4.2.1 The Applicant makes the following submissions as part of the Review Application.

4.2.1.1 **Disposal of the Land**

The Applicant submits that there is confusion over how the Four Allotments will be disposed of and who will have purchasing rights of the land. The Applicant refers to submissions made by existing lease holders of land adjacent to the Four Allotments who made submissions in favour of the Revocation Matter on the basis that they be given a first right of refusal to purchase one or more of the Four Allotments. The Applicant submits that none of the documents issued by the Council or the reports presented to the Council clarified this issue.

4.2.1.2 **Open Space Development**

The Applicant submits that the Council did not sufficiently address as part of the public consultation and its decision making processes the reasons why the Council has not invested or developed the Four Allotments into usable open space reserves in accordance with its legislative obligations under Section 7(b) of the Act and why the Council would not do so in the future.

The Applicant also refers to the *'initial legislative requirement imposed on the Developer (Prodec) to provide open space as part of the development at Black Point' and 'that land vested in the Council for the purpose of providing residents and visitors to the area (Black Point) with a recreational space'.*

The Applicant is critical of the Council for selling *'prime land'* vested in the Council and failing to develop the land in accordance with its obligations.

4.2.1.3 **Pre-determination**

The Applicant is concerned the Council has predetermined the outcome of this matter prior to undertaking the two community consultation processes on the basis of the '*strong percentage of the community that were opposed to the land revocation in the first consultation stage*'. The Applicant considers that the consultations were undertaken as a '*token effort*' and a decision had already effectively been made prior to the conclusion of the community consultation.

4.3 **Black Point Progress Association Inc Submissions**

4.3.1 The Black Point Progress Association Inc (**BPPA**) makes the following submissions which it titles '*Errors of Process*':

4.3.1.1 the Community Engagement Report is inadequate to constitute the report the Council is required to prepare and make publicly available under Section 194(2)(a) of the Act. In particular, the Community Engagement Report does not make reference to an assessment of how implementation of the proposal will affect the area and the local community. In this regard, the BPPA submits '*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.*';

4.3.1.2 the Council has not complied with Section 194(2)(b) of the Act, namely it has not followed the relevant steps set out in its Public Consultation Policy. In particular BPPA submits that the Council chose Community Engagement Plan Level 2 in relation to Allotments 201 and 202 and Community Engagement Plan Level 3 in relation to Allotments 203 and 204 however, it submits, the Council did not undertake a Community Engagement Plan Level 3 consultation process and ought to have in relation to all Four Allotments;

4.3.1.3 the reports are misleading in referring to 2.4% of total reserve land at Black Point being the amount constituting the land the subject of the proposal and submits that it is in fact '*100% of the beach front land in the bay at Black Point*'.

4.3.2 The BPPA also makes submissions under the heading in its submission '*Merits Review*'. Those submissions are as follows:

4.3.2.1 the Council required the Four Allotments at the time of the original submission '*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 an increase in the popularity of this area of the Council*'. The BPPA submits that it is difficult to understand why retention of the public open space which was considered desirable at one point in time is no longer so. The BPPA does not accept the case put by the Council for additional funds as justified in the circumstances;

- 4.3.2.2 the fact the Council did not when the Act was enacted in 1999 exclude the Four Allotments from the classification of community land, its decision now to seek the revocation of the classification of the Four Allotments as community land is unconscionable and unjustifiable;
- 4.3.2.3 the Council's consideration of the interests of the wider community rather than merely the local Black Point community is flawed and there is virtually total opposition from the 'local community'.

4.4 **Dr John Gray's Submissions**

- 4.4.1 Dr John Gray has made the following submissions in relation to this matter as follows:
 - 4.4.1.1 there is no information on the impact on water and sewerage infrastructure in relation to creating nine additional residences;
 - 4.4.1.2 the Council has not followed its CEP. Dr Gray makes similar submissions in relation to the reference to the Community Engagement Plan Level 2 and Community Engagement Plan Level 3 in the Council officer reports. Dr Gray further submits that the entire process should have been a Community Engagement Plan Level 3 and this did not occur;
 - 4.4.1.3 the Council has ignored the submissions from the community;
 - 4.4.1.4 the Council's proposal to sell the Four Allotments would be *'financially negligent and not a true market value for the ratepayers assets as this would only be achieved on an open market when current Crown lease holders' properties have been removed and the lots sold unencumbered of buildings and land management restrictions.'*;
 - 4.4.1.5 the Council has not undertaken a risk assessment in relation to the financial compensation that some members of the public who have made submissions have indicated they will pursue;
 - 4.4.1.6 the developer Prodec has also *'indicated they will seek compensation as they feel that Council obtained these blocks under duress during the original free holding'*;
 - 4.4.1.7 the Council has not complied with Sections 193 and 194 of the Act and refers in particular to the requirement to follow the relevant steps set out in the Council's Public Consultation Policy and Section 194(2)(a)(iv).
- 4.4.2 Dr Gray also refers to the Code of Conduct for Council Members (**the Code**) and appears to question whether the elected members who voted in favour of the proposed revocation of the community land classification of the Four Allotments have complied with the Code.

4.5 **Excluded from Review**

- 4.5.1 We consider that Dr Gray's submission wherein he appears to question whether elected members have complied with the Code is not a matter for

consideration as part of the Review Application. It is not clear if Dr Gray is alleging elected members have breached the Code and, if so how.

5. Assessment of Submissions

5.1 Applicant's Submissions

5.1.1 *Disposal of the Land*

5.1.1.1 The Applicant contends that there is confusion as to how the Four Allotments are to be disposed and refers to submissions made by members of the public in support of the Revocation Matter apparently on the basis they are able to purchase one or more of the Four Allotments.

5.1.1.2 The Council will be required before it disposes of the Four Allotments to consider and apply its Disposal of Land and other Assets Policy (**the Disposal of Land Policy**) or determine for appropriate reasons to waive application of the Disposal of Land Policy.

5.1.1.3 As part of the Further Consultation, the Council provided to those persons who made submissions during the Initial Public Consultation and all other ratepayers at Black Point with a document titled Presentation of Key Issues and Council Comments which states:

'Council would ensure that any sale or disposal would be transparent and ensure that Council obtains the best price and that all potential purchasers are given equal opportunity to purchase the land or assets Council does not yet have a position on the method that would be used if the revocation process does proceed.'

5.1.1.4 The May 2017 Resolutions are concerned with applying to the Minister for approval to revoke the community land classification of the Four Allotments, albeit with a view to sale. If the Minister grants approval and the Council determines to revoke classification of the Four Allotments as community land, it will need to have regard to its Disposal of Land Policy. We do not consider this submission provides a basis for finding that the May 2017 Resolutions were unlawful or not the best or preferable decisions in relation to the Revocation Matter.

5.1.2 *Open Space Development*

5.1.2.1 The Applicant submits that the Council has failed to develop the Four Allotments into usable open space reserves in accordance with its legislative obligations under Section 7(b) of the Act and it can be inferred that the Applicant contends the Council ought to do so.

5.1.2.2 Section 7(b) of the Act provides that it is a function of a council:

'to provide services and facilities that benefit its area, its ratepayers and residents, and visitors to its area (including

general public services or facilities (including electricity, gas and water services, and waste collection, control or disposal services or facilities), health, welfare or community services or facilities, and cultural or recreational services or facilities)'

5.1.2.3 The Council's function set out in Section 7(b) of the Act is but one of 11 functions of a council set out in Section 7. Further, Section 8 of the Act requires the Council to act to uphold and preserve the principles set out in that section in the performance of its role and functions including the following principles:

'(h) seek to ensure that council resources are used fairly, effectively and efficiently;

....

(k) ensure the sustainability of the council's long-term financial performance and position.'

5.1.2.4 The September 2016 Reports state that since the creation of the Four Allotments, their primary use has been by adjacent shack owners for access and storage of vehicles and boats and that the land is not being used for recreational or leisure purposes. This suggests that the Four Allotments are not being used effectively or efficiently. The Applicant appears to accept that the Four Allotments are not useable as reserves in submitting that the Council has *'never invested or developed this open space into useable reserves'*. However, the Applicant submits the Council has not explained why the Four Allotments have not been so developed. In this regard, we note that the document titled *'Presentation of Key Issues and Council Comments'* provided as part of the Further Consultation states:

'After a review of Council's records from 2003, Council has not identified any requests regarding the recreational facilities, or lack thereof, located around Black Point. Council have identified land to the south west of Black Point (Maxine Hawke Reserve) suitable for park and recreational facilities. It is noted that the caravan park area contains a BBQ and tables with chairs for public use.

....

Council records have not identified any requests to improve or make available more car parking at the reserves, moreover it is noted by Council staff that existing carparks are underutilised'.

5.1.2.5 The absence of any requests for the Four Allotments to be developed into useable open space reserves together with the actual current use of the Four Allotments would, in our view, support the Council taking the position that developing the Four Allotments as suggested by the Applicant would not be an efficient or effective use of resources. However, greater consideration of this issue would be preferable.

5.1.3 **Predetermination**

5.1.3.1 The Applicant contends the elected members had predetermined the outcome of the Revocation Matter on the basis there was strong opposition during the Initial Public Consultation and the Further Consultation. We do not consider that it is reasonable to conclude predetermination merely on the basis of the opposition to the Revocation Matter during the Initial Public Consultation and the Further Consultation.

5.2 **BPPA and Dr Gray Submissions**

5.2.1 **Community Engagement Report**

5.2.1.1 The BPPA and DR Gray both contend that the Community Engagement Report is not sufficient to constitute the report the Council is required pursuant to Section 194(2)(a) of the Act to prepare and make publicly available and, in particular, submit it does not contain an assessment of how implementation of the proposal will affect the area and the local community. We do not consider this submission of the BPPA and Dr Gray to be entirely correct for the reasons set out below.

5.2.1.2 Whilst the Community Engagement Report does not specifically state it has been prepared for the purposes of Section 194(2)(a) of the Act, we are of the opinion that it seeks to address the matters required to be included in such a report and it was made publicly available as required by the Act.

5.2.1.3 The Community Engagement Report states that *the 'open space reserves have minimal value from a recreational or leisure perspective and have little or no impact on future recreational opportunities'*. This is in our view an assessment that the disposal of the Four Allotments will have no or minimal impact in relation to recreational activities. Further, the Community Engagement Report sets out a proposal with respect to the proceeds of the sale of the Four Allotments which is also an assessment of the impact of the proposal on the area and local community. We note that there was additional information assessing the affect of the disposal of the Four Allotments in the document titled 'Presentation of Key Issues and Council Comments' and it is perhaps unfortunate that this information was not included in the Community Engagement Report.

5.2.1.4 We do not however consider as submitted by the BPPA and Dr Gray that the Council was required to include in its Community Engagement Report information concerning the impact of the creation of nine allotments on Black Point's infrastructure. It appears that this submission is that such an impact ought to have been considered as part of the assessment of how implementation of the proposal will affect the area and the local community. However, in our view, the 'proposal' is the revocation of the community land classification of the Four Allotments and possible disposal. Any consideration of the future use of the Four Allotments and the impact of such use on existing infrastructure

would be merely speculative and subject to other statutory controls, requirements and processes.

5.2.2 **Public Consultation**

- 5.2.2.1 This submission of the BPPA and Dr Gray is two-fold. Firstly, the February 2017 Reports state in relation to Allotments 201 and 202 that Community Engagement Plan Level 2 was undertaken and in relation to Allotments 203 and 204 there is a reference in one instance in both reports to a Community Engagement Plan Level 3 having been undertaken. We are advised that the reference to Community Engagement Plan Level 3 is a typographical error and we consider that to be a logical explanation.
- 5.2.2.2 Secondly, the submission by the BPPA and DR Gray is that the Council ought to have followed a Community Engagement Plan Level 3. Whilst it is not entirely clear why a Community Engagement Plan Level 2 was chosen, the community engagement plan adopted by the Council and attached to the September 2016 Reports provided for a consultation timeframe beyond that set out in the CEP for Community Engagement Plan Level 2. In addition, the Council undertook the Further Consultation.
- 5.2.2.3 The BPPA submit that the Council ought to have undertaken a Community Engagement Plan Level 3 because of the high level of interest and need for community knowledge to influence the decision. Whilst it certainly transpired that there was a high level of interest from the Black Point we do not consider there was a need for community knowledge. The Council in our view had the information it needed. It may be that Community Engagement Plan Level 2 was selected as all that was required was feedback from the community on the Revocation Matter. The BPPA further submits Community Engagement Plan Level 2 was inappropriate because it is concerned with a choice between options. It is possible to interpret the CEP as allowing for a Community Engagement Plan Level 2 even where there are no or limited options. However, it may have been preferable for the Council to provide reasons for selecting Community Engagement Plan Level 2.
- 5.2.2.4 We do not consider that the reference to 2.4% of total reserve land at Black Point being the amount of land the subject of the revocation matter is misleading. We consider it was always very clear the Four Allotments are beach fronting.

5.2.3 **Retention of Public Open Space**

- 5.2.3.1 The BPPA submits that it is difficult to understand why retention of the public open space which was considered desirable at one point in time is no longer so. The BPPA does not accept the case put by the Council for additional funds as justified in the circumstances. In our view, the current use of the Four Allotments, their location (between residential allotments) and alternative open space areas at Black Point are relevant

considerations for the Council to take into account in determining the most efficient and effective use of the Four Allotments. It is in our view necessary for the Council to consider current needs of the community which can, and do, change over time. A more detailed analysis of the merits of the Revocation Matter would have been preferable.

5.2.4 **Exclusion from Community Land Classification**

- 5.2.4.1 The BPPA submits that the fact the Council did not when the Act was enacted in 1999 exclude the Four Allotments from the classification of community land, its decision now to seek the revocation of the classification of the allotments as community land is unconscionable and unjustifiable.
- 5.2.4.2 The Council has a discretionary power to revoke the community land classification of land subject to compliance with the Act. The BPPA submission on this point is effectively that the Council cannot now exercise that discretionary power because it did not in 1999 resolve to exclude the Four Allotments from classification as community land. This submission suggests the Council has fettered its discretion to revoke the community land classification of the Four Allotments by not excluding the Four Allotments from community land in 1999. We do not consider this can be correct as this would mean a council could never revoke the community land classification of land that it held in 1999 and did not at that time exclude from classification as community land. This argument conveniently ignores that the Act expressly empowers the Council at any time to revoke the classification of land as community land.

5.2.5 **Local Community**

- 5.2.5.1 The BPPA submits that the Council's consideration of the interests of the wider community rather than merely the local Black Point community is flawed. The BPPA submits the local Black Point community is opposed to the Revocation Matter and any consideration of the benefit to the wider community is incorrect. The BPPA relies on *Penola & District Ratepayers and Resident's Association Inc & Butler v Wattle Range Council* (2010) SASC 218 (**Penola**) to support its submission. We disagree that Penola supports the general proposition that the Council must only consider the local Black Point community and not the Council's wider community. The passage in Penola quoted by the BPPA in its submission related specifically to Section 194(1)(a) of the Act dealing with land required to be held for the benefit of the community under a trust and the Court found that such trusts can be for the wider community or a local community. In our view, the reliance by the BPPA on Penola for its submission on this point is misplaced.
- 5.2.5.2 In addition, Section 194(2)(a) of the Act specifically states that the report on a proposal to revoke the classification of land as community land and which is to be made publicly available, must contain an assessment of how implementation of the proposal

would affect '*the area and the local community*'. The 'area' is defined in the Act as the area for which the Council is constituted, ie the entire Council area. Therefore in our view, the Council did not err in considering not only the Black Point community but also the community of the whole Council area.

5.2.6 **Failure to Consider Public Submissions**

5.2.6.1 Dr Gray argues the Council has ignored the submissions from the community.

5.2.6.2 Presumably this submission is based on the Council making a decision that the majority of persons who made submissions to the Council were opposed to. If that is the basis for this submission, we do not consider that it is a proper basis to find the Council has ignored the submissions from the community.

5.2.7 **Financial Negligence**

5.2.7.1 Dr Gray submits that the Council's proposal to sell the Four Allotments would be '*financially negligent*'.

5.2.7.2 Whilst it may be that the Council could at some stage in the future realise a greater financial gain from the sale of the Four Allotments, this may be the case at any point in time due to increasing property values. It is not in our view a basis for finding the Council has erred in making the May 2017 Resolutions.

5.2.8 **Financial Compensation**

5.2.8.1 Dr Gray submits the Council has not undertaken a risk assessment in relation to the financial compensation that some members of the public who have made submissions have indicated they will pursue and that Dr Gray states Prodec has indicated it will pursue.

5.2.8.2 We do not consider there is at this stage a reasonable basis for the claims for compensation and threats of legal action.

5.3 **Legal Assessment**

5.3.1 In our view, the Council has followed the requirements of the Act in relation to the Revocation Matter however there two aspects of the Council's processes regarding the Revocation Matter which could have been improved and which could form the basis of a successful challenge to the validity of the May 2017 Resolutions. Those areas relate to the Community Engagement Plan Level selected and the Community Engagement Report.

5.3.2 There are no reasons provided as to why the Council selected Community Engagement Plan Level 2. It would have been open to the Council to select Community Engagement Plan Level 3 and this may have been more appropriate. It also does not appear there were any media releases which is set out as part of the Community Engagement Plan Level 2, although we note there were media articles appearing in the Yorke Peninsula Country Times concerning the Revocation Matter.

- 5.3.3 The Community Engagement Report could have expressly stated it constituted the report required by Section 194(2)(a) and included a more detailed and comprehensive assessment of how implementation of the proposal would affect the area and the local community and the merits of the Revocation Matter particularly the current community need.

5.4 Merits Assessment

- 5.4.1 We note the information provided to us regarding the Council's financial sustainability summarised as follows:
- the Council has for some time been undertaking a services review and considering mechanisms for minimising the financial impact of providing those services to the community. As part of this review, consideration has been given to the potential to dispose of excess Council assets;
 - Council's 2014/15 Annual Business Plan referred to the potential for sale of excess vacant Council land and made reference to Maitland, Balgowan and Yorketown;
 - shortly after the last local government election, members of the Council participated in a district tour with senior members of the Council administration which included visits to and consideration of potential Council assets that may be suitable for sale;
 - at the time of developing the long term financial plan, no particular assets had been formally identified for sale and therefore were not included in the long term financial plan;
 - in June 2012 Council adopted its 10 year Long Term Financial Plan (**the LTFP**) which introduced a 3% financial sustainability levy over and above CPI increases in rates.

Council had been experiencing large operating deficits for many years previously along with a significant shortfall in spending on asset renewal.

After taking advice both internally and externally, Council came to the conclusion that, within the 10 years of the LTFP, it needed to reach a break even operating result in line with local government industry averages to ensure spending on the renewal of existing assets was sufficiently increased to maintain service levels – again in line with industry averages. Spending on new assets was also reduced significantly in the plan.

The LTFP was adopted with Operating Deficits reducing each year with approximately a break even result targeted for the 2022/23 financial year.

Each reiteration of the LTFP adopted by Council since has also maintained that target after allowing for higher than anticipated rising costs and significant reductions in available ongoing funding from both State and Federal governments.

Each reiteration showed that the levy was required until at least the end of the 2021/22 financial year to achieve Council's industry average

based financial targets. The current review of the LTFP underway also maintains that the levy be retained until at least that time.

5.4.2 We consider the Revocation Matter has merit.

5.5 Review Application

5.5.1 The Council is required to consider and determine the Review Application. It must turn its mind to whether the May 2017 Resolutions were the best or preferable decisions. It must have regard to all the information that it had before it at the time it made the May 2017 Resolutions as well as the additional information contained in the Review Application, the Applicant's additional submission, the BPPA submission and Dr Gray's submission.

Please do not hesitate to contact me if you have any queries or wish to discuss any aspect of this advice.

Yours faithfully
Norman Waterhouse



Felice D'Agostino
Partner
Direct Line: (08) 8210 1202
e-mail: fdagostino@normans.com.au