

## CONFIDENTIAL REPORT

### REPORT RELATING TO: A leader in the delivery of the Community Vision

**Originating Officer:** John Valentine, Manager Strategic Projects  
**Director:** Vincent Mifsud  
**Subject:** Hallett Cove Library building  
**Reference No:** GC140715F01  
**File No:** 13.60.1.1

---

If the Council so determines, this matter may be considered in confidence under Section 90(3)(b), (d) and (g) of the *Local Government Act 1999* on the grounds that the report contains information relating to a matter that could confer a commercial advantage to a third party, is of a commercial nature and Council has an obligation, to maintain the confidentiality of its agreement with Etiria (the Makris Group).



**Geoff Whitbread**  
Acting Chief Executive Officer

#### RECOMMENDATION:

1. That pursuant to Section 90(2) and (3)(b), (d) and (g) of the *Local Government Act 1999*, the Council orders that all persons present, with the exception of the following persons: Abby Dickson, Fiona Harvey, Kathy Jarrett, Victoria Moritz, John Valentine and Craig Clarke be excluded from the meeting as the Council receives and considers information relating to the potential disposal of the existing Hallett Cove Library (and Youth Services) building, upon the basis that the Council is satisfied that the requirement for the meeting to be conducted in a place open to the public has been outweighed by the need to keep consideration of the matter confidential given the information relates to a matter that could confer a commercial advantage to a third party, is of a commercial nature and Council has an obligation, to maintain the confidentiality of its agreement with Etiria (the Makris Group).

**REPORT OBJECTIVES:**

To consider the potential sale of the existing Hallett Cove Library (and Youth Services) building.

The Hallett Cove Library building will be surplus to requirements when the new Cove Civic Centre opens in July 2015. Council has also recently considered the youth services activity at its 23 June 2015 meeting (GC230615R01).

In 2007 Council entered into an agreement with the Etiria (the Makris Group), the owner of the Hallett Cove Shopping Centre. The agreement was to integrate the development of Patpa Drive with the expansion and redevelopment of the shopping centre and, amongst other matters, granted the Makris Group the first right of refusal should Council determine to sell the Hallett Cove Library building.

Legal advice has been gained in relation to the potential disposal of the Hallett Cove Library building and the process that would need to be followed for the disposal to comply with the agreement, Council's recently adopted Disposal of Land and Assets Policy and sound prudential and commercial practices.

**EXECUTIVE SUMMARY:****RECOMMENDATIONS: (6)****DUE DATES****That Council:**

- |   |               |
|---|---------------|
| 1. Note the advice from Mellor Olsson in relation to the potential disposal of the Hallett Cove Library (and Youth Services) building.  | July 2015     |
| 2. Note that two valuations are in the process of being developed the cost of which will be funded from the sale of the property.   | July 2015     |
| 3. Authorise the Acting Chief Executive Officer to call a competitive tender for a commercial property agency to provide advice on the method of disposal and, subject to Council resolving to dispose of the property, manage the marketing, negotiation and finalisation of the disposal process.   | July 2015     |
| 4. Note that the funds for the commercial property agency will be funded from the proceeds from the sale of the property.   | July 2015     |
| 5. Be provided with a subsequent report to consider the valuations and advice on the method of disposal and, if satisfied, resolve to dispose of the Hallett Cove Library and Youth Services building and proceed to marketing the property in accordance with Council's Disposal of Land and Assets policy.  | August 2015   |
| 6. In accordance with Section 91(7) and (9) of the Local Government Act 1999 the Council orders that this report and the minutes arising from this report having been considered in confidence under Section 90(2) and (3)(b), (d) and (g) of the Act shall, except when required to effect or comply with Council's resolution(s) regarding this matter, be kept confidential and not available for public inspection for a period of 12 months from the date of this meeting. This confidentiality order will be reviewed at the General Council Meeting in December 2015 | December 2015 |

## **BACKGROUND**

Council has previously passed a motion for investigations to be undertaken into the potential disposal of the Hallett Cove Library building at Unit 8, 1 Zwerner Drive, Hallett Cove (GC101213M01).

A review of the status of the property has been undertaken by Mellor Olsson Lawyers, their advice is attached as Appendix 1. Mellor Olsson has provided advice in relation to Council's agreement with Etiria No 25 (the Makris Group) in relation to the first right of refusal, the recently adopted Council policy on Disposal of Land and Assets and related matters.

Mellor Olsson's advice also refers to the property currently being listed on a register of community land notwithstanding that the property was excluded from the community land classification in accordance with the Local Government Act in July 2002 (GC230702R402). A search has been undertaken of Council resolutions from 2002 to the present and there is no resolution by which the property has been reinstated as community land. Therefore the property has been confirmed as being excluded from community land status by Council resolution in 2002 and can be considered for disposal by Council without the limitations and processes involved with community land.

## **ANALYSIS:**

### **Legal/Legislative and Risk Management**

The potential disposal and process for achieving the disposal has been reviewed by Mellor Olsson. Council has a specific obligation to offer the first right of refusal to the Makris Group in accordance with the agreement between the parties. Council can potentially go to an open market process (but not an auction) and then offer the property to the Makris Group on the same terms as identified through an open market process.

Whilst Mellor Olsson has described the process that Council can follow according to the agreement with the Makris Group and Council's Disposal of Land and Assets Policy, advice will be required from a commercial property agent regarding the best method to maximise the sale value of the property.

Accordingly the recommended method for proceeding with the disposal of the Hallett Cove Library is described below:

- 1- Council to consider two valuations (this process has been commenced);
- 2- Undertake a competitive tender for the appointment of a commercial property agency to advise on the best way of engaging with the market and the Makris Group to maximise the potential sale value of the property (with the agency to be appointed at a later date to manage the marketing, negotiation and finalisation of the sale) ;
- 3- Council to receive and consider the valuation and disposal method advice (engaging with the market) and, if satisfied, resolve to dispose of the Hallett Cove Library building and authorise the marketing of the property;
- 4- Council considers offers received through the marketing of the property.

Two independent valuations from suitably qualified valuers are in the process of being obtained. The 2 valuations will be brought to Council along with marketing advice, subject to Council authorising the engagement of a commercial property agency.

## **Financial Implications**

The potential sale of the Hallett Cove Library building would result in once-off disposal funds being realised. These funds should be used in an appropriate and prudential manner to either off-set future borrowings for approved major capital projects or placed in the Asset Sustainability Reserve to support Council's long term asset objectives.

Should Council choose to subsequently dispose of this asset a number of costs will be incurred as part of the disposal process, these costs will include:

- 2 independent market valuations, approximate cost of \$6,000.
- Commercial property agency to provide marketing advice and subsequently manage the marketing and sale process for the property, agency costs likely to be 2% of the sale value;
- Legal fees associated with the preparation of the sale contract, transfer forms and processes, likely to be in the order of \$10,000.

These costs would be appropriately netted-off against the sale proceeds from the potential sale of the property. As the cost of the independent market valuations will be incurred up-front this cost would initially be funded from the existing Land and Property operational budget.

## **Policy Implications**

Council's recently adopted Disposal of Land and Assets policy has been reviewed by Mellor Olsson in conjunction with the deed with the Makris Group. There are a range of methods available to Council to market the land (with the exception of an auction). Advice will need to be gained from a commercial property agency on the best options to market the land so as to maximise the potential sale price.

## **CONCLUSION:**

The Hallett Cove Library (and Youth Services) building will be surplus to Council's requirements with the opening of the Cove Civic Centre. Council has an existing agreement that requires Council to offer the first right of refusal to the Makris Group when disposing of the property. Two valuations are being gained for the property and commercial property advice will need to be gained to determine the most appropriate methods for disposing of the property at the best possible value.

Our Ref: PP:M150959

29 June 2015

Mr John Valentine  
 Manager Strategic Projects  
 City of Marion  
 PO Box 21  
 OAKLANDS PARK SA 5046

## LAWYERS

Philip Page  
 Greg Anderson  
 Con Traianos  
 Greg Arthur  
 Phil McGovern  
 Andrew Goode  
 John Dempster  
 Tim Mellor  
 Karen Olsson  
 Anthony Kelly  
 Joanna Andrew  
 Joseph Anderson  
 Phil Dorman  
 Jennifer Goodale  
 Matthew Dorman  
 Henry Ringwood  
 Leonie Millard  
 Elizabeth Olsson  
 Jenny Tummel  
 Carmel Homes  
 Catherine Leis  
 Vanessa Paunkov  
 Sarah Vinall  
 Matt Noonan  
 Zeena Anthony-Qureshi  
 Maria Demosthenous  
 Andrew Smith  
 Callen Bubner  
 Melanie Meaney  
 Erin Moll  
 Emily Barrett  
 Kate McShane  
 SORCHA O'NEILL

Dear John

**RE: HALLETT COVE LIBRARY DISPOSAL**

I refer to our correspondence and discussions in relation to the above matter.

**Background**

You have instructed me that Council is the owner of strata titled land in Zwerner Drive, Hallett Cove, within the Hallett Cove Shopping Centre precinct. The land is Unit 8 in Strata Plan 10132 and is the land comprised in Certificate of Title Volume 5026 Folio 153 ("the Land"). The Land is now surplus to Council's requirements and my advice has been sought regarding its potential disposal.

On 23 July 2002, Council resolved that the Land be excluded from "community land" classification in accordance with Section 193 (1) of the *Local Government Act 1999*. I note that, despite that exclusion, the Land has subsequently been included in two of Council's Community Land Management Plans. I am not aware of any subsequent resolution by Council under Section 193 (5) to re-classify the Land as community land. Unless there was such a resolution, I consider that the subsequent inclusion of the Land in those Management Plans was an administrative error and that the Land is currently not "community land" for the purposes of the *Local Government Act 1999*. The advice set out in this letter is based on the assumption that the Land is not "community land". Please let me know if you believe this assumption is not correct.

Council is a party to a Deed dated 16 March 2007 ("the Deed") with Etiria (No 25) Pty Ltd and Hallett Cove Holdings Pty Ltd (jointly called "Etiria").



PM150959\_007.doc

**Keith**  
 Cnr Makin & Hender Street  
 Keith SA 5267  
**Phone:** 1300 414 414  
**Fax:** (08) 8414 3444

**Adelaide**  
 Level 5 80 King William Street  
 Adelaide SA 5000  
 GPO Box 74  
 Adelaide SA 5001 DX 543  
**Phone:** +61 8 8414 3400  
**Fax:** +61 8 8414 3444

**Port Lincoln**  
 11 Mortlock Terrace  
 Port Lincoln SA 5606  
 PO Box 411  
 Port Lincoln SA 5606 DX 51050  
**Phone:** (08) 8682 3133  
**Fax:** (08) 8682 6030

**Clare**  
 165 Main North Road  
 Clare SA 5453  
 PO Box 671  
 Clare SA 5453  
**Phone:** (08) 8842 1833  
**Fax:** (08) 8842 1811

**Regional Offices (By Appointment Only)**  
**Bordertown**  
 22 Binnie Street  
 Bordertown SA 5268  
**McLaren Vale**  
 178 Main Road  
 McLaren Vale SA 5171  
**Kadina**  
 26 Taylor Street  
 Kadina SA 5554  
**Nuriootpa**  
 45 Murray Street  
 Nuriootpa SA 5355

Clause 13 of the Deed gives Etiria, or its nominee, a first right of refusal in the event that Council wishes to dispose of the Land. Clause 14 of the Deed also imposes conditions on any sale of the Land by Council.

You have asked me to advise concerning:

1. Council's obligations under the Deed;
2. the interaction between the Deed and Council's new *Disposal of Land and Assets Policy*; and
3. the procedure Council should adopt in relation to any disposal of the Land.

### **The Deed**

My instructions indicate that, in 2007, Council entered into arrangements with Etiria (which was and is part of the Makris Group) in connection with the development of the Marion South Plan Connector Road and the Hallett Cove Shopping Centre. The development involved funding from Federal, State and Local Government and included the transfer of former railway land to Council, the redevelopment of the Hallett Cove Shopping Centre, the construction of a new Civic Centre by Council and payment of a financial contribution of \$1.25 million by Etiria to Council.

The purpose of the Deed was to set out the rights and obligations of Etiria and Council in connection with and arising from the development. It was the culmination of a long period of negotiations, which had commenced in late 2000, for the purpose of giving effect to Council's *Marion Strategic Plan 2006-2020*. Extensive public consultation took place in 2003 in connection with the proposals. The Deed and the development contemplated by it were considered beneficial to the southern residents of Marion.

Under Clause 13 of the Deed, Council granted Etiria a first right of refusal in the event that Council wished to dispose of the Land. This right was to continue only so long as Etiria, or another member of the Makris Group, remained the owner of the Hallett Cove District Shopping Centre. I understand that this ownership continues and that the first right of refusal is therefore still binding.

Clause 13 of the Deed sets out the following procedure to be followed by Council in the event that Council intends to dispose of the Land:

1. Council must give written notice to Etiria of Council's intention to dispose of its interest in the Land. The notice must specify the sale price required by Council and the terms and conditions of the proposed sale and constitutes an offer to sell the Land to Etiria.
2. Within 28 days after service of the notice, Etiria must give written notice to Council either accepting or rejecting the offer to sell. If the offer is accepted, there is then a binding contract for the sale of the Land on the specified terms.
3. If Etiria does not accept the offer within 28 days, Council is at liberty to sell the Land to anyone else on the same terms and conditions and for the same price as specified in the original notice. Council cannot sell the Land on more favourable terms without again offering the Land to Etiria on those terms.



Clause 14 of the Deed requires Council not to dispose of its interest in the Land unless the purchaser also agrees to be bound by the terms of the Deed. This would have the effect of the purchaser agreeing to grant Etiria a similar first right of refusal in connection with any future sale of the Land by the purchaser.

### **Council's *Disposal of Land and Assets Policy***

As required by Section 49 (1) of the *Local Government Act 1999*, Council has prepared and, on 23 June 2015, adopted a *Disposal of Land and Assets Policy* ("the Policy"). The Policy replaces Council's earlier *Acquisition and Disposal of Land Assets Policy* which had been adopted on 27 November 2007.

The purpose of the Policy is to ensure that Council's processes are open and accountable in accordance with the prudential requirements of the *Local Government Act*.

The Policy sets out a list of matters to be considered by Council in making a *decision to dispose* of land. For present purposes, I am assuming that Council either will consider, or has already considered, those matters in reaching a decision to dispose of the Land and my advice is therefore limited to *methods* of disposal.

The Policy describes five methods for disposal of land by Council, "*where appropriate*", namely:

1. open market sale;
2. expressions of interest;
3. select tender;
4. open tender, including public auction; and
5. by negotiation with adjoining owners or others with a pre-existing interest in the land or whose purpose for the land is consistent with Council's strategic objectives.

The matters Council is to consider, "*where appropriate*", when selecting a suitable disposal method include:

- the number of known potential purchasers of the land;
- the original intention for the use of the land;
- the current and possible preferred future use of the land;
- the opportunity to promote local economic growth and development;
- delegation limits;
- the total estimated value of the disposal; and
- compliance with statutory and other obligations.



It should be noted that the Policy does not give preference to any particular one of the five listed methods of disposal. Paragraph 1.1.9 of the Policy does, however, specify that:

“The Council will seek to dispose of Land at or above current market valuation by whichever method is likely to provide the Council with a maximum return, unless there are reasons for the Council to accept a lesser return which is consistent with the Council’s overall strategic direction.”

Under Paragraph 1.1.10 of the Policy:

“If the disposal is not to be on the open market, the disposal should be at or above the current market valuation (with due regard to all associated costs to achieve the transaction or such other amount as the Council resolves).”

### **Selecting a method of disposal**

In my view, all five of the methods of disposal listed in the Policy are available to Council in disposing of the Land, except that, within the “open tender” method, a sale by public auction would be inconsistent with Council’s obligations to Etiria under the Deed.

The Deed requires Council to offer the Land to Etiria on the same terms as Council would be prepared to sell the Land to another party. Council must make that offer before it enters into a binding agreement to sell the Land to a party other than Etiria.

This requirement can be met by Council in connection with an open market sale, seeking expressions of interest, a select or open tender or by negotiation with other parties, so long as all of the associated documents include a special condition or proviso that Council will not be bound to proceed with the sale, or has a right to terminate the Contract, until the expiration of a sufficient period for Council to comply with its obligations to Etiria under the Deed.

Therefore, if a purchaser or tenderer offered to purchase the Land for a particular price and on particular terms, Council could put that offer to Etiria, as required by Clause 13 of the Deed, and Etiria would have 28 days within which to accept or reject the offer. At the end of that period, Council would either:

- if Etiria accepted the offer, proceed to sell to Etiria and terminate the arrangement with the other purchaser; or
- if Etiria did not accept the offer, proceed with the sale to the other purchaser.

A sale by public auction would be inconsistent with this procedure, since the effect of such a sale is that an immediately binding contract is formed with the successful bidder. This would not give Council an opportunity to offer the Land to Etiria on the same terms.

Rejection of public auction as a method of disposal of the Land would be consistent with paragraph 1.1.5.7 of the Policy, which requires Council to consider “compliance with statutory and *other obligations*” – in this case, Council’s obligations to Etiria under the Deed.





**Procedure to be adopted**

Once Council has determined that it wishes to dispose of the Land, it should first obtain at least one market valuation of the Land from a suitably qualified independent Valuer or Valuers. In order to satisfy the requirements of Clause 13.1 of the Deed, the valuation may need to identify and value separately any "improvements, renovations or alterations made by Etiria" to the Land, if that is relevant.

Council can then select which method of sale it proposes to use, taking into account valuation advice as to the optimal method, other than sale by public auction.

The tender, sale or expression of interest documents will need to be carefully drawn so as to ensure that no binding agreement is entered into by Council until it has satisfied its obligations to Etiria under the Deed.

Once a potential buyer, or successful tenderer is found, a written Notice of Intention to Dispose of Land should then be prepared and served on Etiria, in accordance with Clause 13 of the Deed, attaching a copy of the proposed Contract and giving Etiria 28 days to respond.

The response (if any) from Etiria will then determine the next steps Council can take in connection with the proposed sale.

Please let me know if you have any further questions or require any additional advice at this stage.

Yours faithfully  
MELLOR OLSSON

Per :

PHILIP H PAGE  
Partner

Direct e-mail: [ppage@mellorolsson.com.au](mailto:ppage@mellorolsson.com.au)  
Direct Phone: 8414 3441 (Adelaide)