

#	Date	Item Title	Confidential Order Details	Item being kept confidential - Agenda/ Attachment/ Minutes	Reason regarding retention or recommend-action to release	Resolution Regarding Action	Last Review Date	Next Review Date	Date Released
8	19 July 06	Developer contributions	<p>Reason: S 90(3)(b) information the disclosure of which:</p> <p>(i) could reasonably be expected to confer a commercial advantage on a person with whom the Council is conducting or proposing to conduct, business, or to prejudice the commercial position of the Council; and</p> <p>(ii) would, on balance, be contrary to the public interest.</p>	Attachment 1	Letters contain information that is not suitable for release	<p>Release and make public the Agenda, Attachments (2, 3, 4) and the minutes.</p> <p>Attachment 1 - Extend Confidential Order to September 2015</p> <p>The Chief Executive Officer be delegated the authority to revoke all or part of the order and directed to present a report containing the item for which the confidentiality has been</p>	7 Sept 09	5 Sept 11	Agenda, Attachments 2, 3, 4 and minutes - released 6 Sept 10

CONFIDENTIAL MINUTES OF
THE SPECIAL MEETING

of the District Council of Mount Barker held in the Bowyer Chambers of the Local Government Centre, Mount Barker on Wednesday 19 July 2006 at 9am

PRESENT

The Mayor (T. Wales), Councillors Stokes, Haines, Tsigros, Bails, Hamilton, Zanker, , Rothe

IN ATTENDANCE:

Chief Executive Officer (A Stuart), General Manager Strategy & Development (H Inat), General Manager Assets & Infrastructure (B. Clancey), General Manager Corporate and Community Services (N. Jeffery).

APOLOGIES

Crs Gamble, Wright and Allen

11 REPORTS BY OFFICERS

11.1

REPORT TITLE: CONFIDENTIAL REPORT - DEVELOPER CONTRIBUTIONS - UPDATE TO COUNCIL
AUTHOR: HENRY INAT
AUTHOR'S TITLE: GENERAL MANAGER STRATEGY AND DEVELOPMENT SERVICES
REPRESENTORS: NA
FILE NUMBER: 90/005/001/4
DEPARTMENT: STRATEGY AND DEVELOPMENT SERVICES

**DEPARTMENT
MANAGER: HENRY INAT**

10.10 Cr Haines left the meeting

10.12 Cr Haines entered the meeting.

Moved Cr Tsigros:

1. That pursuant to Section 90(2) and 90(3) of the Local Government Act 1999 the District Council of Mount Barker orders that the public be excluded from attendance at the meeting to consider in confidence matters regarding:
 - (b) (i) could reasonably be expected to confer a commercial advantage on a person with whom the Council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the Council; and
 - (ii) would on balance be contrary to the public interest; and
 - (h) legal advice

2. That the Chief Executive Officer, General Manager Assets & Infrastructure, General Manager Strategy and Development, General Manager Corporate and Community Services be permitted to remain in the room.

Seconded Cr Zanker and CARRIED

Moved Cr Bails:

3. That Council adopt a revised position as outlined in this report regarding the legal mechanisms to gain security for infrastructure works and authorise the presentation of this at an Information Forum Update to be held 20 July 2006 with land owners/developers involved in the Developer Contribution initiative including:

- The application of Bank Guarantee to secure contributions for the provision of Indirect Infrastructure;
- The application of a Separate Rate (or such other mechanism) that will provide the required security for the provision of Direct Infrastructure;
- Should the application of the Separate Rate not prove successful the Agreement provides that the parties agree to increase the value of the Bank Guarantee to cover any consequential security needed for both the Direct and Indirect Infrastructure.

4. That 28 July 2006 remain the deadline for submissions to Council from developers/land owners in respect to proposed infrastructure works and development site merit but the deadline for submissions on the revised legal process/document be extended until Friday 11 August 2006 in order to provide developers/land owners with a reasonable opportunity to consider the significant changes to the document and the practical application of the separate rate.

5. That Council reaffirms its position that the details of the final Legal Agreement to be applied to the Developer Contribution initiative will be informed by its prudential review.

Seconded Cr Tsigros and CARRIED

Moved Cr Stokes:

6. That the Council orders pursuant to Section 91(7), (8) and (9) of the Local Government Act 1999 that the discussion, reports, attachments and minutes relating to this item be kept confidential until ~~19 July 2007. 6 Sep 2007 (extended at Council Mtg 4 Sep 2006) extended to 6 September 2008 at 3 September 2007 meeting. 9 September 2009, 9 September 2010~~

Seconded Cr Haines and CARRIED.

MEETING DECLARED CLOSED AT 10.40am

DISTRICT COUNCIL OF MOUNT BARKER

NOTICE OF MEETING

Notice is hereby given that the following Special meeting will be held in the Council Chambers, 23 Mann Street, Mt Barker on Wednesday 19 July 2006.

9.00am

Council Meeting



A. Stuart
CHIEF EXECUTIVE OFFICER

18 July 2006

1. APOLOGIES
2. REPORTS BY OFFICERS

2.1

REPORT TITLE: DEVELOPER CONTRIBUTIONS - UPDATE TO COUNCIL

AUTHOR: HENRY INAT

AUTHOR'S TITLE: GENERAL MANAGER STRATEGY AND DEVELOPMENT SERVICES

REPRESENTORS: NA

FILE NUMBER: 90/005/001/4

ATTACHMENTS: 1 - CORRESPONDENCE RECEIVED REGARDING SIMS ROAD
2 - GANTT CHARTT
3- FLOW CHART DETAILING ELEMENTS OF LEGAL AGREEMENTS
4 - LEGAL ADVICE (DRAFT) - APPLICATION OF SEPARATE RATE

DEPARTMENT: STRATEGY AND DEVELOPMENT SERVICES

DEPARTMENT
MANAGER: HENRY INAT

PURPOSE

To update Council on progress reached over recent weeks relating to the application of a 'public and private partnership model' to fund the infrastructure implications of future urban development.

To overview information intended to be presented to a proposed further 'Information Forum Update' to be conducted on Thursday 20 July 2006 with the land owner/ and developers of sites earmarked as participating in the developer contribution model.

RECOMMENDATION

1. That pursuant to Section 90(2) and 90(3) of the Local Government Act 1999 the District Council of Mount Barker orders that the public be excluded from attendance at the meeting to consider in confidence matters regarding *(to be added from clauses under Section 90 of LG Act)*

- (b) (i) could reasonably be expected to confer a commercial advantage on a person with whom the Council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the Council; and
- (ii) would on balance be contrary to the public interest; and
- (h) legal advice
2. That the Chief Executive Officer, General Manager Assets & Infrastructure, General Manager Strategy and Development, General Manager Corporate and Community Services, and the Minute Secretary be permitted to remain in the room.
3. That Council adopt a revised position as outlined in this report regarding the legal mechanisms to gain security for infrastructure works and authorise the presentation of this at an Information Forum Update to be held 20 July 2006 with land owners/developers involved in the Developer Contribution initiative including:
- The application of Bank Guarantee to secure contributions for the provision of Indirect Infrastructure;
 - The application of a Separate Rate (or such other mechanism) that will provide the required security for the provision of Direct Infrastructure;
 - Should the application of the Separate Rate not prove successful the Agreement provides that the parties agree to increase the value of the Bank Guarantee to cover any consequential security needed for both the Direct and Indirect Infrastructure.
4. That 28 July 2006 remain the deadline for submissions to Council from developers/land owners in respect to proposed infrastructure works and development site merit but the deadline for submissions on the revised legal process/document be extended until Friday 11 August 2006 in order to provide developers/land owners with a reasonable opportunity to consider the significant changes to the document and the practical application of the separate rate.
5. That Council reaffirms its position that the details of the final Legal Agreement to be applied to the Developer Contribution initiative will be informed by its prudential review.
6. That the Council orders pursuant to Section 91(7), (8) and (9) of the Local Government Act 1999 that (choose all/either discussion, reports and attachments, minutes) relating to this item be kept confidential until 19 July 2007.

19 July 2007. 6 Sep 2007 (extended at Council Mtg 4 Sep 2006) extended to 6 September 2008 at 3 September 2007 meeting.

BACKGROUND

Council at a meeting held on 5 June 2006 received a report on the progress reached in pursuing the implementation of a public private partnership model directed at securing financial contributions from the private sector to the provision of public infrastructure associated with the development of designated residential sites throughout the District.

Following favourable consideration of that report the program of meetings scheduled have since proceeded and information circulated. A forum with the developers was held on 8 June 2006 at which time information was presented comprising:

- Council's contribution Model;
- Financial and other justification for the details of the contribution regime proposed;
- Infrastructure details as they related to particular sites;
- Draft copy of updated legal agreements; and
- Process for reviewing data presented and submissions to be made.

Details were also presented as to the intent to hold a subsequent 'Question and Answer' session following the 8 June meeting. The Question and Answer session was held 15 June 2006. Following which 'Site Specific' meetings have since been held with the majority of the site representatives over the following weeks.

The process implemented was structured to ensure that those participating had ample opportunity to seek clarification from Council staff leading to the required date for final submissions to be made as at 28 July 2006.

It has recently been considered necessary that Council conduct a further 'Information Update Forum' with the developers/land owners to give Council an opportunity to respond to the key issues raised to date and to provide feedback to the developers/land owners to assist them in preparing submissions. The Forum is proposed to be held on Thursday 20 July. This will be eight days before the close of submissions.

The following information provides an update of what has transpired since the initial forum held 8 June 2006, and an outline of key issues raised over this time.

DISCUSSION

(Summary of key issues raised to date)

As mentioned above the response to the initiative to date has been positive. All private land owners/developers that have participated in discussion have indicated a positive attitude and are wanting to continue to work with Council to achieve positive outcomes.

Not surprisingly though given the nature of the exercise and its numerous complexities a number of concerns have been expressed. A number of the key concerns raised to date include:

- Application of the proposed Bank Guarantee. In particular that the developers in some instances don't own the land and so it will be difficult to secure a bank guarantee. Also the value of the land and the capacity to receive finance for the Guarantee can not be easily achieved given that the land has a reduced value given its current rural zoning.
- The developers want to undertake the direct infrastructure works rather than Council 'procuring' these infrastructure works.
- There is uncertainty as to the application of the Separate Rate.
- Further clarification sought as to what Council's prudential review may result and its implications.
- Time frame concerns by developers with contracts signed and 'sun set' clauses in place which could mean the contracts 'fall through' if the land is not rezoned.
- Process and timing may be an issue. Land owners/developers need to refer matters to their advisors (eg lawyers, engineers, planners) and awaiting their assistance to consolidate their responses.
- Process and time frame to implement the whole developer contribution initiative has been structured on the elements of the 'package' formulated to date ie Bank Guarantee; payment of the guarantee prior to rezoning; Council procuring the works with the capacity of the developers to undertake the works (should they desire). These elements need to be reviewed and possible alternative solutions found which takes time.
- The draft legal agreement is not reflective of a partnership approach, it is very one way in the direction of Council.

(Meetings held with groups to date and specific issues raised)

Meetings have been held with the following groups. They are presented in order of meetings held. A summary of the issues raised is presented below.

Sims Road (West)

- Council is being unreasonable in seeking contributions for external works.
- Council not having taken into account the community use/nature of the development proposed.
- Council wanting to consider a much reduced contribution factor.

- It is not reasonable to expect two access routes to the development site to be upgraded.

(refer Attachment 1 – Correspondence received re Sims Road)

Gum Tree Drive

- Happy to make contribution but at a reduced level.
- Unsure on the application of the separate rate and what it means for his business.
- Council has issued an approval for the site to be subdivided creating certain number of allotments. This approved number of allotments should be deducted from the contributions required.
- Preference to use an alternative mechanism (i.e. not a bank guarantee) but a Land Management Agreement.

Hallett Road

- Generally happy with contributions process. Concerns about significant increase in costs from that detailed by Council in September 2005.
- Needs more information on the condition of the existing pavement on Hallett Road .

Gardner Street (Southern portion)

- As above.
- Implications of the land on the corner of Gardner and Princess Highway if this not going to be rezoned.

Sims Road (East)

- Reluctant participant.
- Need to know status and contents of legal agreements.
- Legal agreements present too much flexibility for Council.
- More details needed on costs.
- All development sites should be paying an equal amount.
- Need to have regard to the updated version of the Residential PAR to get a better appreciation of development implications.
- Concerns about the timing of the contribution from the Sims Road (West) site to the upgrading of Sims Road.

Hurling Drive

- Concerns with legal agreements being too much on Councils side.
- Timeframes for the implementation of the agreements and ensuring the land is rezoned before December 2006.
- Desire for the developer to undertake the works (both Direct and Indirect) rather than make contributions.
- Happy to proceed with the application of the bank guarantee as an interim measure.
- Desirable to prepare an infrastructure staging plan.

Hawthorn Road

- Generally supportive.
- Capacity of site to be developed now given current residential zoning. Response given that all sites are to be treated equally and Council will continue to have the option of applying a separate rate or such other mechanism to encourage contributions to be made.
- Possibility raised of lodging a development application that is inclusive of the direct infrastructure works rather than have these covered by a formal agreement.
- Query as to position of the State Government and what, if any, contribution may be forthcoming.

Mathew Road/Princess Highway NAIRNE

- Concerned about the increase in contributions from that detailed in September 2005.
- Cost impost on the developer and the implications of offering blocks to the market at a competitive price compared to other development sites which are not required to make contributions.
- Capacity to provide funding is dependent upon Council's willingness to consider increasing the area of land to be rezoned for both residential and industrial purposes.

Meadows (West)

- Only those direct costs associated and directly abutting the site were considered reasonable.
- Payment of other direct infrastructure not considered reasonable.
- Capacity of development to address whole of township water and wastewater solutions needs careful consideration.
- Implications on current ownership of Meadows East site.
- Query why other land owners (North of Mawson Road) are not being required to contribute.
- Higher priority for infrastructure investment is water resources ahead of road and footpaths works.
- Timing of infrastructure provision needs a solid six months and to occur pre the wet months i.e. November – May.
- Preliminary discussion regarding the existing Meadows Waste transfer Station site.

Some of the meetings have given rise to requests for Council to provide further information of a technical nature and we are in the process of gaining this.

(No responses received from certain land owners)

Responses have not been received from the following land owners.

- Hawthorn Road (East) – Mrs GE Gallasch – We have made contact with Mrs Gallasch's son and are now awaiting confirmation of a meeting time.
- Meadows (Corner of Nottage Rd) – Mrs Eckerman
- Gardner Street (northern section) – Mr Bonetti
- Hurling Drive {Triangular piece of land}

Letters are being sent by registered mail to the remaining three persons seeking that they make contact with Council. Where possible personal contacts will also be pursued.

(Gantt Chart)

Various project management tools are being applied to assist in the oversight and management of this project. A Gantt Chart (refer attachment 2 of this agenda) is one such tool that is used to assist in this regard.

Details tasks needing to be undertaken and relative time frames to achieve the following outcomes by 30 September 2006 are presented in the Gantt Chart;

- Submissions from developers received and reviewed;
- Council's legal and financial position understood following review of the submissions;
- Council's Prudential Review completed;
- Council having resolved that its satisfied with its position and endorses legal documents;
- Legal documents forward to land owners/developers for signing;
- Council receives and executes legal documents;
- Council considers Residential PAR and is forwarded to Minister for authorization.

It should be noted that completing the above outcomes by 30 September 2006 is likely to prove difficult. It assumes key tasks are completed on time and that third parties (both from Councils and the land owners/developer representatives eg lawyers, engineers etc) are able to make their contributions on time and in an appropriate manner.

(Scenarios – Three possible scenarios)

A series of alternative scenarios have been considered to assist Council turn its mind to possible alternative time frames and outcomes.

Scenario A

As per Gantt Chart formulated to date. Key elements comprise:

- Bank Guarantee paid in full addressing both Direct and Indirect Infrastructure.
- Legal Agreements executed.
- Council endorses PAR 30 September 2006.

Scenario B

- Council to resolve by 30 September 2006 to enter and execute binding legal agreements.
- Developers receive final legal agreements and are given 2-3 months to consider.
- The legal agreements will commit Council to proceed with rezoning and pursue execution of final agreements and the eventual authorization of the PAR.
- Such outcomes would be linked to implementation of a Separate Rate (and or such other mechanisms as considered warranted) as from 1 January 2007.

Scenario C

- Legal Agreements are executed that require the payment of a Bank Guarantee which covers cost associated with the provision of the Indirect Infrastructure. This payment is made within seven (7) days of signing the legal document.
- The Legal Agreement provides for the possible application of a long term security to the provision of the Direct Infrastructure by way of a Separate Rate and or such other mechanism. Subject to the successful application of this alternate mechanism (ie Separate Rate of such other) then the Bank Guarantee applied in the first instance can be gradually drawn down (reduced in value) as the development proceeds (land division stages are approved).
- Should the implementation of the Separate Rate (or such other mechanism) not prove successful then the Legal Agreement provides for the Bank Guarantee (or such other device as agreed by the parties) to be increased in value to address the shortfall in security to cover the costs of the direct infrastructure envisaged.
- Council would resolve and seek authorization of PAR within the September time frame.

Scenario C has more recently been considered as the preferred outcome to be achieved. It is considered to comprise elements which addresses the timing and quantum of funding concerns as raised by the developers (ie the value of the bank guarantee to cover both the Direct and Indirect Infrastructure needs) while ensuring Councils security and obligations by the private sector are adequately provided for.

A flow chart demonstrating Scenario 3's elements is provided at Attachment 2 to this report.

Legal Advice – Separate Rate

The application of the Separate Rate is increasingly considered as the primary mechanism that Council should use to secure contributions to Direct Infrastructure. Recent advice on the capacity to use the Local Government Act in this regard has been received.

Central to the application of a Separate Rate is the need to ensure that the due process is followed and that Development Agreement in no way influences Council's roles and responsibilities as per the legislative provisions (Local Government Act) to implement such a rate.

Attachment 4 to this report provides recent advice in regard to the application of the separate rate.

Mr Michael Kelledy (Wallmans) will be presenting on the practical application of the separate rate at the Information Forum Update and will provide information that the developers/land owners can take away to digest. He anticipates that the developers/land owners will want to come back to Council in due course to gain further information/clarification of the separate rate process.

Meetings organized with Ministers

Previous meetings have been held with both Ministers for Urban Development and Planning and Minister for Transport, Infrastructure and Energy.

Ongoing dialogue is occurring with Planning SA. Working draft of PAR submitted to them for discussion at officer level.

Transport SA has been actively involved to date. The agency has participated at both forums held with the Developers. A submission has also been received from first forum. Further correspondence recently sent as a consequence of the latest forum is expected to be responded to by end July 2006.

More recently letters have again been forwarded to the following Ministers:

- Minister for State/Local Government Relations
- Minister for Urban Development and Planning
- Minister for Transport, Infrastructure, Energy

The first of the meetings to be held is with the Minister for State/Local Government Relations on 25 July 2006.

(Update Information Forum to be held with Land owners/ Developers – Thursday 20 July 2006)

A meeting is proposed to be held with the land owners/developers to provide an update to the key issues raised in discussions held over recent weeks during this matter.

This meeting is intended to achieve the following outcomes:

- Council staff to present further investigations undertaken to address concerns raised to date in the various forums/meetings held. In particular;
 - Investigations undertaken in response to the Bank Guarantee and possible alternative tools/mechanisms.
 - Reaffirm the primary delivery of the physical infrastructure will be via private developers undertaking the works while they construct their own development.
 - Provide a generic example of the application of the proposed separate rate.
- Present an update legal agreement that addresses the above concerns and other issues as considered relevant. New agreement comprising; Bank Guarantee relates to Indirect Infrastructure; Separate Rate to be applicable to Direct Infrastructure; If Separate rate and or such other tool does not eventuate then amount of Bank Guarantee is increase to address both Indirect and Direct costs.
- Conditions Precedent - flow chart – to help explain steps to be taken and document the conditions needing to be achieved at each stage of the process leading to the signing of the agreements and Council approving the Residential PAR to be sent to the Minister.
- Get an update from the developers as to how they are progressing with their respective investigations and capacity to achieve Council's dead line to present final submissions by 28 July 2006. It is proposed that the deadline for submissions on the revised legal process/document be extended until Friday 11 August 2006 in order to provide developers/land owners with a reasonable opportunity to consider the significant changes to the document and the practical application of the separate rate. No extension to the deadline of 28 July 2006 is proposed for the infrastructure works and development site merit.

The opportunity for developers/land owners to make presentations to Council commencing Monday 14 August 2006 is to be maintained. Thus far indications are that a number of developers/land owners intend to take up this opportunity.

Planning Related Matters

Issues raised through this discussion and submission process that identify and relate to land use and development policy factors, such as suggestions that more land be rezoned to better facilitate the payment of contributions, will be presented to the Residential and Industrial Policy Committee for consideration. The outcomes of these planning policy deliberations will then be presented to Council for consideration and final decisions to be made.

Meadows

As previously advised, considerable work is being undertaken in relation to water and wastewater management in Meadows. This is occurring in tandem with proposals from the developer Country Life in respect of the possible provision of this infrastructure. A report is presently being drafted for consideration by Council.

Once Council has determined a preferred approach it is considered likely that further community consultation will be required before final decision making. This is related to but over and above other infrastructure needs in relation to roads and footpaths. These circumstances give rise to Meadows being viewed as a special case in respect to the current draft PAR.

POLICY IMPLICATIONS

1. Financial/budget

The pursuit of investigations relating to the infrastructure implications of future growth and the required legal and other controls needing to be in place has occurred within existing budget provisions.

2. Legal

All relevant legal aspects of this initiative have been carefully considered and provisions incorporated as required.

3. Staffing/Work Plans

All tasks associated with the initiative have occurred within existing work programs.

4. Environmental

Every effort has been made to ensure that constructive and progressive environmental outcomes are achieved throughout the project.

-

5. Social

Every effort has been made to ensure that constructive and progressive social and community outcomes are achieved throughout this project

6. Strategic Plans

The Community Strategic Plan 2004/07 makes specific provisions encouraging Council to undertake and seek partnership models to assist fund the provision of public infrastructure.

COMMUNITY CONSULTATION

1. Customer Needs Analysis

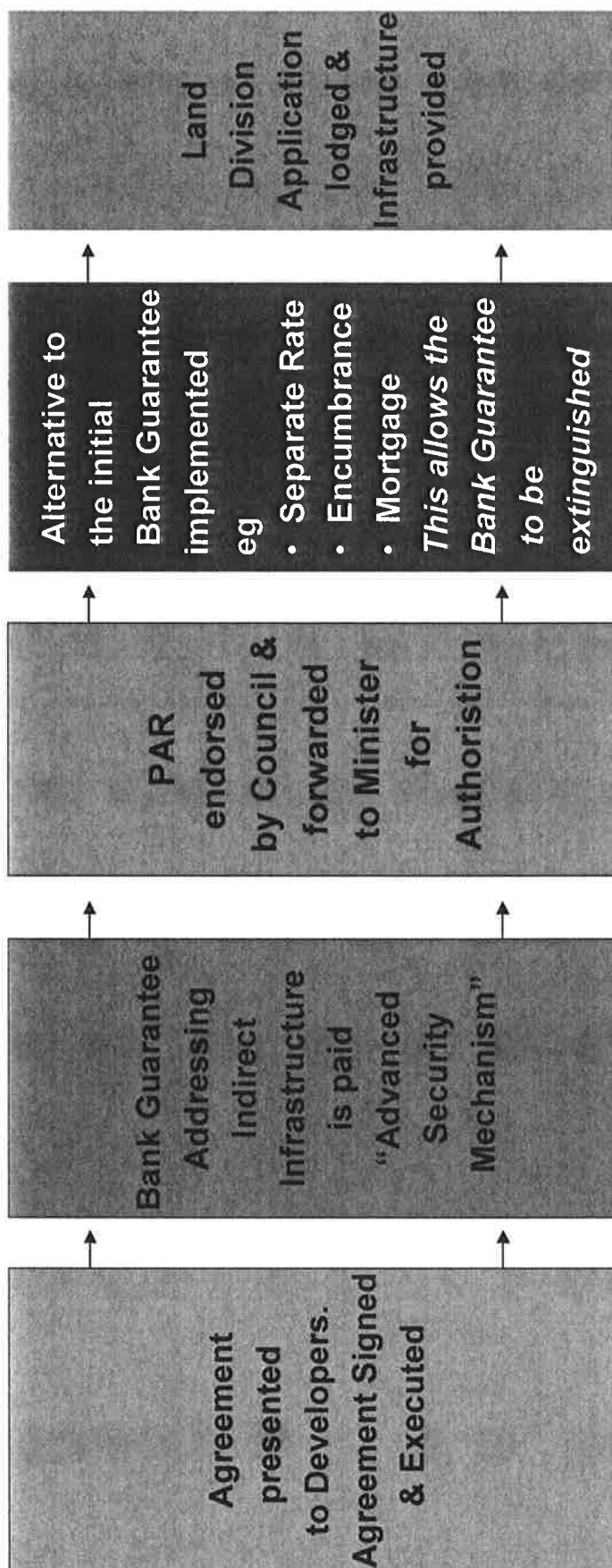
The preparation and processing of the District Wide Residential PAR was paralleled by a comprehensive consultation process.

[illegible]

Development Agreement (Common Law Contract) –

Flow Chart

Scenario C



draft

Our Ref: MJK:mxm:061104

Your Ref:

18 July 2006

Mt Barker District Council
Attention: Mr Andrew Stuart
 PO Box 54
 MOUNT BARKER SA 5251
By email astuart@dcmrbarker.sa.gov.au

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INJURY LAW
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Dear Andrew

PRUDENTIAL CONSIDERATIONS – SEPARATE RATE MECHANISM

Instructions

I refer to recent communications, including various telephone discussions, the cumulative effect of which is to inform this advice pertaining to the use of a separate rate as security for direct and indirect infrastructure works. Those works are relevant to substantial development opportunities which will flow consequential upon Ministerial approval for a proposed PAR.

The PAR extends over a development area comprising a number of potential development sites which are likely to be developed in stages over an envisaged 7 to 10 year time horizon. The Council, having recognised the direct and indirect infrastructure implications arising from such large scale development, is keen to secure the obligations of developers to meet the costs of the infrastructure works whilst, at the same time, seeking not to burden the developers with additional unnecessary costs. For instance, by requiring developers to provide bank guarantees in advance of the PAR and at not insignificant expense for their contribution towards the costs of the infrastructure works.

Separate Rate – Legislative Provisions

The separate rating provisions available to the Council are set out at Section 154 of the *Local Government Act 1999*. The Council has the power to declare a separate rate on rateable land within a part of its area for the purpose of planning, carrying out, making available, supporting, maintaining or improving an activity that is, or is intended to be, of particular benefit to the land, or the occupiers of the land, within that part of the area, or to visitors to that part of the area.

PARTNERS

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 Ian Maitland
 Peter Hoban
 Peter Milte
 Chris Wellington
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It is clear therefore, that the statutory scheme which supports the exercise of the power by the Council to declare a separate rate, requires that certain key criteria must be satisfied, being:

- the separate rate will apply only to rateable land;
- the separate rate may only apply to a part of the Council area and not to the whole of the Council area;
- the separate rate may be declared only for the purpose of an "activity" (whilst this term is not defined, it is to be noted that "project" is defined in the *Local Government Act* to include any form of activity or enterprise, the provision of facilities or services and/or any form of scheme, work or undertaking.); and
- the activity which is to be funded by the separate rate must be (or intended to be) of benefit to the land or to occupiers of the land within the part of Council area to which the separate rate applies – or to visitors to that part of the Council area.

Currently, Section 154(2) provides that a separate rate may be based on the value of the land subject to the rate or, under or with the approval of the Minister, a proportional measure (or other proportional basis) related to the relevant land or the part of the area or to the estimated benefit to the occupiers of the land in the part of the area subject to the rate. The current provisions of Section 154(2) are, therefore, relatively restrictive in terms of the autonomy of the Council and its ability to be flexible with the separate rating power without the prior approval of the Minister. It is to be noted, however, that Section 154 is to be amended, when relevant provisions of the *Local Government (Financial Management and Rating) Amendment Act 2005* come into operation. The effect of these amendments, once operational, will introduce greater flexibility to the separate rating provisions such that the Council may then base the separate rate on the value of the land, upon a proportional measure (as above), or as a fixed charge. The requirement for Ministerial approval will be removed.

A separate rate may be declared for a specified period (the Act provides an example, being the time taken to carry out a capital project) and may be declared for a period exceeding one year. A separate rate (other than one which is declared for more than one year) may not be declared more than one month before the commencement of the financial year to which the separate rate relates. The Council may, therefore, declare a separate rate at any time during the course of a financial year which will apply to land for the balance of that financial year. Whenever the Council declares a separate rate, it must identify the land to which the separate rate will apply.

Wherever the Council declares a separate rate to raise funds for a particular purpose and the Council subsequently resolves not to carry that purpose into effect, or there is an excess of funds over the amount required for that purpose, the revenue raised by the rate or the excess (as the case may be) must either be credited against future liabilities for rates in respect of the land on which the separate rate was imposed or be refunded to the persons who paid the rate, in proportion to the amounts that they paid.

In declaring a separate rate for the first time, the Council must be aware of the provisions of Section 151 of the Act which require the Council to prepare a report on the proposed change (ie the introduction of the separate rate for the first time) and to follow the relevant steps set out in its public consultation policy. The specific requirements in this regard are set out in Section 151(6) – (8) of the Act. However, further amendments to be made to Chapter 10 of the *Local Government Act* by the *Local Government (Financial Management and Rating)*

Amendment Act 2005 will see the introduction of provisions which from 1 January 2007 will impose a requirement to have a business plan for each financial year. The draft business plan is subject to public consultation requirements which are not significantly dissimilar to the public consultation requirements which apply under Section 151. Accordingly, where a separate rate is being proposed to be introduced for the first time and that proposal is included within the Council's draft annual business plan, that will satisfy the requirements which otherwise exist for public consultation under Section 151 of the *Local Government Act 1999*. Where a separate rate which is proposed to be introduced for the first time is not included within the draft annual business plan, the public consultation requirements of Section 151 will continue to apply.

A further statutory consideration in relation to the Council's flexibility associated with the introduction and use of a separate rate, is the discretionary rebate powers of Section 166 of the Act. Under Section 166(1)(a) the Council may grant a rebate of rates where the rebate is desirable, in the opinion of the Council, for the purpose of securing the proper development of part of the Council area. A rebate of rates in this regard, may be granted on certain conditions as the Council thinks fit and may be granted for any period of between 1 and 10 years.

Relevant Considerations

The application of the separate rate, is to be considered in terms of the direct and the indirect infrastructure works. Direct infrastructure works are those works adjacent to or in the vicinity of a development site (or the development area) whereas indirect infrastructure works are new or upgraded infrastructure relative to the cumulative impacts on the "whole of community infrastructure" over the broader Council area (for instance, key open space/reserves, car parking in the town centre and access to the South Eastern Freeway). Accordingly, when consideration is given to the essential criteria of a separate rate, consideration must be given as to whether the infrastructure works proposed to be funded by the separate rate are works that are or are intended to be of particular benefit to the land within the area of the separate rate or the occupiers of the land within that area or to visitors to that part of the area.

In my opinion, direct infrastructure works clearly fall within the separate rate criteria. However, the same cannot be said for indirect infrastructure works which are relative to the whole community infrastructure and so include infrastructure both within and outside of the part of the area to which the separate rate applies. Whilst, therefore, direct infrastructure costs can, in my view, be funded through the separate rate mechanism as clearly meeting the separate rate criteria, the issue of direct infrastructure costs is not so clear. Infrastructure which is of benefit to the Council area as a whole or to occupiers of land in the Council area as a whole rather than to land or occupiers within a defined part of the Council area, will be much more difficult to bring within the relevant separate rate criteria.

In my opinion, the necessary public consultation which must occur before the separate rate can be imposed should include consultation for two separate rates, one being for the direct infrastructure costs and the other for the indirect infrastructure costs. In this manner, the consultation for all potential infrastructure costs may occur irrespective of whether, in the final analysis, it leads to the imposition of a separate rate for one or for both sets of infrastructure works. The better and more robust approach to these issues is, in my opinion, to utilise the separate rating powers to recover the costs of the direct infrastructure works and to rely upon (at least the first instance) the bank guarantee mechanism, (as initially proposed to the developers,) as the source of funding for the indirect infrastructure costs only. In this manner, the costs recovery framework and the attendant security for the Council will better withstand scrutiny and potential challenge.

The rebate powers available to the Council under Section 166(1)(a) of the Act are, in my opinion, broad and flexible in their application. The Council may, therefore, rely upon the power to grant a rebate, in whole or in part, of the separate rate in various circumstances including

- prior to the rezoning of the relevant development sites within that part of Council area to which the separate rate applies;
- in relation to allotments created by the developers and sold to third parties who are not intended to incur any liability for the costs of the infrastructure works;
- in circumstances where a development site is yet to be transferred from a land owner to a developer;
- in circumstances to redress imbalances where one developer has contributed a greater amount than another developer as a result of timing issues;
- in circumstances whereby a developer accepts responsibility for, and undertakes construction of, the direct infrastructure works. Generally, if the proposal which was recently put forward by a number of developers is acceptable to the Council, such that developers will, at their cost but in accordance with standards set by the Council, undertake the construction of the direct infrastructure works, the separate rate payment which is due to be made by those developers may be rebated by reliance upon Section 166(1)(a) of the Act.

One of the fundamental considerations to be taken into account in terms of the application of the separate rate will, as referred to above, be those circumstances where a developer is creating and selling individual allotments from broad acre development sites. The intention of the Council is that the costs of direct infrastructure works (and, for that matter, agreed costs for indirect infrastructure works), are met by the developer and not the purchaser of an individual allotment. Whilst one mechanism to address this scenario would be to rebate to the owner of an allotment any component of the declared separate rate which applied to their allotment, another option might be that in the definition of the area to which the separate rate applies on a year to year basis, the defined area is progressively reduced to exclude sold individual allotments. This would not alter the quantum of the separate rate to be contributed by the developer (in circumstances where the developer is not undertaking the direct infrastructure works) but would simply mean that the area of land over which the separate rate was declared would be a reducing part of the Council area.

An additional consideration, relative to the sale of individual allotments during the course of a financial year, is that the separate rate, having been declared on all of the land within a particular assessment, is not divisible upon the creation of allotments but, instead, continues to apply to the whole of the land including to individual allotments. This is a relevant consideration for the purpose of Section 187 of the Act which provides for the Council to issue a Certificate of Liabilities in relation to any liability for rates or charges on land, including those which have not yet fallen due for payment. The impact, therefore, would be that the total amount of the separate rate due upon a broad acre parcel of land would be disclosed in a Certificate of Liabilities for an individual allotment which has been created from that broad acre land. If the arrangements with the developers are properly documented and Council is satisfied as to the recovery of the separate rate from the developer over the balance of the developer's land, it would be an option for the Council to issue a Certificate of Liabilities which indicates that no rates or charges are due in respect of the individual

allotment. The effect of this is that, under Section 187(4) of the Act, the Certificate would act to estop the Council, for all time, from asserting that any liabilities to the Council for the separate rate exist in relation to that individual allotment. The application of the separate rate to individual allotments going forward could then be addressed as identified above. This approach would operate to ensure that the separate rate liability issues were addressed during the course of a financial year in a manner that would not inhibit the sale of the allotment by the developer and that, thereafter, the purchaser of an allotment would not be exposed to any liability for the separate rate.

A separate rate, like any other rate or charge imposed under Chapter 10 of the *Local Government Act*, is a charge on the land. To this extent, the utilisation of the separate rate as a means of recovering the costs of the direct infrastructure works would act as the necessary security to ensure that the Council (or the community at large through general rate revenue) was not left to bear those costs.

The payment of the separate rate is the responsibility of the owner of the land as the principal ratepayer. Where the developer is also the owner of the land this is unlikely to give rise to any difficulties. However, the occupier of land may be the principal ratepayer where the occupier is entered in the assessment record as the principal ratepayer of land. The occupier may be so entered in the assessment record where the occupier, with the consent of the owner, applies to the Chief Executive Officer of the Council to have the occupier's name recorded in the assessment record as the principal ratepayer. In circumstances where the developer is neither the owner or the occupier of a development site, the liability for the separate rate would fall to the owner. If this unintended consequence of the application of the separate rate were to occur, it might be addressed by the Council by the utilisation of the rebate powers (as described above) or by simply leaving the issue to be determined between the developer and the owner without any involvement by the Council.

The use of Section 155 of the *Local Government Act* is a much more narrow and restrictive power than the use of the Section 154 separate rating powers. Section 155 is only available in respect of a "prescribed service" which means a service involving the provision of water or the collection, treatment or disposal (including by recycling) of waste. On this basis, a service rate and/or service charge could be imposed to recover an amount relative to a water supply scheme and/or a community waste water management system. It could not be used, for instance to recover costs associated with other direct infrastructure works such as, the construction of roads. Accordingly, Section 155 is available to the Council to supplement the use of the Section 154 separate rating powers but only to the limited extent of a relevant prescribed service. Section 155 is, however, a costs recovery mechanism which can be utilised in the future for the purpose of meeting the costs of operating, maintaining, improving and replacing (including by future capital works) prescribed services such as a community waste water management system. Such use of Section 155 will, however, result in the services charges/rates being levied against the owners of rateable land (ie the purchasers of individual allotments) contained within the established valuation assessments at that time.

I understand that each developer will be entering into an agreement with the Council prior to the PAR being referred to the Minister for approval. The agreement will set out the various obligations upon the Council and the developers and will, I expect, include a requirement for the developers to opt to make the relevant financial contribution or an equivalent bank guarantee or to enter into a mortgage for the costs of direct and indirect infrastructure works. The agreement will also recognise the Council's powers, after following the prescribed statutory processes including public consultation (and after considering any submissions made

as part of that public consultation,) to consider the exercise of its powers to declare a separate rate on land within the development area.

The agreement cannot be used to remove or to fetter the statutory obligations to the Council and/or the statutory rights of the developers to participate in the public consultation process. To do so would impugn the prescribed statutory processes and raise concerns about bias, whether real or perceived, on the part of the Council in exercising its statutory powers to declare a separate rate. The reality is, I expect, that in circumstances whereby developers are required to provide a financial payment or a bank guarantee or to enter into a mortgage over their development site, that the option of a separate rate supported by a relevant rebate policy, would be an option that is widely supported by the developers.

Summary

The advice may, therefore, be summarised as:

- a separate rate may be confidently used to recover the costs of direct infrastructure works;
- it will be more problematical to use a separate rate for indirect infrastructure works. The bank guarantee option should be retained for these works;
- public consultation will be required for the imposition of a separate rate. This may occur in isolation or as part of the draft annual business plan (depending upon timing);
- the part of the Council area to which the separate rate applies may progressively reduce as the development and the completion of the works evolve. This is an important factor for the public consultation processes;
- it will be necessary to develop a rate rebate policy to operate in tandem with the separate rate. This policy will identify and address potential anomalies in the application of the rate such as allotments being sold by developers to third parties, developers undertaking the physical works, and the developers not being landowners when the rate is declared;
- the use of Section 155 is of limited application; and
- the agreements to be entered into by the developers must not fetter any statutory rights or obligations.

As you will appreciate, all the considerations arising in respect of this developer contribution scheme give rise to a multitude of considerations relevant to the use of separate rating mechanism to meet the costs of direct infrastructure works. I expect that as this advice is considered and the practical application of a separate rate and the implications arising from the developer contribution scheme are better understood, there will be additional questions and considerations which may be addressed either as part of a final advice or as addenda to this advice. I expect that following meetings with the developers to explain the separate rating scheme there will also be a variety of practical considerations to address.

What I suggest is that as this scheme and this advice is digested and better understood, it will be appropriate to produce a summary (in bullet point form) of the key issues and the application of the separate rate and rebate policy, for the benefit of the proposed developers.

Yours sincerely

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