CONFIDENTIAL ITEMS 2003 – JULY 2026

#	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
175	2 May 2022	Wastewater Service Delivery – Developer wastewater Infrastructure Fees	Section 90 (3) (b) Order 1. Pursuant to Section 90(3)(b) Pursuant to Section 90(2) of the Local Government Act 1999 the Council orders that all members of the public except the Chief Executive Officer; Deputy Chief Executive Officer/General Manager Governance and Wastewater/Recycled Water; General Manager, Infrastructure; General Manager, Planning and Community; General Manager, Corporate Services; Acting General Manager Community Services, Risk and Governance Officer / EA to the Mayor, and Executive Assistant to the Chief Executive Officer be excluded from attendance at the meeting for Agenda Item 3.1 Wastewater Service Delivery – Developer Wastewater Infrastructure Fees. The Council is satisfied that pursuant to Section 90(3)(b) of the Act, the information to be received, discussed or considered in relation to this Agenda item is information the disclosure of which could reasonably be expected to would prejudice the commercial position of the Council. In addition the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in continued non-disclosure of this information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the disclosure of Council's commercial position may prejudice Council's ability to be able to negotiate a cost-effective proposal for the benefit of the Council and the community in this matter and in relation to other contract negotiations.	Council report, related documents and all minutes except Attachments 4 and 5 be retained in confidence	The Council is satisfied that pursuant to Section 90(3)(b) of the Act, the information to be received, discussed or considered in relation to this Agenda item is information the disclosure of which could reasonably be expected to would prejudice the commercial position of Council. In addition the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in continued non-disclosure of this information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the	Retained in confidence, with the exception that this information be made available to all members of the council's Audit and Risk Committee given the addition to the terms of reference of that Committee, until 2 May 2025 or such lesser period for some of the information as may be determined by the Chief Executive Officer and that this order be reviewed every 12 months	7 Oct 25	Within 12 months	*Attachments 4 and 5 released on website 31 August 2022* *Report, Minutes and Attachments released on website 6 November 2026*

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CONFIDENTIAL ITEMS 2003 – JULY 2026

#	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
			Section 91(7) Order 9. Pursuant to Section 90 (3) (b) That having considered Agenda Item 3.1 Wastewater Service Delivery – Developer Wastewater Infrastructure Fees in confidence under 90(2) and (3)(b) of the Local Government Act 1999, the Council pursuant to Section 91(7) of the Act orders that the council report, related documents and all minutes except Attachments 4 and 5 be retained in confidence, with the exception that this information be made available to all members of the council's Audit and Risk Committee given the addition to the terms of reference of that Committee, until 2 May 2025 or such lesser period for some of the information as may be determined by the Chief Executive Officer and that this order be reviewed every 12 months. <u>Order History</u> 5 Sep 22 - 3 Oct 23 3 Oct 23 – 7 Oct		disclosure of Council's commercial position may prejudice Council's ability to be able to negotiate a cost-effective proposal for the benefit of the Council and the community in this matter and in relation to other contract negotiations.				

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3.1	**REPORT TITLE:**	**CONFIDENTIAL ITEM: WASTEWATER SERVICE DELIVERY – DEVELOPER WASTEWATER INFRASTRUCTURE FEES**
	DATE OF MEETING:	**2 MAY 2022**
	FILE NUMBER:	**22/46700**
	ATTACHMENTS:	**1 – LOCATION PLAN SHOWING LAND PARCELS SUBJECT TO A COUNCIL WASTEWATER COMMITMENT DEED (PART A) 17/1300 AND LAND PARCELS SERVICED BY ALANO UTILITIES PTY LTD (PART B) 22/38907** **2 – BASIS FOR WASTEWATER INFRASTRUCTURE FEES APPLICABLE TO FOUR SPECIFIC SITES WITHIN THE MOUNT BARKER GROWTH AREA 22/47344** **3 – ADVICE FROM THOMSON GEER LAWYERS ON FEDERAL LEGISLATION 22/51552** **4 - PROPOSED AMENDMENT TO AUDIT AND RISK COMMITTEE TERMS OF REFERENCE 22/47013** **5 - COUNCIL'S WASTEWATER ACTIVITIES THAT ARE AUTHORISED OR CONTEMPLATED BY STATE LEGISLATION 22/37581** **6 - INCENTIVES TO SECURE MAJOR GREENFIELDS DEVELOPMENT SITES TO BE USERS OF COUNCIL'S WASTEWATER SERVICE 22/37959**
	Key Contact	**Brian Clancey, Deputy CEO/General Manager Governance and Wastewater/Recycled Water**
	Sponsor	**Andrew Stuart, Chief Executive Officer**

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Community Plan 2020-2035:
Community Wellbeing
Goal 4
Safety and resilience
Objective 4.4
Provide wastewater treatment services to deliver public health, environmental and economic outcomes and climate change adaptation solutions

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Annual Business Plan:
Wastewater/recycled Water
Key Annual Objectives
Provide an affordable, cost-effective and reliable service to our wastewater customers

Purpose:
To provide:

1. an overview of the approach that has been taken to wastewater infrastructure fees payable to council by developers in the Mount Barker Growth Area and the rationale for that;
2. legal advice in relation to the applicability and potential implications of the Competition and Consumer Act; and
3. a recommended addition to the terms of reference for the council's Audit and Risk Committee to monitor and report annually to council on the application of the Wastewater Infrastructure Fees and Augmentation Charges Policy.

Summary – Key Issues:

- There is a long history of council decision making in relation to the provision of a wastewater service to the Mount Barker Growth Area and the rationale for that and how it has been approached;
- Recent legal advice concludes that nothing in the information provided by council suggests that council has engaged in predatory pricing, or otherwise misused its market power; and
- The recommendations include an addition to the terms of reference of the Audit and Risk Committee being to monitor and report on the implementation of the Wastewater Infrastructure Fees and Augmentation Charges Policy.

Recommendation:

That Council:

Section 90 (3) (b) Order

1. Pursuant to Section 90(3)(b)
   Pursuant to Section 90(2) of the Local Government Act 1999 the Council orders that all members of the public except the Chief Executive Officer; Deputy Chief Executive Officer/General Manager Governance and Wastewater/Recycled Water; General Manager, Infrastructure; General Manager, Planning and Community; General Manager, Corporate Services; Acting

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Return to Order of Business

General Manager Community Services, and Executive Assistant to the Chief Executive Officer be excluded from attendance at the meeting for Agenda Item 3.1 WASTEWATER SERVICE DELIVERY – DEVELOPER WASTEWATER INFRASTRUCTURE FEES.

The Council is satisfied that pursuant to Section 90(3)(b) of the Act, the information to be received, discussed or considered in relation to this Agenda item is information the disclosure of which could reasonably be expected to would prejudice the commercial position of the Council.

In addition the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in continued non-disclosure of this information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the disclosure of Council's commercial position may prejudice Council's ability to be able to negotiate cost-effective proposal for the benefit of the Council and the community in this matter and in relation to other contract negotiations.

2. Has a short term suspension of normal council meeting proceedings to enable informal discussion of the matters that relate to decision making on this agenda item;

3. End the short term suspension of normal council meeting proceedings;

4. Note and respect the rationale for the decisions taken by council in 2012/2013 to provide a wastewater service to cater for the Mount Barker Growth Area;

5. Note and respect the approach endorsed by council in February 2014 to the determination of wastewater infrastructure fees payable by developers in the Mount Barker Growth Area and the rationale for that;

6. Note the information contained in attachment 2 being in relation to the basis for the approach to wastewater infrastructure fees for four specific development sites within the Mount Barker Growth Area including that a further agenda item for two of these sites is to be prepared for consideration at a council meeting in the near future;

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7. Note the most recent advice from Thomson Geer Lawyers (attachment 3) in relation to the Competition and Consumer Act including that there is nothing from the information reviewed to indicate that council has engaged in predatory pricing; and

8. Amend the Audit and Risk Committee terms of reference (as shown in attachment 4) to add an additional responsibility being to monitor and report annually to council on the application of the Wastewater Infrastructure Fees and Augmentation Charges Policy.

Section 91(7) Order

9. Pursuant to Section 90 (3) (b)
That having considered Agenda Item 3.1 WASTEWATER SERVICE DELIVERY – DEVELOPER WASTEWATER INFRASTRUCTURE FEES in confidence under 90(2) and (3)(b) of the Local Government Act 1999, the Council pursuant to Section 91(7) of the Act orders that the council report, related documents and all minutes except Attachments 4 and 5 be retained in confidence until 2 May 2025 or such lesser period for some of the information as may be determined by the Chief Executive Officer and that this order be reviewed every 12 months.

Explanatory Notes:

1. Confidentiality provisions are proposed given that the content of this item (and attachments) covers legal advice, the current engagement process with SA Water, and commercial in confidence obligations on council arising from some information in wastewater commitment deeds executed by council with developers.

2. A short term suspension of normal council meeting procedures is recommended in order to allow a period of time for informal discussion given the long history of these matters and the nature of the information that is being considered. This requires the approval of at least two thirds of the council members present.

Background:

Part A – A Brief History

1. When the Ministerial DPA was being progressed in 2010, council was advised by the State Government that SA Water would be the wastewater service provider for the Mount Barker Growth Area.

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Return to Order of Business

2. SA Water appears to have had other ideas and council never sensed a genuine appetite on the part of SA Water to deliver this service.

3. SA Water did undertake various studies at different times but never progressed beyond high level/preliminary studies.

4. SA Water did indicate to developers that to service the Mount Barker Growth Area would likely cost around $20,000 per allotment.

5. Developers who had already purchased land or had development rights/options over land, said that was out of the ball park and meant that development was not commercially viable.

6. This led to developers approaching council to be the wastewater service provider for the Mount Barker Growth Area.

7. Key objectives when council was considering whether to be the wastewater service provider for the Mount Barker Growth area included:
   a) To assist to achieve orderly development as the Ministerial DPA did not include any provision for staging, making infrastructure provision far more challenging;
   b) To continue to pursue recycled water opportunities;
   c) To avoid the risk to council and the community associated with possible multiple small scale wastewater service providers offering low cost solutions and the potential for some 'falling over' financially and council having to 'pick up the pieces';
   d) To achieve broader community benefit through the expansion of the council wastewater customer base;
   e) To expand the financial benefits to council derived from the wastewater service, {note that in the Annual Business Plan for 2021/22 it states that wastewater/recycled water service will provide cost recovery to council operations of $1.5 million}; and
   f) To build upon the successful track record of council in delivering a wastewater service and providing public health, environmental and other community benefits.

8. At this time, Alano Utilites Pty Ltd (AU) was not visible; that did not occur until Spring 2013. The development sites within the Mount Barker Growth Area known to now be serviced by AU is shown in attachment 1 (Part B).

9. Also shown in attachment 1 (Part A) are those land parcels within the Mount Barker Growth Area which are the subject of a council Wastewater Commitment Deed and those that are under negotiation. This is the legal mechanism used to formalise those land parcels which are obligated to use the council wastewater service and serves to underpin capital investment in wastewater infrastructure by council.

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Return to Order of Business

10. At the council meeting held on 3 February 2014 an item titled "Council's Role in Wastewater" was considered. At the meeting it was resolved to endorse and formalise high level key objectives for wastewater. That included the following:

    Council will continue to provide the growing community with a wastewater service and be recognised within Local Government as a leader in this field.

    Adopt a commercially based approach in recognition that competition exists.

11. Also at the council meeting held on 3 February 2014 a further agenda item was considered titled: "Wastewater Infrastructure to Service Growth".

12. The resolution of the meeting in relation to that item included the following:

    Authorise (a) the Chief Executive Officer to undertake commercial negotiations with developers of land within the Mount Barker portion of the Mount Barker Urban Growth DPA for the provision of sewer service and (b) the Mayor and Chief Executive Officer to finalise and execute a Wastewater Commitment Deed with individual developers with the CEO to provide quarterly reports to Council meetings on the outcomes of these negotiations without the public disclosure of any commercial in confidence information;

13. That agenda item included the following text:

    The commercial negotiations with developers will need to enable some flexibility to vary from the recommended Sewer Infrastructure Base Fee of $7,250 so as to provide:
    - *incentives for developers to commit pre 30 June 2014;*
    - *recognition of those developers who commit a high volume/monetary amount;*
    - *the ability to include in kind contributions and/or off-sets from developers;*
    - *incentives for commitment by developers to pay specified minimum amounts each year irrespective of the actual rate of land division that they undertake;*
    - *for a developer undertaking capital works (for trunk main network infrastructure or similar) to Council's standard rather than Council procuring; and*
    - *any other matter considered reasonable by the Chief Executive Officer in the context of Council's wastewater service provision objectives.*

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14. A draft of the Wastewater Commitment Deed had been considered at a previous council meeting. Reports were prepared for subsequent council meetings commencing on 16 June 2014.

15. Considerable resources had also been devoted to work on establishing the estimated costs to council. This was reviewed by Tonkin Consulting and this was also considered at the council meeting held on 3 February 2014.

16. A key impact on the cost estimates was the shift from proposing a new secondary wastewater treatment plant near the Aston Hills Golf Course to having a single wastewater treatment plant. These decisions were influenced by Lanser Communities' decision to use Alano Utilities Pty Ltd for their Aston Hills development and Fairmont Homes decision to not proceed with their development option over land that was owned by the Blefari Family (north eastern corner of Sims and Hartman Roads).

17. The decisions of these developers meant that the construction by council of a secondary wastewater treatment plant near the Aston Hills Golf Course (intended to service around 2,000 allotments) was no longer favoured and instead council endorsed a single wastewater treatment plant strategy being to upgrade the existing plant on Springs Road.

Part B – Recent Communications and Decisions

18. Over recent months several confidential memos have been provided to council members on a number of wastewater and recycled water topics.

19. This has included information on the recent engagement process between council and SA Water with a joint report to be prepared and this is currently expected to be available in June 2022. This is anticipated to include the consideration of options including council no longer being the owner and operator of the wastewater service and council retaining ownership but not being the operator with SA Water being the operator.

20. This has also included information regarding arrangements for wastewater entered into with various developers of sites within the Mount Barker Growth Area and concerns raised by Cr Leach regarding the possible implications of the Competition and Consumer Act.

21. Most recently council meetings have resolved to:

    - amend the Wastewater Infrastructure Fees and Augmentation Charges Policy (as recommended and consistent with professional external advice) Note: The Wastewater Infrastructure Fee is to fund new assets required due to growth. As an example, it is used to fund new collection mains to service greenfields land parcels and contributes to the cost of the

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Return to Order of Business

upgrading of the wastewater treatment plant that is growth related as does revenue from the Annual Service Charge being the asset renewal component (not simply like for like due to upgrading as distinct from expansion of capacity for growth) as the wastewater treatment plant is now at end of life;

- have a site specific wastewater infrastructure fee to be payable by the developer in relation to a large development site within Littlehampton. The amount was less than the standard wastewater infrastructure fee having regard to the estimated cost to council to service this development site; and

- note an update on the status of the implementation of the recommendations in the Wastewater Service Delivery Study prepared for council in June 2021 by Frontier Economics.

Discussion:

22. As evidenced above, there is considerable history of council decision making in relation to the provision of a wastewater service for the Mount Barker Growth Area.

23. Council has been diligent in using various mechanisms to secure future revenues (in relation to wastewater) from the developers of land within the Mount Barker Growth Area. These mechanisms have included:

    - Wastewater Commitment Deeds (legally binding);
    - Wastewater Infrastructure Separate Rates;
    - Wastewater Commitment Separates Rates;
    - Wastewater Augmentations Separate Rates; and
    - Land Management Agreements.

24. Council has also made extensive use of external service providers to prepare information (as inputs) to enable council decision making to occur on a sound basis. This has included professional advice in relation to cost estimates, infrastructure design, legal, regulatory, financial and prudential.

25. Concern has been raised by some council members in relation to the wastewater infrastructure fee applicable to sites within the Mount Barker Growth Area, in particular four specific sites for which the circumstances and rationale for the approach to each of these development sites is addressed in attachment 2.

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Return to Order of Business

26. The recent amendments to council policy means that site specific wastewater infrastructure fee amounts are preferred where possible and are to be determined by council meeting resolution. Most immediately this will be applicable to four development sites of scale in Nairne and four sites in the Mount Barker Growth Area that the Bathla Group propose to develop (refer attachment 2).

27. In relation to the Competition and Consumer Act (CCA), the advice from Thomson Geer Lawyers is contained in attachment 3.

28. Information on the council instructions for Thomson Geer Lawyers and their interim advice has been provided to council members previously in conjunction with confidential memos.

29. Importantly, Thomson Geer Lawyers has concluded that:

> *Nothing in the Materials suggests that Council has engaged in predatory pricing, or otherwise misused its market power in contravention of the CCA. In addition to the above, it is, in any event, reasonably arguable that the relevant provisions of the CCA do not apply to Council, on the basis that the provision of the wastewater services by Council does not amount to carrying on a business. The CCA contains an exemption for local government bodies to the extent that those local government bodies are not carrying on a business.*

30. That advice references "Materials" being information provided by council. That included a council-prepared summary of:

- Council's wastewater activities that are authorised or contemplated by State legislation, dated 24 March 2022 (attachment 5); and
- the incentives council offers to secure major greenfields development sites to be users of council's wastewater service, dated 24 March 2022 (attachment 6).

These documents are both attached for completeness.

31. This most recent advice from Thomson Geer Lawyers clearly adds value to the forthcoming consideration of the option of council establishing a wastewater subsidiary. It also rounds out the brief provided to them which included input to the review of the various council wastewater/recycled water policies.

32. BRM Advisory has been retained to undertake the brief on the option of a subsidiary which includes engagement with council members in a similar manner to the process followed for the Wastewater Service Delivery Study that was undertaken by Frontier Economics.

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33. To further enhance good governance, it is recommended that an amendment be made to the Audit and Risk Committee (ARC) Terms Of Reference as contained in attachment 4.

34. Adoption of this recommendation will see an additional monitoring and reporting requirement in relation to the Wastewater Infrastructure Fees and Augmentation Charges Policy.

Community Engagement:

Informing only	As per recommendation 9 above

Policy:
Wastewater Infrastructure Fees and Augmentation Charges Policy
Infrastructure Contributions – Separate Rate Relief Policy

Long Term Financial Plan:
The Long Term Financial Plan includes capacity for future capital expenditure (upgrading, expansion and renewal) and operating expenditure (operation and maintenance) and forecast revenue from both wastewater infrastructure fees payable by developers and wastewater annual service charges payable by ratepayers.

Budget:
Adoption of the above recommendations will not have any direct budget impact.

Statutory/Legal:
Local Government Act 1999
Section 7 - Functions of a council
to provide infrastructure for its community and for development within its area

Staff Resource Requirements:
Implementation of the above recommendations can occur within existing staffing arrangements.

Environmental:
The above recommendations don't have any direct implications for the environment. Council's wastewater and recycled water objectives continue to feature environmental goals.

Social:
The above recommendations don't have any direct social implications.

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Return to Order of Business

Risk Assessment:
A risk continues to be the need to find new customers for recycled water who are prepared to pay a reasonable price and to resolve storage issues to overcome the winter supply surplus capacity versus summer demand.

Asset Management:
The above recommendations don't have any direct implications for asset management. Currently as the owner and operator of the wastewater service, asset management is a council responsibility, funded by the wastewater service.

Conclusion:
Decision making at council meetings on the provision of a council wastewater service for the Mount Barker Growth Area has occurred over a number of years on the basis of the circumstances at the time and the consideration of risks and benefits to the broader community. Those decisions have subsequently been implemented by council officers.

A selection of Previous Decisions By/Information Report to Council

Meeting Date	3 February 2014	CM Reference	48/030/087
Title	Council's Role in Wastewater		
Purpose	To: • provide an overview of the successful role in wastewater undertaken by Council and the community benefits derived from this over a long period of time; and • seek endorsement for the proposed process to develop and formalise high level key objectives for wastewater.		

Meeting Date	3 February 2014	CM Reference	48/030/087
Title	Wastewater Infrastructure to Service Growth		
Purpose	To provide an update on the provision of sewer services (wastewater and solids) to the full Mount Barker Urban Growth DPA area; set a Sewer Infrastructure Base Fee; and provide authority for commercial negotiations with developers.		

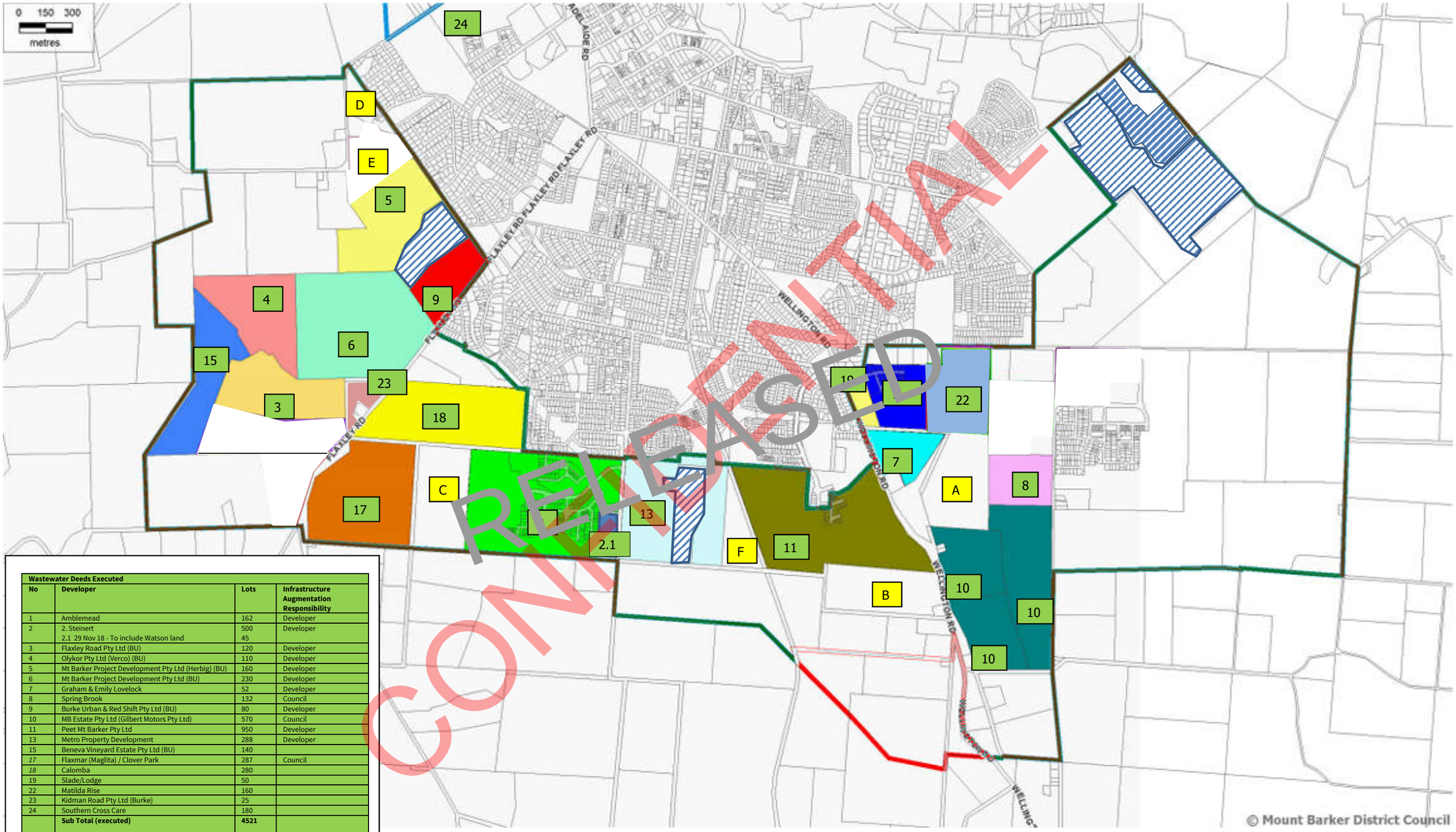
Meeting Date	7 March 2022	CM Reference	DOC/22/8297
Title	REVISED/NEW WASTEWATER AND RECYCLED WATER POLICIES		
Purpose	Adopt the proposed changes to the Draft Revised Wastewater Infrastructure Fees & Augmentation Charges Policy		

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MDPA Parcels Associated with Developer Wastewater Deeds as at 31 August 2021



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Wastewater Deeds Executed			
No	**Developer**	**Lots**	**Infrastructure Augmentation Responsibility**
1	Amblemead	162	Developer
2	2. Steinert 2.1 29 Nov 18 - To include Watson land	500 45	Developer
3	Flaxley Road Pty Ltd (BU)	120	Developer
4	Olykor Pty Ltd (Verco) (BU)	110	Developer
5	Mt Barker Project Development Pty Ltd (Herbig) (BU)	160	Developer
6	Mt Barker Project Development Pty Ltd (BU)	230	Developer
7	Graham & Emily Lovelock	52	Developer
8	Spring Brook	132	Council
9	Burke Urban & Red Shift Pty Ltd (BU)	80	Developer
10	MB Estate Pty Ltd (Gilbert Motors Pty Ltd)	570	Council
11	Peet Mt Barker Pty Ltd	950	Developer
13	Metro Property Development	288	Developer
15	Beneva Vineyard Estate Pty Ltd (BU)	140	
17	Flaxmar (Maglita) / Clover Park	287	Council
18	Calomba	280	
19	Slade/Lodge	50	
22	Matilda Rise	160	
23	Kidman Road Pty Ltd (Burke)	25	
24	Southern Cross Care	180	
	Sub Total (executed)	**4521**	

Wastewater Deeds Under Negotiation Mount Barker Growth Area			
A	Bathla Group	235	
B	Bathla Group	242	
C	Bathla Group	220	
D	Dean Day	24	
E	Burke Urban	57	
F	Former Sandow Land	123	
	Sub total	**901**	

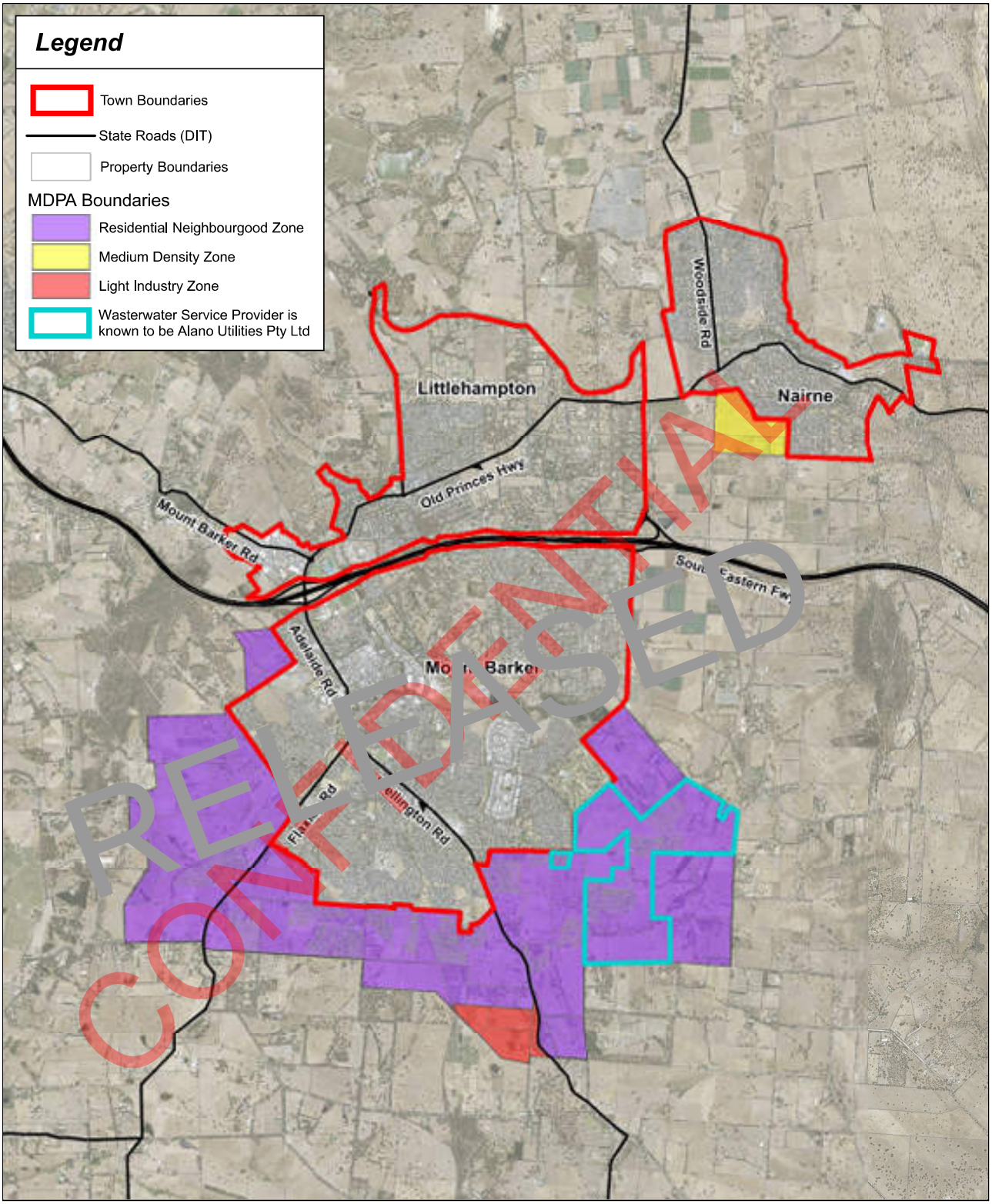
Blue stripes = Council Land

Map Zoom: 8.098 km
Map Scale: 1:20,000
Created on: Tuesday, 26 July 2016 By: advanced

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Mount Barker District Council

MDPA Rezoned Land & Town Boundary

Mount Barker District Council
6 Dutton Road
Mount Barker SA 5251

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Attachment 2

BASIS FOR WASTEWATER INFRASTRUCTURE FEE APPLICABLE TO FOUR SPECIFIC SITES WITHIN THE MOUNT BARKER GROWTH AREA

22/47344 Draft as at 27/4/22

Please note:
References below to Parcel Numbers relate to Attachment 1 Part A.

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Site i) – Parcel Number 11 Bluestone Development (off Hurling Drive via East Parkway)

The Bluestone development originally commenced on Hurling Drive on land that was rezoned in 2006 at the initiation of council.

The developer at that time was Walker Corporation and Daycorp and the development site was serviced by council providing a Community Wastewater Management System (CWMS).

The 2010 Ministerial Development Plan Amendment rezoned land immediately to the south of Bluestone and the Bluestone development then extended, still using CWMS.

The wastewater infrastructure fee payable for CWMS was significantly less than for sewer.

Peet (Mount Barker Pty Ltd) purchased the balance of the Bluestone development site several years ago following which, council put to Peet that from a public and environmental health perspective, a sewer service would be preferable to the continuation of CWMS.

Peet was proposing some group/communal septic tanks to cater for higher density development and that wasn't the preferred option of council.

Peet was prepared to enter into a commercial negotiation with council and expressed concern at the impact that the additional development cost of sewer (compared to CWMS) would have.

Hence the reduction in the wastewater infrastructure fee was incentive for the remainder of the Bluestone development site to be sewered (this was very significant with the estimated number of additional allotments being 950 at the time of the Wastewater Commitment Deed being executed in 2016) so as to achieve a preferred public health outcome for the broader community.

Return to Order of Business

Site ii) – Parcel Number 8 Spring Brook Development (Paech Road)

Council was obligated to provide a sewer service to the Glenlea development site (Parcel Number 10) which is located immediately south of the Spring Brook development site.

The wastewater collection main to service the Glenlea development site runs through the Spring Brook site.

By virtue of that obligation to Glenlea, council faced a 'sunk' capital cost and the strategy was to seek to maximize the return on that infrastructure by securing other customers.

Hence to secure commitment from the developer of the Spring Brook site had very little impact cost wise on the council's wastewater collection network infrastructure due to its size, location and topography. It meant that much of the revenue that would be received from the developer of Spring Brook could be used to contribute to the upgrading of the wastewater treatment plant and hence achieve broader community benefit.

As intended by the Water Industry Act, there was competition as the Alano Utilities Pty Ltd (AU) network was servicing the development site (Aston Hills) on the other side of Paech Road so commercial negotiation was required to provide incentive for the Spring Brook developer to commit to the council service with the developer verbally indicating that the capital cost to use the AU service being considerably less than the council base fee amount.

Site iii) – Parcel Number 17 Clover Park Development (south eastern corner of Flaxley Road and Heysen Boulevard)

The negotiated wastewater infrastructure fee was within $50 of the amount recommended by council officers to achieve full cost recovery to service this development site.

The estimated number of allotments when a wastewater commitment deed was executed in 2017 by the then developer (Flaxmar Pty Ltd which was closely tied to Lanser Communities the developer of Clover Park and Aston Hills) was 287. The actual number of allotments (this is what the developer is charged) is now anticipated to exceed that by a small amount but nonetheless will result in additional revenue to that which was forecast.

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Return to Order of Business

Site iv) – Parcel Number 18 Not yet developed (north eastern corner of Flaxley Road and Heysen Boulevard)

The negotiated wastewater infrastructure fee when a wastewater commitment deed was executed in 2017 by the then developer (Calomba Pty Ltd) was within $50 of the amount recommended by council officers to achieve cost recovery to service this development site (excluding the augmentation of wastewater collection infrastructure to service this and one other land parcel – refer below).

Council understands that this development site is in the process of being purchased by the Bathla Group who own three other development sites in the Mount Barker Growth Area (refer attachment 1 Part A).

The Bathla Group are based in New South Wales. They have indicated a preparedness to execute wastewater commitment deeds over each of the three development sites in their ownership at the current base amount less 10%. The forecast total number of allotments in the three development sites is 699.

It is not yet known if the Bathla Group due diligence in relation to the proposed purchase of the subject land has made known to them the wastewater infrastructure fee that was applicable with Calomba Pty Ltd (a reduction of 3[illegible].7% of the base amount) or whether the Bathla Group would be accepting of the amount negotiated for the three other Bathla Group sites being a 10% reduction of the base amount. Provision does exist for the assignment of the Wastewater Commitment Deed executed by Calomba Pty Ltd to the Bathla Group as the purchaser.

The wastewater commitment deed executed with Calomba Pty Ltd includes that council is to be responsible for the required augmentation of wastewater collection infrastructure to service this development parcel and an adjacent development parcel on the southern side of Martin Road located in between Clover Park and Spring Lake (Parcel C) which is owned by the Bathla Group.

The current estimated cost of the augmentation infrastructure is $600,000 compared to the 2016 estimate of $550,000. This infrastructure would be owned by council. This would service both Parcel Number 18 and the majority of Parcel Number C.

This obligation of council was to provide further incentive to the developers of these two parcels to commit to the council wastewater service given council was seeking to maximize the use of the Western Sector Trunk Main. The augmentation infrastructure required to service these two development parcels would connect to the Western Sector Trunk Main which was installed by council a few years ago.

The recommendation to the Chief Executive Officer from the Senior Project Manager in 2016 included the following text in this regard:

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Return to Order of Business

Construction of a Western Sector Trunk Main (WSTM) to service the broader catchment is a high priority for Council and potential fragmentation of the customer base to other providers would undermine the business case for delivery of this key infrastructure.

Hence the original estimated augmentation infrastructure cost of $550,000 was seen as being modest relative to the benefits that this would deliver for council being a far more effective return on the investment in the Western Sector Trunk Main and revenue to council that this would enable being estimated in 2017 to be a total of $2.72 million from the developers of the two development sites.

The Calomba Pty Ltd and Flaxmar Pty Ltd interests had commonality and both were managed via Lanser Communities. This saw council decision making also influenced by the commercial offer being assessed across both of these parcels so it can be argued that the council obligation to provide the augmentation infrastructure was in part to secure commitment from Flaxmar Pty Ltd for parcel 17 as reflected in the wastewater commitment deeds for these two parcels being executed concurrently i.e. Lanser Communities viewed it as a package deal.

In addition to the 2017 forecast revenue from these two development sites of $2.72 million is the forecast revenue from the Bathla Group for parcel C which is a further $1.859 million (current day dollars) , most of which is also attributable to the augmentation infrastructure.

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Return to Order of Business

THOMSON GEER
LAWYERS

	Memo
From	George Lukic
To	Fraser Bell
Date	27 April 2022
Subject	Predatory Pricing – Mount Barker District Council – Water and Wastewater
Matter No	4965741

Fraser

As discussed, I set out below a supplementary discussion paper addressing the issues arising out of our conference with Brian Clancey on 16 March 2022 and the materials that Brian Clancey sent to us following that meeting (**Materials**), comprising:

1 a project brief in relation to the potential incorporation of a Council subsidiary for Council's wastewater business, reference 2021.132;

2 a letter from Council to SA Water dated 8 October 2021;

3 a letter from SA Water to Council dated 5 November 2021;

4 a Wastewater Commitment Deed between Council and Metro Minters Fields Pty Ltd;

5 a plan showing the total area of land rezoned by the State Government in 2010 and, as an overlay outlined in blue, the portion of that land which is known by Council to be serviced by Alano Utilities Pty Ltd;

6 a Council-prepared summary of Council's activities that are authorised or contemplated by State legislation, dated 24 March 2022; and

7 a Council-prepared summary of the incentives it offers to secure major greenfields development sites to bypass Council's wastewater service, dated 24 March 2022.

I set out my explanation below. In broad terms, nothing in the Materials suggests that Council has engaged in predatory pricing, or otherwise misused its market power in contravention of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

1 Executive summary

(a) Nothing in the Materials suggests that Council has engaged in predatory pricing, or otherwise misused its market power in contravention of the CCA.

(b) In addition to the above, it is, in any event, reasonably arguable that the relevant provisions of the CCA do not apply to Council, on the basis that the provision of the wastewater services by Council does not amount to carrying on a business. The CCA contains an exemption for local government bodies to the extent that those local government bodies are not carrying on a business.

(c) If Council incorporated a subsidiary to provide wastewater services, it would be more difficult for the subsidiary to argue that the CCA did not apply to the subsidiary. This is because the subsidiary would likely fall outside the definition of 'local government body' in the CCA. However, even in this case, as noted above, nothing in the Materials suggests that Council has engaged in predatory pricing or otherwise misused its market power in contravention of the CCA.

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2 Predatory pricing

Nothing in the Materials alters my view in relation to predatory pricing. If Council complies with competitive neutrality principles, its conduct cannot be said to amount to a misuse of market power.

Council's position is assisted by our instruction that Council's previous negotiations with developers in relation to the supply of water have been reactive to requests made by those developers. In some instances developer requests have occurred where there is clear competition with Alano Utilities with both parties competing for the opportunity to provide services to the developer.

3 Incorporation of subsidiary

3.1 **Overview**

I understand that Council is contemplating the incorporation of a subsidiary pursuant to section 42 of the *Local Government Act 1999* (SA) (**LG Act**) to provide wastewater services.

If Council incorporates a subsidiary to provide wastewater services, there is a risk that this subsidiary will not be able to benefit from any immunities available to Council pursuant to section 2BA of the *Competition and Consumer Act 2010* (Cth) (**CCA**), for the reasons set out below.

Section 2BA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) provides:

> *(1) Part IV applies in relation to a local government body only to the extent that it carries on a business, either directly or by an incorporated company in which it has a controlling interest.*
>
> *(2) In this section:*
>
> ***local government body** means a body established by or under a law of a State or Territory for the purposes of local government, other than a body established solely or primarily for the purposes of providing a particular service, such as the supply of electricity or water.*

(Emphasis added).

I summarise the operation of the above provisions as follows.

(a) Section 2BA provides that the operative provisions of the CCA only apply to Council to the extent that Council carries on a business.

(b) Put another way, those provisions will not apply to Council activities that do not amount to carrying on a business. Effectively, section 2BA creates a limited immunity in favour of Council (with the test for this immunity being whether Council carries on a business or not).

(c) However, Council's subsidiary will only benefit from section 2BA if it falls within the definition of 'local government body'. On a plain reading of section 2BA, the subsidiary is not a 'local government body', as it was established for the purposes of providing a particular service (the supply of wastewater services).

(d) This means that section 2BA would not apply to the Council subsidiary, and so the subsidiary would not benefit from the limited immunity provided to the Council by section 2BA.

(e) The effect of the above is that the activities of the subsidiary carry a greater risk profile than the activities of Council (insofar as the subsidiary can never benefit from the limited immunity conferred by section 2BA, but Council may be able to do so to the extent that it

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Return to Order of Business

is able to persuade a regulator that it does not carry on a business in its provision of wastewater services).[1]

(f) Of course, as noted at section 2 above, nothing in the Materials suggests that Council has engaged in predatory pricing or similar behaviour (provided Council has otherwise complied with competitive neutrality principles). The section 2BA immunity buttresses Council's position but is not required in order to find that Council has not contravened the CCA.

3.2 Authorities and other materials considering section 2BA of the CCA

The definition of 'local government body' used in section 2BA of the CCA has been present since 1995, when the *Competition Policy Reform Act 1995* (Cth) (**Competition Policy Reform Act**) introduced section 2D of the Trade Practices Act 1974 (Cth) (**TPA**) (as the CCA then was).[2] The Competition Policy Reform Act was introduced in response to the Hilmer Report.[3]

Section 2D was subsequently repealed by the *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth) (**Trade Practices Legislation Amendment Act**), which Act introduced section 2BA of the TPA. Section 2D was introduced in response to the Productivity Commission's *Review of Section 2D of the Trade Practices Act 1974: Local Government Exemptions* in 2002 (**Productivity Commission Review**).[4]

While the definition of 'local government body' set out above has been present in the CCA since 1995, it has not been the subject of judicial consideration. The issue was not addressed in the second reading speeches and explanatory memoranda for the Competition Policy Reform Act or Trade Practices Legislation Amendment Act, or the Hilmer Report.

Similarly, while the Productivity Commission Review acknowledged the effect of the exclusion (by reference to its impact on specific purpose councils operating in New South Wales), it provided no background to the rationale for the exclusion.[5]

In the absence of any detailed authority considering the operation of the exclusion in the definition of 'local government body', it is reasonable to assume that section 2BA would not apply to a Council subsidiary established for the purpose of providing wastewater services.

4 Carrying on a business

I note that the Materials refer to section 7 of the LG Act in support of the proposition that the provision of water services forms part of the core services of Council. In its original form, section 7(b) of the LG Act expressly referred to the provision of water services as one of the functions of local government:

> *7 The functions of a council include–*
>
> …
>
> *(b) 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*

[1] I note that, even in the absence of the section 2BA immunity, it remains open to the subsidiary to argue that it is not a trading or financial corporation, with the effect that the operative provisions of the CCA do not apply to it. However, this is likely to be a more onerous requirement than simply relying on the section 2BA immunity (and, as noted in my first discussion paper, the equivalent competition provisions of the *Competition Policy Reform (South Australia) Act 1996* (SA) (**SA Act**) apply to all 'persons', rather than merely corporations in any event).
[2] *Competition Policy Reform Act 1995* (Cth) s 81.
[3] Commonwealth, *Parliamentary Debates*, Senate, 29 March 1995, 2434 (Rosemary Crowley); Frederick G Hilmer, Mark R Rayner, and Geoffrey Q Taperell, *National Competition Policy* (Report, 25 August 1993).
[4] Explanatory Memorandum, Trade Practices Legislation Amendment Bill (No 1) 2005 (Cth); Productivity Commission, *Review of Section 2D of the Trade Practices Act 1974: Local Government Exemptions* (Inquiry Report No 23, 14 August 2002).
[5] Productivity Commission, *Review of Section 2D of the Trade Practices Act 1974: Local Government Exemptions* (Inquiry Report No 23, 14 August 2002) 39-40.

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> *community services or facilities, and cultural or recreational services or facilities);*
>
> …

(Emphasis added).

The reference to water (and other) services was removed by section 6 of the *Statutes Amendment (Local Government Review) Act 2021* (SA). However, the reason for the removal is not apparent from the second reading speech to the Act.[6]

The *Statutes Amendment (Local Government Review) Act 2021* (SA) arose out of the South Australian Government's local government reform consultation process, and the South Australian Productivity Commission's *Inquiry into Local Government Costs and Efficiency* (**SA Productivity Commission Report**).[7]

In the SA Productivity Commission Report, the Productivity Commission recommended that the Government clarify, among other things, section 7 of the LG Act '*to make clearer the range of options available to councils in the performance of legislated functions*'.[8] In its response, the Government indicated that:

> *The Government [would] review the provisions of sections 6 and 7 of the Local Government Act 1999 as recommended by the Commission in conjunction with the LGA, as part of the current review of this Act. In particular, the Government [would] consider amending the provisions relating to the role and functions of councils to more directly address councils' discretion regarding the scope of services and infrastructure provided to their communities based on expressed needs in the context of the capacity and willingness of the community to fund service levels relative to competing priorities.*[9]

Notwithstanding the above, the Government in its response appeared to emphasise that the community typically expected councils to deliver certain core services, such as local roads, recreation facilities, and waste collection services.[10]

Importantly, the Government appeared to adopt the view that the core services delivered by councils (or service standards for those services) were a matter for councils themselves, informed by community expectations.[11]

Even in the absence of a specific reference to wastewater services in section 7 of the LG Act, it is clear that the LG Act contemplates the provision of wastewater (and other water) services by Council. For example, section 155 of the LG Act expressly permits Council to impose services charges in relation to (among other things):

(a) the treatment or provision of water; and

(b) the collection, treatment, or disposal of waste (which would encompass wastewater).

Overall, nothing in the Materials alters my initial view. That is, while the position is not certain, it is, on our interpretation of the facts and circumstances, open to conclude that Council does not carry on a business when delivering water services. I note that this position is fortified by the assumption (based on our discussion with Brian Clancey) that:

[6] South Australia, *Parliamentary Debates*, House of Assembly, 17 June 2020, 1617-1638 (Stephan Knoll, Minister for Local Government).
[7] See generally Department of Planning, Transport and Infrastructure, *Reforming Local Government in South Australia* (Discussion Paper, August 2019); South Australian Productivity Commission, *Inquiry into Local Government Costs and Efficiency* (Final Report, 22 November 2019).
[8] South Australian Productivity Commission, *Inquiry into Local Government Costs and Efficiency* (Final Report, 22 November 2019) 156.
[9] Government of South Australia, *Response to the South Australian Productivity Commission's Inquiry into Local Government* (Report, February 2020) 9.
[10] Ibid 7-8.
[11] Ibid 7-9.

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Return to Order of Business

(a) Council does not describe its provision of water services in commercial, business-like terms.

(b) Council does not supply water services with a view to making a profit.

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Return to Order of Business

Mount Barker District Council

Wastewater/Recycled Water

HP22/37959 - 24 March 2022

Commercial In Confidence

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Summary of Incentives Offered by Council to Secure* Major Greenfields Development Sites to be users of the Council Wastewater Service

* Secure in this context means that the developer executes a Wastewater Commitment Deed with council, obliging their development site to be serviced by the council's wastewater system.

The incentives outlined below (in no particular order) are only available to a developer who executes a wastewater commitment deed with council.

An example wastewater commitment deed (not executed) is attached and is selectively referenced in the summary below.

Payment terms

Refer item 3 of the Schedule. In effect payment terms are 6 months versus for developers who use the council network but don't have a wastewater commitment deed (i.e. smaller scale development sites) payments terms are the standard 1 month.

Sewer infrastructure fee amount

Refer to item 5 of the Schedule and clauses 5 and 6. The Sewer Base Infrastructure Fee is applicable to developers who use the council network but don't have a wastewater commitment deed (smaller scale developers) versus the Sewer Infrastructure Fee (a specified amount which does vary for different development sites) that is only applicable to a Developer who has executed a wastewater commitment deed.

The amount that Alano Utilities Pty Ltd charges a developer is not known to council. A few years ago, developers verbally indicated to council that it was circa $4,000 - $4,500 per allotment.

Additional land

At clause 4.5 the Developer can seek to secure from council similar benefits to service additional land that is subsequently developed by the Developer.

Return to Order of Business

Augmentation of required wastewater infrastructure

At clause 3.3 provision exists for council to be obligated to complete required sewer infrastructure augmentation works. Also see clause 8.

This obligation on council exists in relatively few of the executed wastewater commitment deeds.

Timing of Service Delivery

At clause 3.1.3 council is obliged to provide a sewer service to meet the timing needs of the Developer.

Security via the use of the Separate Rate Mechanism

At clause 2 the Developer has the opportunity to use the separate rate mechanism to provide security for the commitment of the Developer to use the council sewer service for the development site. This is an alternative to traditional security mechanisms such as a Bank Guarantee or Insurance Bond. All of the developers with a wastewater commitment deed have opted to use the separate rate mechanism to provide the required security as this comes at no cost to the Developer.

Whether Alano Utilities Pty Ltd requires security from a developer committing to use their sewer system is not known to council.

Other Related Matters

At clause 1.3.3 is confirmation that the execution of the deed does not *"...confer any benefit or advantage on the Developer in obtaining any development approval under the Act or in relation to the conditions of such approval."*

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Return to Order of Business

3. CONFIDENTIAL REPORTS

3.1 REPORT TITLE: **CONFIDENTIAL ITEM: WASTEWATER SERVICE DELIVERY – DEVELOPER WASTEWATER INFRASTRUCTURE FEES**

DATE OF MEETING: **2 MAY 2022**

FILE NUMBER: **DOC/22/46700**

ATTACHMENTS:

1. LOCATION PLAN SHOWING LAND PARCELS SUBJECT TO A COUNCIL WASTEWATER COMMITMENT DEED (PART A) DOC/17/1300 AND LAND PARCELS SERVICED BY ALANO UTILITIES PTY LTD (PART B) DOC/22/38907
2. BASIS FOR WASTEWATER INFRASTRUCTURE FEES APPLICABLE TO FOUR SPECIFIC SITES WITHIN THE MOUNT BARKER GROWTH AREA DOC/22/47344
3. ADVICE FROM THOMSON GEER LAWYERS ON FEDERAL LEGISLATION 22/51552
4 - PROPOSED AMENDMENT TO AUDIT AND RISK COMMITTEE TERMS OF REFERENCE DOC/22/47013
5. COUNCIL'S WASTEWATER ACTIVITIES THAT ARE AUTHORISED OR CONTEMPLATED BY STATE LEGISLATION DOC/22/37581
6. INCENTIVES TO SECURE MAJOR GREENFIELDS DEVELOPMENT SITES TO BE USERS OF COUNCIL'S WASTEWATER SERVICE DOC/22/37959

Moved Councillor Bailey that Council:

Section 90 (3) (b) Order

1. Pursuant to Section 90(3)(b)
   Pursuant to Section 90(2) of the Local Government Act 1999 the Council orders that all members of the public except the Chief Executive Officer; Deputy Chief Executive Officer/General Manager Governance and Wastewater/Recycled Water; General Manager, Infrastructure; General Manager, Planning and Community; General Manager, Corporate Services; Acting General Manager Community Services, Risk and Governance Officer / EA to the Mayor, and Executive Assistant to the Chief Executive Officer be excluded from attendance at the meeting for Agenda Item 3.1 Wastewater Service Delivery – Developer Wastewater Infrastructure Fees.

   The Council is satisfied that pursuant to Section 90(3)(b) of the Act, the information to be received, discussed or considered in relation to this

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Agenda item is information the disclosure of which could reasonably be expected to would prejudice the commercial position of the Council.

In addition the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in continued non-disclosure of this information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the disclosure of Council's commercial position may prejudice Council's ability to be able to negotiate a cost-effective proposal for the benefit of the Council and the community in this matter and in relation to other contract negotiations.

Seconded Councillor Jones CARRIED
SM20220502.01

5.20pm Moved Councillor Orr that Council:

2. with approval of two-thirds of the members present, suspended the meeting procedures pursuant to Regulation 20 of the Local Government (Proceedings at Meetings) Regulations 2013, for a period sufficient to facilitate informal discussion during which time no motion may be moved other than to resume normal meeting proceedings, or resumed at the discretion of the Mayor.

Seconded Councillor Minett CARRIED
SM20220502.02

5.50pm Moved Councillor Seager that Council:

3. end the short term suspension of normal council meeting proceedings.

Seconded Councillor Jones CARRIED
SM20220502.03

Moved Councillor Jones that Council:

4. note and respect the rationale for the decisions taken by council in 2012/2013 to provide a wastewater service to cater for the Mount Barker Growth Area;
5. note and respect the approach endorsed by council in February 2014 to the determination of wastewater infrastructure fees payable by developers in the Mount Barker Growth Area and the rationale for that;
6. note the information contained in attachment 2 being in relation to the basis for the approach to wastewater infrastructure fees for four specific development sites within the Mount Barker Growth Area including that a

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further agenda item for two of these sites is to be prepared for consideration at a council meeting in the near future;

7. note the most recent advice from Thomson Geer Lawyers (attachment 3) in relation to the Competition and Consumer Act including that there is nothing from the information reviewed to indicate that council has engaged in predatory pricing; and
8. amend the Audit and Risk Committee terms of reference (as shown in attachment 4) to add an additional responsibility being to monitor and report annually to council on the application of the Wastewater Infrastructure Fees and Augmentation Charges Policy.

Seconded Councillor Orr CARRIED
SM20220502.04

Moved Councillor Seager that Council:

Section 91(7) Order

9. Pursuant to Section 90 (3) (b)
That having considered Agenda Item 3.1 Wastewater Service Delivery – Developer Wastewater Infrastructure Fees in confidence under 90(2) and (3)(b) of the Local Government Act 1999, the Council pursuant to Section 91(7) of the Act orders that the council report, related documents and all minutes except Attachments 4 and 5 be retained in confidence, with the exception that this information be made available to all members of the council's Audit and Risk Committee given the addition to the terms of reference of that Committee, until 2 May 2025 or such lesser period for some of the information as may be determined by the Chief Executive Officer and that this order be reviewed every 12 months.

Seconded Councillor Leach CARRIED
SM20220502.05

MEETING DECLARED CLOSED AT 6.08 PM

MAYOR

6.6.22
DATE

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