

**Meeting:** Council

**Title:** Lease and Licence for Community land and Buildings Policy Review

**Responsible Manager:** General Manager, Heather Barclay

**Author:** Property and Contracts Manager, James Forde

**Type of Report:** **Decision Required**

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Item No: 16.1.1  
File No: 16.55.1.30  
Date: 18 January 2016  
Attachment: A,B,C

### **Recommendation (Public)**

Pursuant to Section 85(3) of the Local Government Act 1999, the Chief Executive Officer indicates that the matter contained in this report may, if the Council so determines, be considered in confidence pursuant to Section 90(2) of the Local Government Act 1999 on the basis that the information contained in the attached report is information of the nature specified in subsections 90(3)(b) and (d) of the Act being:

- (b) information the disclosure of which –
  - (i) (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) (ii) would, on balance, be contrary to the public interest; and
- (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which –
  - (iii) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
  - (iv) would, on balance, be contrary to the public interest.

In accordance with the above, the information in this report relates to Council's leasing and licensing strategy for community land and is commercially sensitive. Its release may prejudice Council's commercial dealings with third parties and may be, on balance, contrary to the public interest.

### **Recommendation (Public)**

That pursuant to Section 90(2) of the Local Government Act 1999 Council order that the public be excluded, with the exception of members of Council staff, namely the Chief Executive Officer, Kiki Magro, the General Manager, Heather Barclay, the Property and Contracts

Manager, James Forde and the Protocol, Compliance & Governance Officer, Deb Bria from being present at the meeting on the basis that the matter contained in this report is information of the nature specified in subsections 90(3)(b) and (d) of the Act.

**Recommendation (Confidential)**

That Council resolve that:

1. the Strategic Planning and Development Policy Committee to:
  - 1.1. review the “Town of Walkerville’s Community Land Management Plans” (dated 2004);
  - 1.2. review the “Lease and Licence Community land and Buildings Policy” and the “Use of Council Reserves, Parks, Garden and Open Spaces Policy”; and
  - 1.3. make recommendations to Council with suggested amendments (if any) for in principle approval prior to the public consultation process;
2. concurrently with paragraph 1, the Administration:
  - 2.1. obtain independent legal advice in relation to:
    - 2.1.1. the question of whether management contracts fall within the ambit of section 202 of the *Local Government Act 1999* (SA); and
    - 2.1.2. in light of the above and the upcoming legislative amendment, the implications (if any) upon the following existing community land arrangements:
      - 2.1.2.1. Walkerville Bowling Club;
      - 2.1.2.2. INEA YMCA;
      - 2.1.2.3. Walkerville Sports Club;
      - 2.1.2.4. Walkerville Tennis Club;
      - 2.1.2.5. Levi Caravan Park;
      - 2.1.2.6. Walkerville Pre-Kindy; and
      - 2.1.2.7. St Andrew’s Walkerville and Levi Oval licenses;
  - 2.2. subject to the legal advice referred to above, prepare a suite of template documents including leases, licenses and / or management contracts for use across Council’s community land portfolio;
3. having received the legal advice referred to above and having the benefit of the new suite of template documents, the Strategic Planning and Development Policy Committee to:
  - 3.1. review the community land agreements set out in paragraph 2.1.2 above; and
  - 3.2. make recommendations to Council relating to those agreements for Council’s consideration.

4. adopt the following indicative timeline in respect of the matters set out in paragraphs 1 to 3 above:

<b>Task</b>	<b>Expected Completion Date</b>
Strategic Planning and Development Policy Committee Community Land Management Plan and Policy review – paragraphs 1.1 and 1.2	6 weeks (29 February 2016)
Strategic Planning and Development Policy Committee Community Land Management Plan and Policy review recommendations to Council - paragraph 1.3	21 March 2016 (Council Meeting)
Public Consultation (if required) - paragraph 1.3	April 2016
Independent Legal Advice – paragraph 2.1	29 February 2016
Prepare Suite of Template Documents – paragraph 2.2	31 March 2016
Strategic Planning and Development Policy Committee final review and recommendations to Council – paragraph 3.2	16 May 2016 (Council Meeting)

5. that the Administration take no further action in relation to Resolution CNC348/14-15 relating to the Walkerville Pre-Kindy until such time as the indicative timetable set out in this resolution is completed or until otherwise directed by Council.

### **Recommendation (Confidential)**

**Moved:**

**Seconded:**

That Council, having considered the said information or matter in confidence under Part 3 of Chapter 6 of the Local Government Act 1999, orders, pursuant to Section 91(7) of the Local Government Act 1999, that the Report titled “Lease and Licence for Community land and Buildings Policy Review” in relation to this Agenda Item No 16.1.1 and minutes relating to this Agenda Item No 16.1.1 be kept confidential until the issues identified in this Report have been resolved and and that pursuant to Section 91(9)(c) of the Local Government Act 1999 the Council delegates to the Chief Executive Officer the review and power to revoke this Order.

and

That Council resolves to end its confidential deliberations pursuant to Section 90(2) of the Local Government Act 1999 Council and re-admit the public.

### **Purpose of Report**

To provide elected members with an update regarding the Administration’s review of the Lease and Licence for Community Land and Buildings Policy and an action plan for a high level review of Council’s overall community land strategy.

## **Relevance to Strategic Plan and / or Corporate Plans**

Living in the Town of Walkerville.

### **A Lively Local Culture**

#### **Objective 1**

Encourage active community involvement in events, activities and places.

#### **Objective 2**

Promote and support diverse cultural values, heritage and identity.

### **An Economically Successful Community**

#### **Objective 1**

Create and active, well-connected Town Centre.

#### **Objective 2**

Identify and develop mixed-use opportunities along Main North Road and North East Road.

#### **Objective 3**

Provide information and resource material that actively promotes home based business activity.

### **Sensitive Environments & Development**

#### **Objective 1**

Create a safe, well-planned and biodiverse Linear Park that allows for recreation along the river.

#### **Objective 2**

Promote development in balance with the natural environment.

#### **Objective 3**

Create accessible, useable and connected open spaces and streets.

### **Background**

As elected members will be aware, community land management has been an ongoing issue for Council. A confidential report on the subject was prepared by the Administration and presented to Council on 19 January 2015. A copy of that report is attached this report and marked "Attachment A".

The report sets out the measures taken by the Administration to address some of the issues, namely the introduction of the Lease and Licence Community land and Buildings Policy and the draft Leasing and Licensing Model for Community Land (both of which are attached to the report). The policy is scheduled for review on 18 August 2016.

In light of the recent legislative changes discussed below and the uncertain status of several of Council's community land agreements, the Administration has conducted a high level review of Council's overall community land strategy.

The issues arising out of that review are set out in this report. In regular consultation with the Strategic Planning and Development Policy Committee, the Administration has developed an action plan and indicative timetable for the review and development of Council's overall community land management strategy.

## Discussion

### Legislative Requirements

The manner in which Council conducts itself in relation to local community land is governed by chapter 11 of the *Local Government Act 1999* (SA) ("**the Act**"). A copy of chapter 11 of the Act is attached to this report and marked "Attachment B". Relevantly, in relation to community land, the chapter sets out provisions in relation to:

- the classification and revocation of land as community land;
- community land management plans;
- the use of community land for business purposes; and
- the alienation of community land by lease or licence.

The Act contains strict provisions relating to the need for and the content of the community land management plans. It is evident from the Act that these documents are intended to be the governing instruments for any given parcel of community land. They are, in effect, individual leasing and licensing policies for community land.

In accordance with the provisions of the Act, Council has adopted the *Town of Walkerville Community land Management Plans* (dated 2004). A copy of the management plans is attached to this report and marked "Attachment C".

In contrast, there is no legislative requirement for Council to adopt a general policy relating to leases and licenses. Indeed, the provisions relating to leases and licenses set out in section 202 of Act simply grant Council the right to alienate community land by lease or licence.

Because the Act is silent on leasing and licensing policy, there is a risk of such a policy encroaching upon the work of the management plans. The Administration has identified some evidence of this in Council's existing documents. The effect can be uncertainty and a lack of clear direction.

On that basis, the Administration recommends that Council, through the Strategic Planning and Development Policy Committee, undertake a concurrent review of both its community management plans and its leasing and licensing and related policies. The goal is to provide Council with a cohesive community land strategy that is clear, concise and compliant with the legislation.

Elected members should note that the Act requires that any proposed amendments to Council's community management plans are put public consultation before they can be adopted by Council. Accordingly, the need for public consultation has been factored into the Administration's proposed timetable.

### Leases, Licences or Management Contracts?

The next issue to consider is the form and content of documents that are used to lease or licence community land. The Administration is of the view that the leases and licences currently in operation are not appropriate. This is due to a number of factors such as the age of the documents and the community driven nature of the relationships. Similarly, there appears to have been some inconsistency in the management of the documents as a result of the inevitable turnover of staff and personnel, both within Council and its community groups.

A key feature of a number of the existing agreements is the styling of some of them as “management contracts”. This appears to be a common practice in local government. Such documents appear to be utilised in order to avoid certain legislative burdens such as:

- the 21 year limit imposed by section 202 of the Act; and
- the application of the *Retail and Commercial Leases Act 1995* (SA) (“**the Leases Act**”).

The proposition is that a management contract is neither a lease nor a licence and as such is not subject to the 21 year restriction of the Act or the application of the Leases Act. For the reasons set out below, the Administration is of the view that this proposition needs to be tested by independent legal advice.

For instance, as a matter of law, a licence is no more than the grant of a non-exclusive right to occupy a premises for a particular purpose. While most management agreements expressly state that they are not leases or licences, the reality is that most, if not all management agreements grant a right on the part of a manager to enter upon a premises to conduct a business.

Ultimately, while the language of the document is evidence of its intended purpose, the conduct of the parties and the practical reality of the relationship will also go towards determining the true nature and status of any agreement and relevantly to Council, whether the agreements are captured by the legislation.

The Administration considers it important to obtain certainty on this point. If it is the case that a management contract is merely a licence in disguise, then such agreements may fall within the scope of the Leases Act. That legislation imposes stringent requirements (on landlords in particular) in commercial tenancy environments. Given the community driven nature of Council’s relationships with its tenants, there are likely to be numerous instances of non-compliance with the Leases Act by both parties. This will need to be considered as part of the resolution or winding up of existing agreements and any forward operating strategy.

### Legislative Change

One of the key issues when leasing or licensing community land (and as noted above, one of the primary drivers behind the employment of management contracts) is the 21 year limit imposed by section 202 of the Act.

As elected members will be aware, section 202 of the Act restricts the grant of a lease or a licence for a maximum of 21 years. It cannot be renewed or extended after that time and a new lease is required. The grant of a new lease by Council must be considered in the context of its Procurement Policy and may not be granted until public consultation has been completed (unless that lease is approved under a management plan and is for 5 years or less).

Recently, however, Parliament has passed an amendment to the Act whereby the limit imposed by section 202 is to be raised from 21 years to 42 years. The Administration understands that the amendment will take effect in or around March 2016.

This change will have a significant effect on Council’s existing agreements, many of which have expired or are close to expiring and are nearing their 21 year limits. Prior to the anticipated change, those agreements could not be renewed and new leases would have needed to have been granted. The effected agreements include:

- Levi Caravan Park;
- INEA YMCA;

- Walkerville Bowling Club;
- Walkerville Sports Club;
- Walkerville Pre-Kindy;
- Walkerville Tennis Club; and
- the St. Andrews Walkerville and Levi Oval Licences.

In light of the anticipated change, it may be now possible for Council renew or extend these existing agreements. Council will need to consider this matter once the Administration's proposed action plan has been completed and the Administration is recommending that Council, through the Strategic Planning and Development Policy Committee, revisit its position in respect of each of the agreements listed above at that time.

### **Options for Consideration**

#### Option 1

That Council resolve that:

1. the Strategic Planning and Development Policy Committee to:
  - 1.1. review the "Town of Walkerville's Community Land Management Plans" (dated 2004);
  - 1.2. review the "Lease and Licence Community land and Buildings Policy" and the "Use of Council Reserves, Parks, Garden and Open Spaces Policy"; and
  - 1.3. make recommendations to Council with suggested amendments (if any) for in principle approval prior to the public consultation process;
2. concurrently with paragraph 1, the Administration:
  - 2.1. obtain independent legal advice in relation to:
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      - 2.1.2.7. St Andrew's Walkerville and Levi Oval licenses;

- 2.2. subject to the legal advice referred to above, prepare a suite of template documents including leases, licenses and / or management contracts for use across Council's community land portfolio;
3. having received the legal advice referred to above and having the benefit of the new suite of template documents, the Strategic Planning and Development Policy Committee to:
  - 3.1. review the community land agreements set out in paragraph 2.1.2 above; and
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5. that the Administration take no further action in relation to Resolution CNC348/14-15 relating to the Walkerville Pre-Kindy until such time as the indicative timetable set out in this resolution is completed or until otherwise directed by Council.

### Option 2

Council direct the Administration to carry out any, all or none of the above items from Option 1.

### **Analysis of Options**

#### Option 1



This option contemplates the review and development of Council's overall community land management strategy. It is intended to provide Council with a framework that is clear, concise and consistent with its legislative obligations.

The indicative timetable contemplates a final presentation to Council by the May 2016 Council Meeting with a view to implementing Council's decisions in the second half of 2016.

### Option 2

This option will enable Council to approach the issue at its discretion.

### **Financial and / or Risk Implications**

#### Financial

At present, the Administration considers that the uncertain nature and status of several agreements exposes Council to financial risk.

#### Social

A clear and concise community land strategy is relevant to most if not all of Council's strategic objectives.

#### Environmental

N/A

#### Governance

N/A

#### Preferred Option & Reasoning

The Administration recommends Council adopt Option 1 for the reasons set out in this report.