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I hereby give notice that a Confidential Council Meeting will be held on:

Date: Tuesday, 21 May 2019
Time: 6.00 p.m.
Location: Council Chamber
Civic Centre
10 Watson Terrace
Mount Gambier

AGENDA

Confidential Council Meeting 21 May 2019

Graeme Maxwell
Chief Executive Officer

17 May 2019

**27.2 QUEEN ELIZABETH PARK TRUST / BLUE LAKE GOLF COURSE - LEASING -
REPORT NO. AR19/24097**

CONSIDERATION FOR EXCLUSION OF THE PUBLIC

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except Mayor L Martin, Councillors S Perryman, C Greco, P Jenner, K Amoroso, F Morello, B Hood, M Bruins and Council Officers N Serle, B Cernovskis, P Lee, J Nagy, S McLean, M McCarthy, T Tzioutziouklaris and F McGregor be excluded from attendance at the meeting for the receipt, discussion and consideration in confidence of Agenda Item 27.2 AR19/24097 Queen Elizabeth Park Trust / Blue Lake Golf Course - Leasing.

The Council is satisfied that, pursuant to section 90(3) (b), (d) and (h) of the Act, the information to be received, discussed or considered in relation to the Agenda Item is:

- information the disclosure of which could reasonably be expected to confer a commercial advantage on a person with whom the Council is
 - conducting business; or
 - proposing to conduct business; or
 - to 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 the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information.

- commercial information of a confidential nature (not being a trade secret) the disclosure of which 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

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 the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information.

- legal advice

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 material to be considered comprising legal advice and other update relating to the leasing of the golf course and associated Queen Elizabeth Park Trust matters the disclosure of which could reasonably prejudice the position of the Council and confer an advantage on a third party with whom the Council may enter into lease negotiations.

Meeting: Council
CM9 Reference: AF13/64
Author: Michael McCarthy, Manager Executive Administration
Authoriser: Graeme Maxwell, Chief Executive Officer

The Council is satisfied that, pursuant to Section 90(2) & (3) of the *Local Government Act 1999*, the information to be received, discussed or considered in relation to this agenda item is:

- (b) information the disclosure of which could reasonably be expected to confer a commercial advantage on a person with whom the Council is conducting business; or proposing to conduct business; or to prejudice the commercial position of the Council
- (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which 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
- (h) legal advice.

REPORT RECOMMENDATION

1. That Council Report No. AR19/24097 titled 'Queen Elizabeth Park Trust / Blue Lake Golf Course - Leasing' as presented on 21 May 2019 be noted.
2. To be determined at the meeting



The Acting Chief Executive Officer reported:

Legal advice obtained in relation to a range of questions and issues associated with the Queen Elizabeth Park Trust ("QEPT") and its leasing and governance arrangements (including the Blue Lake Golf Course) are provided as an attachment for information and consideration.

Also attached is a letter from the QEPT advising of a Board Motion made on Wednesday 15 May 2019 that after prolonged and careful review the QEPT will not be seeking to undertake a lease on Golf Course Land from the City of Mount Gambier at the cessation of the current lease on the 30th June 2019.

As a result further legal advice has been sought in relation to the options available to Council as a result of this decision by the QEPT.

This further legal advice will be circulated to Members under separate cover and tabled at the Council meeting and a further verbal report will be provided by the Chief Executive Officer in relation to this matter.

In any consideration of the leasing of the blue lake golf course Members should note that Council previously resolved on 21 November 2017 to undertake public consultation on a proposal to lease and licence the golf course and driving range to the QEPT for a term of up to 21 years. Public consultation was conducted on this proposal with no submissions received. Accordingly the Chief Executive Officer was authorised to negotiate, have prepared and affix the Council Seal to any documents necessary to give effect to this proposal.

An alternate Council resolution would be necessary to authorise a varied proposal to that endorsed in November 2017, with further public consultation if the varied proposal exceeds a 5 year term.

The Retail and Commercial Leases Act would likely apply to a lease or licence granted direct to an operator of the golf course or caravan park that includes a shop front, including a statutory right to a minimum 5 year term. A prospective tenant must obtain legal advice prior to waiving any statutory rights under this Act.

It should also be noted that portion of the golf course is Crown Land, and any lease/licence proposal should be notified to the Department of Water, Environment and Natural Resources. Objection might be anticipated if a proposal includes further development of the Crown Land, or any other activities that impinge on Native Title or other State/Crown interests. The department has previously voiced 'No *objection*' to the further lease and licence of the golf course to the QEPT.

ATTACHMENTS

1. Legal Advice on Queen Elizabeth Park Trust (QEPT) Blue Lake Golf Club/Course and Blue Lake Holiday/Caravan Park - PDF [↓](#)
2. QEPT Letter to CMG - Lease Renewal 15th May 2019.pdf [↓](#)



From: James McEwen <jmcewen@molawyers.com.au>
Sent: Wednesday, 15 May 2019 4:13 PM
To: Graeme Maxwell; Michael McCarthy
Cc: Janelle Borlace
Subject: Blue Lake Golf Club/QEPT

Dear Graeme

I refer to your letter of 9 May 2019 and provide advice on each of the questions raised below.

Advice

- 1. Question - If the future of the Golf Club's lease cannot be resolved by the expiry date of 30 June 2019, does the Club have any hold over rights until the matter has been resolved? If not, can they be accommodated with a month by month lease arrangement pending long-term resolution?**

Advice - The leases and sublease contain holding over provisions that mean the parties can remain beyond expiry as monthly tenants on the same terms and conditions.

There are 2 leases for the golf course due to its expansion from a 9 hole to an 18 hole course. Both leases end on 30 June 2019 are on similar terms. Clauses 6.10 and 5.9 provide that if QEPT continues to occupy the land after 30 June 2019 it will do so as a monthly tenant on the terms and conditions contained in the lease.

This means if the matter is not resolved and Council does not require QEPT to surrender up the lease at 30 June as required under clauses 4.15 and 3.15, QEPT can continue as lessee pursuant to a monthly periodic tenancy that can be terminated by either party on 1 months' notice.

The sublease between QEPT and William and Wendy Burley (**Sublessee**) is for a term of 5 years expiring on 30 June 2019. It contains a holding over clause 3.3 which permits the Sublessee to continue beyond 30 June 2019 as a monthly tenant determinable at any time by 1 months' notice. This monthly periodic tenancy will be on the same terms as the sub lease.

- 2. Question - Is it possible under the QEPT Charter for the body to relinquish responsibility for the Golf Club to Council but maintain responsibility for the Blue Lake Caravan Park?**

Advice – QEPT's responsibility for the golf club is contractual pursuant to its lease from Council. Therefore unless other arrangements are put in place (or it continues on a holding over as per question above) it will only have responsibility for the golf club until 30 June 2019. The sublease and management agreement will also end on 30 June 2019.

The lease of the caravan park is a separate contract that governs QEPT's responsibilities in relation to the caravan park. Therefore it is possible for QEPT to relinquish responsibility for the golf club but still maintain responsibility for the caravan park.

I advise that the caravan park lease contains special condition 1 in the second schedule that means that if the golf course leases ends, the rent payable to Council under the caravan park lease will be reviewed by market review in 2019, 2024, 2029 and 2034. It will be reviewed by CPI in all other years. To better understand the consequences of this will involve engaging a valuer to determine the impact on the rental payable when reviewed to market. Alternatively the parties could agree to enter into a variation of lease removing this if it is not required.



3. Question - If the QEPT is determined to have lost its relevance overall, what would be the process to disband the entity?

Advice – The process would involve the Trustees passing a resolution to wind up the trust pursuant to clause 19 of its constitution. In short at least 2 of the Council nominees and 2 of the Chamber Nominees must vote in favour. Any assets remaining following the winding up process *'shall be applied by the Council until expended to improve or manage the Mount Gambier Crater Lakes Area for the benefit of the inhabitants of Mount Gambier.'*

Because the Trust is not technically a trust but is actually an Incorporated Association governed by the *Associations Incorporation Act 1985* they will also be required to apply to deregister pursuant to section **43 A** of the Act. Despite the use of the term winding up in the constitution this would not really be a winding up process for the purposes of the Act.

One issue here that will require careful consideration relates to the fact that under the Act the deregistration process in section 43 A cannot be used if the Trust has assets valued at more than \$5000 after all debts have been paid. If the Trust did have assets over \$5000 then they would have to resolve to wind up pursuant to section 41 (6) of the Act and this involves the appointment of a liquidator.

In my view, the broad powers provided under the constitution would allow the Trust to resolve to transfer all of its assets to Council. This could be done prior to registration thus avoiding the section 41 (6) winding up process.

4. Question - Are there any legal impediments to the QEPT being disbanded?

Advice – They must be wound up pursuant to the terms of the constitution, in particular clause 19, and also deregistered pursuant to the Act as set out in answer 3 above. I am not aware of their contractual obligations (leases, licences or other agreements) with other entities but all of these need to be considered also.

5. Question - If the QEPT was disbanded, what is the implication for the continuing lease arrangement with the Blue Lake Caravan Park?

Advice – Pursuant to clause 14.4.3 of the lease, QEPT would be in breach of the lease and Council would be entitled to re-enter the land and terminate the lease.

Consequently, the sublease to Blue Holiday Park Pty Ltd, BLHP Nominees Pty Ltd (**Sublessee**) would automatically terminate. I confirm that the Sublessee would not have any claim or recourse against QEPT (or Council) as a result of such termination pursuant to clause 28.3.2 of the Sublease.

6. Question - If the QEPT was disbanded, what would need to occur in relation to the transition of responsibilities and assets to Council? What would be a realistic transition period?

Advice – If the QEPT was wound up pursuant to the constitution its assets must be applied to Council and expended *'to improve or manage the Mount Gambier Crater Lakes Area for the benefit of the inhabitants of Mount Gambier.'* I think this could all be done very quickly but cannot provide a time frame without details regarding the assets involved.

One issue to consider in this scenario involves the caravan park lease. Assuming Council is happy with the Sublessee, it could (subject to compliance with section 202 of the LG Act) enter into a new lease directly with the Sublessee (as lessee) on agreed terms. Alternatively the headlease could be assigned by QEPT to the Sublessee via a deed of assignment that would likely also include any agreed variations. For example the rent may change and the special conditions would appear to be redundant.

7. Question - If the Golf Club are successful in securing a lease as an entity in their own right, either with the Council or the QEPT, what would be the process for transfer of plant and equipment assets?

Advice - Without details regarding the plant and equipment referred to it is not possible to accurately advise. I confirm that pursuant to clause 5.1 of the more recent golf course lease *"Unless the trust obtains the Council's written acknowledgement, then, irrespective of whether the Council or the Trust purchased them, all structures,*



improvements, fixtures and fittings located on the Premises at any time during the term will become the property of, and belong to the Council. This is related more to improvements, fixtures and fittings and does not cover all plant and equipment.

The position is essentially the same in the older original golf course lease as clause 3(f) provides that all buildings and improvements erected by the tenant become the property of Council.

If the plant and equipment assets are owned by QEPT and they are wound up and applied to Council then the Council would be justified transferring them to the golf club if it was of the view that such transfer would *'improve or manage the Mount Gambier Crater Lakes Area for the benefit of the inhabitants of Mount Gambier'* as per the constitution of QEPT.

- 8. Question - If a lease was negotiated, either between Council and the Golf Club or the QEPT and the Golf Club, what would be the implications for any Golf Club sub-lessees and/or Council/QEPT if the Golf Club failed in their lease obligations or surrendered their lease?**

Advice – If this was to occur any sublease or licence from the golf club to third parties would terminate and Council would be left to run the golf club or otherwise deal with the land. There would be other issues resulting from such breach including Council pursuing the golf club for damages and other costs resulting from such breach and early termination. The lease would be the relevant contract setting out the rights of Council in this circumstance. In short, Council would be entitled to take legal action against the Golf Club. Depending on the terms of any sublease or licence third parties may also have rights against the golf club.

- 9. Question - The golf course and clubhouse are located on Crown Land under the care and control of Council. The land is community land for use as a golf course. If Council resumes control of the golf course land and buildings thereon, are there any matters relevant to the community land classification that the Council should have regard for when considering the granting of a future lease of the land and facilities thereon?**

Advice – Yes, there are a number of matters to consider. Firstly, because it is community land, Council is bound to comply with the requirements of its community land management plan (CLMP) for this land. If it were to consider going beyond the scope of the CLMP it would need to amend the CLMP in accordance with the process set out in the LG Act. Public consultation would be required in the event the proposed amendment amounted to a significant impact on the interests of the community.

I also advise that Council must comply with section 202 of the LG Act when granting a lease or licence of community land. If it were to grant a lease or licence longer than 5 years public consultation will be required (and the lease/licence will need to be authorised in the relevant CLMP).

Because it is crown land Council must comply with the *Crown Land Management Act 2009* and in particular section 22 regarding consent from the Minister to a lease of Crown land. The recent inclusion of section 22 (5) means that consent is not required where Council is the lessor, it is community land and the Council is satisfied that the grant of the lease:

- (a) would not detract from any existing public use and enjoyment of the land; and
- (b) would not prevent the land being used for the purpose for which it was dedicated; and
- (c) would not otherwise, in the opinion of the council, be improper or undesirable.

- 10. Question - Are there any other risks or issues that should be considered in the context of the various scenarios explored above?**

Advice – The council should also ensure that it complies with its section 49 procurement policy in the event it goes down the path of offering a new lease and management agreement directly to the existing sublessee and manager without testing the market.



Finally I advise that the Council should always remind itself of the its role, function and the principals it must observe before making any decision. These are set out clearly in sections 6, 7 and 8 of the LG Act. There are too many relevant subsections to discuss here but I draw your attention to the following which are relevant (amongst others) to the issues discussed above in my view:

- (a) 6 (a) to act as a representative , informed and responsible decision maker in the interests of its community;
- (b) 7 (g) to promote its area and to provide an attractive climate and locations for the development of business, commerce, industry and tourism;
- (c) 7 (i) to manage and, if appropriate, develop public areas vested in, or occupied by, the Council.

In doing the above a council must observe a number of principles in the performance of its role and function including but not limited to the following:

- (a) provide open, responsive and accountable government;
- (b) be responsive to the needs, interests and aspirations of individuals and groups within its community;
- (c) give due weight, in all its plans, policies and activities, to regional, State and national objectives and strategies concerning the economic, social, physical and environmental development and management of the community;
- (d) seek to facilitate sustainable development and the protection of the environment and to ensure a proper balance within its community between economic, social, environmental and cultural considerations;
- (e) seek to ensure that council resources are used fairly, effectively and efficiently; and
- (f) ensure the sustainability of the council's long-term financial performance and position.

Once you have considered my advice above please do not hesitate to contact me with any questions. I note that there are many moving parts and would be happy to discuss and clarify these with you further if required.

Kind regards

James McEwen
Partner



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Provided in the Strictest of Confidence

Mr Graeme Maxwell
Chief executive Officer
City of Mount Gambier
PO BOX 56
MOUNT GAMBIER SA 5290

15th May 2019

Re: Lease – Blue Lake Public Golf Links & Clubhouse

Dear Graeme

The Queen Elizabeth Park Trust (QEPT) wishes to provide and update the City of Mount Gambier Councillors on the decision regarding the lease of the Blue Lake Public Golf Links due to expire on the 30th June 2019 as a matter of urgency.

The Queen Elizabeth Park Trust Board held a Special Board Meeting on Wednesday 15th May 2019. The following motion was tabled and put to a vote; the motion was carried.

1. After prolonged and careful review the QEPT will not be seeking to undertake a lease on Golf Course Land (Lease Area A & B and Licence Area "C") from the City of Mount Gambier at the cessation of the current lease on the 30th June 2019.
2. QEPT will make our experience, knowledge and expertise available to any future tenant who takes on the lease.
3. The QEPT to advise the Blue Lake Golf Club that post 30th June 2019 the QEPT will cease to hold the head lease of the Blue lake Public Golf Links and associated facilities. QEPT will not undertake any further negotiations with the Blue Lake Golf Club.

The QEPT will notify the Blue Lake Golf Club of the decision early tomorrow 16th May 2019.

If required QEPT trustees are willing to attend any designated informal gatherings or discussions with the Council or the Chamber of Commerce.

Further information please contact me on 0427 259 151.

Yours sincerely

Colin Martin
Chairperson
On behalf of Queen Elizabeth Park Board Members



CONSIDERATION FOR KEEPING ITEMS CONFIDENTIAL

1. In accordance with Sections 91(7) and 91(9) of the *Local Government Act 1999* the Council orders that the report 27.2 AR19/24097 Queen Elizabeth Park Trust / Blue Lake Golf Course - Leasing and its attachments, the discussion and the resolution/s and minutes arising from the report, having been considered by the Council in confidence under Section 90(2) & (3) (b), (d) and (h) be kept confidential and not available for public inspection until 16 June 2020.
2. Further that Council delegates the power of review revoke, but not the extension, of the confidential order to the Chief Executive Officer on a monthly basis in accordance with the provisions of Section 91(9)(c) of the *Local Government Act 1999*.

CONFIDENTIAL