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

Date: Tuesday, 13 December 2022
Time: 6.00 p.m.
Location: Council Chamber
Civic Centre
10 Watson Terrace
Mount Gambier

CONFIDENTIAL AGENDA

**Council Meeting
13 December 2022**

A handwritten signature in black ink, appearing to read "Sarah Philpott", is positioned above the printed name and title.

**Sarah Philpott
Chief Executive Officer
9 December 2022**

23.3 SECTION 270 - INTERNAL REVIEW – REPORT NO. AR22/77592

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 the Mayor, Councillors and (Council Officers) be excluded from attendance at the meeting for the receipt and consideration in confidence of Agenda Item 23.3 AR22/77592 Section 270 - Internal Review.

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

- information concerning matters that must be considered in confidence in order to ensure that the Council does not:
 - breach any law, order or direction of a court or tribunal constituted by law,
 - breach any duty of confidence, or
 - breach any other legal obligation or duty
- 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 matter for consideration includes associated legal advice obtained in relation to the nuisance matters being associated with the subject matter of the report, and attachments to the Internal Review report contain 3rd party information for which Council has no express or implied licence to publish and so disclosure could reasonably be expected to breach a law or duty of confidence in relation to that content.

23.3 SECTION 270 - INTERNAL REVIEW – REPORT NO. AR22/77592

Committee:	Council
Meeting Date:	13 December 2022
Report No.:	AR22/77592
CM9 Reference:	AF13/64
Author:	Michael McCarthy, Manager Governance and Property
Authoriser:	Darren Barber, General Manager Corporate and Regulatory Services
Summary:	This report provides an overview and outcome/recommendations from a request for an internal review of Council Decision 2021/154 under section 270 of the Local Government Act 1999 in relation to lagunaria patersonia (Norfolk Island Hibiscus) street trees located in Mitchell Street, Mount Gambier.
Strategic Plan Reference:	Goal 1: Our People Goal 2: Our Location Goal 3: Our Diverse Economy Goal 4: Our Climate, Natural Resources, Arts, Culture and Heritage Goal 5: Our Commitment

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:

- (g) information concerning matters that must be considered in confidence in order to ensure that the Council does not: breach any law, order or direction of a court or tribunal constituted by law, breach any duty of confidence, or breach any other legal obligation or duty
- (h) legal advice.

REPORT RECOMMENDATION

1. That Council Report No. AR22/77592 titled 'Section 270 - Internal Review' as presented on 13 December 2022 be noted.
2. That the recommendations provided in the section 270 review of Council decision 2021/154 and the associated legal advice are considered and actioned including that Council:
 - Reconsider all the information before it at the time it made the Decision;
 - Consider the information submitted by the Applicants, the report and the conclusion of the report;
 - Determine to engage an appropriately qualified person to consider and make recommendations on appropriate action regarding alleged nuisance associated with the trees, including what measures Council could /should take in respect of the trees to alleviate any possible nuisance being caused, or potentially caused; and
 - Following consideration of a report prepared by such an appropriately qualified person, determine whether to affirm, vary or revoke the Decision.
3. That the consultant representative of the original applicants be advised of Council's next actions as set out in resolution (2).



TYPE OF REPORT

Legislative

BACKGROUND

Legislative Background

Section 270(1) of the *Local Government Act 1999* provides that Council must establish procedures for the review of decisions of the Council, employees of Council, and other persons acting on behalf of Council, creating a statutory right for a person to apply for the internal review of a Council decision.

Council has adopted [C290 - Internal Review of Council's Decision Policy](#) for this purpose.

Request for Internal Review Background

There are twelve mature *lagunaria patersonia* (Norfolk Island Hibiscus) trees located along the footpath on the western boundary of Mitchell Street, Mount Gambier. These trees form part of the edge of the Catholic Church property which is bounded by Mitchell Street, Jardine Street, Penola Road and Alexander Street.

The St Paul's Roman Catholic Church, St Paul's Catholic Church Presbytery and former St Paul's Roman Catholic Convent are located within the Catholic Church property and are places of State Heritage.

In 2018 a Development Application was lodged for a land division on the north eastern corner of the Catholic Church Complex, creating twelve additional residential allotments.

Council received several requests from both the developer and owner of one of the newly created allotment 8/6 Jardine Street, Mount Gambier seeking the removal of these street trees., their concerns including:

- The trees drop numerous materials which are falling in their gutters
- Concerns about contamination of rainwater, in particular from the hairs from the pods; and
- The trees are dangerous for people and pets, namely they are a known irritant.

Council Officers sought initial input from the State Heritage Advisor in respect to the trees and Council considered the request for removal and the State Heritage Advisor's comments at its meeting held on 16 March 2021, resolving as follows:

1. *That Council Report No. AR21/12246 titled 'Lagunaria Trees - Mitchell Street' as presented on 16 March 2021 be noted.*
2. *Having had regard to the advice from the State Heritage Advisor, the issues raised by the land development and adjoining land owner, Council engage a qualified arborist to provide an independent report on the structural integrity of the trees and any future perceived problems of the trees, prior to determining if the trees should be retained or Development Approval sought for their removal."*

Arborman Tree Solutions ("ATS") was engaged by Council to prepare a report which identified that the trees are in good to fair overall condition with extended useful life expectancies and they all achieve a Low Risk rating both as individuals and part of the group.

Council considered this matter further at its meeting held on 15 June 2021 where the following was resolved:

1. *That People and Place Committee Report No. AR21/31705 titled 'Lagunaria Trees - Mitchell Street' as presented on 07 June 2021 be noted.*
2. *Empak Homes and the property owner of 8/6 Jardine Street be advised:*
 - (a) *After an extensive investigation into the health and risk assessment of the lagunaria patersonia (Norfolk Island Hibiscus) planted along the western side of Mitchell Street, the trees are not considered by Council to warrant their removal.*



- (b) *The trees are considered to be in good and fair overall condition with extended useful life expectancies. None of the trees display features that indicate they are in health or structural decline or that they are not suited to the environment. The trees are street trees and are part of a historic planting that provides an important heritage link with the history of the area.*

Following this resolution, Council received an application for an Internal Review of Council Decision under section 270 of the *Local Government Act 1999* from a third party representing the developer and property owner.

The Request for an Internal Review of Decision (Resolution 2021/154) was considered in confidence at the Council meeting on 19 April 2022 where it was resolved:

- “1. *That Council Report No. AR22/21802 titled ‘Request for Internal Review of Council Decision’ as presented on 19 April 2022 be noted.*
2. *That legal advice received on the potential impacts of decision making processes for an internal review requests be noted.*
3. *That, having received a request under section 270 of the Local Government Act 1999 for a review of Council’s June 2021 decision in Resolution 2021/154 relating to the Mitchell Street trees:*
 - (a) *the Chief Executive Officer (or delegate) engage an external provider to conduct a review under section 270 of the process and decision associated with Resolution 2021/154;*
 - (b) *the reviewer present a preliminary and final report to Council for consideration, having undertaken a natural justice phase;*
 - (c) *the review also consider and make recommendations on appropriate action regarding alleged nuisance associated with the Mitchell Street trees;*
 - (d) *the total cost of undertaking the review be included in the report provided back to Council.*
4. *If a reviewer engaged under (3) is unable to perform the step in (3)(c), that the preparation of a separate report addressing matters of alleged nuisance associated with the Mitchell Street trees be deferred until Council has considered the report(s) in (3)(b).”*

Following the resolution, Council engaged an external reviewer to conduct the Section 270 Review of Council Decision.

The final report on the matter and confidential legal advice are provided as **Attachment 1** and **2** for Members review and consideration.

As the reviewer was unable to perform the step in resolution 3(c) dated 19 April 2022 and in accordance with resolution 4 of that same date the preparation of a report addressing matters of alleged nuisance has been deferred until Council has considered the report in 3(b) – in this report.

PROPOSAL

The Internal Review report, prepared by a practitioner at Norman Waterhouse Lawyers considered that the Council decision under review, that the trees not be removed, was a lawful decision, but taking into account all the information as set out in the report, the Decision is not the best or preferable decision available.

In forming this view the reviewers merit assessment provided:

8.3.5 Critically, however, the ATS Report did not address the impact the Trees were having on Ms Holmes’ property (or any of the other relevant properties), which was one of the key reasons for Ms Holmes’ requests for the removal of the Trees.

8.3.6 Further, no assessment of the effect of the debris of the Trees on the relevant properties seems to have been undertaken. Such an approach seems necessary in light of the anecdotal evidence referred to earlier in this report regarding the potential for certain irritations arising from the existence of the trees and their interaction with persons in the vicinity.



8.3.7 These were short-comings in the decision-making process and in our view, Council were not presented with the relevant information to enable it to make a considered decision in relation to this matter.

8.3.8 Council should engage an appropriately qualified person to consider the impacts of the Trees on Ms Holmes' property (and other relevant properties owned by Empak Homes), to make recommendations on any appropriate action and form a conclusion as to whether there is any nuisance associated with the Trees.

8.3.9 That appropriately qualified person should specifically consider what measures Council could take in respect of the Trees to alleviate any nuisance being caused, or potentially caused, including, but not limited to, maintenance pruning.

8.3.10 In reaching these conclusions, we note that we have not formed any views about whether such a nuisance exists or has the potential to exist arising from the presence of the Trees at this location, but rather that the evidence before the Council at the time it made the Decision did not directly address this issue when, in our view, it ought to have.

The internal review report made the following recommendations.

That the Council:

- *Reconsider all the information before it at the time it made the Decision;*
- *Consider the information submitted by the Applicants, the report and the conclusion of the report;*
- *Determine to engage an appropriately qualified person to consider and make recommendations on appropriate action regarding alleged nuisance associated with the trees, including what measures Council could/should take in respect of the trees to alleviate any possible nuisance being caused, or potentially caused; and*
- *Following consideration of a report prepared by such an appropriately qualified person, determine whether to affirm, vary or revoke the Decision.*

Together with the Internal Review Report preliminary legal advice was sought to assist Council with determining its way forward with this matter, which provides some legal commentary on tree nuisance. The legal advice is provided as an attachment to this report (**Attachment 1**).

As envisaged in the resolution dated 19 April 2022, the internal review report is limited to an administrative review of the decision-making process associated with Council's June 2021 decision to not remove the tree(s). This report and the legal advice, whilst commenting on the matter of nuisance, are unable to provide expert opinion/evidence on the potential nuisance from the trees.

The recommendation of the internal review report and legal advice being to obtain such evidence to enable a risk assessment and determination of appropriate actions.

This report recommends that Council follow the report recommendations and engage an appropriately qualified person to consider and make recommendations on appropriate action/measures to alleviate any possible nuisance being caused, or potentially caused, by the trees, before determining whether to affirm, vary or revoke its decision from June 2022.

Should Council consider revoking and reversing its decision and instead determine to remove the trees, prior to considering an expert opinion on the possible nuisance and appropriate alleviation actions/measures, it should be aware that other members of the community may have opposing views to the original applicants. Council has received at least one unsolicited communication supporting Council's position on retaining the Mitchell Street trees.

Accordingly, Council should ensure that it is fully informed in its decision making on this matter, to avoid a further internal review of an opposing Council decision.



LEGAL IMPLICATIONS

An internal review is a statutory process under section 270 of the Local Government Act 1999, and must be conducted in accordance with the policy required to be adopted by Council for this purpose, [C290 - Internal Review of Council's Decision Policy](#).

STRATEGIC PLAN

N/A

COUNCIL POLICY

This matter relates to a review under Council's [C290 - Internal Review of Council's Decision Policy](#).

ECONOMIC IMPLICATIONS

N/A

ENVIRONMENTAL IMPLICATIONS

Any environmental implications, such as may be associated with the subject trees are yet to be determined and will be a matter for a subsequent report if necessary.

SOCIAL IMPLICATIONS

N/A

CULTURAL IMPLICATIONS

N/A

RESOURCE IMPLICATIONS

Resource implications for this matter include the cost of the internal review process and any recommendations or subsequent activities.

Internal review (and associated legal advice) costs incurred to-date total \$5,900 (+GST). This is inclusive of costs up to and including 26 September 2022, with an invoice anticipated for final costs up to and following the provision of the Internal Review Report to Council on 29 September 2022.

The initial cost estimate reported to Council at its meeting in April 2022 was in the vicinity of \$10,000, noting that the review step in resolution 3(c) made at the same meeting is yet to be conducted.

These costs do not include the internal administration costs associated with administering the internal review, such as engaging and instructing external consultants, collating associated documentation, preparation of reports, communication with the applicants/applicants representative.

VALUE FOR MONEY

Whilst a relevant consideration, the conduct of a section 270 review is a statutory process that is required to follow the relevant process set out in the legislation and Council policy.

RISK IMPLICATIONS

The risk associated with the section 270 review and its recommendations which have arisen from the final report may be subject to subsequent external review by the SA Ombudsman.

Council must also consider the risk associated with outcomes and actions, or lack thereof, in relation to the alleged nuisance associated with the trees, which is yet to be affirmed by an appropriately qualified independent source, this being the recommended next step arising from the internal review.

EQUALITIES AND DIVERSITY IMPLICATIONS

N/A

ENGAGEMENT AND COMMUNICATION STRATEGY

The resolutions and associated actions arising from this report will be notified to the consultant acting for the original proponents.



IMPLEMENTATION STRATEGY

The administration will undertake the actions arising from this report with a further report to Council anticipated to present the recommendations of an appropriately qualified person in relation to any actions/measures to alleviate any possible nuisance being caused, or potentially caused.

CONCLUSION AND RECOMMENDATION

That the recommendations provided in the section 270 review of Council decision 2021/154 and legal advice (as attached) are considered and actioned including that Council:

- reconsider all the information before it at the time it made the Decision;
- consider the information submitted by the Applicants, the report and the conclusion of the report;
- determine to engage an appropriately qualified person to consider and make recommendations on appropriate action regarding alleged nuisance associated with the trees, including what measures Council could /should take in respect of the trees to alleviate any possible nuisance being caused, or potentially caused; and
- following consideration of a report prepared by such an appropriately qualified person, determine whether to affirm, vary or revoke the Decision.

ATTACHMENTS

1. Section 270 Internal Review - Mitchell Street Lagunaria Trees - Final Report [↓](#) 
2. Confidential Legal Advice - Section 270 Internal Review - Mitchell Street Lagunaria Trees [↓](#) 

CONFIDENTIAL



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 23.3 AR22/77592 Section 270 - Internal Review and its attachments, resolution/s and minutes arising from the report, having been considered by the Council in confidence under Section 90(2) & (3) (g) and (h) be kept confidential and not available for public inspection until the matter has been considered by Council, with covering Report No. AR22/77592 and Resolutions/Minutes to be released immediately following consideration by Council, the legal advice (Attachment 2) be retained in confidence until further Order of Council to release pending further review of associated matters by Council, and the Internal Review Report (Attachment 1) be retained in confidence with the Chief Executive Officer expressly authorised to release the Internal Review Report in a redacted form with only such information that is considered to not fall within the scope of the grounds in s90(3)(g) of the *Local Government Act 1999*.
2. Further that Council delegates the power to review, revoke, but not extend the confidential order to the Chief Executive Officer in accordance with the provisions of Section 91(9)(c) of the *Local Government Act 1999*.

CONFIDENTIAL

**MINUTES OF CITY OF MOUNT GAMBIER COUNCIL MEETING
HELD AT THE COUNCIL CHAMBER, CIVIC CENTRE, 10 WATSON TERRACE, MOUNT
GAMBIER
ON TUESDAY, 13 DECEMBER 2022 AT 6.00 P.M.**

PRESENT: Mayor Lynette Martin (OAM), Cr Ben Hood, Cr Frank Morello, Cr Josh Lynagh,
Cr Kate Amoroso, Cr Max Bruins, Cr Paul Jenner, Cr Sonya Mezinec

OFFICERS IN ATTENDANCE:

Chief Executive Officer	- Mrs S Philpott
General Manager City Infrastructure	- Ms B Cernovskis
General Manager Corporate and Regulatory Services	- Mr D Barber
Acting General Manager City and Community Growth	- Mrs G Davison
Manager Governance and Property	- Mr M McCarthy
Manager Financial Services	- Mrs J Scoggins
Media and Communications Coordinator	- Mr J McDonald
Communications Officer	- Ms M Brookes
Executive Administrator	- Mrs S Dohnt
Executive Administrator	- Ms T Chant

RESOLUTION 2022/254

Moved: Cr Sonya Mezinec

Seconded: Cr Paul Jenner

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 the Mayor, Councillors and Mrs S Philpott, Ms B Cernovskis, Mr D Barber, Mrs G Davison, Mr M McCarthy, Mrs J Scoggins, Mr J McDonald, Ms M Brookes, Mrs S Dohnt and Ms T Chant be excluded from attendance at the meeting for the receipt and consideration in confidence of Agenda Item 23.3 AR22/77592 Section 270 - Internal Review.

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

- information concerning matters that must be considered in confidence in order to ensure that the Council does not:
 - breach any law, order or direction of a court or tribunal constituted by law,
 - breach any duty of confidence, or
 - breach any other legal obligation or duty
- 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 matter for consideration includes associated legal advice obtained in relation to the nuisance matters being associated with the subject matter of the report, and attachments to the Internal Review report contain 3rd party

information for which Council has no express or implied licence to publish and so disclosure could reasonably be expected to breach a law or duty of confidence in relation to that content.

CARRIED

RESOLUTION 2022/255

Moved: Cr Frank Morello

Seconded: Cr Max Bruins

1. That Council Report No. AR22/77592 titled 'Section 270 - Internal Review' as presented on 13 December 2022 be noted.
2. That the recommendations provided in the section 270 review of Council decision 2021/154 and the associated legal advice are considered and actioned including that Council:
 - Reconsider all the information before it at the time it made the Decision;
 - Consider the information submitted by the Applicants, the report and the conclusion of the report;
 - Determine to engage an appropriately qualified person to consider and make recommendations on appropriate action regarding alleged nuisance associated with the trees, including what measures Council could /should take in respect of the trees to alleviate any possible nuisance being caused, or potentially caused; and
 - Following consideration of a report prepared by such an appropriately qualified person, determine whether to affirm, vary or revoke the Decision.
3. That the consultant representative of the original applicants be advised of Council's next actions as set out in resolution (2).

CARRIED

RESOLUTION 2022/256

Moved: Cr Max Bruins

Seconded: Cr Sonya Meziniec

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 23.3 AR22/77592 Section 270 - Internal Review and its attachments, resolution/s and minutes arising from the report, having been considered by the Council in confidence under Section 90(2) & (3) (g) and (h) be kept confidential and not available for public inspection until the matter has been considered by Council, with covering Report No. AR22/77592 and Resolutions/Minutes to be released immediately following consideration by Council, the legal advice (Attachment 2) be retained in confidence until further Order of Council to release pending further review of associated matters by Council, and the Internal Review Report (Attachment 1) be retained in confidence with the Chief Executive Officer expressly authorised to release the Internal Review Report in a redacted form with only such information that is considered to not fall within the scope of the grounds in s90(3)(g) of the *Local Government Act 1999*.



2. Further that Council delegates the power to review, revoke, but not extend the confidential order to the Chief Executive Officer in accordance with the provisions of Section 91(9)(c) of the *Local Government Act 1999*.

CARRIED

CONFIDENTIAL

