

# CONFIDENTIAL



REPORT FOR:	<b>Council</b>		
MEETING DATE:	28 May 2019		
REPORT FROM:	Director City Services		
REPORT TITLE:	<b>Internal Review of a Council Decision – Discretionary Rate Rebate – Assessment 9004</b>		
FILE NAME:	F19/277	RECORD NO:	AR19/18163

## COMMUNITY VISION & STRATEGIC PLAN OUTCOMES

### **6 We Achieve**

- 6.3 We aim to provide good governance practices and compliance with all legislative requirements in delivery of services.
- 6.5 We use and manage our financial resources in the best interests of our community, and to ensure financial sustainability and organisational efficiency now and into the future.

## **PURPOSE**

A request for an internal review under s270 of the Local Government Act 1999, has been received in relation to a decision that Council made in relation to an application for a discretionary rate rebate. The matter has been prepared for Council to review in accordance with the Internal Review of Council Decisions Policy 1.1.05. Council must review its original decision, and make a determination as to whether to affirm, vary or revoke the decision.

## **RECOMMENDATION**

### **Council resolves:**

1. That the original decision of Council to not provide a discretionary rate rebate is affirmed.
2. That a letter be prepared to the complainant to advise of the outcome of Council's Internal Review.

## **BACKGROUND**

An application for a discretionary rate rebate was received from Ms Jodie Harris for the 2018/2019 financial year. On 24 September 2018, Council made the following decision in relation to the rate rebate application:

***Council** does not provide a discretionary rebate to limit the increase of the general rate on Assessment 9004 to 6% for the 2018/2019 financial year pursuant to Section 166 of the Local Government Act 1999.*

Following the decision of Council, a further application for a rate rebate was received from Ms Jodie Harris on 19 November 2018. Ms Harris was advised that to have the decision of Council reconsidered, an internal review was the appropriate course of action, rather than a further application.

On 12 March 2019, Ms Harris requested an Internal Review of the decision made by Council on 24 September 2018. The request is included in the attached report prepared by Kelledy Jones Lawyers, which contains a full summary of the background information, and all actions taken in relation to this matter.

## **DISCUSSION**

In accordance with Council's Internal Review of a Council Decision Policy 1.1.05, the request for an internal review of Council's decision was referred to Kelledy Jones Lawyers for an independent review of the actions undertaken, and decision made by Council.

When undertaking an internal review, the relevant test to be applied is whether the decision made by Council was

- a reasonable decision to make in the circumstances;
- a decision open to be made on the facts before it;
- a decision made in the public interest; and
- that the decision-making process was not flawed in any manner.

The conclusions and recommendations from the Kelledy Jones Lawyers Internal Review Report state as follows:

*9.1 Taking the above into account, we find the Council provided the Applicant with, or otherwise made available, all of the information necessary for her to inform herself of the rates that would be applied to the Land upon purchase.*

*9.2 Any misunderstanding in that regard has not been occasioned by any act, or omission, of the Council.*

*9.3 Further, we do not find the Council acted unreasonably, or that its discretion has miscarried, or has not been appropriately applied, in refusing to grant the Applicant's Application for a discretionary rebate of rates, whether under section 166(1)(l) or 166(1)(m) of the Act.*

*9.4 It is also relevant to note that whatever the policy position, the Applicant still had the opportunity, and did, make application for a discretionary rebate of rates for the Land, which Application was considered by the Council on its merits at its meeting of 24 September 2018.*

*9.5 It is also noted that the Council has since, in a proactive manner, beyond its statutory requirements, sought to ensure that all local real estate agents and conveyancers inform themselves of the application of the Policy and Rate Rebate Policy.*

*9.6 Irrespective of the manner in which the Council resolves to determine this matter, it is acknowledged that the Applicant has recourse to the Ombudsman if she remains dissatisfied.*

## **COUNCIL TO MAKE A DETERMINATION**

In accordance with Council's Internal Review of a Council Decision, Council must now make a determination in relation to their original decision, taking into account all of the information provided in this report, including the report provided by Kelledy Jones Lawyers.

If Council is of the opinion that the original decision was made in accordance with the relevant policies and procedures and the decision was reasonable, Council can affirm the previous decision and no further action is required.

If Council is of the opinion that the original decision was not made in accordance with policies or procedures or the decision was not reasonable as it did not meet one or more of the above criteria, then Council can vary or revoke the previous decision.

## **CONFIDENTIALITY PROVISIONS**

Pursuant to Section 90(2) of the Local Government Act 1999 the Council orders that all members of the public except staff be excluded from attendance at the meeting to discuss this report (AR19/18163).

The Council is satisfied that, pursuant to Section 90(3)(a) of the Act, the information to be received, discussed or considered in relation to the Agenda Item is information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead) being the personal information of a ratepayer's request for a discretionary rebate.

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 personal information pertaining to the ratepayer will be discussed.

That having considered this agenda item in confidence under Section 90(2) and (3)(a) of the Local Government Act 1999, the Council, pursuant to Section 91(7)(b) of the Act orders that all documents relating to report AR19/18163 be retained in confidence until the matter is resolved by Council.

### **NOTE**

In the interests of being transparent with the decision making process, Council sought the permission of the Ms Harris to have the matter considered in the ordinary course of business, open to the public. Ms Harris declined this offer requesting the matter remain in confidence. Whilst the information within this report does relate to the 'personal affairs' of an individual, the information is all publically available. It is ultimately for Council to determine whether the report is considered in confidence.

## **RISK MANAGEMENT**

### **1: Financial/Budget/Asset Management**

Rate capping rebates total \$436,116.55 for the 2018/2019 rating year.

If Council decides to apply a discretionary rate rebate, the amount of the rebate would have an impact on the current 2018/2019 budget.

If Council does not apply the discretionary rate rebate policy, it may expose Council to further applications for discretionary rate rebates from other residents in similar circumstances.

### **2: Legal/Policy**

Section 270 of the Local Government Act 1999 provides for the internal review of Council decisions.

Section 166 of the Local Government Act 1999 provides for discretionary rate rebates.

### **3: Environment/Planning**

Not applicable.

### **4: Community**

#### 4.1 General

The Complainant will be advised of the outcome of the Internal Review following the Council decision.

#### 4.2 Aboriginal Community Consultation

Not applicable.

**Melissa Kretschmer**  
**06/05/2019**

**PORT AUGUSTA CITY COUNCIL  
DISCRETIONARY REBATE OF RATES  
SECTION 270 REVIEW**

CONFIDENTIAL

## PORT AUGUSTA CITY COUNCIL

### DISCRETIONARY RATE REBATE

#### Review pursuant to section 270 of the *Local Government Act 1999*

##### 1. INTRODUCTION

- 1.1 By way of letter dated Tuesday 12 March 2019, Ms Jodie Harris ('the Applicant'), made application with the Port Augusta City Council ('the Council') for a review under section 270 of the *Local Government Act 1999* ('the Act'). A copy of the letter is **Appendix 1**.
- 1.2 Briefly by way of background, the Applicant is the registered owner in fee simple of the land comprised in Certificate of Title 5283 Folio 688, commonly known as 26 Marcus Place, Port Augusta ('the Land').
- 1.3 The Applicant purchased the Land on 29 June 2018 for \$447,000.
- 1.4 The Land had, prior to purchase by the Applicant, been subject to a discretionary rebate of rates, pursuant to section 166(1)(l) of the Act, otherwise known as a 'rate cap'.
- 1.5 Following transfer of the Land to the Applicant, the discretionary rebate of rates, in the nature of the rate 'cap' that had been previously granted, was not applied to the Applicant's assessment.
- 1.6 The Applicant made application for a discretionary rebate of rates pursuant to section 166(1)(l)(ii) of the Act ('the Application'), which was refused by the Council after consideration of the matter at its meeting on 24 September 2018.
- 1.7 One of the relevant considerations taken into account by the Council in making its decision was the transfer of ownership of the Land.
- 1.8 In refusing her application for a discretionary rebate of rates, the Applicant asserts that:
  - 1.8.1 the Council failed to take into consideration, or failed to adequately take into consideration, the fact that it had previously granted a discretionary rebate of rates in similar factual circumstances, where land ownership had changed in the 18 months prior;
  - 1.8.2 the Council failed to take into account that its original intention in granting a discretionary rebate of rates, in the nature of the 'cap' was to *'minimise the impact resulting from the removal of the 'maximum cap'*; and
  - 1.8.3 the resultant 43% increase in her rates liability was *'unfair and unreasonable compared to the average of 3.2% and the capping of 6% for other residential assessments'*.

- 1.9 For the purposes of this review, it is relevant to note that:
- 1.9.1 following substantial changes in site valuations across the area, the Council noted that from the 2012/2013 rating year, it was appropriate to grant a discretionary rebate of rates to certain, identified, properties (subject to conditions) pursuant to section 166(1)(l)(ii) of the Act;
  - 1.9.2 the Land was one of the identified properties;
  - 1.9.3 this discretionary rebate of rates was in the nature of a 'cap' on the general rate, and was applied to the assessment in order to provide relief against what would otherwise amount to a substantial change in rates payable by a ratepayer;
  - 1.9.4 during its 2014/2015 deliberations, the Council had determined to 'phase out' these 'capped' rate rebates over the successive three (3) years;
  - 1.9.5 nothing contained within the Council's subsequent resolution, following its budget deliberations in relation to a 'capped' rate for certain properties, affected a ratepayer's ability to make separate application under section 166(1)(l) for a discretionary rebate of rates; and
  - 1.9.6 the Council's Annual Business Plan and Budget 2018/2019 stated the Council had reviewed the rate capping rebate it had introduced to provide a discretionary rebate for properties that were materially affected by large increases in property valuation and noted that some exclusions applied to its application, which were outlined in the Rating Policy.
- 1.10 Taken together, it can be reasonably be construed that the Applicant contends in refusing her application for a discretionary rebate of rates, the Council has not considered all relevant matters, such that it was not acting as an informed and responsible decision maker in the interests of its community. Therefore, the decisions are contrary to sections 6 and 8 of the Act.

## 2. THE SECTION 270 REVIEW PROCESS

- 2.1 To facilitate the process, the Council engaged KelledyJones Lawyers ('KJL'), to:
- 2.1.1 undertake an independent, 'arms-length' review of all relevant information available to the Council at the time the decision was made; and
  - 2.1.2 having regard to the concerns raised by the Applicant, to review the decision-making processes and prepare a report for the consideration of the Council.
- 2.2 For the avoidance of doubt, reference to 'the Council' in this report is a comprehensive term and is to be read, as necessary, as encompassing employees of the Council.
- 2.3 On 5 April 2019, KJL sent a letter to the Applicant, by email, inviting the Applicant to provide any further information that she wished to be considered as part of the review.

- 2.4 By way of email dated 11 April 2019, the Applicant provided a submission, together with several attachments.
- 2.5 The Applicant submits:
- 2.5.1 that upon receiving her first quarter rates notice for 2018/2019 ('the Assessment Notice'), she made follow up enquires with her real estate agent ('the Agent'), her conveyancer, and two (2) other real estate agents in the region, who were not aware that the rate 'cap' that had previously been applied to the Land **would not** continue to apply after settlement;
- 2.5.2 that there is '*significant inconsistencies with decision making processes & outcomes in recent years*' and that as a result of those inconsistencies, she feels she is '*being treated unfairly and being unreasonably burdened financially*'; and
- 2.5.3 that '*rates are a tax on land and not on a person who owns the land, the land value has not changed*'.
- 2.6 A copy of the Applicant's submission, and attachments, is **Appendix 2**.
- 2.7 The relevant 'test' that has been applied in this review is whether, based on all of the available information, the decision made by the Council was:
- 2.7.1 a reasonable decision to make in the circumstances;
- 2.7.2 a decision open to be made on the facts before it;
- 2.7.3 a decision made in the public interest; and
- 2.7.4 that the decision-making process was not flawed in any manner.
- 2.8 The standard of proof that has been applied in this review is on the balance of probabilities. In determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, KJL has considered the nature of the allegations made and the consequence if they were to be upheld.
- 2.9 The review process has been guided by the Council's *Internal Review of a Council Decision Policy* ('the Policy'), adopted in accordance with section 270 of the Act, as well as principles of procedural fairness. A copy of the Policy is **Appendix 3**.
- 2.10 The objective of this Report is to assist the Council in its review process. This Report sets out:
- 2.10.1 the background facts which have given rise to the application for review;
- 2.10.2 a summary of relevant information obtained during the course of the review;
- 2.10.3 our findings in relation to the issues raised by the Applicant, and the appropriateness of the Council decisions; and
- 2.10.4 the options now available to the Council.

- 2.11 KJL **recommended** that, consistent with principles of procedural fairness, the Applicant be provided with a copy of the draft Report, and afforded an opportunity to make any further submission, limited to the facts as stated, the conclusions drawn and the recommendations made, prior to finalisation of the Report.
- 2.12 A copy of the draft Report, and Appendices, was provided to the Applicant by way of email on Friday 26 April 2019. The Applicant was invited to provide any further submission she may wish to be taken into account, to be received by close of business on **Friday 3 May 2019**.
- 2.13 No further submission was received from the Applicant, and, accordingly, KJL proceeded to finalised this review.

### 3. BACKGROUND

- 3.1 The Applicant purchased the Land on 29 June 2018.
- 3.2 A copy of the Certificate of Title Historical Search details for the Land, evidencing the purchase date, together with the Certificate of Title, setting out the purchase price, is **Appendix 4**.
- 3.3 Importantly, prior to the purchase date, the Council **did provide** the Applicant, through the Agent, with a copy of the relevant information pertaining to the Land, as required of it under section 7 of the *Land and Business (Sale and Conveyancing) Act 1994*.
- 3.4 This included a copy of a Certificate of Liabilities pertaining to the rates liability for the Land, which stated the 'General Rates' to be applied. A copy of the documents provided by the Council are **Appendix 5**.
- 3.5 The second page of the Certificate of Liabilities (being page 14 of 14 of the documents provided by the Council) notes that:

*Capping Rebate*

*The capping rebate applied to the general rate on 2017/2018 **will not apply to this assessment** in the 2018/2019 financial year as Council have resolved that where a change of ownership has occurred in the current financial year the capping rebate does not apply in the following year. (our emphasis)*

- 3.6 The Council issued the Applicant with the Assessment Notice on 27 July 2018. A copy of the Assessment Notice is **Appendix 6**.
- 3.7 The Assessment Notice confirmed the Council declared general rates in the 2018/2019 financial year on the following basis:
  - 3.7.1 valuations made by the Valuer General applicable for the 2018/2019 financial year; and
  - 3.7.2 differential General Rates were declared and are based on the use of the land, and the locality of the land (being the zone defined in the Port Augusta City Council Development Plan), as specified on the front of the Assessment Notice.



- 3.8 Accordingly, the Assessment Notice provided that for the 2018/2019 financial year:
- 3.8.1 the site valuation for the Land was **\$175,000**;
  - 3.8.2 the land use was 'residence' in 'Residential No Eff Zone, being Land located in the 'Residential' Zone;
  - 3.8.3 rates were declared on 5 July 2018 and were set at **2.9959 cents** in the dollar;
  - 3.8.4 general rates subsequently totalled **\$5,242.83**;
  - 3.8.5 'Capping' was recorded at \$0.00;
  - 3.8.6 an annual Service Charge of **\$224.00** was applied for a Kerbside Collection/Recycling Service Charge;
  - 3.8.7 the 'Rebate' was set at \$0.00;
  - 3.8.8 an 'NRM Levy' of **\$36.30** was applied; and
  - 3.8.9 the total rates payable for the Land were **\$5503.13**.
- 3.9 Upon receiving the Assessment Notice, the Applicant wrote to the Chief Executive Officer ('CEO') of the Council *'seeking an explanation of the inconsistencies in the council rate notices for 2018/19 and the unfair council capping policy that is burdening some ratepayers with significant increases'*. A copy of this letter is **Appendix 7**.
- 3.10 In the letter to the CEO the Applicant stated that:
- 3.10.1 she was *'shocked'* to receive the rates notice, which demonstrated an increase in rates of 43% from the previous year;
  - 3.10.2 upon making enquires with the Council, she was advised by the Council Rates Officer that *'the site value [of the Land] had not changed at all, however, I was no longer entitled to receive capping that the previous owners had received'*;
  - 3.10.3 she was not advised by either her Agent or conveyancer that the rate liability would increase upon her purchase of the Land, and she was therefore *'unable to make an informed decision'* in her purchase;
  - 3.10.4 she had contacted the OmbudsmanSA, who had advised her to write to the Council as the Act *'allows individual councils to grant discretionary rebates'*;
  - 3.10.5 *'other residents in Marcus Place have the same site value as me and their rates are \$3588 ... I don't understand why my council rates can be almost \$2000 more than my next-door neighbour. This is not consistent or comparable.'*; and
  - 3.10.6 she is being discriminated against as she *'believed that Council rates were set for a property not an individual ratepayer'*.

- 3.11 Notably, the increase in 'rates liability' for the Land from the 2017/2018 financial year to the 2018/2019 financial year was only 0.00092900 cents in the \$.
- 3.12 That is, the Assessment Notice **did not** demonstrate an increase of 43% in rates from the previous year, but rather, a removal of the rates 'cap'.
- 3.13 Subsequently, on 24 August 2018, the Applicant submitted the Application for a discretionary rebate of rates for the 2019/2019 financial year, in the amount of \$1,915, pursuant to section 166(1)(l)(ii) of the Act. A copy of the Application is **Appendix 8**.
- 3.14 At its meeting on 24 September 2018, the Council, as a governing body, considered the Application in confidence and resolved **not** to grant a discretionary rebate of rates to the Applicant for the 2018/2019 financial year.
- 3.15 The Council's confidential resolution provided that that having considered the Application, the item be '*retained in confidence until the matter is resolved by Council*'. The Agenda Report is now publicly available on the Council's website.
- 3.16 Importantly, while the Agenda Report notes the Council's previous decision to grant a discretionary rebate of rates, in the nature of a 'cap', to certain properties, and noted the change in ownership of the Land, (being one of the factors taken into account in continuing to apply this position to certain properties), the Report demonstrates that notwithstanding its policy position, the Council also obtained legal advice confirming it was also required to examine the Application on its merits.
- 3.17 In this regard, section 166(3b) of the Act is relevant, which provides that a council should give reasonable consideration to the granting of rebates under section 166 and **should not** adopt a policy position that excludes the consideration of applications for rebates on their merits.
- 3.18 A copy of the Agenda Report, which included a copy of the Application, as well as the Applicants letter to the CEO of 20 August 2018 is **Appendix 9**.
- 3.19 The Council's decision to **not grant** a discretionary rebate of rates in the circumstances was communicated to the Applicant, by letter dated 26 September 2018. A copy of the Council's letter to the Applicant is **Appendix 10**.
- 3.20 In its letter, the Council advised, amongst other things, that:

*as part of the discussions and in support of the Council decision to refuse your application, the Council noted that from the 2012/2013 rating year, following substantial changes in site valuations across Port Augusta and Stirling North, the Council determined that it was appropriate to grant, pursuant to section 166(1)(l)(ii) of the LG Act, a discretionary rebate in the nature of a 'cap' on the general rate, in order to provide relief against what would otherwise amount to a substantial change in rates payable by a ratepayer. Exclusions applied to eligibility for the rebate, included where there had been a change of ownership in the preceding 18 months.*

*The rationale which supports the relevant exclusion is that the change of ownership triggers the cap to be removed because the **site value is already in place when the ownership changes**, i.e. the new owner **has not***

***experienced the increase in site value and resultant sudden increase in the liability for the general rates.*** (our emphasis)

- 3.21 It was also noted that the '*exclusion from the cap was clearly stated in the Certificate of Liabilities*', provided to the Agent (**Appendix 5**).
- 3.22 On 22 October 2018, the Applicant sent an email to the CEO, the (then) Mayor Sam Johnson and Councillor Phillip Brown, seeking an '*explanation of how Council can refuse my application, when the previous owners of my property were given the rebate, despite not meeting the eligibility requirements*'.
- 3.23 The Applicant attached to this email a copy of the Agenda, and Agenda Report, for a Special Meeting of Council held on 5 October 2016, which she considered evidenced that:
- there were 9 properties, including the property I now own (assessment 9004) granted rebates despite ownership change in the prior 18 months.*
- 3.24 A copy of the Applicant's email and attachments is **Appendix 10**.
- 3.25 On 25 October 2018, the Council responded to the Applicant, advising:
- 3.25.1 in the 2016/2017 rating year, the Council abolished the maximum rate, which subsequently exposed owners of higher value residential land to a substantial increase in rates;
- 3.25.2 following a number of complaints regarding this increase in rates experienced by a number of land owners, the Council resolved to '*effectively provide a cap on the increase in general rates for ratepayers in the 2016/2017 rating year to an increase of \$675 above the 2015/2016 year general rates*';
- 3.25.3 the decision of the Council in this regard was intended to be a '*once off event to minimise the impact resulting from the removal of the 'maximum cap*', but that the '*capping rebate*' has continued in subsequent years '*to limit the increase in rates to a set percentage for that rating year. There have been specific exclusions to the capping rebate as outlined in the rating policies for those years*'; and
- 3.25.4 if the general rate for the Land increased above a capped percentage then '*as per Council policy after the 18 month exclusion period has concluded, you may be eligible for a capping rebate as per the rating policy at that time*'.
- 3.26 A copy of the Council's response to the Applicant is **Appendix 12**.
- 3.27 On 24 October 2018, the Applicant wrote to the Council again requesting an explanation as to the conditions imposed upon eligibility for rate capping. The email exchange between the Council and the Applicant is **Appendix 13**.
- 3.28 On 19 November 2018, three (3) months after the initial Application, the Applicant submitted a further application for a discretionary rebate of rates, requesting that it be '*considered by the new council at the next meeting*' ('the Second Application').

3.29 In the Second Application, the Applicant submitted '*all I am asking for is to receive the same consideration from council that they have provided to other ratepayers in previous years*', and, in this regard, relied on section 166(1)(m) of the Act in making the application.

3.30 Section 166(1)(m)(ii) of the Act provides that a council may grant a rebate of rates or service charges:

*where the rebate is considered by the council to be appropriate to provide relief in order to avoid what would otherwise constitute:*

*(i) a liability to pay a rate or charge that is inconsistent with the liabilities that were anticipated by the council in its annual business plan; or*

*(ii) a liability that is unfair or unreasonable.*

3.31 A copy of the Second Application is **Appendix 14**.

3.32 On 21 November 2018, the Council advised the Applicant by way of email that as the Application had already been considered by the Council, she '*may wish to consider a request to review a Council decision as per the policy no. 1.1.05 – 'Internal Review of a Council Decision.'*' A copy of the Council's email to the Applicant is **Appendix 15**.

3.33 In making this recommendation, it is important to note that the Council **did have** regard to the provisions under section 166(1)(m) of the Act, when considering the Application at its meeting of 24 September 2018 (in addition to section 166(1)(l)).

3.34 The Applicant subsequently made application for this review in accordance with the Council's *Internal Review of a Council Decision* (**Appendix 1**).

#### 4. 2018/2019 DECLARATION OF RATES

4.1 At a Special Meeting of Council held on 5 July 2018, the Council considered its draft Annual Business Plan and Budget 2018/2019, as well as the draft *Rating Policy 2018/2019* ('the Policy').

4.2 The draft Annual Business Plan and Budget 2018/2019, and Policy, had all been the subject of a public consultation process, prior to the Council's consideration of the same, from the period 30 May 2018 to 20 June 2018. There was also a community forum held on Thursday 14 June 2018.

4.3 At its meeting of 5 July 2018, following its consideration of these matters, the Council resolved, amongst other things:

4.3.1 to adopt, pursuant to section 167(2)(a) of the Act, the valuations of the Valuer-General of site values for all land in the area of the Council, effective from 5 July 2018;

4.3.2 an increase in general rates of 3.2%;

4.3.3 that in the exercise of the powers contained in the Act in respect of the financial year ending 30 June 2019, pursuant to section 156(1)(c) of the Act, declare differential general rates according to the locality and the use

of the land, based on site value of the land on all rateable land in the amounts as specified;

- 4.3.4 pursuant to section 153(3) of the Act, that there is to be '*no fixed maximum increase in the general rate of rateable land that constitutes the principal place of residence of a principal ratepayer*'; and
- 4.3.5 pursuant to section 166(1)(l)(ii) of the Act, the Council would '*provide additional relief against what would otherwise amount to a substantial change in rates payable by a ratepayer*' through the imposition of a rebate, subject to conditions.
- 4.4 A copy of the Minutes of the Special Meeting of Council on 5 July 2018, evidencing the Council's resolution in full, is **Appendix 16**.
- 4.5 A copy of the adopted Policy, as well as the Rate Rebates Policy, is **Appendix 17**
- 4.6 A copy of the adopted Annual Business Plan and Budget 2018/2019 is **Appendix 18**.
- 4.7 The rates declared by the Council for the 2018/2019 financial year have been correctly applied to the Land, as evidenced by the Assessment Notice (**Appendix 6**).

## 5. DISCRETIONARY REBATES OF RATES

- 5.1 Section 166 of the Act sets out the statutory basis upon which a '*council may grant a rebate of rates or service charges*'.
- 5.2 We state '*may*', because it is important to note that an application for a discretionary rebate of rates, if made out, on one of the bases provided for within section 166(1) of the Act, remains a discretion vested in the Council as to whether it will be granted.
- 5.3 In accordance with section 166(1)(l) of the Act, the Council may grant a discretionary rebate:

*Where the rebate is considered by the council to be appropriate to provide relief against what would otherwise amount to a substantial change in rates payable by a ratepayer due to -*

- (i) *A redistribution of the rates burden within the community arising from a change to the basis or structure of the council's rates; or*
  - (ii) *A change to the basis on which land is valued for the purpose of rating, rapid changes in valuations, or anomalies in valuations.*
- 5.4 Further, section 166(m) provides that
- where the rebate is considered by the council to be appropriate to provide relief in order to avoid what would otherwise constitute -*
- (i) *a liability to pay a rate or charge that is inconsistent with the liabilities that were anticipated by the council in its annual business plan; or*

(ii) *a liability that is unfair or unreasonable.*

- 5.5 Section 166(2) of the Act provides that a rebate *'may be granted on such conditions as the council thinks fit'*.
- 5.6 On this basis, it is for the Council to determine, **at its discretion**, whether it intends to grant a discretionary rate rebate, up to and including 100 per cent of the relevant rates or service charge, and if so, whether that rebate will be subject to conditions.
- 5.7 Accordingly, for the purposes of the 2018/2019 'cap', the Council resolved to adopt a policy position that:
- 5.7.1 subject to conditions, the increase in rates on residential land uses will be limited to 6% over the general rate payable in the 2017/2018 financial year;
- 5.7.2 subject to conditions, the increase in rates on all other land uses will be limited to 15% over the general rate payable in the 2017/2018 financial year; and
- 5.7.3 of the five (5) conditions the abovementioned 'capping' is subject, one of those conditions is that the 'cap' will only apply if *'the ownership of the rateable land has not changed in the preceding 18 months'* (our emphasis).
- 5.8 This position was set out under the Policy, adopted by the Council at its Special Meeting of 5 July 2018.
- 5.9 Notwithstanding the Policy, section 166(3b) of the Act also provides that a council should give *'reasonable consideration'* to the granting of rebates under section 166(1) and should not adopt a policy that excludes the consideration of applications for rebates on their merits.

## 6. THE APPLICATION

- 6.1 After receiving the Assessment Notice, the Applicant submitted the Application to the Council on 24 August 2018.
- 6.2 Clause 4.13 of the Policy provides that the Council *'will consider on merit all applications made on the relevant form for rebate received under section 166 of the Act'* (our emphasis). (**Appendix 17**).
- 6.3 The purpose of the Policy is to provide the Council:
- ...with a tool to assist it in its decision making functions, and to provide guidance to the community, as to the grounds upon which a person or body is, or may be entitled to a rebate of rates.*
- 6.4 Clause 4.2.1 of the Policy relates to the application of mandatory and discretionary rate rebates. Clause 4.2.1.7 provides that:

*The Council has an **absolute discretion**:*

***To grant a rebate of rates or service charges in relation to discretionary rebate applications.***

*To determine the amount of any such rebate, to a maximum of 100% of the relevant rate or service charge. (our emphasis)*

- 6.5 The Applicant complains that in exercising its discretion to refuse the Application, it did not take into consideration, or did not sufficiently take into consideration, the fact that it has previously granted a discretionary rebate of rates in similar circumstances, where land ownership had changed in the 18 months prior.
- 6.6 Notwithstanding that the Council may have previously granted a rebate in such circumstances, **we find** that there can be **no implied precedent** in the exercise of the discretion.
- 6.7 That is, the Council **cannot** be obligated to exercise its discretion in favour of the Applicant, simply because it may previously have found good reason for granting a rate rebate in similar circumstances.
- 6.8 Indeed, we are advised in relation to the assessments referred to by the Applicant, as set out at paragraph 3.23 above, that in the 2016/2017 financial year the Council applied a maximum increase in the general rate to a principal place of residence, pursuant to section 153(3) of the Act.
- 6.9 After receiving a number of submissions from ratepayers, the Council determine to exercise its discretion to apply a 'cap' to rates, extending beyond the principal place of residency 'test', as set out under section 153(3). This 'cap' applied in that financial year, even in circumstances where there had been a change of ownership in the preceding 18 months. Relevantly, this included the Land, which was not owned by the Applicant at the time.
- 6.10 However, the exercise of the Council's discretion in this regard was limited to the 2016/2017 financial year, and since that time, the Policy has been consistently applied.
- 6.11 In our view, and as identified in the Policy, each application for a discretionary rebate of rates is required to be considered on its merits, and in light of the applicable facts and circumstances.
- 6.12 On the basis of the materials reviewed, it is evident to KJL that the Applicant's Application **was appropriately assessed** by the Council on this basis, and it gave consideration to the merits of the Application, prior to determining to refuse to exercise its discretion to grant a rebate of rates.
- 6.13 This position was explicitly communicated to the members, by way of legal advice contained in the Agenda report prepared for the Council's consideration of the Application at its meeting of 24 September 2019 (**Appendix 9**).
- 6.14 We find it was reasonably open for the Council to determine to not exercise its discretion to provide a rebate of rates in the circumstances, and the Council's decision, as well as its reasons, were communicated to the Applicant, by way of letter dated 26 September 2018.

## 7. SECOND APPLICATION

- 7.1 The Applicant also complains she was not aware that the 'cap' would no longer apply upon her purchase of the Land, and made a further application for a discretionary rebate of rates pursuant to section 166(1)(m)(ii) of the Act on 19 November 2018.
- 7.2 The Applicant submitted that relief was required in order to avoid what would otherwise constitute '*liability that is unfair or unreasonable*'.
- 7.3 However, the Agenda Report for the Special Meeting of Council for 24 September 2018, confirmed the Council gave consideration to both sections 166(1)(l), in addition to section 166(1)(m) of the Act, in its determination of the Application. However, it ultimately determined not to exercise its discretion to grant the same in the circumstances.
- 7.4 Importantly, despite the Applicant's contention that she was not aware that the 'cap' would no longer apply to the Land upon transfer, it is evident that in accordance with its obligations under both the Act and the *Land and Business (Sale and Conveyancing) Act 1994*, the Council made this information available to the Applicant through:
- 7.4.1 the publicly available Policy, Annual Business Plan and Budget 2018/2019, after being adopted by the Council at its meeting of 5 July 2018;
- 7.4.2 which were all subject to a public consultation process, while in draft form, over the period from the period 30 May 2018 to 20 June 2018; and
- 7.4.3 the Certificate of Liabilities issued by the Council to the Applicants' Agent which stated that the '*capping rebate will not apply to this assessment in the 2018/2019 financial year as Council have resolved that where a change of ownership has occurred in the current financial year the capping rebate does not apply in the following year*' (our emphasis) (**Appendix 5**).
- 7.5 Further, the Applicant stated in her letter to the CEO of 20 August 2018 (**Appendix 7**) that:
- The Port Augusta Council's Annual Business Plan & Budget 2018/19 states [pg 14] their intention 'to increase operating revenue without materially increasing rates' however by removing the rate capping for some and not others it has had a significant impact on some ratepayers.*
- 7.6 It is appropriate to also acknowledge that on page 15 of the Annual Business Plan and Budget 2018/2019, it is stated that:
- Council has also reviewed the rate capping rebate that it introduced in 2009. This policy was put in place to **provide a discretionary rebate for properties that were materially affected by large increases in property valuation**. The policy has limited rate increases to a level determined by Council over the past 9 years.*
- The capping % has typically been between the range of 10% and 15% for residences and 10% and 20% for businesses. In 2015/2016 Council resolved to **phase this policy out over the next four budget periods**. However, significant variances in site values in 2016/2017 resulted in large variances in general rates for ratepayers and additional discretionary rebates were applied.*



*For 2018/2019, the rate cap will be set at 6% for urban and non-urban residential assessments and 15% for all other assessments. **Some exclusions apply to the application of the capping rebate. These exclusions are outlined in the rating policy.** (our emphasis)*

- 7.7 Whilst we acknowledge the Applicant's contention that the Agent, conveyancer and two (2) other real estate agents in the region were not aware of this policy position, this **is not** evidence of an improper or unlawful decision being made by the Council, or otherwise, a miscarried application of its discretion in the circumstances.
- 7.8 In purchasing the Land, it was incumbent on the Applicant to inform herself of all relevant matters in making her decision, including the rating liability that would attach to the Land.
- 7.9 While it is unfortunate that the Applicant was not aware that the 'cap' would not apply to the assessment for the Land upon her purchase, this information was provided to the Applicant, through her Agent, and was publicly available.
- 7.10 It is also relevant to note that whatever the policy position, the Applicant still had the opportunity, and did, make application for a discretionary rebate of rates for the Land, which Application was considered by the Council on its merits at its meeting of 24 September 2018.
- 7.11 We find it was reasonably open for the Council to determine that the applicable rates were not '*unfair or unreasonable*' for the purposes of section 166(1)(m)(ii) of the Act and to decline to exercise its discretion to grant a rebate of rates on this basis.
- 7.12 We further find it was reasonable for the Council to consider the Second Application was in the nature of an 'appeal' in relation to the Council's decision regarding the Application, and note that the Rates Rebate Policy provides at clause 4.3.5 that any person who wishes to apply for a discretionary rebate of rates '*must do so on or before 31<sup>st</sup> August in the year of the application.*'
- 7.13 The Second Application was well beyond this timeframe, which, while not determinative on its own, taken together with the fact that the Council **did** consider the application of section 166(1)(m)(ii) at its meeting of 24 September 2018, it was appropriate upon receipt of the second Application to recommend that the Applicant request a review under section 270 of the Act of the Council's decision in the circumstances.

## 8. RELEVANT CONSIDERATIONS AND FINDINGS

- 8.1 The above matters have been carefully considered as part of the review process, and our findings in relation to each are set out below.
- 8.2 As to the Applicant's complaint that the Council failed to take into consideration relevant matters when it determined to refuse to exercise its discretion, **we find** that:
  - 8.2.1 upon purchase of the Land the Applicant received, through her Agent, a Certificate of Liabilities from the Council. Therefore, it was known, or knowable, by the Applicant that the rating 'cap' would no longer apply to land upon transfer;

- 8.2.2 in this regard, the Certificate of Liabilities states that the 'capping rebate **will not apply** to this assessment in the 2018/2019 financial year as Council have resolved that where a change of ownership has occurred in the current financial year the capping rebate does not apply in the following year' (our emphasis) (**Appendix 5**);
- 8.2.3 in addition, the conditions which applied to the Council's policy position in relation to the 'capping rebate' was, and is, publicly accessible information, evidenced in the Minutes of the Special Council Meeting held on 5 July 2018, the Policy and the Annual Business Plan and Budget 2018/2019 (**Appendices 16, 17, 19**);
- 8.2.4 the Council, acting as a transparent, accountable and responsible decision maker, ensured that publicly available information was accessible in relation to this issue, and was specifically communicated to incoming purchasers of affected properties, through notification in the Certificate of Liabilities delivered with the section 7 of the *Land and Business (Sale and Conveyancing) Act 1994* documents;
- 8.2.5 notwithstanding the provisions under the Policy, the Council also received legal advice that it was required to consider the Application on its merits, in accordance with section 166(3b) of the Act, which position is replicated in the Policy. The legal advice was contained in the Agenda report for the Council meeting of 24 September 2018;
- 8.2.6 accordingly, after considering the Application in accordance with the provisions of the Policy, as well as based on its individual merits, in exercising its discretion under section 166(1) of the Act, the Council resolved, **not to grant** the rebate of rates;
- 8.2.7 its reasons were communicated to the Applicant, by way of letter dated 26 September 2018;
- 8.2.8 having reviewed the material available to the Council in making its decision, we are of the view that the Council's decision to refuse the Application **does not** demonstrate that its discretion has miscarried;

## 9. CONCLUSIONS & RECOMMENDATIONS

- 9.1 Taking the above into account, **we find** the Council provided the Applicant with, or otherwise made available, all of the information necessary for her to inform herself of the rates that would be applied to the Land upon purchase.
- 9.2 Any misunderstanding in that regard has not been occasioned by any act, or omission, of the Council.
- 9.3 Further, we **do not** find the Council acted unreasonably, or that its discretion has miscarried, or has not been appropriately applied, in refusing to grant the Applicant's Application for a discretionary rebate of rates, whether under section 166(1)(l) or 166(1)(m) of the Act.
- 9.4 It is also relevant to note that whatever the policy position, the Applicant still had the opportunity, and did, make application for a discretionary rebate of rates for the

Land, which Application was considered by the Council on its merits at its meeting of 24 September 2018.

- 9.5 It is also noted that the Council has since, in a proactive manner, beyond its statutory requirements, sought to ensure that all local real estate agents and conveyancers inform themselves of the application of the Policy and Rate Rebate Policy.
- 9.6 Irrespective of the manner in which the Council resolves to determine this matter, it is acknowledged that the Applicant has recourse to the Ombudsman if she remains dissatisfied.

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**APPENDICES**