

# CONFIDENTIAL



REPORT FOR:	<b>Council</b>		
MEETING DATE:	23 November 2015		
REPORT FROM:	Chief Executive Officer		
REPORT TITLE:	<b>Bowhill Properties Pty Ltd (Deregistered) – Deposit – Proposed Residential Development adjacent Aerodrome</b>		
FILE NAME:	F10/610	RECORD NO:	AR15/43875

## COMMUNITY VISION & STRATEGIC PLAN OUTCOMES

### **1 We Thrive**

- 1.3 We use and manage our financial and physical resources in the best interests of our community, now and for the future.
- 1.4 Develop partnerships to attract investors in business proposals and new developments that contribute to a diversified and robust economy.

### **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, now and for the future.

## **PURPOSE**

The purpose of this report is to provide Elected Members with an opportunity to consider the issues associated with the contractual arrangements entered into between Council and Bowhill Properties Pty Ltd (deregistered) in 2010 and the deposit funds paid pursuant to the contract provisions.

## **RECOMMENDATION**

### **Council:**

1. To determine and approve the Option listed below, that is to be actioned by the Chief Executive Officer:

#### **Option 1**

Reimburse to Mr Cheetham or his nominated entity the total funds held by Council being \$306,457.65.

#### **Option 2**

Reimburse to Mr Cheetham or his nominated entity the \$250,000 deposit paid as per the contract agreement and retains the interest accrued.

#### **Option 3**

Reimburse to Mr Cheetham or his nominated entity the interest accrued being \$56,457.65 and retain the deposit of \$250,000.

**Option 4**

Reimburse to Mr Cheetham or his nominated entity an amount as determined by Council.

**Option 5**

Advises Mr Cheetham that Council in line with the special conditions contained in the *Instrument of Agreement*, will be retaining the deposit funds including accrued interest.

**BACKGROUND**

Council at its meeting held on 26 October 2015 resolved:

1. *Requests a further report in respect to the proposition that Council does not wish to negotiate the transfer of funds to Bowhill Property Group Pty Ltd.*

**DISCUSSION**

As Elected Members are aware in 2010 Council entered into contractual arrangements with **Bowhill Properties Pty Ltd** for the sale of Council land adjacent the Airport for a proposed residential development.

The developer Mr Pat Cheetham as part of the contractual arrangements was required to pay a \$250,000 deposit, which under the conditions of the contract would be forfeited if the conditions of the contract were not met.

The Instrument of Agreement dated 18 June 2010 included reference to the provisions for the payment and forfeiting of the \$250,000 deposit (plus accrued interest).

A sale agreement dated 25 June 2014 between the same parties, being Council (vendor) and Bowhill Properties Pty Ltd (as purchaser) purported to terminate the 2010 contract, however it was later found that on 19 January 2014 the same year, that Bowhill Properties Pty Ltd was actually a deregistered company (ceased to exist) under Section 601AB of the *Corporations Act 2001*. This meant that the sale agreement executed in June 2014 was invalid and that the 2010 contract remained in force.

The Australian Securities & Investments Commission (ASIC) were contacted by Council legal advisor in March 2015 to seek advice as to their position in relation to the \$250,000 deposit, plus interest held by Council under the Instrument of Agreement dated 18 June 2010. ASIC advised that they would not assert any claim to the deposit of funds and that they had no further interest in the funds.

It is understood that Council and ASIC separately informed Mr Cheetham that he could have **Bowhill Properties Pty Ltd** reinstated by the Court, to then deal with the Council in relation to the 2010 contract and the deposit, however at this point in time it appears that Mr Cheetham has not taken up this opportunity. Mr Cheetham did however advise on 8 October 2015 that he has registered **Bow Hill Property Group Pty Ltd** ACN 168 018 415 and that this company is to be used for the deposit refund.

Based on the above, and under the special conditions of the 2010 contract, the deposit and accrued interest have been forfeited to Council and neither Mr Cheetham nor any new company he might control has legal claim to the funds held by Council.

The total amount held by Council including interest is \$306,457.65. Council is now required to determine how much, if any of the total funds, should be reimbursed to Mr Cheetham. As pointed out above, under the provisions of the contract Mr Cheetham no longer has any legal claim to these funds and technically if Council did reimburse any of the funds, under the provisions of the contract the reimbursement should be made to Bowhill Properties Pty Ltd, however this company does not exist.

Therefore, if Council should resolve to reimburse Mr Cheetham or his nominated entity any or all of the funds held by Council, in effect it would be paying Mr Cheetham or his nominated entity, from Council's own money.

For Elected Members' information an email from Mr Cheetham which verbalises his argument for the return of the funds held by Council has been attached for consideration.

The total deposit was \$250,000 which accrued while held in Council's lawyers Trust Account interest to the amount of \$56,457.65. It regard to this issue it is believe that Council has the following options available:

In addition to the above information, it is also considered appropriate to inform Elected Members of outstanding debts that Mr Cheetham has with Council, under various companies that he owns. This information should be taken into consideration, if Council is of a position to return any or all of the deposit funds.

- 1) Outstanding Rates against Augusta Developments Pty Ltd \$46,449.54
- 2) Bowhill Properties Pty Ltd - \$15,851.15

**TOTAL: \$62,300.65**

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#### **Option 2**

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#### **Option 3**

Reimburse to Mr Cheetham or his nominated entity the interest accrued being \$56,457.65 and retain the deposit of \$250,000.

#### **Option 4**

Reimburse to Mr Cheetham or his nominated entity an amount as determined by Council.

#### **Option 5**

Advises Mr Cheetham that Council inline with the special conditions contained in the *Instrument of Agreement* will be retaining the deposit funds including accrued interest.

### **CONFIDENTIALITY PROVISIONS**

Council is satisfied, pursuant to Section 90(3)(d) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is 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.

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. 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 this information could reasonably be expected to prejudice the commercial position of the person who supplied the information, regardless of whether the Council is, or proposing to, conduct business with the person and may result in the person refusing to negotiate with Council

in the future and this may have a detrimental impact on future development within the City.

It is recommended that Council maintain the confidential provisions as outlined above until negotiations with the person have been either terminated or renegotiated and fully executed.

## **RISK MANAGEMENT**

### **1: Financial/Budget**

Costs may be incurred if litigation by the person is instigated in relation to the matter outlined within this report.

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

Section 36 of the *Local Government Act 1999* provides that Council has the legal capacity of a natural person and, in particular may enter into any kind of contract or arrangement and may sue and be sued.

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

Not applicable.

### **4: Community**

#### 4.1 General

Not applicable.

#### 4.2 Aboriginal Community Consultation

Not applicable.

#### 4.3 OPAL – Healthy Lifestyle Program

Not applicable.

**J BANKS**

**CHIEF EXECUTIVE OFFICER**

**17/11/2015**

# CONFIDENTIAL

Lee Heron

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**From:** John Banks  
**Sent:** Tuesday, 17 November 2015 8:34 AM  
**To:** Lee Heron  
**Subject:** FW: Tonight's meeting

-----Original Message-----

**From:** Pat [<mailto:augustadevelopment@bigpond.com>]  
**Sent:** Tuesday, 27 October 2015 9:33 AM  
**To:** John Banks  
**Cc:** Carmel  
**Subject:** Re: Tonight's meeting

John

How many more reports can possibly be given

TO SUMMARISE

You have a developer that fully self funded the entire structure plan and infrastructure plan and master plan DPA and spent 7 years achieving this .  
You have a developer that has invested around \$15,000,000 into the Westside development exclusive of housing You have a developer that has paid a \$250,000 deposit plus interest approximately 5 years ago to Acquire a certain area of land The region has been on a downward economic spiral over the past 5 years No Olympic Dam No Beach Energy No Arrufura Whyalla job losses Power Station Closure No New Port No Desalination This list is endless

The area of land to be purchased is now proposed one tenth in size a reflection of the above all not proceeding .

The revised deposit offered is approximately one tenth to accommodate the revised land size .

I have personally presented and explained in front of council members You submitted a report to the strategic committee It has once gain gone before council last night This has taken months already To be told further reports are required This does not cut it John this is a disgrace

It now appears we are being treated with the same respect as we have always had out of council and that is very little .

To be honest any other council in SA would treat a developer with respect and welcome them with open arms if they were to build what I have built on the Westside

This needs to be exposed through media outlets .

it is an absolute disgrace that you as a Council treat a developer that has spent millions believed in and continues to invest in your town in the manner that you are Clearly my development means nothing at all to council This is evident by your actions

Kind Regards

Pat Cheetham

Ph .....0412945644

Augusta developments Pty Ltd

[augustadevelopment@bigpond.com](mailto:augustadevelopment@bigpond.com)

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> On 26 Oct 2015, at 9:19 PM, John Banks <[John.Banks@portaugusta.sa.gov.au](mailto:John.Banks@portaugusta.sa.gov.au)> wrote:  
>  
> Hi Pat,  
>  
> The Council has called for the preparation of further reports I respect to both questions.  
>  
> John Banks  
>  
>> On 26 Oct 2015, at 19:53, Pat <[augustadevelopment@bigpond.com](mailto:augustadevelopment@bigpond.com)> wrote:  
>>  
>> Good evening John  
>>  
>> Please advise the outcome of tonight's meeting  
>>  
>> Kind Regards  
>>  
>> Pat Cheetham  
>>  
>> Ph .....0412945644  
>>  
>> Augusta developments Pty Ltd  
>>  
>> [augustadevelopment@bigpond.com](mailto:augustadevelopment@bigpond.com)  
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