

**ADELAIDE HILLS COUNCIL
ORDINARY COUNCIL MEETING
Tuesday 23 March 2021
CONFIDENTIAL AGENDA BUSINESS ITEM**

Item: 18.1

Responsible Officer: Marc Salver
Director Development & Regulatory Services
Development & Regulatory Services

Subject: Sale of Land for Recovery of Debt – 1615 Lobethal Road,
Lenswood

For: Decision

1. Sale of Land for Recovery of Debt – 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:

- CEO, Andrew Aitken
- Director Infrastructure & Operations, Peter Bice
- Director Development & Regulatory Services, Marc Salver
- Director Corporate Services, Terry Crackett
- Director Community Capacity, David Waters
- Manager Financial Services, Mike Carey
- Governance & Risk Coordinator, Steven Watson
- Minute Secretary, Pam Williams

be excluded from attendance at the meeting for Agenda Item 18.1: (Sale of Land for Recovery of Debt) in confidence.

The Council is satisfied that it is necessary that the public, with the exception of Council staff in attendance as specified above, be excluded to enable Council to consider the report at the meeting on the following grounds:

Section 90(3) (i) of the *Local Government Act 1999*, the information to be received, discussed or considered in relation to this Agenda Item is information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds that we take place, involving the council or an employee of the council, the disclosure of which could reasonably be expected to prejudice the legal processes required to progress the sale of the land.

Accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information and discussion confidential.

2. Sale of Land for Recovery of Debt – 1615 Lobethal Road, Lenswood - Confidential Item

SUMMARY

The property in question is located at 1615 Lobethal Road, Lenswood (refer to **Appendix 1** Locality Plan & Photos), is 1,517m² in area, is zoned Watershed (Primary Production) and is located within the settlement of Lenswood.

Council initiated enforcement action against the landowner for an unauthorised change of land use in November 2011. Council considered that the land was being used for the storage of materials in the nature of a builders yard/junk yard. The lawful use of Land was considered to be a dwelling and motor repair station, which had ceased many years earlier and therefore any other uses after this time had never been approved. The landowner was made aware of this requirement at the time but to date has never lodged a Development Application to change the land use and is still required to do so if the builders/junk yard is to remain on the site. However, as a result of the landowner's continued failure to comply with a number of directives and enforcement notices over the years to cease placing objects and materials on the road verge and around the landowner's property, Council initiated proceedings in the Environment, Resources and Development (ERD) Court pursuant to Section 85 of the *Development Act 1993*. This resulted in Council being successful in obtaining an Order from the Court on 23 July 2018 to have the owner clean up his property. Further, Council was awarded costs, which are now recoverable from the landowner in question.

An allocatur was subsequently applied for by Council and issued by the ERD Court on 9 May 2019 awarding the sum of \$16,183.08 to Council. This is the legal document that Council has since used to pursue the recovery of this debt from the landowner. Since May 2019 Council has engaged a lawyer to recover the debt which to date has failed primarily due to uncooperative behaviour of the landowner. Therefore the last option available to Council is to pursue a Warrant of Sale of real property (i.e. land) in order to recover the debt. The process to be undertaken is permissible pursuant to Section 7 of the *Enforcement of Judgements (EoJ) Act 1991* (Refer to **Appendix 2** – Extract of the EoJ Act) and the *Uniform Civil Rules 2020*.

This report discloses the details of how the debt has arisen and history of all the avenues pursued by Council and its lawyers in order to try and recover the debt from the landowner. This report seeks Council's authorisation to issue a Warrant of Sale of the real property (i.e. the land) in question in order to recover the debt owed to Council from the landowner. Administration is therefore recommending that Council authorise the CEO to initiate proceedings to pursue a Warrant of Sale of the landowner's property (comprised of three titles) in order to recover the total sum of \$16,702.17 (which includes recoverable costs incurred to date), plus any additional recoverable costs claimable by Council as a result of this debt recovery process.

RECOMMENDATION

Council resolves:

1. That the report be received and noted.
 2. That the CEO be authorised to pursue the Warrant of Sale of the following property in accordance with Section 7 of the *Enforcement of Judgements Act 1991* in order to recover the sum of \$16,702.17 plus any additional recoverable costs claimable by Council as a result of this debt recovery process:
 - A5937 – VG 5670451102 (comprising three titles) - 1615 Lobethal Road, Lenswood
 3. That the CEO be authorised to sign and execute any required documentation in order to give effect to the above resolution.
-

1. GOVERNANCE

➤ Strategic Management Plan/Council Policy

Goal 4 A Recognised Leading Performer
Key Issue 4.2 Management and Risk Responsibility
Key Action 4.2.6 Manage and maintain the sustainable financial position of Council

➤ Legal Implications

Council was awarded costs by the Environment, Resources and Development Court as a result of enforcement action against the landowner pursuant to Section 85 of the *Development Act 1993* in July 2018. An allocatur was subsequently applied for and issued by the ERD Court on 9 May 2019 awarding the sum of \$16,183.08 to Council. This is the legal document that Council has since used to pursue the recovery of this debt from the landowner. Since then Council has engaged a lawyer to recover the debt which to date has failed primarily due to uncooperative behaviour of the landowner. The Sheriff of the Court attempted three times to contact the landowner to issue a Warrant of Sale of moveable goods and advised that there was insufficient effects/items to seize to satisfy the amount of the debt on the property. The last option available to Council is to therefore pursue a warrant of sale of real property (i.e. land) in order to recover the debt. The process to be undertaken is permissible pursuant to Section 7 of the *Enforcement of Judgements (EoJ) Act 1991* (Refer to **Appendix 2** – Extract of the EoJ Act) and the *Uniform Civil Rules 2020*.

➤ Risk Management Implications

Conducting the debt recovery process as outlined will assist in mitigating the risk of:

Not recovering the legally awarded costs of enforcement action resulting in Council writing off the debt owed which will have a negative impact on its financial position.

Inherent Risk	Residual Risk	Target Risk
Medium (2C)	Low (1D)	Low (1D)

A reduction in the level of debt held by Council as a result of outstanding rates and other debts owed to Council will ensure that financial resources can be deployed in areas that align with Council's Strategic Plans.

➤ **Financial and Resource Implications**

As stated earlier, the ERD Court awarded Council the sum of \$16,183.08 to Council which amounts to the claimable legal costs of pursuing the Court action against the landowner. Additional recoverable costs as a result of the debt collection process amounting to \$519.09 (ex GST) (costs incurred to date) are permitted to be added to the original debt which results in the total amount being sought to be recovered amounting to \$16,702.17 at this stage. However, other costs amounting to \$1,214.10 (excl. GST) incurred to date as part of the debt recovery process are non-recoverable. Further, should Council agree to the Warrant of Sale process, then Council will incur additional costs of \$1,310 which are also non-recoverable.

At the time of writing this report the value of outstanding debt owed to Council is \$16,702.17. Payment of this debt will reduce the level of outstanding debts and positively impact on the cash flow of the organisation.

➤ **Customer Service and Community/Cultural Implications**

Not applicable

➤ **Sustainability Implications**

Not applicable

➤ **Engagement/Consultation conducted in the development of the report**

Council Committees: Not Applicable

Council Workshops: Not applicable

Advisory Groups: Not Applicable

Administration: Chief Executive Officer
Director Corporate Services and Directorate Officers
Executive Manager Governance & Performance

External Agencies: Not Applicable

Community: Not Applicable

2. **BACKGROUND**

Initial enforcement action for an unauthorised change of land use at 1615 Lobethal Road, Lenswood (refer to **Appendix 1** Locality Plan) commenced back in November 2011. Council considered that the land was being used for the storage of materials in the nature of a builders yard/junk yard. The lawful use of Land was considered to be a dwelling and motor repair station, which ceased many years earlier and therefore any other uses after this time

had never been approved. The landowner was made aware of this requirement at the time. As a result of the landowner's failure to comply with the Development Compliance Officer's instructions at the time, an enforcement Notice was issued pursuant to Section 84 of the *Development Act 1993* on 12 June 2012.

On 25 July 2012 the landowner had a site meeting with the Administration to discuss the abovementioned notice. At that meeting, the landowner committed to clean up the property within a month, weather permitting. A follow up email was then sent to him on 13 August 2012 as nothing had been done and he was given until 25 August 2012 to complete the clean-up. In a response to Administration on the same day, the landowner requested more time to comply. A subsequent site inspection on 5 October 2012 revealed that he had partly complied with the Enforcement Notice. Administration then sent a follow up letter to the landowner on 7 November 2012.

On 21 November 2012, at the landowner's request, he met with Director Development & Regulatory Services to discuss the requirements for lodging a development application to change the old service station into a store. To date, almost nine years later, no such application has been lodged with Council.

Over the course of the ensuing months in 2013, the Development Compliance Officer again contacted the landowner on a number of occasions to clean up the property resulting in a letter to him on 4 September 2013. As a result of these ongoing issues, the landowner requested a meeting with the CEO and the Director Development & Regulatory Services which occurred on 27 November 2013. Soon thereafter the landowner cleaned up the property to Council's satisfaction at the time.

However, on 3 March 2017 after receiving complaints again from the public regarding storage of materials on the road verge and the subject land, a site inspection was undertaken which identified that the land was once again being used unlawfully for the storage of materials. As this was not the first time Council had taken action against the landowner in this regard, Council's lawyers were engaged to undertake further enforcement action to remedy the situation. On 22 March 2017 a letter was sent to the landowner advising him that the Council considered that a change of land use had occurred requiring Council's approval.

On 7 April 2017, Council received a letter from the landowner advising that the materials stored on the land were to be used at a later date for repairs to the property. In his opinion, this was considered to be the lawful use of the land for farm machinery and repair, although Council has no record of such a landuse.

On 4 May 2017, Council then issued another Section 84 Enforcement Notice requiring the landowner to remove a number of items from the land by 31 May 2017, and to cease unlawful use of the land for this purpose. By 1 June 2017, Council noted that no action had been taken by the landowner in relation to the Section 84 Notice and no correspondence had been received from him in this regard. On 27 June 2017, Council then sent a letter and an email to the landowner advising him that Council had instructed its lawyers to commence Section 85 Enforcement Proceedings pursuant to the *Development Act 1993*, in relation to this matter and that a summons would be delivered to him shortly. On 4 July 2017, Council sent another email to him requesting a list of items to be removed from the land, failing which the Section 85 proceedings in the ERD Court would be commenced. As no response had been received by 20 July 2017, Council sent another email to the landowner giving him until 27 July 2017 to comply with the Section 84 Notice.

After numerous further attempts to contact the landowner, and due to his continued non-compliance with the requirements of the Section 84 Notice, Council's lawyers filed affidavits of service and an accompanying letter with the Environment, Resources and Development (ERD) Court in January 2018 requesting that the matter be listed for hearing as soon as possible.

A directions hearing in the ERD Court was then held on 29 March 2018, which the landowner failed to attend. As a result, the lawyers sent him a letter on 4 April 2018 advising him that the hearing had been adjourned to 10 May 2018, which he was urged to attend. The landowner attended the 10 May 2018 Court hearing which resulted in the ERD Court issuing an order pursuant to Section 85 of the Development Act on 23 July 2018. The Order required the landowner to clean up the subject land and awarded Council costs in relation to recovering its legal expenses incurred as a result of these proceedings.

After a number of attempts to resolve the costs issue with the landowner, and not receiving any responses in this regard, Council's lawyers sent a letter on 11 October 2018 to the landowner in which a final offer was made with regard to recovering Council's costs. The aforementioned letter requested the landowner to respond to them by 8 November 2018. However, again the landowner failed to respond and on 31 January 2019, and so the lawyers sent another follow up letter to him giving him another 28 days to respond, stating that failing which Council would then proceed with a debt recovery process.

As a result of no response being received from the landowner by 12 March 2019, Administration instructed the lawyers on the same day to seek an allocator from the ERD Court for the full amount claimed, i.e. \$16,183.08 which was subsequently obtained from the Court on 9 May 2019.

On 14 April 2020, the CEO received an email from the landowner which in essence stated that he had no ability to pay the debt and that he had offered to pay \$2,000 of the debt owed during the previously mentioned Court process. The CEO then responded on 27 April 2020 advising that the debt was due and that if he was suffering hardship, then Council would be willing to negotiate payment options. However, no response was received and so the CEO followed up on the aforementioned email on 25 May 2020 and again on 8 July 2020. Note that the landowner was also sent an SMS telling him to check his emails and to respond to the CEO. As no response had been received by the 8 July 2020, the CEO advised the landowner that he had left Council with no option but to advise the Administration to continue with the bankruptcy proceedings in order to recover the outstanding debt.

However, as a result of the Federal Government's change to the bankruptcy legislation in response to the COVID-19 Pandemic, the recoverable debt limit was increased from \$5,000 to \$20,000. As a result of this change in the legislation, Council then pursued an alternative debt recovery process by seeking the sale of moveable property. However, the Sheriff of the Court attempted three times to contact the landowner to issue a Warrant of Sale of moveable goods and advised that there was insufficient effects/items to seize on the property to satisfy the amount of the debt. The last option therefore available for Council is to pursue a warrant of sale of real property (i.e. land) in order to recover the debt. The process to be undertaken is permissible pursuant to Section 7 of the *Enforcement of Judgements (EoJ) Act 1991* (Refer to **Appendix 2** – Extract of the EoJ Act) and the *Uniform Civil Rules 2020*.

Note that the landowner was also advised in all the aforementioned emails that any additional legal costs incurred by Council would be added to the current debt amount owed. However, to date, no response has been received from the landowner in this regard.

3. ANALYSIS

From the above it can be seen that the landowner has been aware for many years of Council's requirements regarding the unlawful change of landuse and the placement of items on the road verge in and around his property. However, as detailed above, he has on a number of occasions failed to comply with the enforcement notices and directives given to him by the Administration to clean up his property. In short, it is noted that had the landowner complied with previous requests to clean up his property, the Council would not have had to take the matter to the ERD Court and seek a Section 85 Order. As a result Council incurred the legal costs which are now the subject of the allocatur and this debt recovery process.

Financial Hardship

As outlined in Council's *Debt Recovery Policy*, should a ratepayer be experiencing financial hardship it is possible to postpone the recovery process to avoid progression to sale. For the purposes of the Policy "financial hardship" means a situation where a ratepayer is unable, reasonably, because of prolonged illness or unemployment, or other reasonable cause, to discharge their financial obligations to the Council and the ratepayer reasonably expects to be able to discharge those obligations if payment arrangements were changed.

Financial hardship does not include circumstances where a person is simply unwilling to make payment.

Cases of financial hardship are considered by application on an individual basis and always with a view to the ratepayer re-establishing financial capability and, wherever possible, meeting their financial obligations. In this instance, the landowner was offered the option of seeking the payment of the debt in instalments. However, to date no response has been received from the landowner.

With all the above in mind, the Administration considers that Council's only option to pursue the recovery of the debt is to pursue a Warrant of Sale of the landowner's properties (note there are three titles owned by the landowner). Administration is therefore seeking Council's approval to initiate and pursue this sale of land process.

4. OPTIONS

Council has the following options in relation to this report:

- I. To endorse pursuing the Warrant of Sale of land process in order to recover the debt owed to Council (recommended).
- II. To not endorse the sale of land process to recover the debt owed to Council and resolve other actions (not recommended).

5. APPENDICES

- (1) Locality Plan & Photos of 1615 Lobethal Road, Lenswood
- (2) Extract of Section 7 of the *Enforcement of Judgements Act 1991* – Seizure and sale of property to satisfy a monetary judgement

Appendix 1

*Locality Plan & Photos of 1615 Lobethal Road,
Lenswood*

Locality Plan - Appendix 1



Planners Summary

- PlanningSummary

AHC Core

- Parks
- PropertyOwner
- Parcels
- Roads
- Rivers
- River
- Creeks
- Streams

Flood Study Data

Stormwater Updated

- StormwaterPipesQAd
- PRIVATE_DrivewayPits
- PRIVATE_DrivewayPipes
- DPTI_Pits
- DPTI_Pipes

CWMS

Zones_Policy & Landuse

Natural Resources Mangement

Rec Trails & Rd Res with Rec Signifi cance

- RecTrailsDISS
- Major
- Meduim
- Small

RecAccessSignif2004

Planning

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Scale = 1:1508.220

50 m



PHOTOS OF 1615 LOBETHAL ROAD, LENSWOOD



Google Street View – February 2008



Google Street View – December 2009



Administration photo – June 2012



Administration Photo – November 2013



Administration Photo – November 2013



Google Street View photo – December 2019



Administration Photo - April 2020



Administration photo – July 2020



Administration photo – July 2020



Administration photos – March 2021

Appendix 2

*Extract of Section 7 of the Enforcement of Judgements
Act 1991 – Seizure and sale of property to
satisfy a monetary judgement*

7—Seizure and sale of property

- (1) The court may, on application by a judgment creditor, issue a warrant of sale authorising seizure and sale of a judgment debtor's real or personal property (or both) to satisfy a monetary judgment.
- (2) The seizure and sale of personal property that could not be taken in bankruptcy proceedings against the judgment debtor cannot be authorised.
- (3) The sheriff may, in pursuance of a warrant under this section—
 - (a) enter the land (using such force as may be necessary for the purpose) on which property to which the warrant relates, or documents evidencing title to such property, are situated;
 - (b) seize and remove any such property or documents;
 - (c) place and keep any such property or documents in safe custody until completion of the sale;
 - (d) sell any property to which the warrant relates (whether or not the sheriff has first taken steps to obtain possession of the property).
- (3a) If the warrant authorises the sale of land, the sheriff may eject from the land any person who is not lawfully entitled to be on the land.
- (4) The sheriff may, in appropriate cases, leave a judgment debtor in possession of property until it is sold in pursuance of the warrant.
- (5) Subject to any contrary direction by the court—
 - (a) the sale of real property or tangible personal property will be by public auction (but if no bid that the sheriff considers acceptable is made at auction, the sheriff may proceed to sell the property by private treaty for a price not less than the highest bid);
 - (b) if there is a reasonable possibility of satisfying the judgment debt out of personal property, the sheriff should sell personal property before proceeding to sell real property.
- (6) Where any part of the judgment debtor's property consists of intangible property, the sheriff may sign any transfer or do anything else necessary to convert that property into money.
- (7) Where property of the judgment debtor seized in pursuance of the warrant consists of a bank note or other money, the sheriff must, unless it has a value greater than its face value, hand it over to the judgment creditor in full or partial satisfaction of the judgment.

8—Charging orders

- (1) A court may, on application by a judgment creditor, charge property of a judgment debtor with a judgment debt or part of a judgment debt.
- (2) Where the court makes an order under subsection (1), it may make ancillary or consequential orders—
 - (a) requiring registration of the charge; or
 - (b) prohibiting or restricting dealings with the property subject to the charge; or

3. Sale of Land for Recovery of Debt – 1615 Lobethal Road, Lenswood - Period of Confidentiality

Subject to the CEO, or his delegate, disclosing information or any document (in whole or in part) for the purpose of implementing Council's decision(s) in this matter in the performance of the duties and responsibilities of office, Council, having considered Agenda Item 18.1 in confidence under sections 90(2) and 90(3)(i) of the *Local Government Act 1999*, resolves that an order be made under the provisions of Sections 91(7) and (9) of the *Local Government Act 1999* that the report, related attachments and the minutes of Council and the discussion and considerations of the subject matter be retained in confidence until either the Warrant of Sale process for the land in question is completed and a settlement reached or until legal proceedings have concluded, but no longer than 12 months.

Pursuant to Section 91(9)(c) of the *Local Government Act 1999*, that Council delegates the power to revoke the confidentiality order either partially or in full to the Chief Executive Officer.