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OLSSON

lawyers

Our Ref: PP:M150284

10 February 2015

Mr John Valentine
Manager Strategic Projects
City of Marion
PO Box 21
OAKLANDS PARK SA 5046

Dear John

RE: CITY SERVICES SURPLUS LAND

I refer to our e-mail correspondence and to our discussion on 9 February 2015 in relation to the above matter.

Background

You have instructed me that the redevelopment of Council's City Services site on Marion Road, Mitchell Park will result in an area of land of approximately 7,000 square metres ("the surplus land") becoming surplus to Council's requirements and available for sale.

The surplus land is not "community land" for the purposes of the *Local Government Act 1999*.

The owner of the land at 919-929 Marion Road, Mitchell Park, adjoining the northern boundary of the surplus land ("the adjoining land"), has submitted a written proposal that:

1. Council grant it a first (or last) right of refusal in relation to the purchase of the surplus land; and
2. in return, all rent paid by Council under its current Lease in respect of parking arrangements on the adjoining land would be refunded to Council.

You have instructed me that, in addition to the above approach from the owner of the adjoining land, Council has received several other informal expressions of interest in the surplus land.

LAWYERS

Philip Page
Greg Anderson
Con Traianos
Greg Arihur
Phil McGovern
Andrew Goode
John Dempster
Tim Mellor
Karen Olsson
Anthony Kelly
Joanna Andrew
Joseph Anderson
Phil Dorman
Jennifer Goodale
Matthew Dorman
Henry Ringwood
David Parrish
Leonie Millard
Elizabeth Olsson
Helen Stratford
Jenny Tummel
Carmel Homes
Catherine Leis
Vanessa Paunkov
Sarah Vinall
Matt Noonan
Zeena Anthony-Qureshi
Maria Demosthenous
Andrew Smith
Callen Bubner
Melanie Meaney
Cecilia Pascale
Erin Moll
Emily Barrett
Kate McShane

CONVEYANCERS

Judith Phillips
Michelle Colmer
Kristy Tohl
Mary Parr

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Adelaide
Level 5 80 King William Street
Adelaide SA 5000
GPO Box 74
Adelaide SA 5001 DX 543
Phone: +61 8 8414 3400
Fax: +61 8 8414 3444

Port Lincoln
11 Mortlock Terrace
Port Lincoln SA 5606
PO Box 411
Port Lincoln SA 5606 DX 51050
Phone: (08) 8682 3133
Fax: (08) 8682 6030

Clare
165 Main North Road
Clare SA 5453
PO Box 671
Clare SA 5453
Phone: (08) 8842 1833
Fax: (08) 8842 1811

Regional Offices (By Appointment Only)
Bordertown
22 Binnie Street
Bordertown SA 5268
McLaren Vale
178 Main Road
McLaren Vale SA 5171
Kadina
26 Taylor Street
Kadina SA 5554
Nuriootpa
45 Murray Street
Nuriootpa SA 5355

Keith
Cnr Makin & Hender Street
Keith SA 5267

Phone: 1300 414 414
Fax: (08) 8414 3444

You have asked me to advise concerning the appropriate process Council should adopt in relation to the eventual disposal of the surplus land and, in particular, whether that disposal should be undertaken:

- by public tender or public request for expressions of interest; or
- by direct negotiation with the owner of the adjoining land.

The adjoining land

Council is currently the lessee under an "Agreement to Lease Premises" dated 29 August 2014 ("the lease") in respect of portion of the adjoining land. The lessor under the lease is Marion 919 Pty Ltd. The lease commenced on 1 September 2014. The term of the lease is described as "3 months initially then monthly where the Lessor or Lessee must give 3 months written notice to the other party to vacate". The portion of the adjoining land included in the lease is described as the "hard stand areas" and all buildings situated on the adjoining land are specifically excluded from the lease. The permitted use of the land is "storage of cars, trucks, heavy vehicles and equipment". The monthly rental is \$6,000.00, plus GST.

Whilst the written proposal to Council requesting a first (or last) right of refusal has been made by letter from a company named Cantor Property Pty Ltd, the registered owner of the adjoining land is, in fact, Marion 919 Pty Ltd, which appears to be a company related to Cantor Property Pty Ltd.

Council's Acquisition and Disposal of Land Assets Policy

As required by Section 49 (1) of the *Local Government Act 1999*, Council has prepared and, on 27 November 2007, adopted an "Acquisition and Disposal of Land Assets Policy" ("the Policy").

The Policy describes two main procedures for disposal of land by Council, namely:

- open market methods, which are to be considered "*in the first instance*", and
- other than open market methods, "*based on individual case merits*".

The open market methods of sale may include:

- public tender;
- selected tender; and
- public auction.

The circumstances in which non-open market methods of sale may be appropriate include (so far as most relevant):

- land that, because of its small size, dimensions or irregular shape, would not readily support a self-contained development;
- land for inclusion with an adjacent holding; and

- land that will complement a proposed development on an adjoining site, the sale of which is consistent with Council's objectives.

The purpose of the Policy is to ensure that Council's processes are open and accountable in accordance with the prudential requirements of the *Local Government Act*.

Factors to be considered

1. Clearly, under the Policy, the first and preferred procedure for disposal of land is by an open market method. In my view, this method should only be departed from if there are strong reasons to do so.
2. There are some factors, in the present instance, that might suggest a sale process other than by an open market method. Those factors relate to the fact that the surplus land in question is likely to be of greater value to the owner of the adjoining land than to other potential purchasers.
3. Despite that, however, the surplus land is not insignificant in area and is capable of supporting a self-contained development.
4. In addition, some interest has already been received by Council from potential purchasers other than the owner of the adjoining land.
5. Entering into direct negotiations with the owner of the adjoining land without testing the open market, even based on an independent valuation or valuations obtained by Council, may preclude other potential buyers from the opportunity to submit a higher offer.
6. Granting the owner of the adjoining land a first (or last) right of refusal in relation to the sale of the surplus land could constitute a fetter on that sale, since any contract entered into with another party would have to be expressed to be subject to the outcome of the exercise (or non-exercise) of that right. This may deter other potential buyers.
7. The benefit of a refund to Council of the rent paid for its use of the adjoining land might be outweighed by either:
 - a. a potential decrease in sale price as a result of potential purchasers being deterred by the first (or last) right of refusal process, or
 - b. a potential increase in sale price if the surplus land is sold on the open market without that restriction.
8. Using an open market method of sale would not prevent the owner of the adjoining land from participating in the process and making a competitive bid for the surplus land.

It is a matter for Council to decide, having regard to the above and any other relevant factors, whether it wishes to adopt an open market or non-open market method of sale.

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In my view, however, the factors favouring a non-open market method are not sufficiently persuasive to warrant departure from the open market procedure, which is the preferred method under the Policy.

Once Council has determined the overall sale method it intends to adopt, and is ready to proceed with the sale, it should obtain:

- an independent valuation of the surplus land; and
- specialised real estate marketing advice as to the most appropriate method of sale (such as public auction, public tender, selected tender, direct negotiation, etc).

Please let me know if you require any additional advice at this stage.

Yours faithfully
MELLOR OLSSON

Per : 

PHILIP H PAGE

Partner

Direct e-mail: ppage@mellorolsson.com.au

Direct Phone: 8414 3441 (Adelaide)