



Byron Shire Council



Supplementary Agenda Ordinary Meeting

Thursday, 25 March 2021

held at Council Chambers, Station Street, Mullumbimby
commencing at 9.00am

Public Access relating to items on this Agenda can be made between 9.00am and 10.30am on the day of the Meeting. Requests for public access should be made to the General Manager or Mayor no later than 12.00 midday on the day prior to the Meeting.

A handwritten signature in black ink that reads "Mark Arnold".

Mark Arnold
General Manager

CONFLICT OF INTERESTS

What is a “Conflict of Interests” - A conflict of interests can be of two types:

Pecuniary - an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person or another person with whom the person is associated.

Non-pecuniary – a private or personal interest that a Council official has that does not amount to a pecuniary interest as defined in the Code of Conduct for Councillors (eg. A friendship, membership of an association, society or trade union or involvement or interest in an activity and may include an interest of a financial nature).

Remoteness – a person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to a matter or if the interest is of a kind specified in the Code of Conduct for Councillors.

Who has a Pecuniary Interest? - a person has a pecuniary interest in a matter if the pecuniary interest is the interest of the person, or another person with whom the person is associated (see below).

Relatives, Partners - a person is taken to have a pecuniary interest in a matter if:

- The person's spouse or de facto partner or a relative of the person has a pecuniary interest in the matter, or
- The person, or a nominee, partners or employer of the person, is a member of a company or other body that has a pecuniary interest in the matter.

N.B. “Relative”, in relation to a person means any of the following:

- (a) the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descends or adopted child of the person or of the person's spouse;
- (b) the spouse or de facto partners of the person or of a person referred to in paragraph (a)

No Interest in the Matter - however, a person is not taken to have a pecuniary interest in a matter:

- If the person is unaware of the relevant pecuniary interest of the spouse, de facto partner, relative or company or other body, or
- Just because the person is a member of, or is employed by, the Council.
- Just because the person is a member of, or a delegate of the Council to, a company or other body that has a pecuniary interest in the matter provided that the person has no beneficial interest in any shares of the company or body.

Disclosure and participation in meetings

- A Councillor or a member of a Council Committee who has a pecuniary interest in any matter with which the Council is concerned and who is present at a meeting of the Council or Committee at which the matter is being considered must disclose the nature of the interest to the meeting as soon as practicable.
- The Councillor or member must not be present at, or in sight of, the meeting of the Council or Committee:
 - (a) at any time during which the matter is being considered or discussed by the Council or

Committee, or

- (b) at any time during which the Council or Committee is voting on any question in relation to the matter.

No Knowledge - a person does not breach this Clause if the person did not know and could not reasonably be expected to have known that the matter under consideration at the meeting was a matter in which he or she had a pecuniary interest.

Non-pecuniary Interests - Must be disclosed in meetings.

There are a broad range of options available for managing conflicts & the option chosen will depend on an assessment of the circumstances of the matter, the nature of the interest and the significance of the issue being dealt with. Non-pecuniary conflicts of interests must be dealt with in at least one of the following ways:

- It may be appropriate that no action be taken where the potential for conflict is minimal. However, Councillors should consider providing an explanation of why they consider a conflict does not exist.
- Limit involvement if practical (eg. Participate in discussion but not in decision making or vice-versa). Care needs to be taken when exercising this option.
- Remove the source of the conflict (eg. Relinquishing or divesting the personal interest that creates the conflict)
- Have no involvement by absenting yourself from and not taking part in any debate or voting on the issue as of the provisions in the Code of Conduct (particularly if you have a significant non-pecuniary interest)

RECORDING OF VOTING ON PLANNING MATTERS

Clause 375A of the Local Government Act 1993 – Recording of voting on planning matters

- (1) In this section, **planning decision** means a decision made in the exercise of a function of a council under the Environmental Planning and Assessment Act 1979:
- (a) including a decision relating to a development application, an environmental planning instrument, a development control plan or a development contribution plan under that Act, but
- (b) not including the making of an order under that Act.
- (2) The general manager is required to keep a register containing, for each planning decision made at a meeting of the council or a council committee, the names of the councillors who supported the decision and the names of any councillors who opposed (or are taken to have opposed) the decision.
- (3) For the purpose of maintaining the register, a division is required to be called whenever a motion for a planning decision is put at a meeting of the council or a council committee.
- (4) Each decision recorded in the register is to be described in the register or identified in a manner that enables the description to be obtained from another publicly available document, and is to include the information required by the regulations.
- (5) This section extends to a meeting that is closed to the public.

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BUSINESS OF ORDINARY MEETING

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LATE REPORTS

Report No. 17.1 Former Byron Hospital - appointment of head lessee

5 **Directorate:** General Manager

Report Author: Claire McGarry, Place Manager - Byron Bay

File No: I2021/462

Summary:

10 This report provides an update on the former Byron Hospital project and recommends a change in direction for the allocation of head lease.

RECOMMENDATION:

- 15 1. **That the General Manager liaise with the Office of Local Government on the proposal to call a tender for the lease to ensure that Council meets its statutory requirements.**
- 20 2. **That Council delegate to the General Manager authority under the Local Government Act to proceed to tender for the management of the former Byron Hospital site under a head lease agreement.**

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Report

Background

5 Council is currently repurposing the former Byron Hospital site to become a 'community hub' for Byron Bay, providing vital and currently lacking educational, community, arts and health services.

10 Following consideration of governance models, Council resolved, subject to advice from Office of Local Government, to adopt a model involving a directly negotiated lease to Old Byron Hospital Ltd for long-term management of the site. The proposed lease documents that were sent to Office of Local Government (OLG) to ensure Council meets its statutory requirements.

15 During subsequent discussions, OLG staff indicated that, after a preliminary review only, the proposed arrangement might meet the definition of public private partnership but that it was not certain. OLG staff suggested Council consider making some more changes to the documents to attempt to make it clearer that the arrangements were for management of a council building but they were unable to confirm what the outcome of their final review would be, even if Council followed the suggestions.

20 OLG have been unable to provide an estimated timeframe as to how long the assessment would take or, if it were to be assessed to be a Public Private Partnership, how long that process would take, so this report recommends an alternative approach – open tender - that could put management of timeframes back within Council's control.

Next steps

Two aspects of this project are happening in parallel – physical repurposing of the building and putting management arrangements in place for the future use of the building.

25 The building repurposing has progressed to the detailed design and engineering phase, with local architects BKA engaged to lead the design and Development Application process. This report relates to the aspect of finalising management arrangements.

30 As outlined above, consistent with Council resolution **20-502**, the proposed lease and agreement were forwarded to the OLG. The OLG suggested changes to the lease documents, which Council staff discussed with OBH Ltd.

OBH advised that they:

- have already achieved their goal of securing the site for future community use;
- also want the best possible outcomes delivered from the site and are committed to transparency and accountability;

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LATE REPORTS

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- also find the lack of timeframe certainty arising from ongoing liaison with OLG to be undesirable;
- would understand if Council instead calls a tender for provision of services to manage the building, and are clear that if Council proceeds with a tender, OBH will be required to compete on the same terms as all other service providers for the right to manage the facility through lease.

For OBH, although they are confident in their ability to submit a competitive tender utilising their skills base and history on this project, they are also committed to seeing the best possible manager running the Old Byron Hospital so great outcomes can be achieved for community.

Given OLG cannot provide an estimated timeframe for finalisation of their review, it is recommended an alternative approach of calling a tender under LG Act s55 be considered. The tender would be for a contract to provide facilities under s55(c) and services to Council, under s55(f); i.e., management of the Council building to provide space for the delivery of community services. The tender would largely be based on the existing proposed lease and management agreement; however, some very minor changes would be required.

The governance model would remain the same as was resolved by Council, i.e. a lease to a not-for-profit company limited by guarantee. Also, probity is achieved through either process, with tender processes having in-built probity requirements and where tenders do not occur, OLG oversight providing probity. However, the OLG oversight is proving to take much longer than expected, with continuing uncertainty about future timeframes.

The main benefit of a tender would be to put timeframes back within Council's control with additional benefits including demonstrating that those who wish to now make a case for use and management of the facility and provision of services have the opportunity to do so and that the best possible outcomes are achieved for community from the site.

If Council resolve to pursue a tender, staff will update OLG and ask them for confirmation of compliance, a workshop can be held with Councillors on 1 April 2020 and the draft selection criteria, along with any update received from OLG, can be reported to the 22 April 2020 Council meeting.

Strategic Considerations

Community Strategic Plan and Operational Plan

CSP Objective	L2	CSP Strategy	L3	DP Action	L4	OP Activity
Community Objective 2: We cultivate and celebrate our diverse cultures, lifestyle and sense of community	2.3	Provide accessible, local community spaces and facilities	2.3.2	Support effective management of community buildings (SP)	2.3.2.3	Administration of former Byron Hospital site

Recent Resolutions

20-502

5 **Resolved:**

1. That the General Manager liaises with the Office of Local Government on the proposed lease to ensure that Council meets its statutory requirements.
2. That Council enters into a head lease, with a change to clause 25 from 5 years to 3 years, and rent incentive with Old Byron Hospital Ltd, subject to advice from the Office of Local Government and finalisation of the loan repayment arrangements.
3. The report, attachment 3 to the report (Draft lease) and revised draft Rent Incentive Deed (E2020/76323), be made public documents

Legal/Statutory/Policy Considerations

- 15 • Contracts, above the monetary threshold, for the provision of facilities or services to Council are covered by s55 tender provisions of the LG Act and are excluded from the Act's public-private partnerships provisions.
 - 20 • Commercial leases of operational land are not covered by s55 tendering provisions.
 - The proposal is unusual and involves aspects of both, i.e. a contract to manage the building for Council and to provide services to the community, via a lease and a management/rent incentive agreement.
- 25 Council have done everything it can to ensure compliance with the requirements of the LG Act, engaging with Office of Local Government as early as August 2019. Council's request for assessment under the PPP Guidelines has not resulted in a decision, so it is recommended Council put the alternative approach to the OLG for consideration.

Financial Considerations

The proposed changed procurement arrangement does not change the financial implications of the project.

5 Consultation and Engagement

Negotiations regarding the terms and conditions of the head lease have been undertaken between Council staff, the Office of Local Government, OBH directors and both parties' legal representatives.

10 It is proposed that a probity adviser be engaged to support the recommended tender approach.