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18 March 2019

Mr Shane Donnelly
Clerk of the House
House of Assembly
Parliament House
Hobart TAS 7000

Mr David Pearce
Clerk of the Council
Legislative Council
Parliament House
Hobart TAS 7000

Hand delivered

Public interest disclosure investigation report

Please find attached my investigation report into a public interest disclosure concerning the sale of a property by the Meander Valley Council to recover unpaid rates for tabling before the House of Assembly and the Legislative Council pursuant to s85 of the *Public Interest Disclosures Act 2002*.

Yours sincerely



Richard Connock
OMBUDSMAN



Ombudsman Tasmania

**Investigation into a public interest disclosure concerning
the sale of a property by the Meander Valley Council to
recover unpaid rates**

16 October 2018

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Summary

A disclosure was received by my office regarding the sale of a private property by the Meander Valley Council to recover outstanding rates. The sale arose from unusual circumstances in that the property owner had refused to pay their local government rates as they believed their property belonged to God.

I determined that the disclosure was a protected disclosure pursuant to the *Public Interest Disclosures Act 2002* and decided to investigate the Meander Valley Council's actions to ascertain whether the Council had engaged in serious or significant improper conduct.

After completing my investigation I was satisfied that the Meander Valley Council had acted appropriately and that there was no evidence of it engaging in serious or significant improper conduct. I concluded, however, that the *Local Government Act 1993* should be amended to better protect property owners when councils sell their land for unpaid rates. I am aware that the Minister for Local Government has announced a review of the *Local Government Act 1993* that will be occurring over the next 2 years.

I made the following recommendation as a result of my investigation:

I recommend that s137 of the *Local Government Act 1993* be amended to contain the same or similar provisions as reg 143 of the *Local Government Regulation 2012 (Queensland)* so councils are required to obtain a valuation prior to the sale of land for unpaid rates and that the valuation becomes or informs the reserve price for the property at auction.

Introduction

1. My office received a disclosure in September 2017 about Meander Valley Council's (Council) sale of a home in Mole Creek (the Property) on 1 September 2017 for \$120,000.00.
2. Council sold the Property by public auction under s137 of the *Local Government Act 1993* (LG Act) to recover \$5,259.99¹ in outstanding rates. The auction took place when the Property was still inhabited by the registered owner and was sold without having been made available for inspection by any potential purchaser.
3. Since June 2012 the registered owner and their family have refused to pay their rates as they considered their land belonged to God. Legal action in the Magistrates Court in 2012 had recovered some of the outstanding debt but, as they continued to refuse to pay, their outstanding rates bill accumulated.
4. The disclosure raised the following concerns:
 - a. the price achieved at auction was considerably below the property's actual value that was estimated to be in excess of \$300,000.00;
 - b. the reserve price for the Property was inadequate as it only covered the outstanding rates and costs associated with the sale;
 - c. reasonable attempts were not made to recover the outstanding rates using other means, as Council had done previously, prior to selling the Property; and
 - d. the resolution to sell the Property was raised and discussed during an open council meeting in March 2017, rather than a closed meeting.
5. I was satisfied that the disclosure was a protected disclosure under the *Public Interest Disclosures Act 2002* (the PID Act). I then determined that the protected disclosure was a public interest disclosure as it tended to show that Council had engaged in serious or significant improper conduct, specifically maladministration.
6. If a matter is assessed to be a public interest disclosure the Ombudsman must investigate to determine whether there has been any improper conduct by a public officer or a public body².

¹ At 22 March 2017.

² Section 39 of the PID Act.

Assessment of the Protected Disclosure

7. The Ombudsman can receive and investigate disclosures about public officers and public bodies, which includes local councils³, under the PID Act.
8. I am required to determine whether a protected disclosure is a public interest disclosure. This test is set out in s30 of the PID Act:

30. Determination by Ombudsman of disclosure as public interest disclosure

- (1) If a person makes a disclosure to the Ombudsman in accordance with Part 2, the Ombudsman must, within a reasonable time after receiving the disclosure, determine whether the disclosure is a public interest disclosure.*
- (2) In making a determination under subsection (1), the Ombudsman must be satisfied that the disclosure shows or tends to show that a public officer or public body –*
 - (a) has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or public body; or*

...

9. The disclosure was made in accordance with Part 2 of the PID Act as:
 - a. it was made by a public officer;
 - b. it related to a public body, Council;
 - c. the discloser believed that Council had engaged in improper conduct;
 - d. the conduct was of a type that, if it had occurred, potentially fell within the definition of improper conduct, specifically maladministration;
 - e. the conduct occurred after 1 January 2001; and
 - f. it was made to the office of the Ombudsman.
10. I determined that the protected disclosure was a public interest disclosure after considering the material the discloser provided and conducting various public searches. The information tended to show that Council may have engaged in maladministration, which is included in the definition of improper conduct in s3(1) the PID Act.

³ Section 4(1)(d) of the PID Act.

11. The alleged maladministration needs to be serious or significant as determined in accordance with a guideline I have issued⁴. I was satisfied that it was serious or significant because:
- the reserve price that Council set was too low;
 - the sale price of the property was \$200,000 below the government capital valuation from 2012 of \$320,000 so there was a potentially significant financial loss; and
 - the sale was of a home.
12. I have a duty to investigate a public interest disclosure under s39 of the PID Act. This duty is subject to the exceptions in Division 2, Part 6 of the Act but none of these sections are applicable. Part 6 of the PID Act sets out my powers and responsibilities in relation to the investigation of a disclosed matter.
13. I wrote to the Honourable Peter Gutwein MHA, Minister for Local Government, and the General Manager of Council on 10 November 2017 notifying them of my intention to investigate the disclosed matter⁵.

Relevant Legislation

14. In addition to the PID Act, I also considered:
- a. the LG Act, in particular s137 that sets out Council's authority to sell land where rates have been outstanding for three years or more. Appendix A to this report contains s137 of the LG Act; and
 - b. the *Land Titles Act 1980*, in particular s78.

The Investigation

15. When undertaking this investigation I wrote to the General Manager of Council, Mr Martin Gil, to notify him of the public interest disclosure and requested a response be provided to the allegations that the following conduct constituted serious or significant maladministration:
- a. that if there had been a reserve price for the property, it was too low;
 - b. the land was sold significantly below its value; and

⁴ Guideline No. 1 /2010 - *Public Interest Disclosures Act 2002* guidelines and standards for the purpose of determining whether improper conduct is serious or significant – accessible at www.ombudsman.tas.gov.au.

⁵ Section 46 of the PID Act.

- c. that reasonable attempts had not been made to recover the outstanding rates debt, under Division 10 of the LG Act, before selling the land under s137.
16. The disclosure had also raised concerns about the determination Council made to sell the land at an open Council meeting in March 2017 rather than in a closed meeting. I undertook inquiries in relation to this issue, and determined that Council had acted in accordance with existing policy and procedure and that the determination did not amount to serious or significant misconduct.
17. I also requested that I be provided with:
 - a. any policies or procedures relating to debt recovery, the sale of land (Council's or registered owners' land) and the use of closed council meetings;
 - b. copies of any relevant correspondence with the registered owner of the Property including outstanding rates notices and the required notices under s137 of the LG Act;
 - c. a copy of the contract of sale, real estate advertisements, correspondence with the real estate agent, the contract with the real estate agent and any documentation provided to prospective purchasers or auction conditions;
 - d. all closed and open Council agendas and minutes relating to the sale of the Property;
 - e. all internal Council correspondence (including memos and emails) regarding the sale of the Property; and
 - f. all media releases or statements relating to the sale of the land.
18. I wrote to the Valuer-General to obtain information about the market value of the Property.
19. I requested information from the State Revenue Office concerning the stamp duty payable on the Property.
20. I also sought advice from the Solicitor-General about Council's duty to a landowner when it is selling land under s137 of the LG Act.

Compliance with Section 137 of the Local Government Act 1993

21. As part of this investigation, I made inquiries to establish if Council complied with the requirement of the LG Act as well as any Council policy when it sold the Property for unpaid rates.
22. Council produced documentation to demonstrate how it said it had complied with s137 of the LG Act including:
 - a. rates notices and overdue notices for a period in excess of three years;
 - b. a Notice of Intention to Sell dated 22 March 2017, which met the requirements of s137(3) of the LG Act, and proof of service of that notice on the registered owner of the property; and
 - c. a copy of a public notice published in the Examiner on 22 March 2017 and a copy of the notice that I was advised was placed in the Examiner on 29 March 2017. Both notices contained the information required by s137(5A).
23. Council also provided documents to show that it had communicated with the registered owner about the quantum of the outstanding rates and the options available to Council to recover the unpaid rates in the event the rates remained outstanding.
24. After having reviewed the information provided I was satisfied that Council had complied with the legislative requirements of the LG Act⁶ and those contained in the Meander Valley Policy No. 77, in particular part 4.7 Rates and Charges:

Pursuant to section 137 of the Act, if rates are not paid for a period exceeding three years, Council may sell a property or part of a property to recover the unpaid rates. Council can sell it by public auction or by direct sale. Decisions to sell a property for recovery of rates will be made on a case by case basis.

The Council's Duty to the Property Owner

25. Part of this investigation included an examination of whether Council owed any legislated or common law duty to the property owner to achieve a fair price when it was selling a property for unpaid rates.

⁶ Section 137.

Is there a statutory duty owed to the property owner?

26. Section 137(2)(bb) of the LG Act provides that for the purpose of selling land the council may –

(bb) do anything a mortgagee can do under the Land Titles Act 1980 in the case of a default of payment of money owing under a mortgage;

27. Section 78(1) of the *Land Titles Act 1980* provides that a mortgagee may, in good faith and having regard to the interest of the mortgagor, sell the land or any part of the land. I considered and obtained advice on whether s137(2)(bb) of the LG Act imposed a similar duty on councils to act in good faith and consider the interests of the property owner.
28. It appears from the wording in s137(2)(bb), that Council receives the benefit of the powers of a mortgagee under the *Land Titles Act 1980* but, perversely, is not subject to any of the limitations. There is no specific provision included in the LG Act imposing a duty on a council to obtain a fair price let alone act in good faith and have regard to the interests of the property owner.

Common law duty

29. While the LG Act does not impose a duty on Council to obtain a fair price, common law may. In *Sutherland Shire Council v Heyman*⁷ the High Court found that a public authority may be subject to a common law duty of care when it exercises a statutory power or performs a statutory duty (per Mason J as he then was at p 458).
30. It is also noteworthy that Studdert J in the New South Wales Supreme Court case of *Quzag v Gunning Shire Council*⁸ (which also concerned the sale of land for unpaid rates by a council, pursuant to similar provisions in the *Local Government Act 1993* (NSW)⁹) found that the council there had a duty to act reasonably in relation to the sale, in seeking to obtain a fair price.¹⁰
31. I asked Council whether it sought advice or considered its common law obligations to obtain a fair price for the Property when determining to sell it.
32. Council advised that it took no specific advice about any common law obligations but did seek legal advice on other aspects of the process under s137 of the LG Act.

⁷ [1985] HCA 41.

⁸ [2005] NSWSC 970.

⁹ Section 713(2).

¹⁰ *Quzag v Gunning Shire Council* [2005] NSWSC 970, [142] and [146].

33. In the context of whether it obtained a fair price, however, Council noted the length of time during which it worked with the registered owner to avoid going to auction. I discuss this issue later in my report. Further, Council suggested that there is no evidence, given the circumstances, that Council did not obtain a fair price. It noted that:
- a. the auction was conducted in accordance with s137 of the LG Act;
 - b. it was conducted in an open and transparent manner by a qualified real estate agent; and
 - c. it was widely publicised, evidenced by the fact there were a large number of media organisations present.

The Property Value and Sale Price

34. The Property had a statutory valuation of \$320,000.00 in 2012 following the six yearly valuation cycle undertaken by the Office of the Valuer-General.¹¹
35. The Valuer-General, Tim Grant, advised that the statutory valuation reflects the market value of a property as at the 'Level of Value' date; in this case a date in 2012. Mr Grant said that a statutory valuation should not be used as evidence of the market value of a property at a later date.
36. I asked Mr Grant if he could conduct a market valuation of the property as at the date of sale as this would form a basis for determining whether the sale price was fair. Mr Grant advised that he could not do that as the property was in private ownership at the time of my request and his authority only extends to Crown properties owned or managed by the authority, or in this case under the 'control of a council'.¹²
37. In any event, Mr Grant advised that he did not believe that I could use his market valuation as a comparison for the final purchase price. This is because Mr Grant would have had free access to all aspects of the property on which to make a valuation. Potential purchasers did not have that opportunity.

¹¹ Pursuant to the *Valuation of Land Act 2001* the values of property within a municipality are assessed and notified on a *Levels of Value* date every six years.

¹² Section 137(2)(bb) of the LG Act authorises a council to do anything a mortgagee can do under the *Lands Titles Act 1980*. This gives the valuer, acting under the instruction of a council, the right to enter the land, under s78(1)(b) of the *Land Titles Act 1980*, whilst the property is in the possession of a council.

38. Mr Grant, however, referred to some factors he believed may have influenced the sale price of \$120,000.00 for the Property:
- a. The Property was not available for inspection prior to the auction and was sold on the basis of '...as is, where is, in its present state and condition'¹³. Potential purchasers were not able to require Council to explain or reconcile differences or discrepancies in names, dimensions, areas or boundaries that affect or describe the Property. This would prevent a purchaser from conducting the normal checks undertaken prior to purchase such as a building condition report or environmental report.
 - b. The Particulars and Conditions of Sale by Auction included a Notice of Occupation, notifying potential purchasers that the Property was inhabited at the time of the auction and that vacant possession was not given on completion¹⁴. Mr Grant stated that this is a very compelling reason for a lesser price being offered, particularly as a mortgagee may have considered the property an unsound investment.
 - c. Potential purchasers would have to assume that Council had complied with all the legislative requirements allowing it to sell the Property.
39. Mr Grant advised that the sale of the Property will not be included in comparable market sales evidence for statutory valuation purposes because it is outside the normal conditions of sale. This means the sale price will not have an adverse impact on the statutory valuations of surrounding properties.

Reserve Price

40. Given the above, I am satisfied that the price achieved at auction was reasonable. A question still remains, however, as to whether Council should have taken greater care to protect the interests of the property owner when selling the Property. A particular concern raised by the disclosure was whether the reserve price set for the Property was too low.
41. A reserve price is a means by which property owners at auction are able to set the minimum price that would be an acceptable sale price. In determining what a reasonable reserve price should be, property owners will often consider a valuation of the subject property.

¹³ Particulars and Conditions of Sale By Auction Clause 19.3.

¹⁴ Ibid.

42. Council confirmed that a reserve price was set for the Property. The real estate agent appointed to conduct the Property auction was provided with this reserve price at 10.00am on 1 September 2017, an hour prior to the auction commencing. Council advised that the reserve price was set at \$15,005.00, which it considered was sufficient to cover the liabilities outstanding to the Council and the Crown¹⁵ and the costs of the sale to that date¹⁶.
43. Council did not obtain a valuation of the Property or seek or receive any advice about its value prior to its sale. Although there is no statutory obligation to do so, Mr Grant advised that it would have been possible for Council to instruct him to undertake a valuation of the Property during the time that it was in Council's control.
44. In Victoria¹⁷ and Queensland¹⁸ if land is being sold for unpaid rates a valuation has to first be obtained and the land must be sold for an amount equal to or more than the written valuation. No equivalent provision exists in Tasmanian legislation.¹⁹
45. Regulation 143 of the *Local Government Regulation 2012 (Queensland)* provides –

143 Conduct of auction

- (1) *The local government must set a reserve price for the auction that is at least –*
- (a) *The market value of the land; or*
 - (b) *The higher of the following –*
 - i. *The amount of overdue rates or charges on the land;*
 - ii. *The value of the land.*
- (2) *If the reserve price is not reached at the auction, the local government may enter into negotiations with the highest bidder at the auction to sell the land by agreement.*
- (3) *However, the price for the land under the agreement must be more than the highest bid for the land at the auction.*

¹⁵ Section 139(1)(a) LG Act.

¹⁶ Section 139(1)(a) LG Act.

¹⁷ Section 181(2) of the *Local Government Act 1989 (Vic)*.

¹⁸ Regulation 143(1) of the *Local Government Regulations 2012 (Qld)*.

¹⁹ Nor is there a similar requirement in South Australia, New South Wales or Western Australia.

(4) If the highest bidder at the auction does not agree to buy the land, the land is taken to have been sold at the auction to the local government for the reserve price.

(5) However, subsection (4) does not apply if the land is held on a tenure the local government is not competent to hold.

46. This can be contrasted with the requirements in Tasmania for the sale of council owned land. The LG Act²⁰ provides that a council can only sell its own land after it has obtained a valuation. There is no requirement, however, to set a reserve price and Council does not have a policy about setting one.
47. Obtaining a valuation and having a reserve price set that is equal to or greater than the valuation would potentially address any concern that a reasonable price has not been achieved or that Council has failed to exercise due care and diligence. Council is exercising a significant power by selling (in some cases) a valuable asset that may result in significant and serious loss to the registered owner. I consider that the Queensland Regulation set out above provides a strong example of how the LG Act could be amended to include protections for land owners without being too prescriptive.
48. Council maintains that the price achieved for the Property was reasonable in the circumstances and that it reflects a fair market price. Council said that it acted in accordance with all policy and legislative requirements in relation to the sale, including setting a reserve price. In addition, Council has indicated that by proceeding with a public auction for the Property it was meeting its obligations to achieve the best price.
49. I acknowledge that Council did comply with both legislative and policy requirements when facilitating a public auction of the Property and determining a reserve price. Therefore, Council's conduct cannot be categorised as serious or significant improper conduct.
50. It is my opinion, however, that the reserve price set was not reasonable and should have more accurately reflected the estimated value of the Property and the nature of the asset in question, that is a family home. In order to determine a reasonable reserve price Council should have obtained a valuation of the Property.
51. I am also concerned that Council did not turn its mind to whether it owed the registered owner a common law duty of care. Greater care should be taken to ensure that appropriate steps are taken, such as demonstrating a reserve price based on the valuation of the property, to minimise Council's exposure to potential civil action.

²⁰ Section 177(2).

52. In response to a draft copy of my report Council's General Manager requested that there be some acknowledgement of the exceptional circumstances that influenced Council's management of this particular process, especially with respect to the application of the common law. Mr Gill's letter can be found in full at Appendix B. The General Manager's comments are fair, this case was certainly unusual. The registered owner in fact returned the proceeds of the auction to Council, so steadfast were they in their belief that the property was not theirs but rather God's. This case has, nonetheless, highlighted the need for legislative review to improve the operation of s137 of the LG Act.

Recommendation

I recommend that s137 of the *Local Government Act 1993* be amended to contain the same or similar provisions as reg 143 of the *Local Government Regulation 2012 (Queensland)* so councils are required to obtain a valuation prior to the sale of land for unpaid rates and that the valuation becomes or informs the reserve price for the property at auction.

Engagement with the Property Owner Prior to Sale

53. As part of the investigation I asked Council whether any consideration had been given to making the Property available for inspection prior to the auction.
54. Under the LG Act²¹ a council may require any occupier of the land, who is not the owner of the land, to vacate the land. Vacant possession prior to the sale was not possible in this instance, however, as the Property was the registered owner's home. Council believed this was the case based on Land Tax records as well as registered post-delivery confirmations²².
55. Council advised that it did not attempt to arrange an open home inspection of the Property with the registered owner prior to the auction. An assessment was made that this was not feasible based on information including written communication from the registered owner and their family and information received at a meeting held with the family in 2016.

²¹ Section 137(2)(ba).

²² Registered post-delivery confirmation for letter to ratepayer for the Notice of Intention to Sell dated 23 March 2017.

56. Council further advised that a letter it received from the registered owner and their family on 16 January 2018, after the sale of the property, confirmed Council in its opinion that the registered owner would not have supported an open home for prospective purchasers.
57. The option, however, of arranging an inspection, and the possible impact that may have had on any potential sale price, was never put to the registered owner. Council was of the view, however, that it was unlikely that the registered owner would have cooperated even if provided with the opportunity to participate in any presale inspection. Given the unusual circumstances and the history of this matter, I accept that Council's view was reasonable.
58. It is acknowledged that sales of properties in situations such as this do not usually come about where the registered owner has been cooperative with Council. It may still be worth considering actively putting the option of open homes or property inspections to home owners, especially if it can be explained in terms of trying to achieve the best possible price for a property.

Alternative Means of Recovery

59. As the amount that was outstanding in unpaid rates was a relatively small sum of money when compared to the sale price, I asked Council if it had considered alternatives to selling the Property²³.
60. In 2012 Council took recovery action for outstanding rates relating to the Property from its registered owner²⁴ through the Magistrates' Court. Judgement was entered against the owner in that action and a vehicle was seized, but the funds from the sale of the vehicle had not covered the outstanding debt.
61. Options to recover the outstanding rates were provided to Meander Valley Councillors at a closed Council meeting on 17 January 2017. These options included recovery through Oral Examination or obtaining a Warrant to Sell Property. Both options would require making an application for an order from the Court.
62. Advice provided to Council assessed these alternative methods and included information about the estimated cost and likelihood of achieving a successful outcome. It was determined that it was unlikely the registered owner would cooperate with any Court proceedings and that this would result in additional costs and delay.

²³ Section 133 of the LG Act allows councils to recover unpaid rates in court.

²⁴ As at that time.

63. The advice provided to Council did not seem to take into account the fact that the registered owner of the Property had changed since the last Magistrates Court action was undertaken. One of the then joint tenants had died in the intervening period.
64. It was also unknown whether the registered owner had any property that would be available for seizure and sale to try to recover the debt. Documentation provided by Council and signed by the registered owner indicated that the attitude towards payment of Council rates had not changed with the Property ownership. The registered owner indicated that the rates would not be paid.
65. The action previously taken by Council²⁵ had not resulted in the registered owner recognising the responsibility to pay ongoing rates. The registered owner had also communicated with Council that no rates payments would be made in the future. Even if an alternative means of recovering the outstanding rates was successfully employed, it would potentially only settle the outstanding debt and costs to a set point in time. This would leave Council liable to continue to recover future debts.
66. These discussions ultimately led to the resolution reached by Council on 14 March 2017 to sell the Property.
67. I am satisfied that the decision to proceed to a sale was reasonable, after taking into account previous attempts Council made to recover unpaid rates from the registered owner and acknowledging outstanding rates would continue to accumulate. Communication received from and on behalf of the registered owner made it clear that they were unlikely to address the outstanding rates or pay any future rates.

Closed or Open Council Meeting?

68. I asked Council about the order for the sale of the Property being raised and discussed during an open rather than a closed meeting. Council referred to the *Local Government (Meeting Procedures) Regulations 2015* as the basis for all determinations about what matters should be discussed in an open rather than closed meeting. Regulation 14²⁶ provides that a meeting is to be open to the public unless closed under reg 15²⁷.
69. Council confirmed that Councillors had discussed the potential sale of the Property at a closed meeting on 17 January 2017. The Council Agenda for this meeting references reg 15(2)(i)²⁸ as being the reason the matter was being discussed in a closed meeting:

²⁵ As at 2012.

²⁶ Local Government (Meeting Procedures) Regulations 2015.

²⁷ Ibid.

²⁸ Ibid.

15. Closed meetings

...

(2) A part of a meeting may be closed to the public when any one or more of the following matters are being, or are to be, discussed at the meeting:

...

(i) matters relating to actual or possible litigation taken, or to be taken, by or involving the council or an employee of the council;

70. Councillors further discussed the sale of the Property at a workshop on 28 February 2017, where it was determined (although there are no minutes of the discussion) that they considered the item should be presented at an open council meeting.
71. Council has further responded to this issue by saying that the remaining reasons for taking an item to a closed Council meeting under reg 15(2) did not apply to the sale of the Property. This was partly based on the provisions of s137 of the LG Act, which requires a notice of intention to sell to include significant details about the property to be sold, the owners of the property and the outstanding rates to be advertised and displayed in public forums. This would ultimately result in information about the registered owner and the Property being made public, even if it had been determined in a closed Council meeting.
72. I am satisfied that Council considered the appropriateness of whether the matter should be discussed during an open or closed meeting. The decision to use an open meeting allows Council actions to be transparent and open to the public. The decision Council reached to sell the Property meant that details about the registered owner would be made public and the decision being discussed was not one that should have been discussed during a closed meeting.
73. Council made a resolution at the open meeting on 14 March 2017 to sell the Property. Council then complied with the requirements contained in s137 of the LG Act and the registered owner was notified of the intention to sell by way of registered letter dated 20 March 2017. A copy of the notice of intention to sell was also advertised in the local newspaper and placed on the property on 22 March 2017.
74. I am satisfied, based on the information provided, that the determination made by Council to discuss the matter during an open meeting was reasonable in the circumstances.

Conclusion

75. After investigating the public interest disclosure, I am satisfied that, overall, Council acted appropriately and in accordance with existing legislation and policy. Council had the legislative authority to sell the Property to recover the outstanding rates and it was reasonable for it to do so.
76. It is my view, however, that the existing legislation needs to be amended to strengthen the safeguards for property owners. Councils should be required to set reserve prices that reflect the fair value (as determined by a recent market valuation) of the property. This would reduce council exposure to similar questions about discrepancies between the sale price of a property and its estimated valuation. Councils should also attempt to engage the registered owner in additional communication to determine whether the owner would be open to allowing inspections of the property prior to sale.
77. I considered whether it was appropriate to make recommendations that Council make changes to its existing policies to reflect the need to recognise a potential common law duty to property owners and to better engage in communication with the registered owners prior to sale, however, I determined that these policy changes would follow from any legislative amendments made. This would then result in all Tasmanian council's having to review existing policy rather than just the Meander Valley Council.
78. I have made one recommendation accordingly.

Recommendation

I recommend that s137 of the *Local Government Act 1993* be amended to contain the same or similar provisions as reg 143 of the *Local Government Regulation 2012 (Queensland)* so councils are required to obtain a valuation prior to the sale of land for unpaid rates and that the valuation becomes or informs the reserve price for the property at auction.

16 October 2018



Richard Connock
OMBUDSMAN

Appendix A

137. Sale of land for unpaid rates

- (1) If any rates in respect of land that is not Crown land have been outstanding for 3 years or more, the council may –
 - (a) sell that land or part of that land as if it were the owner of the land –
 - (i) by public auction; or
 - (ii) if the proceeds of the sale are unlikely to meet the costs of the public auction, by direct sale; or
 - (b) apply to the Minister for an order that the land be transferred to the council if it is not possible after reasonable inquiry to identify the owner of the land or the whereabouts of the owner.
- (1A) The Minister may require a council to provide any information the Minister considers necessary to support an application under [subsection \(1\)](#).
- (1B) The provisions of [section 140\(3\)](#) and [\(4\)](#) apply to an order under [subsection \(1\)](#) as if it were an order under that section.
- (2) For the purposes of selling land, the council may –
 - (a) subdivide, change the use of or otherwise develop the land; and
 - (b) carry out any work on the land; and
 - (ba) require any occupier of the land who is not the owner of the land to vacate the land; and
 - (bb) do anything a mortgagee can do under the [Land Titles Act 1980](#) in the case of default of payment of money owing under a mortgage; and
 - (c) grant any easements or enter into covenants in respect of the land.
- (3) Before a council sells land or takes any action under [subsection \(2\)](#), the general manager must serve a notice in writing on the ratepayer stating–
 - (a) the period for which the rates have been in arrears; and
 - (b) the amount of the total rates outstanding in relation to the land; and
 - (c) that if that amount is not paid in full within 90 days the council intends to sell the land for non-payment of rates.

- (4) The general manager is to send a copy of the notice to—
 - (a) any owner of the land who is not the ratepayer; and
 - (b) any registered mortgagee of the land; and
 - (c) any other person who has a registered interest in the land.
- (5) The general manager is to cause the details of the notice as specified in [subsection \(5A\)](#) to be advertised on at least 2 occasions in a daily newspaper circulating in the municipal area.
- (5A) A notice referred to in [subsection \(5\)](#) is to specify —
 - (a) the land or lands to which the notice relates; and
 - (b) the owner or owners of the land or lands; and
 - (c) the matters referred to in [subsection \(3\)](#) .
- (6) The general manager may effect service of the notice by leaving it in a conspicuous place on the land if the general manager—
 - (a) having made reasonable enquiries cannot ascertain the name or address of the person on whom the notice is to be served; or
 - (b) considers it unlikely that the notice would otherwise come to the attention of the person on whom it is to be served.
- (7) If the outstanding amount —
 - (a) is not paid within 90 days, a council may sell the land in accordance with this Division; or
 - (b) is paid within 90 days, the general manager must cancel the auction.
- (7A) If the ratepayer pays the outstanding amount within 90 days, the council may recover any costs incurred by it under this Division in relation to the matter as a debt owed to it under this Part.
- (8) If the land fails to be sold, the council may take steps under [section 140](#) in relation to the land.

Appendix B

Meander Valley Council

W O R K I N G T O G E T H E R

Our ref.: 18796

8 October 2018

Ombudsman Tasmania
GPO Box 960
HOBART TAS 7001

ombudsman@ombudsman.tas.gov.au

Dear Mr Connock

RE: PUBLIC INTEREST DISCLOSURE INVESTIGATION – O1709-139

Thank you for forwarding the draft report for Councils consideration. I understand and support the conclusions and the recommendation you have come to in the report. I do however have one request for your consideration before you finalise it.

In section 39 of your report you ask the question, "*as to whether Council should have taken greater care to protect the interests of the property owner*".

Following discussion, you then conclude in section 50 that you were "*concerned that Council did not turn its mind to whether it owed the owner a common law duty of care*".

I have highlighted your reference to the property owner because the attribution of ownership was critical in this matter and determined the course of action that Council took.

The Beerepoot family had stated on many occasions that they were not the owners of the property. They had written to Council and stated publically that the property was owned by the Almighty Elohim of Abraham, Isaac and Jacob. One letter to Council states:

It is He that owns the land, by levying rates and now ultimately taking possession of this property you have rejected this truth and instead have attempted to establish your authority over Him.

Remitting the balance of the funds remaining of the sale to our family does not absolve the Meander Valley Council or its officers of their responsibility towards the Most High.

.../continued over page



The question for me throughout this process, which reflects your broader concern, was, who do we owe a duty of care to if the property owner refuses the attribution of property owner and insists that the property owner is God?

In every other similar circumstance I would agree with your concerns about the application of a common law duty of care. But I would argue that this circumstance was exceptional. It might sound like a silly question to you or me, but if we were to respect the beliefs of the Beerepoot's we need to ask it; did Council have a common law duty of care to God?

In the end the Beerepoots refused to accept any proceeds from the sale of the property stating, *your responsibility lies with Him and not with us.*

My request then, is that there is some acknowledgement in your report of the exceptional circumstances that influenced Council's management of this particular process, especially with respect to the application of common law. This was an uncommon situation.

Please let me know if you would like to discuss this further.

Yours sincerely



Martin Gil
GENERAL MANAGER