

# Probity Plan

Sale of Former Bowling Club, Vesper Street, Batemans Bay

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# 1 Purpose

- 1.1 This document is the Probity Plan for the proposed sale of the Former Bowling Club land (**Land**) at Vesper Street, Batemans Bay (**Sale**).
- 1.2 The purpose of this Probity Plan is to:
- (a) inform relevant stakeholders and participants of the probity controls and processes in connection with the Sale;
  - (b) ensure that a high standard of ethics and probity is achieved in all aspects of the Sale, including by facilitating transparency and accountability through comprehensive documentation and reporting;
  - (c) assist the Council to achieve a justifiable outcome and to meet its probity obligations;
  - (d) assist Council officers, employees and consultants to identify and manage probity issues and ensure that all staff and contractors have guidance on key issues; and
  - (e) create an overarching probity framework that will inform all aspects of the Sale and create specific probity protocols under the Probity Plan as and when required.
- 1.3 This probity plan has been developed in order to demonstrate compliance with Council's Policy for Land Management – Acquisition, Disposal and Leasing / Licensing (**Council Policy**) and the ICAC Direct Dealing guidelines (**Direct Dealing Guidelines**) having regard to the significance, size and complexity of the potential transaction.

# 2 Background

- 2.1 The Land is owned by Council.
- 2.2 Since 2016, Council has considered several reports (listed in Annexure A) exploring how Council may best utilise the Land for the community. The preferred future uses of the Land were identified by the community as tourist accommodation, conference facilities, restaurants, cafes and residential accommodation.
- 2.3 On 27 March 2018, Council resolved to request Expressions of Interest for redevelopment of the Land, consistent with the preferred development outcomes previously identified.
- 2.4 Expressions of Interest were received in 2022. This Probity Plan will apply to any further negotiations with the proponents.

# 3 Policy Framework

## *Sale by Direct Negotiation*

- 3.1 The Council Policy notes that the sale of land 'shall be by competitive process, unless circumstances warrant sale by direct negotiation'.
- 3.2 The Council Policy provides that direct negotiations can be undertaken in various circumstances, including where public marketing processes have failed to achieve the desired outcome or in response to a proposal which achieves specific policy goals of Council.
- 3.3 An Expression of Interest process has been undertaken and a competitive process has been applied to the proposed Sale of this site. However Council proposes to continue negotiations with multiple proponents and therefore considers it appropriate to continue to be guided by policies and guidelines relevant to direct negotiations.
- 3.4 The Council Policy provides that disposal of land by direct negotiation must be carried out in accordance with the Direct Dealing Guidelines.

- 3.5 The Direct Dealing Guidelines define direct negotiations as ‘exclusive dealings between an agency and a counterparty without first undergoing a competitive process’.
- 3.6 The Direct Dealing Guidelines note inherent risks to direct dealing but also set out circumstances when direct negotiations may be appropriate, subject to probity principles being complied with, including ‘transactions that derive from an earlier competitive process’. The Guidelines provide that direct negotiations with an entity selected through a competitive process can be justified, provided the parties anticipate it during the original selection process.
- 3.7 The Direct Dealing Guidelines further provide that that an agency can defend its decision to enter direct negotiations in a range of ways including:
- (a) publishing notice of its intention to enter into direct negotiations; and
  - (b) documenting the decision-making process.
- 3.8 Council will resolve to enter into direct negotiations with proponents at an open Council meeting and its decision will therefore be published. Council staff will keep accurate records of the decision-making process, including the assessment of expressions of interest against relevant criteria.

#### *Requirement for Probity Plan*

- 3.9 The Council Policy provides that where land is being sold by direct negotiation, Council staff will consider how to address probity to cover the following matters:
- (a) obtaining best value for money;
  - (b) demonstrating accountability and transparency;
  - (c) dealing with conflict of interest;
  - (d) providing a fair chance for all to participate; and
  - (e) where Council sells property subject to a development application, that application will be assessed independently of Council and submitted to either the Joint Regional Planning Panel or Council for determination.
- 3.10 The Council Policy further provides that for transactions worth more than \$50,000, a detailed, written Probity Plan will be developed.

#### *Probity Principles and Probity Risks*

- 3.11 The Direct Dealing Guidelines provide that the following “probity principles” should govern decisions about direct negotiations:
- (a) fairness
  - (b) impartiality
  - (c) accountability
  - (d) transparency
  - (e) value for money.
- 3.12 The Direct Dealing Guidelines identify the following strategies for managing probity risks:
- (a) seeking authority
  - (b) documenting the process

- (c) performing due diligence
- (d) managing conflicts of interest and segregating duties
- (e) conducting negotiations
- (f) agreeing on the price and executing the agreement

3.13 The Direct Dealing Guidelines identify the following as particular probity risks :

- (a) lack of fairness or impartiality
- (b) conflicts of interest
- (c) ensuring consistency and transparency while maintaining confidentiality over sensitive commercial information
- (d) a high degree of community interest and ensuring community participation in the process
- (e) ensuring appropriate benefits (including financial and community benefits) are offered, considered and obtained.

3.14 This Probity Plan sets out the strategies and steps that will be taken to maintain the probity principles and manage the risks set out in the Direct Dealing Guidelines and relevant to the proposed Sale.

## 4 Participants

4.1 Project participants will include:

- (a) Eurobodalla Shire Council officers and executives, including:
  - (i) Andrew Greenway, Divisional Manager, Property and Commercial Services;
  - (ii) Joanne Marbrow, Property Coordinator
  - (iii) Lindsay Usher, Director Planning and Sustainability Services; and
  - (iv) Warwick Winn, General Manager
- (b) Adam Sadil – Real Estate Agent, engaged by Council conduct the Expression of Interest process
- (c) Naomi Simmons, Sparke Helmore Lawyers, engaged by Council to advise on probity issues and requirements under the *Local Government Act 1993*.

4.2 Council may also engage other consultants, including valuers and legal advisers to advise about aspects of the Sale and on the terms of any final Contract for Sale.

4.3 Councillors are not included as “Participants” in this Probity Plan. Councillors are required under the *Local Government Act 1993* to comply with the Council’s Code of Conduct. While it is recommended that Councillors follow the guidance in this Probity Plan, it is intended to apply to negotiations with the proponents and does not strictly apply to the final decision to be made by Councillors.

## 5 Documents

5.1 Negotiations for the Sale will be carried out in accordance with and / or with reference to:

- (a) this Probity Plan;
- (b) the Council Policy;
- (c) the Direct Dealing Guidelines;
- (d) Council's Code of Conduct;
- (e) Council's Code of Meeting Practice;
- (f) the report to the Ordinary Meeting of Eurobodalla Council held on Tuesday 14 February 2023 regarding the Sale; and
- (g) correspondence sent to the proponents through Adam Sadil on or about 19 August 2022.

## 6 Probity Principles

6.1 The probity principles outlined in paragraph 3.11 will be addressed in the following ways throughout the negotiation process.

Probity Principle	What Council will do
Fairness	All responders to the initial EOI were asked for the same information and were advised that Council may choose whatever future path it deems appropriate, including entering into direct negotiations with one or more proponents. All proponents were advised that the final development of the Land may be different to the proposals subject to the EOI.
	Council may decide to provide additional information to proponents. In circumstances where the information has not been requested by a proponent, Council will provide the same information to both proponents.
	If a proponent requests information from Council, Council may decide to provide its response to both proponents. Council will not, however, directly or indirectly disclose confidential or commercially sensitive information about a proposal to another proponent.
	All proponents will be afforded the same opportunities to negotiate with Council. During negotiations, Council may ask individual proponents to provide clarification of the proposal or to consider suggested changes to the proposal.
	Meetings with proponents will be attended by a minimum of 2 Council staff, who will use their best endeavours to ensure that the information provided to each proponent is consistent, relevant to the proponent's proposal and does not disclose confidential or commercially sensitive information.

	<p>Proponents will be given the same opportunities to attend meetings with Council and request further information about their proposal. Proponents will be advised to direct enquiries to a specific Council officer, who will record the request. Council will not disclose information provided by proponents to the other proponents without the relevant proponent's prior consent.</p>
Impartiality	<p>A panel of 3 Council staff selected the preferred candidates for further negotiation to avoid any personal bias.</p>
	<p>Contact with proponents will be avoided, unless the contact is arranged for the purposes of negotiations in accordance with this Probitity Plan or is necessary as part of Council's usual business.</p>
	<p>If a proponent seeks to discuss the Sale in unrelated business meetings or social situations with a Council officer, the officer should indicate that it is not appropriate to discuss such matters and make a file note of the discussion.</p>
	<p>Participants must decline offers of hospitality, gifts and other benefits from proponents during negotiations.</p>
	<p>The final proposals will be reviewed by more than 1 Council officer. Recommendations will be based on the same criteria used to select the preferred proponents, being:</p> <ul style="list-style-type: none"> <li>* Social Impact – 20%</li> <li>* Financial Impact – 35%</li> <li>* Strategic Alignment – 25%</li> <li>* Governance / Risk – 20%</li> </ul>
	<p>Although Council staff will make a recommendation, the final decision will be made by Councillors. Councillors are not required to follow the recommendation of Council staff. The final decision on the Sale must be made by resolution of the Council. Under section 377 of the <i>Local Government Act 1993</i>, a decision to sell land cannot be delegated.</p>
	<p>Conflicts of interest will be managed in accordance with the Council's Code of Conduct and paragraph 8 of this Probitity Plan.</p>
Accountability	<p>Council staff must keep detailed records of all communications with proponents, including verbal discussions, meetings and correspondence.</p>

	Councillors will be provided with information received from proponents and Council staff will regularly brief Councillors about the progress of negotiations.
	Council staff and Councillors are accountable for actions and decisions under the Council's Code of Conduct and the <i>Local Government Act 1993</i> .
Transparency	Council makes its decisions in an open meeting of Council, although there will be a number of confidential attachments to ensure commercially sensitive information is not disclosed.
	At this stage, all proposals will require changes to planning controls and a planning proposal will need to be prepared to achieve the desired outcome. Community consultation will be carried out in accordance with the requirements of the <i>Environmental Planning and Assessment Act 1979</i> .
	Some details of the negotiations may be kept confidential to maintain the integrity of negotiations and ensure sensitive commercial information is kept confidential. Notwithstanding, reports to Council (excluding any confidential information) and Council's resolution to sell the land will be publicly available and Council meetings will be conducted in accordance with the requirements of the <i>Local Government Act 1993</i> and Council's Code of Meeting Practice.
Value for Money	Independent valuations from two registered valuers will be obtained.
	Financial benefit will be a key factor in negotiations and the final determination on the Sale.
	Community benefits incorporated into the proposal will also be considered when assessing each proposal.

## 7 Managing Probity Risks

7.1 The probity risks related to the Sale will be managed in the following ways by Council.

Management Strategy	What Council will do
Seeking authority	The final decision on the Sale will be made by resolution of the Council. Under section 377 of the <i>Local Government Act 1993</i> , a decision to sell land cannot be delegated.
Documenting Process	Records will be kept on Council's record system of all communications with proponents, the rationale for direction negotiation, value for money evidence, details of the negotiation process, how conflicts are managed & any other key details.
Due Diligence	Enquiries will be made about the proponents' experience, finances, trading history and other relevant information

Managing conflicts & segregating duties	Participants have an ongoing obligation to declare any conflicts of interest.
	Key staff will be required to sign conflict of interest forms or make a public declaration that no conflict exists. Councillors will be reminded of their responsibilities in this regard.
	The transaction will be reported to Council's Audit, Risk and Improvement committee in accordance with the Land Management Policy.
	Any actual, perceived or potential conflict of interest will be treated with a high level of seriousness by all Participants and will be managed in accordance with Council's Code of Conduct.
	The Development Application for the Land will be assessed independently of Council in accordance with the Policy. Any agreement about the Sale will include a provision that the agreement does not fetter Council's discretion to determine or make decisions about any Planning Proposal or Development Application.
Conducting negotiations	Whilst not a tender, Council will be mindful of matters and processes that would be used in a tender.
	An evaluation protocol has been developed for the initial EOI and this will continue to guide recommendations to Council.
	A draft contract of sale has been developed.
	Negotiations will be led by the Divisional Manager, Property and Commercial Services with key terms endorsed by Director.
	A negotiation procedure will be prepared and provided to the proponents. The negotiation procedure will provide details of the relevant contacts at Council and Council's proposed approach to negotiations. Proponents will be requested to refrain from lobbying or approaching Councillors outside of the agreed negotiation protocol.
	At the conclusion of negotiations, proponents will be asked to present their best and final offers to Council.
	Formal evaluation criteria have been prepared to assess the best and final offers made by proponents. This criteria will form the basis of the recommendation to Councillors by Council staff. Councillors are not bound to follow the recommendation of Council staff.
	Accurate minutes of meetings and records of discussions with proponents will be kept.
	The final agreement will be a real estate Contract for Sale which is already in the public domain. Conditions which stem from final negotiations may be



Agreeing & executing	added to this contract or form part of an associated Deed of agreement or Option Deed if required.
	The form of any final agreements will be subject to legal advice.
	Any agreement related to the Sale will not be executed unless Council has resolved to enter into the agreement.

## 8 Monitoring and Compliance

- 8.1 The Divisional Manager, Property and Commercial Services will monitor compliance with this Probity Plan and will provide any probity information to Participants as the negotiations progress.
- 8.2 All Participants are responsible for reporting to the Divisional Manager, Property and commercial Services any potential or suspected breach of this Probity Plan.
- 8.3 The Divisional Manager, Property and Commercial Services will maintain a Conflict of Interests register to ensure that records are kept of any declared conflicts of interest.
- 8.4 The Divisional Manager, Property and Commercial Services will maintain a Probity Issues register identifying any probity issues raised by Participants or proponents and how those issues have been managed or resolved.

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## Annexure A Council Reports and Minutes

Report	12.06.18	CCS18-022	Bowling Club Site Lease to RMS
Report	27.03.18	MR18-001	Mayoral Report, Regional Aquatic, Arts and Leisure Centre at Mackay Park
Report	29.08.17	PSR17-050	Consideration of Business Cases and Concept Plan Options for Mackay Park Precinct Redevelopment
Report	13.06.17	PSR17-034	Mackay Park Short Term Interim Use and Disposal of Equipment Update
Report	12.07.16	PSR16-026	Batemans Bay Bowling Club, Aquatic Centre and Mackay Park Precinct
Report	12.07.19	PSR16-027	Classification of Land as Operational – Batemans Bay
Report	26.04.16	CON16-009	Mayoral Report – Purchase from Club Catalina
Report	23.02.16	CON16-002	Preliminary Expression of Interest Document
Report	09.02.16	CON16-001	Consideration of Potential Public-Private Partnership