

**16.2 PHOENIX PLAZA CAR PARK PRIVATE PARKING AGREEMENT****Record Number:** CC18/135;IC18/236**Author(s):** Jack Darzanos, Team Leader Environment and Regulatory Services**Previous Motions:** Nil

**Attachments:**

1. **Signed Private Parking Agreement - Phoenix Plaza CR14/20529** 
2. **Section 3 Policy - Expiations CR18/51983** 
3. **Legal Opinion - Phoenix Plaza - Parking Agreement CR18/51991** 
4. **Parking Control Signage - Phoenix Plaza Car Park CR18/52417** 

**16.2 Phoenix Plaza Car Park Private Parking Agreement****Reason for Confidentiality**

In accordance with Sections 83(5) and 84(6) of the Local Government Act, 1999 – the Chief Executive Officer considers that this item may be considered in confidence by the Council on the grounds set out below (and therefore will remain confidential until the Council resolves how this item is to be classified).

A further written report will be considered by Members at the Meeting after the following recommendation is carried.

**Officer's Recommendation****16.2 Phoenix Plaza Car Park Private Parking Agreement****That:**

1. Pursuant to Section 90(3) (a),(d)(i),(h) of the Local Government Act 1999 (the Act), the Council orders that the public be excluded from attendance at that part of this meeting relating to Item 16.2, expecting the following persons:
  - Chief Executive Officer
  - Manager Development, Environment & Regulatory Services
  - Manager Infrastructure & Engineering Services
  - Manager Finance & Corporate Services
  - Manager Business Enterprises & Communications
  - Manager, Library and Community Services
  - Minute Taker

to enable the Council to consider Item 16.2 in confidence on the basis the Council considers it necessary and appropriate to act in a meeting closed to the public (excepting those persons listed above) in order to receive, discuss or consider in confidence the following information or matter relating to Item 16.2:

  - (a) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead)
  - (d)(i) commercial information of a confidential nature (not being a trade secret) the disclosure of which could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party
  - (h) legal advice.
2. 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 or matter confidential.

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**OFFICER'S RECOMMENDATION****That Council:-**

1. Notes the administration's decision to waive all unpaid Expiation Notices.
2. Not reimburse Expiation Notices issued after 23 June 2016 that have been paid, as per the attached legal advice.  
or
3. Reimburse Expiation Notices issued and paid after 23 June 2016 if requested by a member of the public, and on presentation of suitable evidence.
4. Council acknowledge the administrations introduction of new internal process developed to notify key staff responsible for managing service level agreements in advance of their expiry dates.
5. A review of all other existing Private Parking Areas agreements be undertaken.

**RECOMMENDATION**

1. Pursuant to Sections 91(7) and 91(9) of the *Local Government Act 1999* the Council orders that the:
  - The minutes
  - The written report
  - Attachments to the written report

associated with Item 16.2 Phoenix Plaza Car Park Private Parking Agreement, , having been considered by the Council in confidence under Section 90(3)(a),(d)(i),(h) be kept confidential and not available for public inspection until will be reviewed annually in accordance with the Act, on the basis that the information received, discussed and considered in relation to this agenda item is:

information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead); AND commercial information of a confidential nature (not being a trade secret) the disclosure of which could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; AND legal advice.

2. Further that Council delegates the power of review, but not the extension, of the confidential order to the Chief Executive Officer on a monthly basis in accordance with the provisions of Section 91(9)(c) of the *Local Government Act 1999*.
3. All confidential orders will be reviewed at least annually in accordance with the *Local Government Act 1999*.

**SUMMARY**

To advise Council on the status of parking controls under the Private Parking Areas Act 1986, conducted at the Phoenix Plaza Car Park.

**BACKGROUND**

In June 2014 Council entered into an agreement with Gawler Retail Pty Ltd through their Property Managers, Savills (SA) Pty Ltd. The Property Managers had contacted Council in November 2012 about the Target shopping centre car park after having discussed concerns with the centre owners about long term car parkers in their undercover parking areas.

They advised Council that the areas are predominately reserved for customers of the shopping centre. They stated that they are finding that people who work in Gawler are parking there all day. Savills requested that they would appreciate to know if Council could patrol this car park with a 3 hour limit put in place.

The agreement was duly executed on 23 June 2014 and Councils General Inspectors commenced monitoring the car park under the Private Parking Areas Act 1986 shortly thereafter (**Attachment 1**).

The owner granted Council and its officers, employees and agents the right to enter the Parking Area for the purposes of enforcement of the provisions of Part 3 of the Act in relation to the Parking Area. The owners installed all relevant and necessary signs at the entrance and throughout the car park.

The car park provided time limits on the parking of vehicles within the Parking Area and additionally:

- designated parking bays as disabled persons parking areas;
- installed loading areas;
- created no standing areas;
- introduced restricted or reserved parking areas; and
- installed permit parking areas.

The owner also provided all authorised tenants with permits to park in their designated permit areas. Copies of these permits were provide to Council for reference and for Council's records to assist with enforcement functions.

The duration of the agreement was from the date of signing until midnight on that same day two (2) years thereafter. The agreement stated that it may be continued for a further period or periods with the written consent of both parties. Under the agreement the expiry date was 23 June 2016.

Shortly after June 2016 the management of the property was no longer carried out by Savills (SA) Pty Ltd and new property managers were appointed. At the time the expiry date of the agreement was not identified by Savills (SA) Pty Ltd, the new Property Managers or Council and subsequently not actioned through an extension between the parties.

Unfortunately, the lack of contact between all the parties through the provision of correspondence identifying the change in management and the appointment of new property managers resulted in all parties not picking up on the overdue date of the agreement resulting in the agreement exceeding its duration.

Council officers continued to monitor parking controls in the car park in good faith on behalf of the owners.

## COMMENTS/DISCUSSION

On 11 July 2018, and at the request of Tony Piccolo MP, Council undertook a review of several expiation notices issued at the Phoenix Plaza Car Park for persons parking in marked "RESERVED" parking bays on the ground floor. The letter sought to determine whether the allegations made by the public that the "reserved" parking bays were no longer valid, because of recent tenancy changes.

As per the expiations policy (**Attachment 2**) a review of the expiations was conducted. It must be noted that further expiations had been issued prior to receipt of this letter, and based on the evidence of the offences were not waived and subsequently paid.

The review examined whether the expiations being issued were valid following concerns that the parking bays were only reserved for customers of the previous tenancy Beaurepaires.

Council staff had been liaising with centre management since 2016 about the "RESERVED" parking bays on the ground floor following expiations being issued to some tenants of the Phoenix Plaza Shopping Centre.

Phoenix Plaza Centre Management advised that the “RESERVED” carpark spaces referred to in the correspondence were made available for use by staff associated with Phoenix Plaza tenancies, including Beaurepaires, via a designated permit system.

Following the departure of Beaurepaires, these reserved car parking spaces continued to be made available for use by staff associated with Phoenix Plaza tenancies, via the same designated permit system. As a result, these car parking spaces continued to display signage indicating they were reserved.

Ground floor reserved bays were made available by Phoenix Plaza Centre Management to permit parkers from within the centre as an option for safer parking for some tenants who remained there after hours. Additionally, other reasons included the transport of clients with impaired mobility to tenancies, a tenant requiring mobility assistance that had difficulty utilising the stairs with a frame, the transfer of items from vehicles to offices when the stairs and or lift was not a viable option. Council was advised that all tenants with existing permits could use these marked reserved bays as required, and if their permit was shown on the dash board of their vehicle an expiation notice would not be issued.

This reserved parking was also supported by the entry signage to the car park erected under the requirements of the Private Parking Areas Act 1986. The signs advise users of the car park, that they can park within the car park for a time limit of 3 hours unless indicated with “RESERVED” (**Attachment 4**).

Council also on 23 July 2018 provided information to The Bunyip following a query by one of the drivers who had received an expiation and was mentioned in the letter from Tony Piccolo MP to Council on 11 July 2018.

On 24 July 2018 Tony Piccolo MP requested a copy of the Private Areas Car Parking Agreement, in particular correspondence between Council and Gawler Retail Pty Ltd extending the term of agreement beyond 23 July 2016. Upon the realisation that there was not such exchange of correspondence Council ceased monitoring the entire car park, including the “Reserves” spaces.

On 24 July 2018 contact was made with Phoenix Plaza Centre Management to seek agreement for council to continue to monitor the car park as required by the original agreement, and to seek clarification on the issue pertaining to the “RESERVED” parking bays on the ground floor. Centre management advised that due to confusion the Reserved signs they would be blacked out. They also suggested they would be reviewing this issues due to staff concerns over safety and would advise Council accordingly if and when they are re-instated.

The centre managers confirmed via email on 30 July 2018 that Gawler Retail Pty Ltd, were happy for the Town of Gawler to continue to undertake parking enforcement of the Phoenix Plaza car park. The email sent to Council contained copies of new permits which were for council’s reference and file. The new permits were to advise Council Rangers what to look for when enforcing parking in the car park. Council was also advised to note that permit parkers are not to be fined, provided that they are not parked on the ground level.

Council staff acknowledged the correspondence from the property manager. Following instructions issued to Council by centre management to continue monitoring the car park. Council has prepared a new contract extending the agreement to undertake parking control at the Phoenix Plaza Car Park on behalf of the owners. The agreement is currently being reviewed by both parties prior to execution. However, Council staff have not and will not recommence monitoring of the car park until such time of the new contract has been executed.

In the absence of correspondence between Council and Gawler Retail Pty Ltd effectively extending the contract beyond 23 July 2016, and as part of the ongoing review of the parking expiations, Council staff sought an opinion from its legal service provider on 2 August 2018 on the issuing of

expiations outside the range of the agreement and the validity of the expiations issued (**Attachment 3**).

The advice which was received on 8 August 2018 found that the Agreement expired on 23 June 2016, and Council was unable to locate any documentation within the Council's records to demonstrate that the written consent of both the Council and Gawler Retail Pty Ltd (or their agent) was obtained to extend the term of the Agreement.

That Council has continued to enforce the provisions of the Agreement and the Private Parking Areas Act 1986 in the Car Park beyond the expiry of the Agreement.

The opinion found that in the absence of a formal agreement under Part 4 of the Private Parking Areas Act 1986, Council has no general standing authority to enforce the provisions of the Private Parking Areas Act 1986 with respect to particular private land.

As such, it is likely that any enforcement action taken by the Council to issue expiation notices to alleged offenders who have infringed the requirements of the Private Parking Areas Act 1986 in the Car Park, is without power. They advised that there is no lawful basis for each of the expiation notices issued by the Council between 23 June 2016 and at least 1 August 2018, except any issued with respect to an alleged offence against Section 8(2) (relating to disabled persons parking areas) of the Private Parking Areas Act 1986.

Notwithstanding this conclusion, the legal providers found that it will not be necessary for the Council to waive expiation notices issued to persons for allegedly breaching the Private Parking Areas Act 1986 in the Car Park, nor to withdraw/reimburse those persons who have paid expiation fees pursuant to those notices.

An expiation notice can be regarded as an allegation by the Council that a person has committed the specific offence detailed in the notice. The Expiation of Offences Act provides the alleged offender with the opportunity to pay an expiation fee in order for the offence not to be dealt with further by the Council. Under the Expiation of Offences Act, payment of an expiation notice does not constitute an admission of guilt, but ensures that no further action can be taken by the Council to prosecute the alleged offence.

In the opinion of our legal advisors citing the Supreme Court's decision in that a plaintiff sought a refund of the expiation fee already paid, Council is under no obligation to refund an expiation fee which has already been paid. Expiation of an offence finalises the rights and liabilities of the issuing authority and of the recipient of the expiation notice, and the choice to expiate an offence (i.e. make payment of the relevant fee) rests with the recipient of the notice.

Given this position, any common law right to refund (e.g. under the common law doctrine of restitution which is based upon an objective of prevention or reversal of unjust enrichment) is excluded.

On the basis of the above, Council has been advised that it is under no obligation to refund expiation fees already paid due to an invalidly issued expiation notice. Essentially, the recipient had the opportunity to challenge the expiation notice at the time of issue and, once payment of the expiation fee was made, that opportunity was lost. The recipient has therefore, voluntarily assumed the risk the expiation notice may have been issued in error, but elected to pay it (or take no action and have the matter proceed to enforcement) in any event.

With respect to existing unpaid expiation notices, there is again no obligation upon Council to waive these expiation notices. Strictly, as a matter of law, it is for the recipient of an expiation notice to dispute it or elect to be prosecuted if they think the allegation in the notice is incorrect.

As a matter of policy (**Attachment 2**) Council staff have however chosen to waive all unpaid expiation notices in this case pursuant to Section 16(1)(a) of the EO Act on the basis the notice should not have been given with respect to the offence. Council may as per policy, choose to waive unpaid

expiation notices (including those in dispute), but not disturb any notices which have already been paid.

The matter at hand for Councils decision is purely the decision of either to refund Expiration Notices that have been paid between 23 June 2016 and present, or not.

It must be noted that withdrawal of an expiation notice which has already been paid, enlivens an obligation to refund the payer under Section 16(2) of the EO Act. However, it must be reiterated that, as a matter of law, there is no obligation to withdraw any expiation notice.

Following instructions issued to Council by centre management to continue monitoring the car park an agreement has been drafted to undertake ongoing parking control at the Phoenix Plaza Car Park on behalf of the owners. The agreement is currently being reviewed by both parties prior to execution.

Council has not continued monitoring parking controls in the car park on behalf of the owners since that matter commenced. Monitoring will continue once the contract is executed by both parties.

### **Process for review**

Under section 2 of Councils Expiations Policy expiations can be reviewed and withdrawn accordingly by the administration (**Attachment 2**).

If a person wishes to informally dispute the alleged offence or to provide information of extenuating circumstances they may do so in writing to Council within the 28 days expiation period. (Reviews will not be accepted after the 28 day period unless the person gives proof that they did not receive the original notice). The request for review by the person that has received the expiation notice must include/provide evidence to support the request.

Responsible Officers must collate all information for the review including the formal request and any relevant Councils documentation. The review is carried out by the Team Leader Environment and Regulatory Services, Administration Officer and Authorised Officers (or their nominee). All requests for review will be considered on their individual merit, but will be subject to the following:

- Any errors or omissions of fact;
- Any errors or omissions in procedure;
- Any failure of Council infrastructure/traffic control devices;
- Any extenuating circumstances which may ameliorate the offence (documentary evidence must be provided);
- Where reasons are associated with health or medical circumstances, documentary evidence must be provided;
- Where reasons are associated with a vehicle breakdown, documentary evidence must be provided in the form of receipts or evidence of RAA/Mechanic attendance;
- Where documentary evidence cannot be provided the person will be required to declare the information on a statutory declaration. Persons relying on a statutory declaration will be advised that serious penalties apply for false or misleading information within a statutory declaration. The Team Leader Environment and Regulatory Services reserves the right to refer any false or misleading statutory declarations to SAPOL for investigation.
- Financial hardship of the person is not a ground considered in a review. Extensions of the time to pay expiations in full will be considered (2 to 4 weeks depending on the amount of the expiation), without penalty. Alternatively a person who advises they have financial hardship can elect to be referred to the Fines Enforcement and Recovery Unit within the Courts Administration system to make arrangements to 'pay off' their fines.
- The elected Council itself nor its Committees will not become involved in reviews of expiation notices and will not hear deputations regarding individual expiation notices. Where an appeal

is rejected by the Chief Executive Officer or Manager of Development, Environment and Regulatory Services (or their nominee) the next course of review is the Courts.

- A person issued with an expiation notice may elect to have the matter referred to the Courts at any time.
- The matter is trifling.

### **Procedures**

Council staff have introduced a new internal process of managing contractual agreements. The process utilises Councils Skytrust program which records documents and specifically notifies via email authorised officers responsible for managing service level agreements. The aim is to provide suitable notification of impending renewal dates well in advance of their expiry dates.

All current agreements for the provision of the Private Parking Areas Act 1986 are under review and legal advice to be sought as considered appropriate.

Additionally, as recent as last month two more land owners have contacted Council seeking an agreement to monitor parking under the Private Parking Areas Act 1986 in the car parks.

### **COMMUNICATION (INTERNAL TO COUNCIL)**

Mayor  
Chief Executive Officer  
Manager Development, Environment & Regulatory Services  
Governance Officers

### **CONSULTATION (EXTERNAL TO COUNCIL)**

Legal Service Providers  
Property Manager

### **POLICY IMPLICATIONS**

Section 3 Policy – Expiations is the Relevant Policy

### **STATUTORY REQUIREMENTS**

Private Parking Areas Act 1986

### **FINANCIAL/BUDGET IMPLICATIONS**

Approximately 34 unpaid Expiration Notices totalling \$2,278 have already been waived for alleged parking offences in Phoenix Plaza Car Park.

Since 23 June 2016, 118 Expiration Notices have been issues and paid for alleged parking offences in Phoenix Plaza Car Park totalling approximately \$8,000.

### **COMMUNITY PLAN**

Objective 5.3: Deliver ongoing effective and efficient services, including support for regional collaboration