 Adelaide Plains Council	21.1	Proposed Lease of Council Land – NBN Radio Network Base Station Update – July 2019
	Department:	Infrastructure and Environment
	Report Author:	Property Officer
Date: 22 July 2019	Document Ref:	D19/35521

EXECUTIVE SUMMARY

- The purpose of this report is, in accordance with Resolution 2019/268, to provide Council with requested information in relation to:-
“...the process required to ascertain amendments of the lease of the Thompson Beach Progress Association property, excise the site identified for NBN construction, and provide a grant payment of \$50,000 to the Thompson Beach Progress Association, contingent on payment direct to Council should motion 2019/236 be rescinded.”
- A Deed of Partial Surrender for the site identified by NBN, and currently contained within the existing lease between Council and TBPA, is critical prior to Council taking any steps in relation to establishing a new lease with NBN Co Ltd (NBN). If TBPA does not surrender the relevant portion of land, Council cannot enter into a lease with NBN in relation to the site identified.
- Council’s current position (resolution 2019/236) is to allocate the annual income payable by the NBN, to TBPA until 20 March 2026, when the TBPA lease is due for renewal.
- Notwithstanding Council’s current position, TBPA has recently requested a payment of \$50,000 instead of the annual income allocation. Further, TBPA has verbally advised that they intend to refuse to enter into a Deed of Partial Surrender unless, and until, the requested payment of \$50,000 is received upfront.
- Council could provide a payment of \$50,000 to TBPA by offering a funding agreement or by way of direct and upfront payment. Options are outlined in more detail within the body of this report.
- It is for Council to consider its position and the options available in light of TBPA’s recent request, and to instruct the Chief Executive Officer accordingly.

RECOMMENDATION

“that Council, having considered Item 21.1 – *Proposed Lease of Council Land – NBN Radio Network Base Station Update – July 2019*, dated 22 July 2019, receives and notes the report, and in doing so instructs the Chief Executive Officer to advise Thompson Beach Progress Association that....”

BUDGET IMPACT

Estimated Cost:	Dependent upon Council's decision
Future ongoing operating costs:	Dependent upon Council's decision
Is this Budgeted?	Not Applicable

RISK ASSESSMENT

Notwithstanding Council's current position, TBPA has recently requested a payment of \$50,000 instead of the annual income allocation. Further, TBPA has verbally advised that they intend to refuse to enter into a Deed of Partial Surrender unless, and until, the requested payment of \$50,000 is received upfront. There are serious risks in providing an upfront payment to a community group without the necessary legal instruments in place.

The proposed lease facility will provide improved telecommunications to the local region and generate a modest rental income for Council of \$7,500 per annum. Failure to execute a new lease with NBN by September 2019 is likely to result in project delays, or in NBN walking away from the negotiation.

The current position between Council and NBN is that all legal fees associated with negotiation of the tower lease, variation of the current lease and associated legal costs of amending the Community Land Management Plan as well as public consultation costs will be borne by NBN. In the event that Council is unsuccessful in securing the NBN lease, Council will be responsible for the legal fees incurred to date.

Attachments

Nil

DETAILED REPORT

Purpose

The purpose of this report is, in accordance with Resolution 2019/268, to provide Council with requested information regarding “...the process needed to ascertain amendments of the lease of the Thompson Beach Progress Association, excise the site identified for NBN construction, and provide a grant payment of \$50,000 to the Thompson Beach Progress Association, contingent on payment direct to council should motion 2019/236 be rescinded”.

Background

Council, at its Ordinary Meeting on 27 May 2019, resolved:

21.2 Proposed Lease of Council Land – NBN Radio Network Base Station Update

Moved Councillor Lush Seconded Councillor Di Troia **2019/ 236**

“that Council, having considered Item 21.2 – Proposed Lease of Council Land – NBN Radio Network Base Station Update dated 27 May 2019, receives and notes the report and in consideration of Resolution 2018/073 resolves to allocate the annual income payable by the NBN to the Thompson Beach Progress Association (TBPA) until 20 March 2026, when the TBPA lease is due for renewal.”

CARRIED

At its Ordinary Meeting on 24 June 2019, Mr Mick Lewis of TBPA gave a deputation in relation to the ongoing discussions that have been had to date regarding the NBN Radio Network Base Station. At the same meeting, Council resolved:

21.2 Proposed Lease of Council Land – NBN Radio Network Base Station Update – June 2019

Moved Councillor Strudwicke Seconded Councillor Parker **2019/ 268**

“that Council, having considered Item 21.2 - Proposed Lease of Council Land – NBN Radio Network Base Station Update – June 2019, dated 24 June 2019, receives and notes the report and instructs the Chief Executive Officer to provide a report on the process needed to ascertain amendments of the lease of the Thompson Beach Progress Association, excise the site identified for NBN construction, and provide a grant payment of \$50,000 to the Thompson Beach Progress Association, contingent on payment direct to council should motion 2019/236 be rescinded.”

CARRIED

Discussion

This matter is complex, and has been ongoing for some time. In addition to addressing the issue of leases and surrender, a review of Council’s relevant Community Land Management Plan was required.

Process Required to Amend Lease with TBPA (“the Current Lease”) and Excise the Site to NBN

The Current Lease may be amended through execution of a secondary agreement, the Deed of Partial Surrender. Upon execution of the Deed of Partial Surrender, Council could then offer the relevant land to NBN in accordance with ongoing lease negotiations. However, Council cannot amend the Current Lease without TBPA’s agreement.

Council, at its Ordinary Meeting on 25 February 2019, instructed the Chief Executive Officer to finalise and execute the lease with NBN, and in doing so to finalise the TBPA lease variation. However, TBPA has since verbally advised that they intend to refuse to enter into a Deed of Partial Surrender unless, and until, a payment of \$50,000 is received upfront.

Process to Provide Payment of \$50,000

TBPA has recently requested a payment of \$50,000 instead of the annual income allocation. Council could provide a payment of \$50,000 to TBPA by offering a funding agreement or by way of direct and upfront payment.

Option 1 - Funding Agreement

A funding agreement is a legally binding document that would outline obligations of both parties – in this instance, execution of a Deed of Partial Surrender, payment of \$50,000 and agreement as to how the funds would be used.

<u>Pros</u>	<u>Cons</u>
<ul style="list-style-type: none"> • A legally binding document provides both parties with assurances of the desired outcome in relation to executing the surrender and how the funds are to be used. • Council could outline clear requirements regarding the use of the funds for the betterment of the property. This could include funding records, providing acquittals be provided to Council and compliance with development permits. • Reputation-wise, Council can be seen to have offered the financial outcome that has been sought by the TBPA and if rejected, then the refusal reflects upon TBPA. 	<ul style="list-style-type: none"> • To be prudent, drafting an additional agreement would require support from a law firm such as Norman Waterhouse who have provided other inputs to this project to date. • TBPA are not obliged to accept such an offer and may maintain a position of wanting a payment prior to surrendering the land. • The Funding Agreement and Surrender will need to be executed in a timely manner to ensure that the NBN Co lease is in place before mid-September.

To pursue a funding agreement, Council would need to:-

- Offer the option of a funding agreement to the TBPA;
- Instruct the CEO to prepare and execute the Deed of Surrender and Funding Agreement.

Option 2 – Provide an upfront payment

TBPA has indicated that their preferred option is receipt of a direct and upfront payment of \$50,000.

<u>Pros</u>	<u>Cons</u>
<ul style="list-style-type: none">• TBPA have verbally advised that they will surrender the land via a Deed of Partial Surrender required for the NBN Radio Network Base Station to enable Council to issue a lease to NBN if they receive an upfront payment	<ul style="list-style-type: none">• Council has no guarantees in relation to how the money is spent or means of recourse in the event the funds are misused• Providing unsecured funding to a community group has potential to set a precedent for negotiating with other community groups

To provide an upfront payment, Council would need to:-

- Instruct the CEO to issue such a payment;
- Arrange for the execution of Deed of Surrender.

It should be noted that, because this option provides for payment in advance, there is no associated funding document.

Council's Current Position

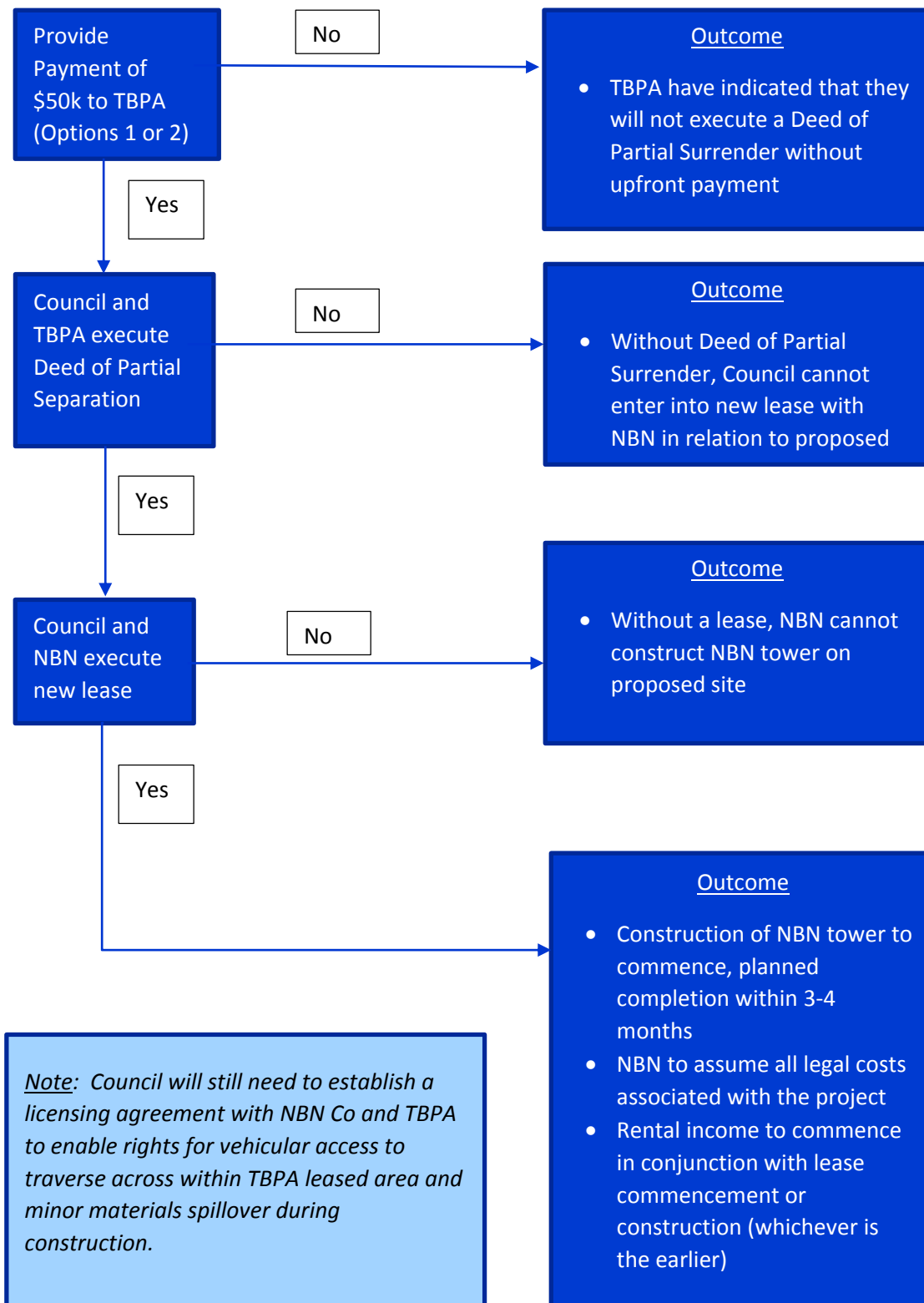
Council's current position (resolution 2019/236) is to allocate the annual income payable by the NBN, to TBPA until 20 March 2026, when the TBPA lease is due for renewal.

<u>Pros</u>	<u>Cons</u>
<ul style="list-style-type: none">• The value of the allocated the annual income to the TBPA until 2026 when the Association's lease expires, is circa \$45,000 and is slightly less than the funding that the group are seeking• Council is only required to pass on money as it is received under the lease• Council would be setting a precedent that could be copied or adopted by other community groups	<ul style="list-style-type: none">• This option is unlikely to progress the current negotiations with TBPA, and may result in failing to deliver NBN to the Thompson Beach community.

To proceed with Council's current position of allocating annual income payable by the NBN to TBPA in accordance with resolution 2019/236, Council would need to instruct the CEO to:-

- Confirm Council's position to the TBPA, obtain a final position from TBPA accordingly; and
- Notify NBN of the outcome, and depending on TBPA's final position, either proceed with lease negotiations/execution in relation to the relevant portion of land, or investigate options for alternative locations for the NBN Radio Network Base Station within the region.

Thompson Beach NBN Base Station Network steps and outcomes based on provision of funding via a formalised funding agreement or direct payment to the Thompson Beach Progress Association



TBPA's Current Position

Throughout the course of negotiations, TBPA have indicated that they believe Council's intention to allocate the annual income payable by the NBN has been unclear.

This has led to TBPA recently requesting a payment of \$50,000 instead of the annual income allocation. Further, TBPA has verbally advised that they intend to refuse to enter into a Deed of Partial Surrender unless, and until, the requested payment of \$50,000 is received upfront.

NBN's Current Position

NBN has advised that it is their goal to have the lease executed by mid-September 2019. To offset concerns regarding potential delays, NBN have recently commenced making enquiries of other possible locations for the proposed NBN infrastructure within the same title of land but outside the scope of the TBPA leased portion.

Council is aware that NBN expect that all design and planning components for the construction of the project will be completed and that construction will be tied directly to the finalisation of the lease. If the lease is executed by mid-September 2019 then it is anticipated that the Thompson Beach community would have NBN fixed wireless by the beginning of 2020.

If Council is not successful in obtaining the surrender of the parcel of land that is required for the NBN Radio Network Base Station, NBN will assess its options in relation to proceeding with the intended NBN Radio Network Base Station.

Conclusion

Given the complexity and uncertainty surrounding this matter, it is prudent that Council provide the Chief Executive Officer with a clear direction and in doing so, consider the risks and benefits associated with the options above, and its current position.

It is further noted that should Council wish to pursue Option 1 or 2 outlined within this report, it would firstly be required to rescind various resolutions that support Council's current position.

References

Legislation

Local Government Act 1999

Council Policies/Plans

Public Consultation Policy