



AGENDA APPENDIX
Council Meeting
Wednesday 24 June 2015

AGENDA ITEM FOR SEPARATE DISTRIBUTION TO COUNCILLORS AND
EXECUTIVE LEADERSHIP TEAM DUE TO DOCUMENT SIZE.

THE ITEM IS ACCESSIBLE VIA THE COUNCIL WEBSITE OR BY
CONTACTING COUNCIL ON 03 5662 9200.

**E.1 ADOPTION OF ANNUAL BUDGET 2015-2016. DECLARATION OF
RATES AND CHARGES AND UPDATED STRATEGIC RESOURCE
PLAN**

Appendix 2 – Legal Advice on Rating and Budget Matters



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Date

19 June 2015

Subject

Advice on rating and budget matters

Questions

1. Does the proposed change in the definition of 'farm land' in Council's differential rating classification increase the risk of successful challenges being made by aggrieved property owners?
2. What avenue of appeal options would ratepayers have in seeking to challenge the change as proposed?

Summary of advice *Below is a summary of our advice. Please read it in conjunction with the detailed advice that follows.*

The change to farm land classification, as presently proposed, is in our view incapable of constituting a separate classification. Despite this, we see no difficulty in formulating a separate category for properties of a minimum specified size which have an AVPCC code of 117. This might be described as 'Rural Residential Land' or similar. However, we recommend Council consider what might be the rational justification for adopting a land size of 18.3 hectare or greater for this category.

Provided the above recommendations are accepted, the appeal options for ratepayers are extremely limited.

The new category is likely to constitute a 'material' change to the draft Budget. It follows that, strictly speaking, Council will be required to recommence the submission process under s 223 of the Act if it wishes to adopt the Budget with the proposed alteration to differential rates.

Contact

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Chris Cantor

Detailed analysis

Background

1. In 2014 Council adopted a new rating strategy for the period 2014-2018 which, amongst other matters, set differential rating categories according to the Australian Valuation Property Classification Codes (**AVPCC**).
2. With respect to farm land, this was defined to mean 'any land on which the business of farming is being carried out', subject to the following criteria for types of farm land:
 - meeting minimum land areas; and
 - having specified AVPCCs applied to the land.
3. In general, the revised structure for the sub-classifications of farm land was as follows:
 - 3.1 Land of less than 2 hectares, forming part of a farm business laying across the municipal boundary;
 - 3.2 Land of less than 2 hectares used for specialist livestock purposes or commercial flower or plant growing (generally, more intensive agricultural use);
 - 3.3 Land of between 2 and 20 hectares used for either more intensive agricultural purposes or, if there is no dwelling on the land, used for any recognised farming purpose within AVPCC 500 – 583; or
 - 3.4 Land exceeding 20 hectares, used predominantly for farming purposes, having an AVPCC within the range 500-583 (being all farming/agricultural land).
4. All of the above definitions are subject to the overriding requirement that the land be used by a 'business' within the meaning of s 2(1) of the *Valuation of Land Act 1960 (VLA)*, in particular, sub-paragraph 2(1)(c), which requires farm land to be used by business that:
 - (i) has a significant and substantial commercial purpose or character; and
 - (ii) seeks to make a profit on the continuous or repetitive basis from its activities on the land; and
 - (iii) is making a profit from its activities on the land, or has a reasonable prospect of making a profit from its activities on the land if it continues to operate in the way that it is operating.
5. We assisted in the drafting of the above categories as adopted in Council's 2014/2015 rating strategy.
6. We understand that, following the public submission process for Council's 2015/2016 budget, a proposal has been made to include within the farm land classification the following further sub-category of farm land:
 - land having a total area equal to or greater than 18.3 hectares;
 - used predominantly for farming purposes; and
 - if there is a dwelling on the land or a permit for a dwelling, has applied to it AVPCC 117.

7. AVPCC 117 comes within the residential section of the codes. It is described as 'Residential Rural/Rural Lifestyle' land, with a more specific description as follows:

A single residential dwelling on land in a rural, semi-rural or bushland setting. Primary production uses and associated improvements are secondary to the residential use.

8. Against the above background, we are asked to advise Council in relation to the validity of this proposed category.

Legal analysis

9. It should be apparent from the background set out above that there is an inherent conflict between the non-primary production use of land within AVPCC 117 and the overarching requirement that farm land be used by a farming 'business'.

9.1 In this regard, those who seek the benefit of the farm land classification do not use their land primarily for farming purposes, although there may be a secondary agricultural use. We do not understand these properties to be operating businesses on the land with a 'significant and substantial commercial purpose'. If that were the case, the AVPCC would likely be otherwise.

9.2 We understand that there are approximately 40 such properties meeting this criteria. It is also to be noted that there will be properties of less than 18.3 hectares who will, by reason of their size, not receive the benefit of reclassification.

9.3 Land of 18.3 Ha or greater with a dominant residential use is likely to be of significant value and therefore attract significant rates. Presently, the rates are paid at the full general residential rate, while farm land is being rated at 70% of the general rate. Accordingly, it is perhaps not surprising that owners of rural lifestyle properties are seeking a reduction of the rate in the dollar. Therefore, it appears that the current challenge is not one of failing to recognise genuine farming businesses, but rather a more basic question of the rate burden.

9.4 It has been suggested that the use of AVPCC 117 land by a 'business' (within the meaning of s2 of the VLA) might still qualify as farm land. We respectfully disagree based on the interpretation of 'business' by VCAT in farm land classification cases.

9.5 In *Joosse v Mornington Peninsular Shire Council* [2013] VCAT 213, the Tribunal considered previous 'farm land' cases and identified the main features that should be present before farming activities could be considered a 'business', including:

- (a) presence or otherwise of a dwelling on the relevant land;¹
- (b) presence or otherwise of clear business goals or a business plan;²
- (c) any other occupations held by land owners;³
- (d) extent or amount of any profit generated by the farming activities;⁴
- (e) extent or amount of expenditure on the farming activities;⁵ and

¹ *Teh v Mornington Peninsula Shire Council* [2000] VCAT 1295.

² *Hunter v Greater Bendigo City Council* [2000] VCAT 656 and *Boyd Property Company v Mornington Peninsula Shire Council* [2000] VCAT 1295.

³ *Hunter v Greater Bendigo City Council* [2000] VCAT 656 – where the applicant was a roof plumber.

⁴ *Wiltshire v Ballarat City Council* [2004] VCAT 702, *D'Alia v Mornington Peninsula Shire Council* [2012] VCAT 1045 and *Joosse v Mornington Peninsular Shire Council* [2013] VCAT 213.

⁵ *D'Alia v Mornington Peninsula Shire Council* [2012] VCAT 1045.

- (f) maturity of those activities – eg of plants being cultivated for eventual commercial sale.⁶

- 9.6 We are of the view that, properly considered, rural lifestyle properties are unlikely to operate as a 'business' in the sense accepted by the Tribunal.
- 9.7 In our view, therefore, the category under consideration, being land of 18.3 hectares or greater with a current AVPCC 117, is incapable of falling within the current definition of farm land. We say this because the farm land category remains subject to an overriding requirement that such land meet the definition of 'business' as contemplated in s 2(1) of the VLA. We do not recommend Council resile from that overriding qualification as it serves to protect the integrity of the category, at the heart of which is the requirement that land be used predominantly for farming purposes.
- 9.8 Accepting that these properties are not used by a farming 'business' (as defined by the VLA), this underscores the need for a separate category.

Recommended wording for new category and rational justification

10. If Council is prepared to do so, we would recommend adopting a separate and distinct category for the type of land in question. Such land may be characterised as 'Rural Residential Land' or similar.
- 10.1 We recommend the following form of wording or similar:
- Rural residential land is any land which:
- has a total area equal to or greater than 18.30 hectares;
- where primary production and uses and associated improvements are secondary to the residential uses; and
- has applied to it an AVPCC code 117
- 10.2 In our view, this category is capable of being adopted provided there is a clear policy basis for doing so. The extent of any differential rate on the dollar is a matter for Council and we do not comment on this, save to note that the highest differential rate must not be more than four times the lowest rate.⁷

Is the current proposal subject to challenge as to validity?

11. Having concluded that the current proposal requires a separate classification, rather than being included within farm land, a separate question is whether such a category would be subject to legal challenge.
- 11.1 We are instructed that the current proposal arose in response to a submission regarding the draft budget by a property owner who owned a property of 18.38 hectares. We understand this property has an AVPCC 117. The submission, as we understand, was that the benefit of farm land classification should also extend to such properties. The proposed solution is to include with the farm land category, land with AVPCC 117 provided it is 18.3 hectares or greater. This of course departs from the current rating strategy, which specifically set out to remove non-primary production land from the farm land classification.
- 11.2 When compared to the farm land category and sub-categories, it occurs to us that the use of a particular land dimension (in this case 18.3 hectares or greater) is potentially an arbitrary basis for the establishment of a rural land category.

⁶ *Teh v Mornington Peninsula Shire Council* [2000] VCAT 1295.

⁷ See section 161(5) LG Act

- 11.3 The land size within the current sub-categories of farm land quite clearly reflects the intensiveness of agricultural use. It is appropriate to recognise varying land sizes depending on the relevant agricultural activity. The same cannot be said with respect to rural lifestyle properties, which are not used predominantly for farming purposes (although they may have secondary agricultural uses).
12. Given this, we question what might be the rational justification for the 18.3 hectare or greater land size when determining what will fall within this particular category?
- 12.1 The question we have raised above invokes the requirements of the Ministerial Guidelines⁸ to have regard to good practice taxation principles and their assessment against a particular differential rate, objective and determination, as well as modelling or consideration of the impact of the rating decision. Presently, the 18.3 hectare proposal lacks any such analysis, let alone a clear objective, as it has arisen in response to a single submission. Simply put, the proposal lacks strategic justification.
- 12.2 We think the issues we have raised can be resolved relatively easily provided the reasons for adopting the proposed category are considered and clarified in Council's budget. In considering such reasons, we recommend the question of land size be more closely considered.

Revised budget

13. We regard the need for a new category as triggering the requirement for a revised budget by reason of s128(1) of the LGA, which provides:
- A Council must prepare a revised budget if circumstances arise which cause a material change in the budget and which affects the financial operations and position of the Council.
- 13.1 Section 129 requires public notice be given for a revised budget. The right to make a submission under s 223 applies to this public notice.
- 13.2 There will, of course, always be some 'room to move' when Council is considering a draft Budget. The issue is defining just how much 'movement' is permissible.
- 13.3 We think Council is free to alter a draft Budget as long as the alteration is not substantial or material. It will, though, often be difficult to determine whether a proposed alteration is a material one.
- 13.4 In our view, the question of materiality must be determined by comparing what was originally proposed in the draft Budget with what would emerge if the proposed alteration was adopted. If that assessment reveals that the proposed alteration is a material one, the Budget cannot be adopted without the council undertaking a further public notice and submission process.
- 13.5 S 127(3) requires that the draft budget contain details of any proposed differential rate. An altered proposal as to differential rates is, in our view, a material change and a revised budget should therefore be prepared.

Conclusion

14. Council's current proposal is incapable of fitting within the current description of 'farm land'
15. Council is at liberty to adopt a new category for 'Rural Residential Properties' provided:
- 15.1 the category is sufficiently drafted;

⁸ Ministerial Guidelines for Differential Rating, issued April 2013

- 15.2 there is strategic justification for the category; and
 - 15.3 the proposed new category is put in a revised budget and public notice given.
 16. We trust this advice is of assistance. If there is any aspect requiring clarification, please let us know.
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Contact

Please contact Chris Cantor on [REDACTED] if you have any other queries.