

**Investigation into Casey City Council's Special Charge  
Scheme for Market Lane**

**June 2016**

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# Letter to the Legislative Council and the Legislative Assembly

To

**The Honourable the President of the Legislative Council**

and

**The Honourable the Speaker of the Legislative Assembly**

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament my report on an *Investigation into Casey City Council's special charge scheme for Market Lane*.



Deborah Glass OBE

**Ombudsman**

21 June 2016

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# Foreword

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*... some residents will be in financial hardship over this Scheme ... [council officer] told me that when writing the submission/objections we cannot say that we the residents cannot afford it as it is not a valid reason!!!! What do you call a valid reason????? To the residents that cannot afford it and will be at risk of financial hardship it is an enormous valid reason.*

Complaint to Council about Market Lane  
Special Charge Scheme

The reports I table in Parliament are usually about a systemic issue I have chosen to investigate on my own motion, often – although not always – prompted by a pattern of complaints. But sometimes I will report on an individual complaint that has had a big impact on members of the community.

My office receives tens of thousands of complaints each year. Each one is a small cog in the big wheel of public opinion about how the public sector is doing its job. Some complaints are resolved in a day; others can take many months. Very few complaints result in formal investigations, and fewer still in reports tabled in Parliament. But in all cases where we can help, we ask: Is this fair? And if not, how can it be fixed?

This investigation was triggered by a complaint about an interest charge levied by a local council. A single complaint, but it revealed much about council practice.

Thirty-seven ratepayers were levied with a special charge for the cost of sealing an unmade road adjacent to their properties. Each owner would be liable for between \$15,000 and \$20,000 plus interest if paid in instalments over 15 years.

When the ratepayers were first consulted about the scheme, Council told them the interest rate would be approximately 4.25 per cent. The special charge scheme was declared in open council, but in a closed session at the same meeting, the interest rate was increased to 7.5 per cent, by which time the owners' right to object to the scheme had expired.

This very important decision directly affecting ratepayers was made at a closed council meeting. My officers started looking at how widespread this practice was and, as a result, I have launched a separate own motion investigation into transparency in local government decision making.

This case illustrates some overarching themes of confused or arbitrary process and poor communication with ratepayers. These undermine public trust in the level of government closest to most: their local council.

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In this case, we concluded that Council had acted in a way that was wrong, unreasonable, unjust and, in two respects, contrary to law. In short, the council's actions were unfair. So how could it be fixed? During the investigation the council dropped its 1.5 per cent 'administration surcharge' and agreed to refund amounts charged in excess of the legal requirement.

We also recommended, and I am pleased to say Council agreed to, a number of measures that address transparent decision making and better information about council processes. A recommendation in relation to refunding residents the additional excess interest charges is being put to council members for consideration. I have also recommended that Local Government Victoria take the opportunity in its current review of the Local Government Act to ensure greater consistency on special rates and charges across all councils.

The wider issue of transparency in decision making in local government is ongoing, and I will report on my separate investigation in due course. But in any event, this case is testament to the fact that small complaints can make a big difference.

Deborah Glass

**Ombudsman**

# Background

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1. On 9 September 2014, Ms Judith Graley MP, state Member of the Legislative Assembly for Narre Warren South, wrote to me on behalf of several constituents about Casey City Council's decision to increase the interest rate in a special charge scheme under the *Local Government Act 1989*. I had already received four complaints from residents about the scheme at this time.
2. Market Lane is in the outer Melbourne suburb of Narre Warren South. At the relevant time it was an unsealed road. The purpose of the scheme was to seal it and add drainage and lighting.
3. The Local Government Act allows councils to levy special charges on a group of ratepayers to fund specific works or services when they receive a 'special benefit' from the work.<sup>1</sup> Special charges are commonly levied for works such as footpaths, roads, kerbs and channels or drains.
4. All 37 properties on Market Lane were levied with a special charge for the cost of the road works, which also covered five properties on Gwenda Court, a cul-de-sac that runs onto Market Lane. One property on Greaves Road was also levied.

**Image 1: Market Lane, Narre Warren South before the road works**



*Source: Council's response to enquiries, 29 October 2014, and shown at Council's presentation to residents on 13 February 2013.*

<sup>1</sup> *Local Government Act 1989* sections 163-166. Local Government Victoria's website contains general information about special charge schemes at <[knowyourcouncil.vic.gov.au/guide-to-councils/finance-and-planning/rates-and-charges](http://knowyourcouncil.vic.gov.au/guide-to-councils/finance-and-planning/rates-and-charges)>.

5. Initial council estimates were that each owner would be liable for either \$20,807.13 (29 properties) or \$15,308.10 (eight properties), depending on the benefit received. Council offered owners the option of paying the special charge as a lump sum or in 60 quarterly instalments over 15 years, subject to interest.

6. Ms Graley's constituents were concerned that when Council consulted on the proposed scheme, they were told the interest rate applied to instalments would be variable<sup>2</sup> but set at 4.25 per cent per annum. However, after Council declared the special charge, it closed the meeting on 17 June 2014 and increased the interest rate. It later informed the affected owners that the interest rate was to start at 7.5 per cent per annum. By this stage, the owners' right to object to the special charge under the Local Government Act had expired.

**Image 2: Extent of the Market Lane Special Charge Scheme, 18 February 2014**



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7. For those property owners liable for a principal of \$20,807.13, the change from 4.25 per cent per annum to 7.5 per cent per annum was equivalent to an increase of \$6,590 over the term of the instalment plan, assuming a constant interest rate.
  8. My office made initial enquiries with Council under section 13A of the Ombudsman Act on 6 October 2014, seeking an explanation for the increase in the interest rate and other information about the scheme.
  9. My office made further enquiries on 26 November 2014 and met with Local Government Victoria to learn how special charge schemes were managed, and about the approach to closed council meetings within the sector. During this time, my office also consulted a certified practising accountant on the calculations of the interest rate, and met with the Victorian Auditor-General's Office to discuss charging interest for special charge schemes.
  10. During this time, my office received another four complaints from residents regarding the Market Lane Special Charge Scheme, bringing the total number of complaints to nine.
  11. On 23 July 2015 I notified the Hon. Natalie Hutchins MP, Minister for Local Government, and Council's Chief Executive Officer (CEO), Mr Mike Tyler, of my intention to formally investigate the complaint.

# Jurisdiction and investigation methodology

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12. The administrative actions of the council are within my jurisdiction.
13. My investigation involved:
  - assessing the information provided by Ms Graley, the other complainants and Council
  - examining documentary evidence regarding the scheme, including Council's correspondence with property owners, relevant policies, minutes of Council meetings, and a recording of the closed council meeting held on 17 June 2014
  - discussions with staff from Local Government Victoria, the Municipal Association of Victoria and the Victorian Auditor-General's Office
  - interviewing Council's Manager of Rates, Property and Valuations
  - providing Council with a copy of my draft report dated 30 December 2015 and considering its response
  - discussing the draft report and recommendations with Local Government Victoria and Council.
14. In considering the concerns raised, the standard of proof I applied in my investigation and report was the balance of probabilities.
15. In accordance with section 25A(3) of the Ombudsman Act, I advise that any persons who are identifiable or may be identifiable from the information in this report are not the subject of any adverse comment or opinion. They are named or identified in this report on the basis that:
  - I am satisfied that it is necessary or desirable to do so in the public interest
  - I am satisfied that identifying those persons will not cause unreasonable damage to their reputations, safety or wellbeing.

# Support for the Market Lane Special Charge Scheme

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16. Council initiated work on the scheme in late 2012 in response to a petition signed by eight land owners, representing at most five of the 37 affected properties.<sup>3</sup> The petition requested 'the sealing of Market Lane' for reasons of safety, rough road surface, dust, mud and noise. It did not request a special charge scheme. The petition was tabled at a council meeting on 4 December 2012 but was not made publicly available with the agenda or minutes of that meeting.
17. In response, Council voted to invite all affected owners to a meeting to discuss the proposal. The council held the public meeting on 13 February 2013. Council officers presented different options for the proposed works, estimated costs and arrangements for a special charge scheme to cover the cost.
18. Following this meeting, Council mailed a survey to the 37 affected owners. The survey:
  - asked the owners to indicate whether or not they were in favour of the scheme
  - informed the owners that if they did not submit a survey response by 15 March 2013, the council would assume that they were in favour.
19. All 37 affected owners responded to the survey. Twenty owners were in favour of the scheme. Seventeen owners were not.
20. Although the split between those in favour and those opposed was relatively small, Council resolved to fully develop a proposal for the scheme. Over the next 10 months, council officers developed detailed designs and cost estimates for the scheme. In February 2014 Council gave formal public notice of its intention to declare the scheme – which it is required to do under the Local Government Act – and invited submissions.<sup>4</sup>
21. Several residents voiced serious concerns about their ability to fund the scheme. In a letter to Council, one of Ms Graley's constituents wrote:

I would like to advise that I am totally opposed to the [special charge scheme] taking place and that it will be difficult for myself to make payments. ... Having to spend \$20K+ is a very large amount of money ... I do not understand how this has happened – City of Casey makes a lot of money out of their rates, which keeps going up every year, so not only do I have to pay expensive rates, cost of the re-sealing, but also interest on top of the \$20K+ ... I do not want to sell. This will put additional stress on me – there is already enough stress in my life.

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<sup>3</sup> One signature on the petition is illegible and unaccompanied by a printed name or discernible property number. For the purposes of this report, it is assumed that the illegible signature represents a property in Market Lane.

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<sup>4</sup> *Local Government Act 1989* section 163B(3) and Casey City Council, 'Notice to Declare a Special Charge Scheme', 26 February 2014.

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22. Another resident wrote to Council:

I had a meeting with [council officer] not long after we received our letter from Council a few weeks ago, I explained to [council officer] that we and some of [the] residents will be in financial hardship over this Scheme and [council officer] told me that when writing the submission/objections we cannot say that we the residents cannot afford it as it is not a valid reason!!!! What do you call a valid reason?????? To the residents that cannot afford it and will be at risk of financial hardship it is an enormous valid reason. My husband is about to retire in a few months and we have been put through a stressful and upsetting time these past few weeks knowing that all the years we worked so hard to get ahead to pay for our home ... that we will not be able to enjoy a peaceful and debt free retirement if this scheme goes ahead.

23. The council received 10 submissions about the scheme:

- One submission supported the scheme.
- Two submissions were generally in support but were concerned about costs.
- Six submissions were against the scheme.
- The remaining submission was signed by owners representing 24 of the 37 properties affected by the scheme. It stated:

... we opposed the [notice of intention to declare a special charge] based on the fact that all residents bought their homes with the full knowledge of the Market Lane's unmade status.

It noted that a narrow majority of residents had voted in favour of the scheme. The submission also made detailed suggestions on possible cost savings.

24. A council officer attempted to clarify whether this submission opposed the scheme. In response, the author of the submission stated:

We do not oppose the improvements generally what we oppose is the cost and the debt we will incur as we are now retired hence we voted NO and have not changed.

25. At its 17 June 2014 meeting, Council considered a report by council officers summarising the submissions to decide whether to proceed with the scheme. The report described the submission representing 24 properties as:

... objecting to the costs of the scheme. The [submission] however was not a majority objection to the scheme.

26. Despite the reservations expressed by nine of the 10 submissions, including the submission representing 24 out of 37 properties, the report to Council did not recommend any changes to the scheme. Council voted to declare the special charge scheme without modifications.

# Information provided by Council during the consultation phase

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27. My investigation identified that some of the information provided by Council during the consultation period was flawed.

## Information about the petition

28. At the public meeting on 13 February 2013, some of the affected owners said they had not seen the petition that had been presented to Council.<sup>5</sup> According to the minutes of the meeting, council officers told those present that 'there were approximately 25 signatures on it'.<sup>6</sup> My officers identified that there were eight signatures on the petition.
29. In response to a request to see the wording of the petition, council officers told<sup>7</sup> the property owners that the petition referred to dust, mud, noise and property values as reasons why the road should be sealed.<sup>8</sup> The council officers also said that 'petitions once submitted are confidential under the Privacy Act'. Under a ruling from the Privacy Commissioner in 2004, this is not correct.<sup>9</sup> Despite this insistence on confidentiality, the minutes show that officers disclosed the name of the owner who circulated the petition.
30. When one owner suggested that Council had 'jumped' after receiving a few signatures on a petition, officers are recorded as stating that the council 'needs to respond to the petition once it is tabled at a Council Meeting'. This claim was repeated throughout the meeting.

31. The council's meeting procedures state that councillors 'may' move a motion to deal with a petition. The procedures do not require that a motion be moved, or prescribe the content of the motion.<sup>10</sup>

## Information about the owners' right to object

32. Any person who is liable to pay a special charge under a proposed scheme has a right to 'object'.<sup>11</sup> Under the Local Government Act, the right to 'object' is different from the right to make a 'submission'. Any person can make a submission in relation to a proposal to declare a special charge,<sup>12</sup> but the number of submissions made does not limit a council's power to declare the special charge. By contrast, if people representing the majority of affected properties exercise their right to 'object', a council cannot declare a special charge.<sup>13</sup>
33. When a council gives public notice of its intention to declare a scheme, section 163B(3) of the Local Government Act provides that it must state which persons have a right to object and how to lodge an objection. In the case of Market Lane, Council's public notice about the proposed scheme explained how people could make a submission to Council but made no mention of the right to object, how this right could be exercised and by whom, or the time limits for doing so.<sup>14</sup> The public notice was therefore not compliant with section 163B(3) of the Local Government Act.
34. Furthermore, in correspondence between Council and the affected owners, no mention was made of the right to object, or of the impact of a majority objection.

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5 Minutes of public meeting held on 13 February 2013.

6 *ibid.*

7 *ibid.*

8 While the actual text of the petition mentioned dust, mud and noise (as well as safety and the rough road surface) as reasons for sealing Market Lane, it did not mention property values.

9 *Complainant H v. Local Council* [2004] VPrivCmr 2, <[www.cpdp.vic.gov.au/images/content/pdf/privacy\\_case\\_notes/case\\_note\\_02\\_04.pdf](http://www.cpdp.vic.gov.au/images/content/pdf/privacy_case_notes/case_note_02_04.pdf)>, viewed on 2 June 2016.

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10 Casey City Council, Local Law No. 1 (2006) *Meeting Procedures and Use of the Common Seal Local Law*, clause 20.6.

11 *Local Government Act 1989* section 163B(4).

12 *Local Government Act 1989* section 163A.

13 *Local Government Act 1989* section 163B(6).

14 Casey City Council, 'Public Notice of Intention to Declare a Special Charge - Market Lane, Narre Warren North', posted on Council's website and at council offices and published in the *Berwick/Cranbourne News*.

35. Table 1 sets out key Council communications with the Market Lane and Gwenda Court ratepayers, and the declaration of the scheme and its rates.

| <b>Table 1: Key Council communications regarding the Market Lane Special Charge Scheme</b> |   |   |  |
|--|---|---|--|
| <b>Date</b>  | <b>Method</b>   | <b>Contents</b>   | <b>Audience</b>  |
| 13 February 2013   | Information sheet distributed at public meeting   | Special charge scheme: referred to 'submission/objection'; no information on stopping the scheme if there is a majority objection.  | Approximately 40 owners attending, representing 28 of 37 properties included in the scheme |
|  | Public meeting presentation   | Slide presentation: Council will abandon the scheme if there is majority objection.   |  |
| 4 March 2013   | Correspondence: Construction of Market Lane, Narre Warren South – Special Charge Scheme | Letter sent by Council to owners advising of estimated cost per property, and requesting they complete a survey on the scheme.<br><br>Mentions that if survey response not submitted by 15 March 2013, Council will assume owner is in favour of scheme.<br><br>No mention of right to object and its impact on stopping the scheme if there is a majority objection. | Posted to owners   |
| 21 May 2013  | Council meeting   | The result of the owners survey presented; special charge scheme to be developed.<br><br>Mentions owners' right to object to the scheme within 28 days, and that if the majority of owners object, Council must abandon the scheme.   | Attendees at council meeting   |
| 18 February 2014   | Council meeting   | Decision made to send a notice to affected property owners of intention to declare the scheme. Mentions owners' right to object to the scheme within 28 days, and that if the majority of owners object, Council must abandon the scheme.   | Attendees at council meeting   |
| 26 February 2014   | Correspondence: Notice of intention to declare a special charge scheme                  | Information about how to make a submission, but no information about the right to object and its impact on stopping the scheme if there is a majority objection.  | Posted to owners   |
| 6 March 2014   | Public notice   | Information on how to make a submission; no mention of the right to object or its impact on stopping the scheme if there is a majority objection.   | Council website, council offices and published in the Berwick/Cranbourne News              |
| 17 June 2014   | Council meeting   | The Market Lane Special Charge Scheme declared in open council, but the decision to change the interest rate is made in a closed session.   | Attendees at council meeting   |
| 25 June 2014   | Correspondence: Notice of levy of special charge scheme                                 | Information about lodging a submission to VCAT under section 185(2) of the Local Government Act. No information about a majority objection because the scheme was already declared, therefore objections were no longer possible.   | Posted to owners   |

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36. In response to my draft report, Council stated that its consideration of the scheme was a 'very open process to which members of the public had access':

- The right to object and the consequence that if the majority of owners objected to the scheme, the council must abandon it, was included in the report considered at its 18 February 2014 meeting, where it gave notice of its intention to declare the scheme.
- This report was also considered at Council's meeting on 17 June 2014, when Council declared the scheme.
- Council referred to the right of objection in its earlier report considered at its meeting on 21 May 2013, when it considered the petition.<sup>15</sup>

37. While Council considered the right to object in its internal reports, which were publicly available, I have not identified any formal correspondence sent by Council to affected owners that mentioned their right to object. A 'Notice of intention to declare a special charge scheme' was sent to owners on 26 February 2014 and mentioned a right to make a submission but not the right to object. Nor did it state that a majority objection would halt the scheme.

## Information about the interest rate

38. At different times, Council advised owners about two different interest rates for instalments on the Market Lane Special Charge Scheme:

- 4.75 per cent at the public meeting on 13 February 2013
- 4.25 per cent in the notice of intention issued to affected owners on 26 February 2014.

39. At the meeting on 17 June 2014, shortly after Council voted to declare the Market Lane Special Charge Scheme, Council also voted in a closed session to increase the interest rate to 7.5 per cent per annum. Council wrote to affected owners on 25 June 2014 informing them of the increase.

40. From the nine complaints received by my office, it was clear that residents were unaware that the interest rate would be increased, let alone by this amount, and if they had known this earlier it may have affected their support for the scheme. In an email to the council's CEO on 2 July 2014, one of Ms Graley's constituents wrote:

A previous letter that we received in February of this year ... stated that the Special Charge and the construction works of Market Lane were estimated at cost per property ... \$20,807 and interest on instalments set at 4.25 per cent per annum, and we the residents were up for the whole amount without Casey Council not [*sic*] contributing a cent towards the scheme. Come forward a few months and in a recent letter dated (25th June) ... stated that the estimated cost per property remained the same (\$20,807) but the interest rates were set at 7.5 per cent per annum that is an increase of 3.25 per cent in four months!!!! We find this abhorrent that Casey Council can raise this interest rate to such an extent when most of the residents that I know in Market Lane will have difficulties making repayments as high as these.

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<sup>15</sup> Council's response to my draft report, 15 February 2016.

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41. Another resident said:
- In a letter from Casey to residents dated 4 March 2013 the estimated cost to us would have been around \$13,000, why has the new amount significantly increased to \$15,308 (about 18%)? This was not the amount we were asked to cast a Yes or No vote upon.<sup>16</sup>
42. My officers asked Council if it had ever informed owners that it was preparing to change its interest rate and increase the amount they were liable to pay. Council advised that no additional advice was given to owners, and:
- Landowners have previously been advised that the interest rate is variable and reviewed annually by Council. The interest could increase or decrease.<sup>17</sup>
43. The Local Government Act allows a council to vary a special charge, but if the variation results in an increase of 10 per cent or more in the amount payable by a person, the council is required to publicly declare the scheme again, and to give affected owners the opportunity to make submissions.<sup>18</sup>
44. My calculations show that the decision to increase the interest rate resulted in a 23 per cent increase in the total amount payable by owners over 15 years.
45. The requirement in the legislation to declare the scheme again if there is significant financial change is designed to protect ratepayers from significant increases in payments, without the public notification process set out in section 163 of the Local Government Act.
46. When my officers asked Council about this issue, it stated that it considered the interest to be a 'finance cost outside of the scheme'.<sup>19</sup> The council did not agree that the Act required it to re-declare the scheme and consult again with affected owners.
47. In response to my draft report, Council provided legal advice it received on 10 February 2016. The advice expressed the view that the increase in the interest rate did not trigger a requirement to re-declare the scheme as the 'amount of the special charge' and the 'amount of an instalment' are separate, despite both being the amounts 'payable'. That is, the interest payable on an instalment of a special rate or charge is not part of the 'special charge payable'.<sup>20</sup> The advice concluded that only an increase in the amount of the special charge itself (the principal) triggers the requirement to re-declare the scheme.

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<sup>16</sup> A resident's email to Council, 2 April 2014.

<sup>17</sup> Council's response to enquiries, 14 August 2014.

<sup>18</sup> *Local Government Act 1989* section 166.

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<sup>19</sup> Council's response to enquiries, 29 October 2014.

<sup>20</sup> In the Market Lane case, this would be the \$20,807 amount.

# Interest charged by Council

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48. My investigation identified further concerns about Council's decision to charge interest on the scheme, and the way it determined the new interest rate.

## Council's power to charge interest

49. The Local Government Act provides for a council to charge interest on instalments for a special charge scheme but only:

... a component for reasonable interest costs the total of which must not exceed the estimated borrowing costs of the Council in respect of the performance of the function or the exercise of the power in respect of which the special rate or special charge is to be levied by more than 1%.<sup>21</sup>

50. At interview, Council's Manager of Rates, Property and Valuations said that it had been council policy to fund special charge schemes from its own reserves for a number of years, possibly since 2008.<sup>22</sup> He stated that the work at Market Lane was also funded by Council from its own cash reserves and Council did not incur any borrowing costs.<sup>23</sup>

51. My officers queried whether the Act allows a council to charge interest to owners when it has not borrowed money to fund a scheme. The Manager referred my officers to Council's legal advice, which states that section 167(6)(b) of the Act is the source of Council's power to require payment of interest by ratepayers. However, this advice does not address the question of whether this power is available when the council has not borrowed any money to fund the special charge scheme.

52. In response to my draft report, Council obtained further legal advice dated 10 February 2016 that states that the Local Government Act empowers a council to charge interest 'even when no external borrowing is involved'.<sup>24</sup>

## The basis for the new interest rate

53. Council's previous interest rate policy for special charge schemes was set in 2005. This policy used the Reserve Bank's cash rate plus a 1.5 per cent per annum administration surcharge to determine the interest rate.<sup>25</sup>

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<sup>21</sup> *Local Government Act 1989* section 163(6)(b).

<sup>22</sup> Also referred to in the closed council report of 17 June 2014 prepared by the Manager of Rates, Property and Valuations.

<sup>23</sup> Interview with the Manager of Rates, Property and Valuations, 16 October 2015.

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<sup>24</sup> Council's response to draft report, 15 February 2016.

<sup>25</sup> Closed Council report of 17 June 2014 prepared by the Manager of Rates, Property and Valuations.

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54. The new interest rate policy was passed by Council on 17 June 2014. It removed the Reserve Bank's cash rate as the basis for calculating interest rates in special charge schemes. In the new policy, the interest rate was instead based on Council's borrowing rate, then estimated at 6 per cent per annum, plus a 1.5 per cent per annum administration surcharge.<sup>26</sup>
55. It is unclear why Council selected 6 per cent as its borrowing rate. Council provided the following explanations:
- The figure was based 'on the current interest rate charged by a financial institution on a fixed 15-year loan term'.<sup>27</sup>
  - At interview, Council's Manager of Rates, Property and Valuations said that the 6 per cent per annum figure had been nominated to him by the Chief Financial Officer (CFO). He said he had a discussion with the CFO but that he could not provide information about how the figure had been calculated, that his discussion with the CFO had not been documented, and that no reasons had been recorded.
  - The Manager said that around the time of his discussion with the CFO, the previous loan Council had put out to tender had been awarded at an interest rate of 6.2 per cent. Also at the time of his discussion with the CFO, Council was considering options for financing construction of Bunjil Place, a new civic centre. That project was looking at a loan facility at approximately 5.8 per cent interest.<sup>28</sup>
56. The Manager told my officers that he discussed the rate with the CFO following a request from Council's CEO to review the interest rates policy. The Manager said he came to the view that there was a substantial discrepancy between the Reserve Bank cash rate and Council's borrowing rate. He also referred to a 2005 circular from the then Department for Victorian Communities that suggested the borrowing rate 'as being the appropriate rate' to use.
57. The actual wording of the 2005 circular is:
- For instalments paid 'on time', an appropriate rate of interest to charge could be Council's cost of *borrowing* [my emphasis] plus say one percent to cover administrative costs.<sup>29</sup>

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26 Council's response to enquiries, 29 October 2014.

27 *ibid.*

28 Interview with the Manager of Rates, Property and Valuations, 16 October 2015.

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29 Department for Victorian Communities Circular number 27/05: *Use of the Penalty Interest Rate.*

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## The 1.5 per cent administration surcharge

58. Section 167(6)(b) of the Local Government Act limits any additional fee imposed by a council to 1 per cent of Council's borrowing costs for a special charge scheme.<sup>30</sup> However, since 2005 the council has included a 1.5 per cent administration surcharge in addition to its interest rate for special charge schemes.<sup>31</sup>
59. Council offered to review its compliance with this provision of the Act after my officers questioned this practice. The review confirmed that Council's interest rate had been 0.5 per cent over the maximum allowed under the Act. The Manager reported to Council that the problem was limited to the 2014-15 year and recommended that Council reimburse the overcharged amounts for that year, amend its policy and decrease its interest rate for special charge schemes.<sup>32</sup>
60. My officers asked the Manager why his review limited this 'over charging' to the 2014-15 year, when Council had charged a 1.5 per cent administration surcharge as far back as 2005. The Manager explained that, in his view, when Council's interest rate was based on the Reserve Bank's cash rate, it under-represented Council's actual borrowing costs. On this basis, the Reserve Bank's cash rate plus 1.5 per cent did not exceed Council's borrowing costs plus 1 per cent. However, when Council changed the basis of its interest rate to 6 per cent on 17 June 2014, the 1.5 per cent surcharge (bringing the total interest rate payable to 7.5 per cent) was in excess of what was allowed by the Act.

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<sup>30</sup> *Local Government Act 1989* section 163(6)(b).

<sup>31</sup> Casey City Council, *Interest - Private Street Schemes/Drainage Schemes Policy, version 2.1*, 21 October 2014.

<sup>32</sup> Report tabled at Council meeting on 1 September 2015, *Special Rates and Charges*.

## The decision to change the interest rate at a closed meeting

61. Council determined the new interest rate for special charge schemes at a closed meeting on 17 June 2014, after previously declaring the Market Lane Special Charge Scheme at an open council meeting. Closed meetings of Council are not open to members of the public.
62. The Local Government Act allows a council to close a council meeting to the public if it is discussing certain matters that are listed under section 89(2). If a council resolves to close a meeting to the public under this section, it is required to record the reasons for doing so in the meeting minutes.<sup>33</sup>
63. In the minutes of the Council meeting for 17 June 2014, it is recorded that part of the meeting was closed due to discussion of the following matters covered by section 89(2) of the Act:
  - personnel matters
  - contractual matters
  - proposed developments
  - legal advice
  - matters affecting the security of council property
  - any other matter which the council or special committee considers would prejudice the council or any person.
64. The minutes quote these sections but do not give a reason for Council's decision to close the meeting. This is consistent with the approach used in the minutes for Council's ordinary meetings whenever it closes parts of its meetings to the public.

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<sup>33</sup> *Local Government Act 1989* section 89(3).

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65. My officers requested a copy of the report that was provided to councillors at the closed part of the council meeting on 17 June 2014, and a copy of the audio recording of that part of the meeting. The audio recording reveals no discussion about the interest rate change and no reference to the report's contents, with councillors simply adopting the recommendation in the report.
66. My officers have received inconsistent information from Council about why the report that recommended the change in the interest rate was considered in a closed session. Council's CEO said:
- ... it was considered that discussion in open Council could prejudice those paying or earmarked to pay interest on Special Charge instalments. In retrospect, this was an error.<sup>34</sup>
67. However, at interview, Council's Manager of Rates, Property and Valuations stated that it was his advice to have the report considered in a closed session. He stated that it was a coincidence that the interest rate policy was considered in the same meeting as the Market Lane Special Charge Scheme and explained his decision as follows:
- I probably felt that there might have been perhaps a discussion on interest rates or loan tenders that might have been commercial-in-confidence and that was the reason that I ... made the call that it goes [*sic*] into closed council. With hindsight ... it should have been in open council.<sup>35</sup>
68. Despite their inconsistent explanations, both the CEO and the Manager have acknowledged that the report should have been considered in an open council meeting.
69. Council's publicly available policy on interest on special charge schemes<sup>36</sup> was not updated to reflect the new interest rate until 20 October 2014, four months after the decision to change it. Council advised my office that this was due to an 'administrative oversight'.<sup>37</sup>

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34 Letter from Casey City Council, 14 August 2015.

35 Interview with the Manager of Rates, Property and Valuations, 16 October 2015.

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36 Casey City Council, *Interest - Private Street Schemes/Drainage Schemes Policy*. Current version dated 1 September 2015.

37 Letter from Casey City Council, 14 August 2015.

# Changes to the interest rate and the Market Lane scheme following my enquiries

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70. On 19 May 2015 Council resolved to reduce its interest rate for special charge schemes from 7.5 to 6 per cent per annum.<sup>38</sup> The report containing this recommendation stated that the 6 per cent includes a 4.5 per cent borrowing rate plus a 1.5 per cent 'administrative charge'. In contrast to the decision on 17 June 2014, this decision was made in open council. The report also stated:

While Council's practice in recent years has been to fund the schemes from its own reserves, it is appropriate to use Council's borrowing rate as the basis for charging interest on special rates and charges.

However, the report states only that the borrowing rate has been 'advised' at 4.5 per cent, and does not state what relationship the borrowing rate has to the actual costs of special charge schemes, or why it is 'appropriate' as the basis for charging interest on special rates and charges. The conclusion of the report stated that:

The recommendation, if adopted, will better reflect Council's current position if it had to borrow the funds to finance the projects subject to the special rates and charges.

71. All the works in Market Lane were completed on 5 May 2015. This included sealing the road and installing drainage and lighting.

72. On 7 July 2015 Council resolved to finalise the actual costs of the Market Lane scheme.<sup>39</sup> These were lower than the estimated costs for the scheme:

... due to the extremely competitive contract rates submitted by the winning contractor through the public tender process. The actual contract rates of works were lower than the engineer's estimated rates. The engineer's estimate is based on the average past tender rates received by Casey for similar works.<sup>40</sup>

73. For those owners initially allocated a contribution of \$20,807.13, the figure was confirmed as \$16,678.39. For those first charged \$15,308.10, the final contribution was \$12,270.53.

74. As noted above, Council resolved to reduce the 'administrative charge' component of its interest rate on special charge schemes from 1.5 per cent to 1 per cent in September 2015.<sup>41</sup> An officer's report to Council dated 1 September 2015 acknowledged that the 1.5 per cent charge exceeded the limit imposed by section 167 of the Local Government Act. The report also stated that the incorrect charge was limited to the 2014-15 financial year and recommended notifying and reimbursing the 84 ratepayers affected in this period. Council adopted the recommendations.

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<sup>38</sup> Report tabled at Casey City Council meeting on 19 May 2015.

<sup>39</sup> Report tabled at Casey City Council meeting on 7 July 2015.

<sup>40</sup> *ibid.*

<sup>41</sup> Report tabled at Casey City Council meeting on 1 September 2015.

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**Image 3: Market Lane, Narre Warren South after the road works**



*Photograph taken May 2016.*

# Conclusions

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75. My investigation identified numerous issues with Council's actions and decisions in relation to the Market Lane Special Charge Scheme:

- Council proceeded with the scheme despite reservations from approximately two-thirds of owners (at least 24 of the 37 affected properties) and a petition from representatives of only five properties for Market Lane to be sealed.
- Council's subsequent survey of affected owners assumed that any property owner failing to submit a completed survey supported the proposed special charge. In my view this assumption was unreasonable, given the large financial burden imposed on property owners upon declaration of the scheme.
- Council proceeded with the scheme without modification, despite owners of 24 properties expressing concerns during the submission process about the cost and suggesting ways to lower the cost of the project.
- The information provided to owners during the consultation process was inadequate. When Council formally gave notice of its intention to declare the scheme, the formal correspondence to residents did not inform them of their right to object. Residents should also have been made aware that Council was considering increasing the interest rate payable under the scheme.

- Council contends that the interest rate was always 'variable' and therefore could increase or decrease. In my view, an increase from 4.25 per cent to 7.5 per cent was unreasonable because a variable interest rate from a financial institution would be unlikely to increase by 3.25 per cent in such a short period of time. Further, there were no actual borrowing costs to Council for the Market Lane scheme because it was funded from Council's cash reserves.

76. It is reasonable to assume that, had owners known that the interest rate would be 7.5 per cent per annum instead of the quoted rate of 4.25 per cent per annum, the outcome of the consultation process may have been different.
77. As the amount payable was 23 per cent higher as a result of the change in interest rate, Council may have been obliged to re-declare the scheme under the Local Government Act and give residents the opportunity to make further submissions. Recent legal advice received by Council states that the 'amount of the special charge' and the 'amount of an instalment' are separate, despite both being components of the amount 'payable'. My view is that the provisions of the Local Government Act are ambiguous and I am concerned that this ambiguity exposes ratepayers to increased liability without any form of public notification.
78. Further, I query whether the Local Government Act allows a council to charge interest when it has not borrowed money externally in implementing a special charge scheme. Recent legal advice obtained by Council in response to my draft report states that interest can be charged by the council when no borrowing is involved. In my view, the provisions of the Act are equivocal and should be clarified.

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79. It is clear that the borrowing rate is not based on the actual borrowing costs in special charge schemes. There are currently no actual borrowing costs in special charge schemes in the council area given the costs are covered by council funds. Instead, the borrowing rate appears to have been arrived at by averaging out borrowing costs from other council projects.
80. It is not clear why Council decided that its borrowing rate was 6 per cent, as discussions between council officers were not recorded. In the interests of transparency and given the potential financial burden on property owners, it is proper that they be informed of the reason for Council's decision to change the rate.
81. Council's decision making and communication about the new interest rate should have been more transparent. In particular:
- Council did not include details about the right to object in the public notice for the scheme and in correspondence to the Market Lane property owners. As a result, the council breached section 163B(3) of the Local Government Act.
  - Council made a significant decision to increase the interest rate on special charge scheme instalments in a closed session. The decision to move into a closed session for this purpose appears to have lacked a valid legal basis. Council has acknowledged that the decision to increase the interest rate in a closed meeting was an error, and that it should have updated its publicly available policy sooner.
82. On the basis of the evidence, in my opinion:
- Council appears to have acted contrary to law by failing to include details of the right to object in the public notice and in the notice sent to affected owners for the Market Lane Special Charge Scheme as required under the Local Government Act.<sup>42</sup>
  - Council's failure to advise owners of an imminent and significant increase in the interest rate payable under the scheme before their right to object expired was wrong.<sup>43</sup>
  - Council's decision to increase the interest rate from 4.25 per cent per annum to 7.5 per cent per annum was unreasonable and unjust.<sup>44</sup> It was also a decision for which the reasons were not, but should have been, given publicly.<sup>45</sup>
  - Council's decision to enter a closed meeting on 17 June 2014 to make a decision on the new interest rate appears to have been taken contrary to law.<sup>46</sup> In addition, had the decision been legally justifiable, it was a decision in the exercise of a discretion, and the reasons for the decision were not, but should have been, given publicly.<sup>47</sup>

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42 Ombudsman Act section 23(1)(a).

43 Ombudsman Act section 23(1)(g).

44 Ombudsman Act section 23(1)(b).

45 Ombudsman Act section 23(1)(e).

46 Ombudsman Act section 23(1)(a).

47 Ombudsman Act section 23(1)(e).

# Recommendations

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## **To Local Government Victoria**

### **Recommendation 1**

Consideration should be given in the current review of the *Local Government Act 1989* to amending the special rate and charge provisions to remove any ambiguity relating to interest charged and borrowings.

### **Recommendation 2**

Further guidance should be provided to councils on declaring special rates and charges to ensure consistent application by all councils.

#### ***In response to my draft report, Local Government Victoria responded:***

*These recommendations are being actively considered as part of the current review of the Local Government Act 1989.*

#### ***In response to my draft report, Council responded:***

*Casey welcomes recommendations 1 & 2 and hopes that this will lead to the State Government clarifying expectations, either via legislative change or the provision of guidance.*

## **To Casey City Council**

### **Recommendation 3**

Council should develop a special rate and charge scheme section on its website to ensure all relevant information about schemes are available to the community.

### **Recommendation 4**

Council should consider refunding residents for the interest charged over and above 4.25 per cent per annum – the rate as at February 2014 that was notified to residents – until 1 September 2015.

### **Recommendation 5**

In light of its view that it erroneously decided to enter a closed meeting on 17 June 2014, Council should consider releasing on its website all minutes and documentation associated with this closed session regarding the Market Lane Special Charge Scheme interest rate.

### **Recommendation 6**

Council should institute a process of revising its special charge scheme interest rate annually as part of its budget process.

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## Recommendation 7

Council should review the provisions of section 89(2)–(3) of the Local Government Act and, in future, ensure it fulfils its obligations to record the reason(s) for a decision to close a council meeting.

### ***In response to my draft report, Council responded:***

*Recommendation 3 is supported as it is recognised that a Special Rate and Charge Scheme section on Council's website will enhance community understanding of the process.*

*In the case of recommendations 4 & 5, which relate to the amendment of existing Council resolutions, they will be reported to a Council meeting for consideration.*

*Recommendation 6 is supported as it is recognised that the setting of the Special Charge Scheme interest rate is logically part of the annual Budget development process.*

*Whilst Casey is of the view that it is compliant with the requirements of sections 89(2)–(3) of the Local Government Act 1989, it accepts that the Ombudsman has a different interpretation and that a review of compliance with these provisions is appropriate.*