

10.11 Legal proceedings regarding unauthorised signage at 137 Commercial Road, Port Noarlunga South

Legal advice has been received regarding the potential for Council to initiate contempt of court proceedings relating to unauthorised development at 137 Commercial Road, Port Noarlunga South.

This is information seeking council direction.

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File Reference:

- Attachments:
1. Council: agenda report (without attachment 2) and minutes of meeting of 7 February 2006 (8 pages)
 2. Council: agenda report, attachments and minutes of meeting of 17 April 2007 (17 pages)
 3. DAP: agenda report, attachment and minutes of meeting of 26 June 2008 (58 pages)
 4. ERD Court: judgement (18 January 2010) and order (2 February 2010) (23 pages)
 5. Supreme Court: judgement and order (14 October 2010) (22 pages)
 6. Examples of unauthorised signs at 137 Commercial Road, Port Noarlunga South (6 pages)
 7. Legal advice from Norman Waterhouse dated 17 January 2011 (3 pages)

1 Executive summary

1.1 Topic

Legal advice has been received regarding the potential for Council to initiate contempt of court proceedings relating to unauthorised development at 137 Commercial Road, Port Noarlunga South.

1.2 Context

Council resolved at its meetings of 7 February 2006 (attachment 1) and 17 April 2007 (attachment 2) to undertake enforcement proceedings under the Development Act 1993 for the display of unauthorised signs at 137 Commercial Road, Port Noarlunga South.

The Environment, Resources and Development Court (ERD Court) confirmed that the signs were in breach of the Development Act and ordered that they be removed by the landowners (Mr Barry Becker and Ms Jeanette Inglis) and that no further unauthorised signs be placed on the land (refer to attachment 4).

The landowners appealed the ERD Court's decision to the full court of the Supreme Court of South Australia. The Supreme Court concurred with the ERD Court's decision (refer to attachment 5).

Since the decisions of both the ERD Court and the Supreme Court, unauthorised signs have continued to be displayed on the land in contravention of the ERD Court order. A Council direction is sought as to whether contempt of court proceedings against the landowners should be initiated by council.

1.3 Suggested outcome

It is suggested that Council consider this item in confidence. Section 90(3)(h) of the Local Government Act 1999 is suggested as the most appropriate to use for this purpose.

This item is presented as a confidential item because of the receipt of legal advice.

The possible implication of not considering this item in confidence is that it may prejudice any legal action undertaken by council.

Direction is sought as to whether contempt of court proceedings should be commenced.

2 Recommendation(s)

1. That:

- a. under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting in order to consider in confidence this item.**
- b. the Council is satisfied that it is necessary that the public be excluded to enable the Council to consider the report at the meeting on the following grounds:**

Section 90(3)(h) legal advice

- c. 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 discussion confidential.**

AND

2. That the Council:

- a. make application to the Environment Resources and Development Court (ERD Court) under Part 15 of that Court's Rules that the Court's Registrar issue and serve a summons, as contemplated by those Rules, to Barry John Becker and Jeanette Patricia Inglis of 137 Commercial Road, Port Noarlunga South, which summons states that those persons are alleged to have committed a contempt of court by contravening the orders of the ERD Court in action no. 311 of 2006 dated 2 February 2010 on such dates and by such conduct as the Council's solicitors in due course consider can be proved**

- b. prepare such supporting documents, materials and evidence as are necessary to support such application and to prove such contempt of court
 - c. if permitted by the ERD Court, to prosecute any action for contempt brought by the Registrar of the ERD Court against Mr Becker and Ms Inglis or otherwise to provide such assistance as desired by the Court in its proceedings for contempt of court against Mr Becker and Ms Inglis.
 3. That Council authorises the Chief Executive Officer (and any person acting from time to time in that position) to, in the name of the Council:
 - d. take all steps considered appropriate or necessary to give effect to the Resolution 2 above, including obtaining legal representation for the Council
 - e. seek from the ERD Court such remedies, penalties, punishments and orders against Mr Becker and Ms Inglis as the Chief Executive Officer considers appropriate based on legal advice.
 4. That in relation to the matter of Mr Barry Becker and Ms Jeannette Inglis of 137 Commercial Road, Port Noarlunga South, having been considered in confidence under Section 90(3)(h) of the Local Government Act 1999, an order be made under the provisions of Section 91(7) and (9) of the Local Government Act 1999 that the minutes, agenda report and attachments 6 and 7 relating to discussion of the subject matter, be kept confidential until conclusion of legal proceedings (including any appeal actions).

OR

1. That the report concerning the acts and activities of Barry John Becker and Jeanette Patricia Inglis be received and that Council not seek that any proceedings for contempt of court be brought against Barry John Becker and Jeanette Patricia Inglis.
2. That in relation to the matter of Mr Barry Becker and Ms Jeannette Inglis of 137 Commercial Road, Port Noarlunga South, having been considered in confidence under Section 90(3)(h) of the Local Government Act 1999, an order be made under the provisions of Section 91(7) and (9) of the Local Government Act 1999 that the minutes, agenda report and attachments 6 and 7 relating to discussion of the subject matter, be kept confidential.

Key factors

3 Discussion

3.1 Background

Council has been seeking to control the display of signs at 137 Commercial Road, Port Noarlunga South since 2002.

The signs are considered to be 'development' under the Development Act and are not ordinarily expected in a residential setting. Approval had not been sought for the signs under the Act. Council consequently resolved on 7 February 2006 to seek to control the signs at this address by initiating proceedings under section 85 of the Development Act 1993 for a breach of the Act, seeking an order from the Environment, Resources and Development Court (ERD Court) for the signs to be removed (refer to attachment 1).

The proceedings under the Development Act do not relate to the content of the signs.

At its meeting of 17 April 2007, Council resolved to continue with the section 85 proceedings (refer to attachment 2).

As a result of negotiations in the ERD Court, Mr Becker and Ms Inglis (the landowners of 137 Commercial Road), lodged a development application on 14 May 2007 for the 'placement of blackboards displaying in chalk comments of a political nature'. This step was taken to provide the opportunity for the landowners to seek approval for display of the signs. In the event of development approval for the signs being granted, enforcement action in the ERD Court would likely have been curtailed.

Due to the potential for there to be perceived bias by council in assessing this application, the application was referred to the Minister for Urban Development and Planning requesting that the Development Assessment Commission be declared as the relevant authority for the assessment of the application. The Minister declined this request.

The development application was accordingly processed pursuant to the Development Act and against the provisions of the Development Plan and refused by council's Development Assessment Panel at its meeting of 26 June 2008 (refer to attachment 3).

The section 85 proceedings were deferred to enable the assessment of the development application to occur and were resumed upon refusal of the development application.

The section 85 proceedings were heard in the ERD Court on 3, 4 and 5 December 2008. The court handed down its judgement on 18 January 2010 and its orders on 2 February 2010 (refer to attachment 4). The ERD Court ordered that:

- All signs displayed on the land as of 2 February 2010 must be removed by midnight 3 February 2010.
- Mr Becker and Ms Inglis must immediately cease changing the use of the land for the display of signs or messages to the public (other than those exempt from requiring approval) and are restrained from using, suffering or permitting the use of the land for the display of signs and messages to the public unless permitted by a development approval.
- Mr Becker and Ms Inglis are restrained from displaying or suffering or permitting the displaying of any sign visible from a road or by passengers carried on public transport (other than those exempt from requiring approval) unless permitted by a development approval.
- That Council's costs be paid.

Council's costs to that point were \$52,943 exc GST.

Mr Becker and Ms Inglis appealed this decision to the full court of the Supreme Court, which was heard on 7 September 2010 before Chief Justice Doyle and Justices Duggan and Bleby. The Supreme Court handed down its judgement and order on 14 October 2010 (refer to attachment 5). The Supreme Court dismissed

the appeal and ordered that council's costs be paid. Council's costs at the conclusion of the Supreme Court appeal were \$83,332 exc GST. A reasonable recovery of our costs is ordinarily accepted as being approximately two-thirds, being \$60,000.

Mr Becker and Ms Inglis have not appealed this decision to the High Court and have run out of time to do so.

3.2 Complaints

We have received several complaints from members of the public over several years about the unauthorised signage at 137 Commercial Road. These complaints have related to the proliferation and unsightliness of the signs and to the content of the signs, from residents of Port Noarlunga South and as far away as Aldinga Beach.

We received a complaint on 23 December 2010 from a local resident who is familiar with the courts' decisions on the unauthorised signs at 137 Commercial Road. The complainant felt it unfair that council was pursuing him (the complainant) for his outstanding debt (he was in default on his rates) but that the landowners (Mr Becker and Ms Inglis) continue to act in contempt of court with no apparent action from council.

Most recently, on 4 February 2011, we received a complaint from a resident of McLaren Flat who is also familiar with the courts' decisions on the authorised signs. The complainant wanted to know why the landowners were still displaying unauthorised signs in contravention of the courts' decisions and why there was no apparent action from council.

3.3 Continuing breaches

Signs have continued to be displayed on the land in contravention of the ERD Court orders. The court's directions were initially complied with in that the signs were removed from the land by midnight 3 February 2010. However, by 8 February, new signs were witnessed as having been placed on the neighbour's land, at 139 Commercial Road. This was technically not in breach of the order as the order relates specifically to the land at 137 Commercial Road, but we have written to the owner of 139 Commercial Road advising that the continued display of signs is in breach of the Development Act.

Various signs have continued to be displayed at both 137 and 139 Commercial Road since 8 February 2010. We deferred any action other than monitoring and recording signs displayed, as Mr Becker and Ms Inglis appealed the ERD Court's decision to the Supreme Court. We continued to monitor the property and record any contraventions of the orders, pending the decision of the Supreme Court.

Several examples of signs displayed since February 2010 (after the ERD Court's orders of 2 February) are contained in attachment 6. The landowners also regularly publish the same or similar messages as depicted on the signs on the property on a publicly accessible *Facebook* site.

Mr Becker's and Ms Inglis's lawyer was advised through council's solicitors of the unauthorised activities being undertaken by his clients. Their solicitor duly advised them that what they were doing was in contravention of the ERD Court order.

The Development Act does allow some signs to be placed on private property without the need for development approval. As it relates to 137 Commercial Road, the following signs/advertising displays do not need development approval:

- one that is displayed for the purposes of identification, direction, warning or other information that relates to the dwelling, subject to the following conditions:
 - the advertisement area is not more than 0.2m²
 - it does not move, flash, reflect light so as to cause undue distraction to motorists and not be internally illuminated
 - not more than two such advertisements are displayed
- one that announces a local event of a religious, educational, cultural, social or recreational character, or that relates to an event of a political character, subject to the following conditions:
 - the total area of all advertisements on the site is not more than 2m²
 - is displayed for a period not exceeding one month prior to the event and one week after the conclusion of the event (except for electoral material)
 - it does not move, flash, reflect light so as to cause undue distraction to motorists and not be internally illuminated.

Under the Electoral Act 1985, one electoral sign on private property may be up to 2m² in area. There is no legislative requirement about the timely removal of electoral signs on private property. The content of electoral signs is controlled under this legislation by the State Electoral Office.

Mr Becker and Ms Inglis are aware of these exemptions and on occasion display one sign on their property that is less than 2m² in area that (arguably) relates to an event of a 'political character'.

3.4 Contempt of court proceedings

We have sought legal advice about the process of contempt of court proceedings, the costs for such action and any relevant timelines. This advice is contained in attachment 7.

The final paragraph of page one of this advice, '...it is critically important that the requesting party proves that the relevant court orders were personally served upon Mr Becker & Ms Inglis', is the key to determining whether council should initiate contempt proceedings or whether we should rely on a third party to initiate the proceedings.

A third party who is affected by a contempt of court can make the necessary application themselves. In most cases there are practical difficulties with this because service of the relevant court orders (usually done by council) must be proved and also evidence of the contempt (which we have been gathering ourselves). In addition, a court might be reluctant to institute contempt proceedings

on application by a third party where we (council) do not consider it necessary or appropriate to make our own application.

Council officers served the ERD Court orders on Mr Becker and Ms Inglis on 23 February 2010. We have been documenting all signage that has appeared on the property, including measuring the dimensions of each sign to confirm whether they are exempt from approval.

Forwarding evidence to the court for its own pursuit of contempt proceedings will not have any effect other than to have the court return the correspondence. Although contempt proceedings are, legally, taken by the court itself, the court only initiates such proceedings on application of an interested party. Once initiated, the court will rely upon the interested party to furnish it with the necessary evidence.

The legal advice contained in attachment 7 is summarised as follows:

- contempt proceedings are initiated by filing an application with the ERD Court, together with supporting affidavits
- the application will request the court to issue a summons to Mr Becker and Ms Inglis requiring them to attend at court
- the court will arrange for a sheriff to serve the summons upon Mr Becker and Ms Inglis
- Mr Becker and Ms Inglis will either defend the proceedings or admit the contempt
- if we prove that Mr Becker and Ms Inglis are or have been in contempt of court, then the court may:
 - impose a fine
 - impose a sentence of imprisonment, which may be suspended subject to them entering into a good behaviour bond. If further contempts were committed we could apply to have the bond revoked and the imprisonment would commence
- the estimated cost for council to initiate contempt proceedings is approximately \$5000 to \$8000 (some of which is recoverable)
- if Mr Becker and Ms Inglis defended the proceedings, we would incur further costs of approximately \$5000 to \$8000 (some of which is also recoverable)
- there is no time limit within which to bring contempt proceedings, but excessive delays may infer that we waive our rights to make an application.

Our legal advice confirms that the unauthorised signs being placed by Mr Becker and Ms Inglis on 137 Commercial Road are in contempt of the court order. Council has decided on two previous occasions to take action under the Development Act and has successfully defended an appeal in the Supreme Court against the ERD Court's decision, which found in favour of council. Our normal course of action in such situations would be to pursue compliance with the decisions of the courts. To not do so would mean that council has spent substantial resources on this issue for no effective outcome. Recommendations 3 and 4 are both required to enact a decision of Council to take action.

In the majority of cases, enforcement action results in the resolution of a non-compliance under the Development Act without the need for court involvement. There are however, a relatively small number of compliance matters that become protracted and result in costs being incurred by the community, through ratepayer funds, in order to resolve the issue through the courts.

Parties who choose not to comply with legitimate requirements of legislation, and subsequently challenge enforcement action legitimately undertaken by council, do so in the knowledge that there is a risk of costs being incurred in the event of an adverse judgement.

Should Council not decide to initiate contempt proceedings against Mr Becker and Ms Inglis, the implications of setting a precedent for how we deal with future enforcement under the Development Act needs to be considered. The alternative recommendation is an appropriate resolution should Council decide not to take action.

Further direction is sought from Council as to whether we initiate contempt proceedings against Mr Becker and Ms Inglis for the placement of unauthorised signs at 137 Commercial Road, Port Noarlunga South.