

## 10.2 Fernleigh Gardens Retirement Village

*It is alleged that there has been a breach of a Section 84 notice issued under the Development Act 1993 to Fernleigh Gardens Retirement Village. Endorsement is sought for enforcement proceedings to be commenced in relation to this breach.*

*This is information seeking council direction.*

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Contact Number: 8384 0584  
File Reference:  
Attachments: 1. Legal advice from Norman Waterhouse (12 pages)

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## 1 Executive Summary

### 1.1 Topic

It is alleged that there has been a breach of a Section 84 notice issued under the Development Act 1993 to Fernleigh Gardens Retirement Village. Endorsement is sought for enforcement proceedings to be commenced in relation to this breach.

### 1.2 Context

Fernleigh Gardens Retirement Village, 177 Pimpala Road, Woodcroft, has previously been issued with a stop work order for a breach of the Development Act 1993. Ongoing development of the site has been the source of considerable dispute between the developers, adjoining residents and residents of the retirement village for several years. Elected Members and staff have been engaged in these issues periodically.

### 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 enforcement action undertaken by Council. Endorsement is sought for the commencement of enforcement proceedings.

## 2 Recommendation(s)

### 1. That:

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- 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:**
    - (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.**
2. **Council initiate enforcement proceedings under the relevant provisions of the Development Act (subject to legal advice on the appropriate process and section of the Act) in relation to alleged breaches of the Development Act relating to development of the Fernleigh Gardens Retirement Village at 177 Pimpala Road, Woodcroft.**
  3. **That an order be made under the provisions of Section 91(7) and (9) of the Local Government Act 1999 that the abovementioned document (or part of such document) including the minutes and the report of the Council relating to discussion of the subject matter of that document, having been dealt with on a confidential basis under Section 90 of the Act, should be kept confidential on the grounds of information contained in Section 90(3)(h) until conclusion of legal proceedings (including appeal actions) relating to the alleged breaches.**

## **Key Factors**

### **3 Discussion**

The Development Assessment Panel granted planning approval for a development application seeking variation to a previous consent in relation to the Fernleigh Gardens Retirement Village at its meeting of 12 June 2008. Council staff became aware that work had commenced on the approved variation without the building rules consent or civil development approval having been issued. A Section 84 notice under the Development Act 1993 was consequently issued on 29 September 2008 requiring work to cease.

On or about 12 November 2008, several workers were observed working on the site in contravention of the stop work notice. They were advised of the stop work notice and directed to cease work, and did so.

Due to the history of this site, we subsequently sought legal advice, as contained in Attachment 1, to determine what options Council has in

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pursuing the breach of the S84 notice. Staff also met with our solicitors on 5 December 2008 to further clarify the advice.

At the time of writing this report, the owner had not submitted documentation for Building Rules Consent, and Development Approval had not been issued.

The legal advice details several options for undertaking enforcement proceedings in relation to this alleged breach. In discussion with the solicitor, it became clear that pursuing a prosecution (criminal proceedings) would be substantially more onerous in terms of staff time and financial resources, as the burden of proof is higher (beyond reasonable doubt). Pursuing civil proceedings under Section 85 of the Act is less onerous as it requires a lower burden of proof (on the balance of probabilities).

If S85 proceedings were to be pursued, on legal advice Council would seek an order from the ERD Court requesting demolition of the unapproved building work, costs (for legal advice and assistance) and exemplary damages. Should development approval be granted whilst the proceedings are occurring, Council may seek leave to amend the requested order by removing the demolition aspect (as the breach has been remedied by the granting of the development approval), but still retaining the costs and exemplary damages components. Exemplary damages are effectively a penalty for breach of the Act over and above costs.

A prosecution for breach of the notice may be initiated under S84(11) of the Development Act, but it would need to be determined who is prosecuted (the landowner, the builder, the trades people, etc). Formal interviews would be required to be undertaken by staff of the workers observed onsite to determine who instructed the work to occur, whether they knew they were in breach etc. Their answers will determine whether further formal interviews would then need to be conducted with other parties involved.

The potential costs of taking legal action are estimated to be in the order of \$5,000 to \$10,000 initially but the final figure will be dependent upon the response of the owner to the action and the length of time proceedings take. A further option for Council is to expiate for breach of the S84 notice, which is a fee of \$750. However, no further enforcement action would be available to Council if this option were pursued.

Council's endorsement for undertaking enforcement action is requested with the type of enforcement action to be determined on the basis of legal advice.

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