

## **Fernleigh Gardens Retirement Village CONFIDENTIAL**

*Council direction is sought on whether to progress legal action against Excelsior Land Management Pty Ltd in relation to the development compliance matters at Fernleigh Gardens Retirement Village.*

This is an update on a previously reported subject, concept or issue.

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Attachments:

1. Extract from 'Normans Briefly' dated March 2012 (2 pages)
2. Legal advice from Norman Waterhouse Lawyers dated 15 January 2013 (4 pages)
3. Norman Waterhouse letter dated 12 February 2013 (1 page)

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### **1. Recommendation(s)**

#### **1.**

- 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.**
- 2. Council consider and determine its position in relation to continuing further legal action and winding up of Excelsior Land Management Pty Ltd.**
  - 3. That the matter of the Fernleigh Gardens Retirement Village 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 Fernleigh Gardens Retirement Village report and minutes of the Council relating to discussion of the subject matter be kept confidential until conclusion of any legal proceedings (including appeal actions) relating to a winding up application. The report attachments containing legal advice shall remain confidential.**
  - 4. That, pursuant to section 91(9)(a) of the *Local Government Act 1999*, Council delegates the duty to conduct an annual review of the confidentiality order to the Chief Executive Officer, or their sub-delegate.**
  - 5. That, pursuant to section 91(9)(c) of the *Local Government Act 1999*, Council delegates the power to revoke the confidentiality order to the Chief Executive Officer, or their sub-delegate.**

### **2. Background**

This matter has previously been considered as confidential items by Council at its 16 December 2008 and 7 July 2009 meetings. The 7 July 2009 resolution reaffirmed

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the 16 December 2008 resolution *'to 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.'* This reaffirmation was resolved with the knowledge of additional legal costs and likelihood of minimal costs being awarded in return.

These items have since been released from being confidential and can be viewed on Council's website [here](#). They were released following the successful prosecution for the unlawful building work, with a conviction and fine of \$12,800 recorded against the developer Excelsior Land Management Pty Ltd (ELM), as well as a costs order of \$5000 to Council. A summary of the facts in this case and the judgement of the Environment, Resources and Development Court is provided in the extract from the March 2012 edition of 'Normans Briefly' by Norman Waterhouse Lawyers (attachment 1). This was also provided to Elected Members for information in the 23 March 2012 edition of Weekly News.

Since this judgement however, ELM has not paid the fine or our costs. A chartered accountancy firm has been appointed as joint and several Receivers and Managers of the land ownership company for this part of the retirement village, Excelsior Land Holdings Pty Ltd (ELH), although it appears there have not been any applications to wind up ELH. This is a separate company to ELM that the Court convicted, fined and awarded our costs against, so we are unable to seek the fine and costs from ELH. Likewise, we are also unable to seek payments from Fernleigh Gardens Estate Pty Ltd, being another company with ownership of another part of the retirement village, which is being wound up.

The \$12,800 fine is owed to the Fines Payment Unit (FPU) of the Court, which would in turn be passed on to us if and when received. However, we understand the Court does not intend to take action against ELM at this time. Our lawyers, Norman Waterhouse, served a statutory demand on ELM on 7 December 2012 for our costs of \$5000, but only received an email response from the lawyer for ELM and ELH, Mr Neil Strawbridge, advising that *'I am informed by its director that the company has no assets, as the land-owning company, Excelsior Land Holdings is in Receivership'*. Accordingly, as ELM did not comply with the statutory demand, ELM is presumed to be insolvent, enabling us to seek an order for it to be wound up if we so choose. However, there would be further costs to proceed, with the real likelihood of these costs not being recovered.

Written legal advice setting out our options was received from Norman Waterhouse on 15 January 2013 and is provided as attachment 2. As a final offer on our behalf, Norman Waterhouse then wrote to Mr Strawbridge on 12 February 2013 (attachment 3), to advise that we will not file a winding up application against ELM if, by 28 February 2013, ELM pays the \$12,800 fine to the FPU, the \$5000 costs order to us, and the \$160 victims of crimes levy. However, a similar email response was again received from Mr Strawbridge, advising that *'I am instructed that the company has no funds or assets. That is because Excelsior Land Holdings is in Receivership, with Heard Phillips appointed by Westpac last year'*.

Given the above and the real likelihood of costs not being recovered, Council direction is now sought on whether to further pursue the winding up of ELM.

### 3. Financial Implications

As of 11 February 2013, we incurred \$88,769.92 (since 2008) in costs pursuing this matter consistent with the previous resolutions of Council (including GST, Norman Waterhouse fees, barrister's fees and other disbursements such as court filing fees). To pursue the winding up application against ELM is likely to cost a further \$5000 to \$6000 plus GST (including disbursements such as the Court filing fee of \$2196). The costs will be higher if ELM contests the application and we may be liable for their costs (although this is unlikely). If a winding up order is made, our costs may be recovered as a lump sum of \$4900 plus the \$2196 filing fee.

Given Mr Strawbridge's advice that ELM does not have any assets, there is a real likelihood that our debt, and the further costs to be incurred in the winding up application, will not be recoverable. Norman Waterhouse have checked that ELM does not own any property, however we cannot be sure they have no other assets (such as cash in a bank account) unless a winding up application is pursued.

The winding up application costs would be from the Development Services (within City Development) budget for 2012-2013. The three business units for legal costs within Development Services are currently over the approved budget, due mainly to a number of planning appeals and compliance actions this year, and complex legal issues needing advice.

Legal costs for Development Services are difficult to forecast, due to the unpredictable nature of development applications, appeals and compliance issues. As mentioned above, there have been a number of complex matters and appeals this financial year, including the telecommunications facility at Sellicks Beach, Girl Guides application at Blewitt Springs, and a number of rural living truck parking and industrial-type actions, applications and appeals.

The likely further expense of \$5000 to \$6000 plus GST to pursue this Fernleigh Gardens matter further can be accommodated within the Development Services/ City Development budget if Council resolves to pursue it. These issues will be addressed in Budget Review 3.

### 4. Risk and Opportunity

Key risks	Risk details and analysis
ELM contest a winding up application	Costs would exceed the estimated \$5000 to \$6000 plus GST, and there is a possibility of costs being awarded against us, although this seems unlikely.
ELM is wound up but there are no funds available for payment to Council	This is very likely, as we are not aware of ELM having any assets. A further \$6000 or so could be spent for no reimbursement, other than the enforcement proceedings being successfully completed with ELM both convicted and wound up. On the other hand, it may turn out that sufficient assets are found to be available to force our awarded costs and the fine to be paid.
Winding up is not pursued and ELM re-emerge to	We may miss our chance to receive the awarded costs, as winding up proceedings must be filed

continue developing the land	within three months of the failure to comply with the statutory demand (due 27 March 2013). We could then request the FPU to demand the \$12,800 fine payment, which would then flow to us. It is also possible that a different company with similar people involved may take the development over, whether ELM is wound up or not.
Community perceptions that enforcement processes under the Development Act are ineffective.	The events surrounding development compliance action in this matter highlight the complexity of the enforcement process and the financial risks associated with enforcement action. However, this is only one of a series of issues for consideration by Council when determining whether to pursue compliance action.

## 5. Discussion

A decision whether to pursue winding up ELM must be made at this Council meeting. If the winding up application is to be pursued, the application must be filed at the Court within three months of the Company's failure to comply with the statutory demand, so by 27 March 2013. This period cannot be extended. If the Council does not wish to pursue the winding up application now, an application can be filed at some future time (within the next five years), however a new statutory demand would need to be issued and the Company may be deregistered by the Australian Securities and Investments Commission (ASIC) at any time.

It is worth noting that the costs so far incurred (\$88,769.92) and the awarded costs and fine owed to us (total \$17,800) are within the ranges suggested by Norman Waterhouse in the advice presented to Council at the 7 July 2009 meeting. The resolution of Council from that meeting has been fulfilled, in that enforcement proceedings were initiated, which lead to a conviction against the developer. The building company (Alan Sheppard Constructions Pty Ltd) also pleaded guilty and was fined \$750 (which we received in November 2011), and a \$2000 costs payment was also agreed to and paid to us by the building company in July 2012.

The following options are suggested as wording for part 2 of the resolution:

- **That having regard to legal advice dated 15 January 2013, Council resolves to instruct its solicitors to file an Originating Process seeking an order that Excelsior Land Management Pty Ltd be wound up, and that the previously awarded costs and fine be paid in addition to our further costs in this action, relating to development of the Fernleigh Gardens Retirement Village at 177 Pimpala Road, Woodcroft. Council delegates any administrative duties in relation to this decision to the Chief Executive Officer and Director City Development.**

or

- **That having regard to legal advice dated 15 January 2013 and the further costs involved, Council resolves not to seek the winding up of Excelsior Land Management Pty Ltd, in relation to development of the Fernleigh Gardens Retirement Village at 177 Pimpala Road, Woodcroft.**