

Attachment 11.1

**Update on legal proceedings regarding unauthorised signage at 137
Commercial Road, Port Noarlunga South**

31 pages

11.1 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.

General Manager: Terry Sutcliffe, General Manager City Development

Report Author: Renée Mitchell, Manager Development Services

Contact Number: 8384 0584

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**

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.

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

Cr Nash MOVED:

1. *That:*

- a. *under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public with the exception of the Chief Executive Officer, General Manager Corporate and Community, General Manager Projects and Services, General Manager City Development, Chief Financial Officer, Manager Development Services, Group Manager Sustainability, Manager Property and Recreation Services, Team Leader Civic and Executive Administration and Minute Secretary 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.*

Seconded by Cr Merritt.

CARRIED

Cr Bray MOVED:

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.*

Seconded by Cr de Jonge.

Cr Bray WITHDREW his MOTION.

Cr Hammond MOVED:

2. *That Council authorise the Chief Executive Officer to explore an option for a settlement on the matter with Mr Becker and Ms Inglis or their representatives on the following potential option for settlement:*
 - *that Council will not pursue costs and/or contempt of court proceedings subject to an ongoing undertaking from Mr Becker and Ms Inglis that all unauthorised signs will be removed from the land and that the ERD Court order will be complied with, on the understanding that if Mr Becker and Ms Inglis breach this*

undertaking and the ERD Court order, Council may choose to pursue costs and/or contempt of court proceedings and report back to Council in April 2011 with respect to the option and the outcomes of settlement discussions with Mr Becker and Ms Inglis.

Seconded by Cr de Jonge.

CARRIED

Cr Parslow called a division.

For

<i>Cr Hammond</i>	<i>Cr Richardson</i>	<i>Cr Knight</i>	<i>Cr Kilby</i>	<i>Cr Swann</i>
<i>Cr Merritt</i>	<i>Cr Bray</i>	<i>Cr Sutherland</i>	<i>Cr de Jonge</i>	

Against

<i>Cr Jamieson</i>	<i>Cr Chapman</i>	<i>Cr Olsen</i>	<i>Cr Webster</i>	<i>Cr Nash</i>
<i>Cr Schulze</i>	<i>Cr R Brown</i>	<i>Cr Parslow</i>		

CARRIED

Cr Nash MOVED:

- 3. 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).*

Seconded by Cr de Jonge.

CARRIED

11.3 Motion to rescind a motion carried in confidence at the meeting of Council held on 15 February 2011

Cr Schulze has indicated his intention to move the following rescission motion, preceded by a motion to deal with the matter in confidence.

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)(i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place involving the council or an employee of council**
- 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. That Council rescind the following decision of Council passed at the Ordinary Council Meeting held on 15 February 2011 regarding Item 11.1 Legal proceedings regarding unauthorised signage at 137 Commercial Road, Port Noarlunga South:

'That Council authorise the Chief Executive Officer to explore an option for a settlement on the matter with Mr Becker and Ms Inglis or their representatives on the following potential option for settlement:

- *that Council will not pursue costs and/or contempt of court proceedings subject to an ongoing undertaking from Mr Becker and Ms Inglis that all unauthorised signs will be removed from the land and that the ERD Court order will be complied with, on the understanding that if Mr Becker and Ms Inglis breach this undertaking and the ERD Court order, Council may choose to pursue costs and/or contempt of court proceedings*

and report back to Council in April 2011 with respect to the option and the outcomes of settlement discussions with Mr Becker and Ms Inglis'

Should the rescission motion be carried, Cr Schulze has indicated his intention to subsequently move the following motion:

- 1. That Council 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. The summons would state 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 prepare such supporting documents, materials and evidence as are necessary to support such application and to prove such contempt of court 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.

2. 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, take all steps considered appropriate or necessary to give effect to Resolution 1, above, including:
 - obtaining legal representation for the Council; and
 - seeking 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.

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)(i) 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).

11.3 Motion to rescind a motion carried in confidence at the meeting of Council held on 15 February 2011

Cr Schulze has indicated his intention to move the following rescission motion, preceded by a motion to deal with the matter in confidence.

Cr Wenham resumed her seat in the chamber at 10.02pm.

Cr Schulze MOVED:

1. That:

- a. under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public with the exception of the Chief Executive Officer, General Manager Projects and Services, General Manager Corporate and Community, General Manager City Development, Chief Financial Officer, Group Manager Sustainability, Group Manager Governance, Manager Property and Recreation Services, Manager Infrastructure, Manager Development Services, Team Leader Plant & Fleet, Senior Strategic Planner and Minute Secretary 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)(i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place involving the council or an employee of council*
- 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.*

Seconded by Cr Chapman.

CARRIED

Cr Schulze MOVED:

- 2. That Council rescind the following decision of Council passed at the Ordinary Council Meeting held on 15 February 2011 regarding Item 11.1 Legal proceedings regarding unauthorised signage at 137 Commercial Road, Port Noarlunga South:*

'That Council authorise the Chief Executive Officer to explore an option for a settlement on the matter with Mr Becker and Ms Inglis or their representatives on the following potential option for settlement:

- that Council will not pursue costs and/or contempt of court proceedings subject to an ongoing undertaking*

from Mr Becker and Ms Inglis that all unauthorised signs will be removed from the land and that the ERD Court order will be complied with, on the understanding that if Mr Becker and Ms Inglis breach this undertaking and the ERD Court order, Council may choose to pursue costs and/or contempt of court proceedings

and report back to Council in April 2011 with respect to the option and the outcomes of settlement discussions with Mr Becker and Ms Inglis'

Seconded by Cr Chapman.

Cr Webster MOVED that the MOTION be PUT.

Seconded by Cr Nash.

CARRIED

The MOTION was PUT and CARRIED.

Cr Schulze MOVED:

- 3. That Council 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. The summons would state 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 prepare such supporting documents, materials and evidence as are necessary to support such application and to prove such contempt of court 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.*

- 4. 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, take all steps considered appropriate or necessary to give effect to Resolution 1, above, including:*
 - obtaining legal representation for the Council; and*
 - seeking 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.*

Seconded by Cr Jamieson.

Cr Richardson MOVED that item 11.3 Motion to rescind a motion carried in confidence at the meeting of Council held on 15 February 2011 be adjourned until 19 April 2011.

Seconded by Cr Bray.

LOST

Cr Sutherland MOVED that the MOTION be PUT.

Seconded by Cr R Brown.

CARRIED

The MOTION was PUT and CARRIED.

Cr Swann called for a division

For

<i>Cr Jamieson</i>	<i>Cr Chapman</i>	<i>Cr Olsen</i>	<i>Cr Wenham</i>	<i>Cr S Brown</i>
<i>Cr Webster</i>	<i>Cr Nash</i>	<i>Cr Schulze</i>	<i>Cr R Brown</i>	<i>Cr Parslow</i>

Against

<i>Cr Hammond</i>	<i>Cr Richardson</i>	<i>Cr Knight</i>	<i>C Kilby</i>	<i>Cr Swann</i>
<i>Cr Bray</i>	<i>Cr Sutherland</i>			

CARRIED

Cr Nash left her seat in the chamber at 10.57pm.

Cr Chapman MOVED that the meeting continue until the close of current business.

Seconded by Cr Webster.

CARRIED

Cr Nash resumed her seat in the chamber at 11.00pm.

Cr Jamieson MOVED:

- 3. 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)(i) 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 relating to discussion of the subject matter, be kept confidential until legal advice is received and a further report to Council.*

Seconded by Cr Chapman.

Cr Wenham MOVED that the MOTION be PUT.

Seconded by Cr Webster.

CARRIED

The MOTION was PUT and CARRIED.

11.2 Legal action regarding 226-230 O'Sullivan Beach Road, Morphett Vale

Contempt of court proceedings have commenced against the owners of 226-230 O'Sullivan Beach Road, Morphett Vale regarding an unauthorised shed on the land.

This is information seeking Council direction.

General Manager: Terry Sutcliffe, General Manager City Development
Report author: Ben Victory, Acting Manager Development Services
Contact number: 8384 0602
File reference:
Attachments: 1. Norman Waterhouse letter dated 16 August 2011 (2 pages)
2. Letter dated 16 August 2011 from Jo-Anne N Milen & Associates on behalf of Mr & Mrs O'Neil (1 page)
3. Confidential agenda report and minutes from the 21 June 2011 Council meeting (12 pages)

1 Executive summary

Contempt of court proceedings have commenced against the owners of 226-230 O'Sullivan Beach Road, Morphett Vale regarding an unauthorised shed on the land.

1.1 Context

Following the direction of Council from its 21 June 2011 meeting (refer to attachment 3), on 6 July 2011 we filed proceedings in the Environment, Resources & Development (ERD) Court alleging contempt of an order of that Court by Mr & Mrs O'Neil and requested the Registrar to issue a summons to Mr & Mrs O'Neil in relation to the alleged offence. On or about 18 July 2011, the Registrar issued a summons to Mr & Mrs O'Neil.

The matter came on for its first mention on 16 August 2011 before His Honour Judge Costello. Mr O'Neil pleaded guilty to the charge of contempt and Mrs O'Neil pleaded not guilty. Council direction is now sought on whether the Council wishes to effectively 'withdraw' the proceedings against Mrs O'Neil given her apparent lack of involvement and power in this matter, and to continue to proceed against Mr O'Neil only.

1.2 Financial implications

The contempt proceedings are **separate** to the section 85 civil enforcement proceedings in which we were successful. We have already secured an order permitting us to recover our costs of those proceedings, to either be agreed or taxed.

In relation to the contempt proceedings, the *ERD Court Act 1993* provides that where a person is found guilty of contempt arising from non compliance with an order, the Court may make such orders as to costs as it thinks fit. If the Court finds Mr and/or Mrs O'Neil guilty of the offence, then it would be reasonable for us to

attempt to seek an order for our costs incurred in bringing that matter to the attention of the Court. In this case, we will seek to recover our costs of the contempt proceedings, in so far as we can.

The question of costs is at the discretion of the Court. Over the last three months, we have incurred costs in pursuing the contempt proceedings, not all of which will be recoverable. We could attempt to recover our costs of filing the proceedings, including the preparation of the documentation used in the proceedings (ie the affidavits) and the attendance of our solicitor in Court.

There are ongoing resource costs in relation to staff time.

If Council wishes to pursue the contempt of court proceedings against Mrs O'Neil, there is a chance that we may not recover our costs of those proceedings against her and that we may also be required to pay costs to her if she is found by the Court to be not guilty of the offence.

1.3 Suggested outcome

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

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

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)(i) - information relating to actual litigation, or litigation that the Council or Council Committee believes on reasonable grounds will take place, involving the Council or an employee of the council.
- 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. **That the Council resolve that, subject to an agreement being reached that a claim for costs against council will not be pursued, to advise the Environment, Resources and Development (ERD) Court that it no longer wishes to pursue (and in so far as it can, it withdraws) contempt of court proceedings against Mrs Lilly O'Neil of 226-230 O'Sullivan Beach Road,**

Morphett Vale, in relation to the orders of the ERD Court in action no. 292 of 2009 dated 30 November 2010.

3. **That in relation to the matter of Mr Eric O'Neil and Mrs Lilly O'Neil of 226-230 O'Sullivan Beach Road, Morphett Vale, having been considered in confidence under Section 90(3)(i) 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 relating to discussion of the subject matter, be kept confidential until conclusion of legal proceedings (including any appeal actions).**

Key factors

3 Discussion

3.1 Background

The confidential report to the 21 June 2011 Council meeting provided a detailed chronology of events in this matter, dating back to the first development application for the shed in 2003 (refer to attachment 3). The shed was built much larger than was approved and subsequent applications for the larger shed were refused by both council and the ERD Court.

Since June, Mr O'Neil has removed unauthorised portions of the shed and substantially completed it in accordance with the approval granted by council's Development Assessment Panel on 28 October 2010. In addition, two development applications have since been approved by delegated authority to council staff, for minor variations to the 28 October 2010 shed approval. Accordingly, the authorisations provided from items 4 and 5 of Council's resolution made on 21 June 2011 are no longer required.

The summons for contempt was issued by the Registrar of the Court having been notified of the alleged contempt by council. As the orders were made against both Mr & Mrs O'Neil, we advised the Court that both Mr & Mrs O'Neil are in contempt as neither had complied with the orders of the Court by the relevant date. The action was taken against both Mr and Mrs O'Neil as they are joint owners of the land. In addition, some of the early development applications for the shed were lodged either in the name of Mrs O'Neil or with her as a joint applicant. However, the history of our negotiations in the matter have been with Mr O'Neil, particularly during the period of recent legal action.

It is apparent from communications with Mr and Mrs O'Neil by council's staff, lawyers and consultant planner, that Mrs O'Neil has had little if any involvement. As described in the attached letter dated 16 August 2011 from our lawyers Norman Waterhouse, the lawyer now acting for Mr & Mrs O'Neil, Ms Milen, has informed us '...that Mrs O'Neil was unable to act in this matter and was virtually powerless with respect to Mr O'Neil's actions'.

Further, the attached letter dated 16 August 2011 from Ms Milen states the following:

...Mrs O'Neil has indicated that she is not willing to plead guilty to the charge because as she says the only thing that she is guilty of is being a joint registered proprietor. She says she has no control in the situation which has developed between Mr O'Neil and the council. In those circumstances I invite the council to withdraw the application against Mrs O'Neil. I am instructed that the alternative is that Mrs O'Neil will defend the charge.

3.2 Conclusion

Direction is sought from Council as to whether the Council wishes to inform the ERD Court that it does not intend to pursue the contempt proceedings against Mrs O'Neil, given her apparent lack of involvement and control in the matter. This is considered to be reasonable in the circumstances and could also bring an end to our legal action when the submissions on penalty are made on 19 October 2011 in relation to Mr O'Neil (with the exception of council's costs recovery).

If Council wishes to not pursue the contempt proceedings against Mrs O'Neil, then the proposed recommended resolution 2 herein should be made.

Items 2b and 3b of Council's resolution made on 21 June 2011, in so far as they relate to Mrs O'Neil, will then not need to be pursued.

We no longer need to take action under section 85(12) of the *Development Act 1993* to seek to have the unlawful shed removed, as it has now been substantially completed in accordance with development approvals. Accordingly, the authorisations provided from items 4 and 5 of Council's resolution made on 21 June 2011 are no longer required.

The resolution from the 21 June 2011 Council meeting will continue to authorise the Chief Executive Officer (and any persons acting from time to time in that position) to, in the name of Council, seek from the ERD Court such remedies, penalties, punishments and orders against Mr O'Neil as the Chief Executive Officer considers appropriate based on legal advice. However, as the 16 August 2011 letter from Norman Waterhouse states, 'at the end of the day however, any penalty to be imposed upon him is in the discretion of the Court'.

Should Council wish to continue contempt proceedings against Mrs Lilly O'Neil, no resolutions need to be made in relation to Mrs O'Neil as Council's original resolution of 21 June 2011 will continue to stand.