

## 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.*

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Contact number:	8384 0602
File reference:	
Attachments:	<ol style="list-style-type: none"><li>1. Norman Waterhouse letter dated 16 August 2011 (2 pages)</li><li>2. Letter dated 16 August 2011 from Jo-Anne N Milen &amp; Associates on behalf of Mr &amp; Mrs O'Neil (1 page)</li><li>3. Confidential agenda report and minutes from the 21 June 2011 Council meeting (12 pages)</li></ol>

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### 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.

