

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

The owners of 226-230 O'Sullivan Beach Road, Morphett Vale are required to comply with a court order by removing an unauthorised shed by 28 April 2011. Compliance with that court Order has not been achieved.

This is information seeking Council direction.

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Contact number:	8384 0584
File reference:	
Attachments:	<ol style="list-style-type: none">1. ERD Court order dated 30 November 2010 (1 page)2. Norman Waterhouse letter dated 30 November 2010 (2 pages)3. ERD Court order dated 13 May 2005 (1 page)4. DAP agenda item of 28 October 2010 for DA 145/2244/10 (73 pages)5. Norman Waterhouse letter dated 23 March 2011 (2 pages)

1 Executive summary

1.1 Topic

The owners of 226-230 O'Sullivan Beach Road, Morphett Vale are required to comply with a court order by removing an unauthorised shed by 28 April 2011. Compliance with that court Order has not been achieved.

1.2 Context

Council direction is sought on whether to commence contempt of court proceedings and action under the *Development Act 1993* for removal of the partially constructed shed against the owners, Mr Eric and Mrs Lilly O'Neil, of 226-230 O'Sullivan Beach Road, Morphett Vale for not complying with an Environment, Resources and Development Court Order requiring that an unauthorised shed be removed from the property by 28 April 2011.

1.3 Financial implications

We are able to recover approximately two-thirds of our costs in relation to this ongoing matter, as ordered by the Environment, Resources and Development Court. We will be seeking costs in the vicinity of \$10,000.

Should we seek to have the partially constructed shed removed, we may recover the costs of that work as a debt against the property, should the landowner not pay these costs on invoice.

There are ongoing resource costs in relation to staff time. Ongoing legal costs are partially recoverable.

1.4 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 to use for this purpose.

This item is presented as a confidential item because of potential legal action that may be taken by the council.

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 and removal of the partially constructed shed 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)(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:

- 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 Eric O'Neil and Lilly O'Neil of 226-230 O'Sullivan Beach Road, Morphett Vale, 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. 292 of 2009 dated 30 November 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 for any action for contempt brought by the Registrar of the ERD Court against Mr and Mrs O'Neil or otherwise to provide such assistance as desired by the Court in its proceedings for contempt of court against Mr and Mrs O'Neil.**
3. **That Council authorise the Chief Executive Officer (and any persons acting from time to time in that position) to, in the name of Council:**
 - a. **Take all steps considered appropriate or necessary to give effect to the resolution 2 above, including obtaining legal representation for the Council.**
 - b. **Seek from the ERD Court such remedies, penalties, punishments and orders against Mr and Mrs O'Neil as the Chief Executive Officer considers appropriate based on legal advice.**
4. **That Council authorise the Chief Executive Officer (and any persons acting from time to time in that position) to, in the name of the Council:**
 - a. **Cause the removal of the partially completed shed structure from the land known as 226-230 O'Sullivan Beach Road, Morphett Vale, as contemplated by the order of the ERD Court in action no. 292 of 2009 dated 30 November to be carried out.**
 - b. **Recover the costs of that work, as a debt from Eric and Lilly O'Neil.**
5. **That Council authorise the Chief Executive Officer (and any persons acting from time to time in that position) to, in the name of the Council:**
 - a. **Take all steps considered appropriate or necessary to give effect to resolution 4, including obtaining legal advice or representation as required.**
6. **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 history of this issue is protracted. In summary, the key events relating to this issue are:

- On 28 March 2003, Mrs Lilly O'Neil lodged a development application for the construction of a 9m x 15m x 3m domestic shed on a large residential site at 226-230 O'Sullivan Beach Road, Morphett Vale.

- On 24 July 2003, development approval was issued for the shed (development application 145/1121/03).
- In August 2004, we received a complaint from a neighbour that the shed was not being constructed in accordance with the approval. An inspection by a compliance officer confirmed that the shed being constructed was 12m x 21m x 4m in dimensions.
- On 25 August 2004, a section 84 notice was issued under the Development Act directing the construction work on the shed to cease. Mrs O'Neil appealed the section 84 notice to the Environment, Resources and Development (ERD) Court.
- On 23 August 2004, Mr Eric O'Neil lodged a development application seeking to vary the approved plans, so that the proposed shed would be 9m wide with a 2.4m verandah, 24m long including a 3m open section, and a height of 4m (development application 145/2918/04). This application was consistent with the shed being constructed without approval. The section 84 notice was held in abeyance pending the outcomes of assessment of the development application.
- On 16 December 2004, planning consent was refused for development application 145/2918/04.
- On 2 February 2005, Mr O'Neil appealed the refused decision to the ERD Court.
- No compromise or settlement was reached during the conference and the appeal was set down for hearing. The appeal in relation to the section 84 notice was dealt with at the same time as the planning appeal.
- The appeals were heard before a commissioner of the ERD Court on 13 May 2005.
- The ERD Court dismissed both appeals and found in favour of the council. A copy of the ERD Court's order is contained in attachment 3.
- On 13 September 2005, Mr and Mrs O'Neil lodged a third development application (145/3162/05) seeking to vary the original consent by proposing a shed of 9m x 15m x 3m with verandahs extending around the eastern and southern sides, bringing the overall dimensions of the structure to 12m x 21m x 3m.
- On 21 December 2006, development application 145/3162/05 was refused planning consent on the basis that the applicant had not provided sufficient information.
- On 17 February 2007, Mr O'Neil lodged an appeal with the ERD Court against the decision.
- On 29 June 2007, the court upheld the appeal and ordered that development application 145/3162/05 be remitted to the council for a decision on the merits of the development.
- The Development Assessment Panel (the panel) refused the application on 22 November 2007, as it was considered to be seriously at variance with the Development Plan.
- On 22 January 2008, Mr O'Neil appealed the decision to the ERD Court.
- On 24 September 2008, the ERD Court heard the appeal.

- On 22 October 2008, the ERD Court dismissed the appeal and upheld the decision of council to refuse development application 145/3162/05.
- On 22 December 2008, authorisation from the Attorney-General was sought to institute section 85 proceedings (civil proceedings under the *Development Act 1993* where application is made to the court for a court Order to be made directing various actions to be taken) in the ERD Court, as more than three years had lapsed since the offence had occurred.
- On 24 February 2009, the Attorney-General granted authorisation for council to undertake section 85 proceedings against Mr and Mrs O'Neil in the ERD Court (although this was only communicated to us on 9 April 2009).
- On 3 September 2009, the ERD Court granted leave for council to serve a summons upon Mr and Mrs O'Neil advising that council intended to seek an order of the court that all unauthorised building work be removed within three months and the council's costs be paid.
- The summons was served on Mrs O'Neil on 8 September 2009.
- Mr and Mrs O'Neil did not respond to the summons.
- Mr and Mrs O'Neil's son, Allen O'Neil, suffered a fatal injury at the Meyer Road, Lonsdale desalination plant work site on 12 December 2009. Mr Allen O'Neil died on 15 February 2010.
- On 29 April 2010, an ERD Court conference was held with respect to the enforcement proceedings. Council communicated to the court that there was no room for compromise and that if the requirements of the summons could not be agreed between the parties, the matter should proceed to trial.
- On 28 June 2010, a judge of the ERD Court heard the matter and ordered that the partially constructed shed be removed from the land prior to 28 November 2010.
- It was envisaged by the court at the time that Mr O'Neil would submit a fourth development application for the originally approved structure (as the original approval had lapsed).
- On 30 June 2010, Mr O'Neil lodged development application 145/2244/10 seeking approval for a domestic shed of dimensions 15m x 9m x 3m.
- On 28 October 2010, the DAP approved the development application. A condition of approval is that the shed be completed by 28 April 2011, which was proposed by and agreed to by the applicant. A copy of the DAP's agenda item is contained in attachment 4.
- As a result of the DAP's decision, it was considered reasonable that Mr and Mrs O'Neil be given additional time to remove from the land the partially constructed shed (which was required to be done by 28 November 2010) and to complete the shed approved in development application 145/2244/10.
- On 30 November 2010, on application by council, the ERD Court revoked its original order of 28 June 2010 (which required the shed to be removed by 28 November) and further ordered that:
 - the unauthorised shed must be removed before 28 April 2011

- Mr and Mrs O'Neil must seek building rules consent for and complete the construction of the shed approved in development application 145/2244/10 in accordance with the conditions of approval (including that the shed be completed by 28 April 2011)
- that Mr and Mrs O'Neil pay the council's costs (a copy of the ERD Court decision is contained in attachment 1 and a summary by Norman Waterhouse of the hearing is contained in attachment 2).
- On 25 January 2011, a private certifier engaged by the applicant issued building rules consent for development application 145/2244/10.
- On 1 February 2011, development approval was issued for development application 145/2244/10.
- Our solicitors sent Mr and Mrs O'Neil a letter dated 23 March 2011 (attachment 4) reminding them of the requirements of the ERD Court order and encouraging them to comply with the requirements. This letter resulted in a lengthy phone call from Mr O'Neil to our planning consultant, Mr Dennis Batge, the next day, during which Mr O'Neil indicated that he had other priorities. Mr Batge reiterated that council was aiming to resolve the matter.
- Some activity has occurred on the land, predominantly during the Easter period, resulting in the lowering of the shed to the approved 3m height.
- At our suggestion, Mr O'Neil made application to the court seeking an extension of time to complete the shed by 30 November 2011. Mr O'Neil failed to attend the court hearing, at 9am on 19 May 2011, in support of his application. The court dismissed Mr O'Neil's application.
- At our further encouragement, Mr O'Neil wrote again to the ERD Court, on 2 June 2011, apologising for not attending on 19 May and requesting that the matter be reopened. We have not objected to this request. At the time of writing the report, we have not heard from the court as to its response to this request.

We have made several attempts since the court's decision of 30 November 2010 to encourage Mr and Mrs O'Neil to achieve the requirements of the order. We have agreed to delay discussion about costs as our primary aim has been to have the partially constructed shed altered so that it complies with the most recent development approval (145/2244/10). We will be seeking costs in the vicinity of \$10,000, being approximately two-thirds of council's actual legal costs (as detailed in attachment 2).

3.2 Contempt of court proceedings

A third party who is affected by a contempt of court can make the necessary application themselves, in addition to council initiating action. In most cases there are practical difficulties with this because service of the relevant court orders (usually done by council) must be proved by the third party 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.

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.

Contempt proceedings are 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 and Mrs O'Neil requiring them to attend at court
- the court will arrange for a sheriff to serve the summons upon Mr and Mrs O'Neil
- Mr and Mrs O'Neil will either defend the proceedings or admit the contempt
- if we prove that Mr and Mrs O'Neil 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 and Mrs O'Neil defend the proceedings, we would incur further costs of approximately \$5000 to \$8000 (some 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.

3.3 Removal of the unlawful shed

A contempt of court action does not address the issue of the ongoing breach. In the event that a person is in breach of a court Order made under section 85(6)(d) of the *Development Act 1993*, the council can exercise its powers under section 85(12) of the Act to cause any work contemplated by the Order to be carried out, and may recover the costs of that work, as a debt, from the respondent.

Section 85(13) of the Act sets out the process for recovering any debt arising under section 85(12). The process requires Council to give notice in writing to the person advising:

- of the quantum of the debt
- of a period (of at least 28 days) within which the amount must be paid
- that in the event that the amount is not paid within that time, that the person will be liable to pay interest charged as a prescribed rate on the amount unpaid

- that the amount charged, together with any interest charged, is until paid a charge in favour of the council on any land owned by that person.

Section 107 of the Act sets out the process for entering a note of the charge against the relevant instrument of title. Council must give notice in a prescribed form setting out the amount of the charge and the land over which the charge is claimed.

A warrant would need to be obtained from a magistrate to enable council officers and/or contractors to enter the land and remove the unlawful shed from the land.

Council would then have obligations and duties under the *Unclaimed Goods Act 1987* to adhere to in relation to the materials (the partially completed shed structure) that it takes from the land which would include (among other things) storing the materials and giving Mr and Mrs O'Neil an opportunity to claim the materials within three months from the date on which council took possession of the goods. In the event that the materials are not claimed, council might be required (if the value of the goods is \$500 or more) to seek the authorisation of the court to offer the materials for sale as bailee.

3.4 Conclusion

Our normal course of action in such situations would be to pursue compliance with the decisions of the court. 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 relation to contempt of court proceedings, with recommendations required to enact a decision of Council to take action to seek to remove the unlawful shed.

In the majority of cases, enforcement action results in the resolution of a non-compliance under the *Development Act 1993* 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 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 or proceeding for the removal of the partially constructed shed against Mr and Mrs O'Neil, the implications of setting a precedent for how we deal with future enforcement under the *Development Act 1993* needs to be considered. The alternative wording of a resolution below is appropriate should Council decide not to take action:

- *That the report concerning the acts and activities of Eric O'Neil and Lilly O'Neil be received and that Council not seek any proceedings for contempt of court or proceedings for the removal of the partially constructed shed be brought against Eric O'Neil and Lilly O'Neil.*

AND

- *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, for review in 12 months' time.

Direction is sought from Council as to whether we initiate contempt proceedings against Mr and Mrs O'Neil and take action under section 85(12) of the Development Act to seek to have the unlawful shed removed.