

## **10.2 Fernleigh Gardens Retirement Village**

*Council's decision to initiate enforcement proceedings in relation to alleged breaches of the Development Act relating to development of the Fernleigh Gardens Retirement Village is presented for review given recent legal advice.*

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Contact Number: 8384 0584  
File Reference:  
Attachments: 1. Confidential agenda and attachment for Item 10.2 of 16  
December 2008 (18 pages).  
2. Legal advice from Norman Waterhouse dated 5 May 2009 (4  
pages).

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### **1 Executive summary**

#### **1.1 Topic**

Council's decision to initiate enforcement proceedings in relation to alleged breaches of the Development Act relating to development of the Fernleigh Gardens Retirement Village is presented for review given recent legal advice.

#### **1.2 Context**

Council resolved in confidence at its meeting of 16 December 2008 to initiate enforcement proceedings for an alleged breach of a Section 84 notice, which was issued under the Development Act to Fernleigh Gardens Retirement Village on 29 September 2008 requiring unauthorised building work to cease. Further legal advice has been obtained which provides information on the legal process, level of proof required and potential costs of such action, warranting further review by Council of this issue.

#### **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 section.

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.

That council determine its position in relation to proposed enforcement action in relation to alleged breaches of the Development Act relating to the Fernleigh Gardens Retirement Village site.

## **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:**
    - (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 proposed enforcement action in relation to alleged breaches of the Development Act relating to the Fernleigh Gardens Retirement Village site.**
  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 any legal proceedings (including appeal actions) relating to the alleged breaches.**

## **Key Factors**

### **3 Discussion**

Further legal advice has been received in relation to the processes and costs associated with the proposed prosecution relating to the Fernleigh Gardens Retirement Village site. This advice is contained in Attachment 2 and outlines the evidentiary requirements in preparing for any prosecution and the difficulty in proving certain matters. Before proceeding further in this matter, the opportunity is available to consider the next steps, given the significant costs for council associated with this action and minimal penalty for the defendant(s) should council be successful. Attachment 1 contains the agenda item and legal advice that was considered in confidence by council on 16 December 2008.

Attachment 2 details as far as possible the costs that may be incurred by council in preparing the prosecution, in prosecuting its case in the Environment, Resources and Development Court and any likely penalty that may be imposed by the Court against the defendant if council is successful.

In summary, the advice contains the following information:

Preparatory legal fees of approximately \$15,000 plus \$5000 for additional advice from a criminal barrister plus council staff resources.

- Prosecution fees:
  - pre-trial preparation legal fees of approximately \$5-10,000
  - trial legal fees \$40-60,000 + \$20-30,000 for criminal barrister fees.
- Total legal costs for council prosecution could be \$80-120,000.
- The penalty for the defendant if the council prosecution is successful is approximately \$5-10,000 + \$20,000. Any penalty is payable to council.
- Council is only likely to recover 5-10% of the total legal costs if successful (staff costs are not recoverable).

The council staff resources are not measurable at this time, but if prosecution is pursued, substantial time will need to be dedicated to pursuing this matter, which will require the re-prioritising of other matters. Over \$9000 has been expended on legal fees on this matter to date.

Council no longer has the option of expiating for breach of the S84 notice, which is a fee of \$750, as this must be done within six months of the date of when the offence was alleged to have been committed (the date of the alleged offence was 12 November 2008).

Before proceeding further with the prosecution action, confirmation is sought from council in relation to pursuit of this issue given:

- the legal advice received, and
- the substantial costs involved relative to the scale of the breach and the likely penalty.

In the event that council wishes to continue with enforcement action, an appropriate resolution is to confirm its decision of 16 December 2008 as follows:

*'That having regard to legal advice dated 5 May 2009, Council reaffirm its decision of 16 December 2008 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.'*

In the event that council wishes to cease pursuing enforcement on this issue, it would be appropriate that council defer consideration of this item. A formal rescission motion will be required to be submitted by a councillor in accordance with the Local Government (Procedures at Meetings) Regulations 2000 for consideration at a future meeting of council.

