

Hunter's Hill Council



**Extraordinary Meeting
No. 4410
10 October 2016 at 6.30 pm**



ORDER OF BUSINESS

Prayer

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(including Rescission Motions)

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**HUNTER'S HILL COUNCIL
EXTRAORDINARY MEETING OF COUNCIL
Meeting 4410 - 10 October 2016
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1 - OUR COUNCIL

- 1.1 Consideration Of Appeal Against Land & Environment Court Judgement On
Forced Merger

1

ITEM NO	:	1.1
SUBJECT	:	CONSIDERATION OF APPEAL AGAINST LAND & ENVIRONMENT COURT JUDGEMENT ON FORCED MERGER
CSP OUTCOME	:	COUNCIL IS RECOGNISED AND RESPECTED AS AN OPEN AND TRANSPARENT ORGANISATION
DELIVERY PLAN STRATEGY	:	COUNCILLORS ARE WELL-INFORMED ABOUT ISSUES/PROJECTS
REPORTING OFFICER	:	BARRY SMITH

Ref:274381

INTRODUCTION

The purpose of this report is to provide information to the Council that will enable a decision to be made regarding its intention to appeal a recent judgement in the Land & Environment Court against Council.

REPORT

An Extraordinary Meeting of Council was convened on 23rd September 2016 following Mr Justice Moore delivering a judgement in the Land & Environment Court on Tuesday 20 September 2016, regarding the action taken by Hunter's Hill, Lane Cove and Ryde City Councils, over the State Government merger proposal.

The purpose of the meeting was to respond to the following resolution adopted at the Ordinary Meeting held on 25 July 2016, in part as follows

- 211/16**
3. *That in the event of an unfavourable determination of the current L & E Court matter, Council grants the Mayor and General Manager delegation in relation to lodging a notice of intention to appeal, so that advice can be obtained pertaining to the judgment and appropriate action required to be taken concerning any appeal. This delegation shall extend to taking any interlocutory action in the event that the government will not give an undertaking to allow any appeal to proceed.*
 4. *Should an appeal against an unfavourable determination be a considered option, the matter be reported to Council as soon as possible to make a determination whether to appeal. Such a report to include legal advice regarding grounds for an appeal, prospects for success or otherwise, estimate of Council's costs and estimate of costs that could be awarded if an appeal proceeds and is lost.*

Immediately following the judgement in the L & E Court legal advice was sought from Senior Counsel.

Following consideration of the legal advice as referred to in point 4 above, Council resolved at the Extraordinary Meeting as follows:

- 284/16**
1. *That Council lodges a Notice of an Intention to Lodge an Appeal against the judgement brought down in the L & E Court against Council on 20th September and seeks agreement from the State Government not to take any further action prior to the Woollahra appeal determination, or for seven (7) days thereafter.*
 2. *That Council seeks an injunction, or interlocutory orders, to stay any action should the State Government not agree to an undertaking as requested in 1 above.*
 3. *That should the State Government not agree to give an undertaking as requested in 1 above Council considers lodging a formal appeal subject to further advice from Counsel and consideration by Council at the earliest opportunity.*
 4. *Council's lawyers are instructed to make an application to the L & E Court in respect of costs (Para 524 of Judgement) that each party pays their own costs.*

The following actions and outcomes have subsequently been undertaken, or occurred, in response to the resolution of 23rd September 2016.

Part 1

- The notice was lodged and a return date on the appeal was given for 19th December, 2016
- The Minister agreed to the undertaking as requested.
- The resolution requires that the Council must take action regarding the appeal within 7 days of the Court of Appeal judgment in the Woollahra case.
- Further action regarding the Appeal requires a resolution of Council.

Part 2

This part of the resolution became redundant following agreement to an undertaking by the Minister.

Part 3

In line with the resolution, instructions were also given to seek more fulsome advice from Senior Counsel regarding an appeal, for consideration by Council at the earliest opportunity.

The additional advice from Senior Counsel has been received and will be tabled at this meeting and should be considered in conjunction with the advice tabled at the Extraordinary Meeting held on 23 September, 2016, of which a copy was provided to all Councillors. The additional advice provides an opinion regarding two other grounds for appeal.

Part 4

Council's lawyers were instructed in respect of the matter of costs, and subsequent legal advice was received advising that *"there are not reasonable prospects of persuading the Court to depart from the proposed costs order that the Council pay the Crown's costs of the proceedings"*.

Given this advice and our previous position of following the advice of our legal team, the Mayor and I followed this advice and instructed our lawyers not to proceed with the costs application. (Any application had to be filed by midnight 4th October 2016).

Information received also advises that no Councils have proceeded with a costs application.

Further considerations

The advice provided to Council on 23rd September is the substantive advice to be considered.

In total the legal advice(s) from Senior Counsel examine eight (8) grounds for appeal, with five (5) rated as having reasonable prospects of success, one (1) having good prospects of success, one (1) not without prospects of success and one (1) not enjoying reasonable prospects of success.

A number of the grounds for appeal, five (5), are impacted by the Woollahra judgement and if these are then subsequently found to be not appealable the advice provides two (2) grounds on which an appeal could be based, both rated with reasonable prospects of success by Senior Counsel.

CONCLUSION

If all matters impacted by Woollahra are ruled out, that leaves two (2) grounds for appeal and if those are won it puts Council in a similar position as Mosman, Strathfield and North Sydney now find themselves. It is understood that those three Councils intend to appeal the present L & E Court judgements.

What we do not know at this time is the State Government response to the Mosman, Strathfield and North Sydney judgements, including a possible cross-appeal. The State Government response to those judgements may well influence each Council's position going forward.

Council should be aware that Lane Cove Council is currently considering its position and if they also resolve to continue with an appeal, costs could be shared.

While the date for a judgement in Woollahra is not known, it seems reasonable to assume that it may be handed down within the next two weeks. Council will then have only seven days to respond to the judgement and in these circumstances needs to be in a position to do so quickly, if the intention were to proceed with an appeal.

Based on the available legal advice and information, Council may wish to take this opportunity to consider its position in respect of proceeding with an appeal

FINANCIAL IMPACT ASSESSMENT

The current estimate for the court case is \$250,000 and this will be fully expended. As previously advised no budget provision has been made for costs awarded against Council, or costs associated with an appeal.

No indication has been given by the Government as to their costs in any matters at this time. It is not unreasonable to assume that those costs would be at least equivalent, if not more, than Council's own costs.

Council's legal advisors were asked to provide an estimate of these costs and agreed that they would be at least the equivalent to Council's costs, or higher, and that the costs for an appeal would be in the order of \$100,000. However, this may be offset if a cost sharing agreement can be reached.

Any financial impact will be on the 2016/17 budget and separate funding provisions will be required.

The Section 23A Guidelines provide the following advice:

“Should any future expenditure be outside of a council’s adopted budget and be of an amount equal to or greater than \$250,000 or 1% of the council’s revenue from rates in the preceding financial year (whichever is the larger), then such a variation shall be advertised and public comments invited”. *(Page 6 Council Decision Making During Merger Proposal Periods, Dec. 2015)*

The 2016/17 Budget contains an estimate of \$200,000 for L & E Court matters of which \$50,000 has been expended or is committed. This allocation could be used to fund an appeal if Council was of a mind to pursue such a course.

In respect of costs of the current action they are only a ‘guesstimate’, therefore it is suggested that given the doubt around a definite costs estimate that further consideration of this component is deferred until the next budget review.

ENVIRONMENTAL IMPACT ASSESSMENT

There is no direct environmental impact on Council arising from Council consideration of this matter.

SOCIAL IMPACT ASSESSMENT

There is no direct social impact on Council arising from Council consideration of this matter.

RISK ASSESSMENT

As previously advised the major risk is Council having run the case and lost, that costs would be awarded against Council. This has occurred.

If an appeal is run and lost, costs would in all likelihood also be awarded against Council.

Conversely if an appeal is run and won then Council’s costs may be recovered.

In the event Council does not appeal, or loses an appeal, the merger proposal would proceed, a new entity would be proclaimed and Hunters Hill Council would cease to exist.

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This report responds to the need to ensure that Councillors are well informed about issues/projects.

RECOMMENDATION

1. That the actions of the Mayor and General Manager in respect of not pursuing a costs application are endorsed.
2. That Council considers its position in respect of proceeding with an appeal.

ATTACHMENTS

There are no attachments to this report.