



Urban Planning Committee

Agenda: *Urban Planning Committee*

Date: *Monday, 26 March 2007*

Time: *6.00pm*

Outline of Meeting Protocol & Procedure:

- The Chairperson will call the Meeting to order and ask the Committee/Staff to present apologies or late correspondence.
- The Chairperson will commence the Order of Business as shown in the Index to the Agenda.
- At the beginning of each item the Chairperson will ask whether a member(s) of the public wish to address the Committee.
- If person(s) wish to address the Committee, they are allowed four (4) minutes in which to do so. Please direct comments to the issues at hand.
- If there are persons representing both sides of a matter (eg applicant/objector), the person(s) against the recommendation speak first.
- At the conclusion of the allotted four (4) minutes, the speaker resumes his/her seat and takes no further part in the debate unless specifically called to do so by the Chairperson.
- If there is more than one (1) person wishing to address the Committee from the same side of the debate, the Chairperson will request that where possible a spokesperson be nominated to represent the parties.
- The Chairperson has the discretion whether to continue to accept speakers from the floor.
- After considering any submissions the Committee will debate the matter (if necessary), and arrive at a recommendation (R items which proceed to Full Council) or a resolution (D items for which the Committee has delegated authority).

Delegated Authority (“D” Items):

- To require such investigations, reports or actions as considered necessary in respect of matters contained with the Business Agendas (and as may be limited by specific Council resolutions).
- Confirmation of Minutes of its Meeting.
- Any other matter falling within the responsibility of the Urban Planning Committee and not restricted by the Local Government Act or required to be a Recommendation to Full Council as listed below:

Recommendation only to the Full Council (“R” Items):

- Such matters as are specified in Section 377 of the Local Government Act and within the ambit of the Committee considerations.
- Broad strategic matters, such as:-
 - Town Planning Objectives; and
 - major planning initiatives.
- Matters not within the specified functions of the Committee.
- Matters requiring supplementary votes to Budget.
- Urban Design Plans and Guidelines.
- Local Environment Plans.
- Residential and Commercial Development Control Plans.
- Rezoning applications.
- Heritage Conservation Controls.
- Traffic Management and Planning (Policy) and Approvals.
- Commercial Centres Beautification Plans of Management.
- Matters requiring the expenditure of moneys and in respect of which no Council vote has been made.
- Matters reserved by individual Councillors, in accordance with any Council policy on "safeguards" and substantive changes.

Committee Membership:

7 Councillors

Quorum:

The quorum for a committee meeting is 4 Councillors.

WOOLLAHRA MUNICIPAL COUNCIL

Notice of Meeting

22 March 2007

To: The Mayor, Councillor Keri Huxley, ex-officio
Councillors Geoff Rundle (Chair)
 Isabelle Shapiro (Deputy Chair)
 John Comino
 Christopher Dawson
 Wilhelmina Gardner
 David Shoebridge
 John Walker

Dear Councillors

Urban Planning Committee Meeting – 26 March 2007

In accordance with the provisions of the Local Government Act 1993, I request your attendance at a Meeting of the Council's **Urban Planning Committee** to be held in the **Committee Room, 536 New South Head Road, Double Bay, on Monday 26 March 2007 at 6.00pm.**

Gary James
General Manager

Additional Information Relating to Committee Matters

Site Inspection

Other Matters

Meeting Agenda

Item	Subject	Pages
1	Leave of Absence and Apologies	
2	Late Correspondence	
3	Declarations of Interest	

Items to be Decided by this Committee using its Delegated Authority

D1	Confirmation of Minutes of Meeting held on 12 March 2007	1
----	--	---

Items to be Submitted to the Council for Decision with Recommendations from this Committee

R1	Rose Bay & Point Piper Marinas Redevelopment – Assessment & Resourcing – 900.G	2
R2	Response to Notice of Motion – Sydney Grammar School Tennis Court Site Rezoning – 324.	15
R3	Unauthorised & Illegal Works & Uses – Draft Enforcement Policy – 885.G ENF	21

Item No: D1 Delegated to Committee
Subject: **Confirmation of Minutes of Meeting held on 12 March 2007**
Author: Les Windle, Manager – Governance
File No: See Council Minutes
Reason for Report: The Minutes of the Meeting of Monday 12 March 2007 were previously circulated. In accordance with the guidelines for Committees' operations it is now necessary that those Minutes be formally taken as read and confirmed.

Recommendation:

That the Minutes of the Urban Planning Committee Meeting of 12 March 2007 be taken as read and confirmed.

Les Windle
Manager - Governance

Item No: R1 Recommendation to Council
Subject: **Rose Bay & Point Piper Marinas Redevelopment – Assessment and Resourcing**
Author: Peter Kauter, Executive Planner
File No: 900.G
Reason for Report: Response to Notice of Motion

Recommendation:

1. That, in relation to the assessment of the development application for the redevelopment of the Rose Bay & Point Piper marinas:
 - A. the Council commission a report on the traffic and parking impacts of the proposed development from an independent traffic consultant
 - B. if it is considered necessary, based on the response from the applicant for additional information on marine biological impacts and proposed environmental management provisions, the Council commission reports from a marine ecological expert and a contamination expert
 - C. the Council note the request for the NSW Maritime Authority to provide a copy of the relevant documents relating to the application, assessment and determination of the land owner's consent application

Background:

The following Notice of Motion was adopted by Council at its meeting on 26 February 2007:

A report, as a matter of urgency, be brought to the Urban & Planning Committee advising Council as to the required and or advisable reports for Council's consideration of the proposed Rose Bay/Point Point Piper Marinas with emphasis on the reports that have a greater scope in respect to issues of Harbour usage, ecological and related issues over and above issues that pertain to Woollahra Municipality with the view of requesting that the State Government/Waterways undertake such reports or alternatively requesting the financial support of the State Government/Waterways for the undertaking of such reports.

There was another Notice of Motion adopted at the same Council meeting which requires:

A report be brought to the Urban Planning Committee advising of the issues encountered by Council in assessing commercial marina development within the Municipality particularly with respect to the Royal Motor Yacht Club at Point Piper.

The relevant files to enable the preparation of a report on this second resolution are being retrieved and reviewed. A separate report will be submitted to a subsequent meeting of the Committee.

The Director General's position

The Director General of the Department of Planning wrote to Mr Greg Britton of Patterson Britton & Partners Pty Ltd on 13/06/06 in the following terms:

I refer to the proposal by Addenbrook Pty Ltd to redevelop the Rose Bay and Point Piper Marina's in Sydney Harbour and your request for advice on whether the Minister would be the approval authority for this proposal.

I wish to advise you that the Minister has considered the information provided and has determined that the redevelopment of the Rose Bay and Point Piper Marina's does not trigger the provisions of State Environmental Planning Policy (Major Projects) 2005 (Major Projects SEPP). Under these circumstances, the Minister for Planning will not be the approval authority for the proposal.

As you are aware, the proposal is designated development and an environmental impact statement will need to be prepared and accompany any application lodged with the Council. My requirements for the preparation of the EIS will be issued as soon as possible with a target date of 20 June 2006.

It should be noted that under the Major Projects SEPP marinas in Sydney Harbour which berth/moor more than 30 vessels are declared to be a Part 3A development (i.e. development under Part 3A of the Act which, under s.75D requires the Minister's approval). In relation to an existing facility the number of vessels includes a reference to the additional number of vessels moored or berthed at the facility. The development proposed by this DA (DA766/06) reduces the total number of vessels and therefore it is not declared to be a Part 3A development.

The development proposed by DA766/06 is designated development. The applicant therefore was required to prepare an environmental impact statement (EIS). Clause 73 of the *Environmental Planning and Assessment Regulation 2000* (the Regulation) requires an applicant responsible for preparing an EIS to consult with the Director General and in completing an EIS to have regard to the Director General's requirements.

The Director General advised Patterson Britton and Partners by letter dated 16/06/06 of his requirements for the preparation of the EIS. In addition to mandatory issues the Director General also identified key project-specific issues which the EIS must address. These comprised:

- applicable environmental planning instruments
- environmental guidelines: *Best Management Practice for Marinas and Boat Repair Facilities* (DEC)
- **Traffic and parking** – with reference to the *Guide to Traffic Generating Development and Road design Guide* (RTA)
- **Visual** – on the local and regional area, particularly adjoining properties, the open space along the Rose Bay foreshore area, and significant vantage points in the public domain including the harbour
- **Noise** – in accordance with the DEC's *Industrial Noise Policy (2000)*, *Environmental Criteria for Road Traffic Noise*, and *Environmental Noise Control Manual*

- **Soil and water** – with reference to *Guidelines for Fresh and Marine Water Quality* (ANZECC), *Approved Methods for the Sampling and analysis of Water Pollutants in NSW* (DEC), *Managing urban Stormwater: Soils and Construction* (Landcom), *Acid Sulfate Soils Manual* (NSW Acid Sulfate Soils Management Advisory Committee), and *State Environmental Planning Policy No, 55 – Remediation of Land*
- **Flora and fauna** – particularly on threatened species, endangered populations or communities in accordance with section 5A of the *Environmental Planning and Assessment Act 1979*, but also on the potential spread of the noxious weed *Caulerpa taxifolia*

The EIS

The following table lists the reports which form part of the EIS submitted with the DA and the authors of those reports which are of most relevance to the Notice of Motion, i.e. those that have an emphasis on the Harbour, ecology and related issues:

EIS REPORTS	
REPORT TITLE	AUTHOR
Wave Climate Study – Rose Bay Marina	Patterson Britton & Partners
Rose Bay and Point Piper Marinas EIS Heritage Report	Noel Bell Ridley Smith and Partners
Rose Bay and Point Piper Marinas – Berth Waiting List	Addenbrooke Pty Ltd
Redevelopment of Rose Bay and Point Piper – SEPP 33 Review	Sherpa Consulting
Rose Bay and Point Piper sediment Sampling and Testing	Patterson Britton & Partners
Rose Bay and Point Piper Marine Ecology Study	Marine Pollution Research
Noise Impact Planning Assessment	Aitkins Acoustics and Associates Pty Ltd
Waste Management Plan	Advanced Marina Management
Visual Impact Assessment	Richard Lamb & Associates
Traffic and Parking Assessment of Proposed Modifications to Rose Bay Marina	Chris Hallam & Associates Pty Ltd
Peer Review of Traffic and Parking Report	John Coady Consulting Pty Ltd
Swing Mooring Relocation Strategy	Advanced Marina Management
Rose Bay and Point Piper Marinas Environmental Management Plan	Patterson Britton & Partners
Security Management Plan	Advanced Marina Management
Temporary Berthing Relocation Plan	Advanced Marina Management

Integrated development requirements

The proposal also constitutes integrated development under s.91 of the *Environmental Planning and Assessment Act 1979* (the Act). This means that we have to obtain the general terms of any approval from relevant approval bodies. If consent is granted to the DA it must be consistent with the general terms of any approval. The following table contains details of the relevant integrated approval bodies for this DA and the aspect of the development they are required to approve.

INTEGRATED DEVELOPMENT APPROVALS	
APPROVAL BODY	APPROVAL REQUIRED
Department of Environment & Conservation	Scheduled activity under the <i>Protection of the Environment Operations Act 1997</i> s.43; marinas accommodating 80 or more berths are EPA licensed activities; a broad range of environmental matters are required to be considered
NSW Maritime Authority	<i>Rivers and Foreshores Improvement Act 1948</i> part 3A permit; a permit is required for excavation in or on protected land and protected waters
Department of Primary Industries	<i>Fisheries Management Act 1994</i> s.205 permit to harm marine vegetation

The Foreshores and Waterways Planning and Development Advisory Committee

Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (the REP) requires the DA to be referred to the Foreshores and Waterways Planning and Development Advisory Committee (the Advisory Committee). The Advisory Committee comprises an officer from the NSW Maritime Authority, an officer from the Department of Planning and a nominated person from the Council which is the consent authority for the DA. The Advisory Committee mainly considers the proposed development under the provisions of the REP and the *Sydney Harbour Foreshores and Waterways Area Development Control Plan* (the DCP).

Additional external notifications

In addition to the State Government bodies mentioned above notification of the DA has also been sent to:

- Department of Planning
- Energy Australia
- Sydney Water
- Sydney Ferries Corporation
- Department of Lands
- Roads and Traffic Authority (RTA)
- NSW Fire Brigade
- Civil Aviation Safety Authority (CASA) (Commonwealth Government)
- NSW Police (CEPTED referral in accordance with our memorandum of understanding)

It should be noted that these bodies are not required to comment on the DA or to respond to our notification. Officers of the RTA have advised that the Sydney Regional Development Advisory Committee (SRDAC) will consider the proposal.

Internal referrals

The DA has been referred to the following officers within the Council for comment in respect to their relevant areas of expertise:

- Team Leader - Development Assessment
- Heritage Officer
- Urban Design Planner
- Traffic Engineer

- Manager – Public Open Space
- Senior Environmental Health Officer
- Environmental Protection Coordinator

Parking and traffic

The implications of the proposal in terms of parking and traffic is more a local issue than one related to Harbour usage. However, traffic and parking are major issues relating to the marinas DA. No parking is proposed as part of the marinas redevelopment. The EIS includes reports from a traffic consultant and a peer review by a different traffic consultant. The EIS summary on traffic and parking, in part, states '*... the parking implications of the proposal will be positive, without any additional cars, and a likely reduction in the usage of on-street parking. With no increase in car parking demand and no change to the existing marina buildings and services, the external traffic implications of the redevelopment will be improved. ...*'.

Although a detailed assessment of the parking and traffic implications of the development has not been completed, in light of Council's recent decision to commission an independent parking and traffic report for a DA by Cranbrook School, the Committee may wish to indicate if it also wants a report for the marinas DA. The cost of the report on the Cranbrook School DA of \$17,000 was borne by Council.

Our Technical Services Division have advised that they support a report being prepared by an independent traffic consultant due to the limitation of resources available to properly carry out the appropriate standard of assessment.

Comment

Under the Act the Council is the consent authority. The Council, therefore, is obliged to fulfil the consent authority's responsibilities under the Act.

The State Government, through the Department of Environment and Conservation, Department of Primary Industries and the NSW Maritime Authority are obliged to provide responses as required by the integrated development provisions under the Act. Also, advice has to be provided by the Advisory Committee under the REP.

We wrote to the Authority on 2 March 2007 asking for their advice on a number of specific provisions under the REP and the DCP, mainly in relation to navigation and waterway management issues, see Annexure 1. We did this because, as the consent authority, the Council will have to consider these matters before making a decision on the DA. However, the Authority is best placed to provide this advice because of its specialist expertise and experience in these areas. The Authority's Chief Executive, Chris Oxenbould, responded by letter dated 19 March 2007, see Annexure 2. Unfortunately his response does not provide any specific advice that would be useful in assessing these aspects of the proposal. We have therefore made a further written request to the Authority for a copy of documentation relating to the application, assessment and determination of the land owner's consent (LOC) application as these documents should contain an assessment of the Harbour usage issues as required by the existing LOC manual.

In the normal course of events the State Government (including the Authority) do not undertake additional reports or provide financial support if additional reports are needed. The Department of Local Government issued a circular *Additional Fees for Expedited Assessment of Development Applications* (No. 02/18 dated 18/04/2002). The circular states that the DA fee payable under the Act covers every stage in the process of dealing with a DA ‘...from its receipt to the notification of the Council’s determination to the applicant.’. In light of this advice it is likely that any request for direct financial assistance from the State Government for the preparation of a report would be unsuccessful.

The question of assistance has been raised with representatives of the Department of Planning. The response was that the Department will provide Council with any reports that it may have which are relevant to the DA. Providing assistance in the form of additional reports would be considered in the context of the availability of resources.

Our Environment Protection Coordinator has recommended that the applicant provide certain additional information regarding dredging, refuelling, acid sulphate soils and further sampling and testing and the preparation of an environmental management plan. Also, upon receipt of that additional information, the Council may need to engage:

- A marine ecological expert to review the reports and conclusions made in the ecological study to provide clear recommendations regarding contamination and remediation
- A contamination expert to review reports and conclusions made in the contamination reports with clear recommendations regarding contamination and remediation if required

The need for any further additional reports will become apparent as the EIS and the submissions received as a result of the public exhibition of the DA are closely examined and as the other referral comments are received from the internal and external referral bodies.

Identification of Income and Expenditure:

The following table shows the fees paid by the applicant in respect to DA766/06.

DA 766/06 – FEES PAID BY THE APPLICANT	
FEE	AMOUNT(\$)
Application fee (based on estimated cost of work of \$9.35M)	9,270.00
Designated development fee	715.00
Integrated DA handling fee	330.00
Additional advertising fee – designated development	1,532.00
Advertising fee	142.00
Environmental enforcement levy	2,000.00
File retrieval	49.50
Planning levy*	5,984.00
Integrated approval body fees*	750.00
TOTAL	20,772.50

* Denotes fees payable to other bodies

The DA fees will not cover the costs incurred in commissioning reports from experts. Therefore, allowance will need to be made in the 3rd quarter budget review to accommodate the additional costs.

Conclusion:

- The assessment report will be informed by:
 - The large number of technical reports contained in the EIS
 - The responses from public authorities under the integrated development provisions of the Act
 - Planning advice from the Foreshores and Waterways Planning and Development Advisory Committee
 - Expert advice requested from public authorities that may have an interest in the matter
 - Expert advice from Council's specialist staff
 - Public submissions (both for and against)
- Since the Authority has declined to provide specialist advice in relation to Harbour usage issues we have requested a copy of their documents relating to the application, assessment and determination of the LOC application. These documents should contain an assessment of the Harbour usage issues, as required under the existing LOC manual.
- Notwithstanding the volume of technical information upon which the assessment report will rely, since we have been advised that our traffic section will not have the necessary resources to review the traffic data and reports the assessment would benefit from an independent traffic assessment
- Depending on the response to our requests for additional information on dredging, refuelling, acid sulphate soils and further sampling/testing and for an environmental management plan we may need to source independent specialist advice from a marine ecological expert and a contamination expert
- Direct financial assistance from the Department of Planning for the assessment of the DA is unlikely

Peter Kauter
Executive Planner

Allan Coker
Director – Planning and Development

ANNEXURE:

1. Council's letter to the NSW Maritime Authority dated 2 March 2007
2. NSW Maritime Authority's letter to Council dated 19 March 2007

Item No: R2 Recommendation to Council
Subject: **Sydney Grammar School Tennis Court Site Rezoning**
Author: Katina Marchbank – Senior Strategic Planner
File No: 324.
Reason for Report: To respond to a Council notice of motion (19 December 2005) regarding whether or not the land owned by Sydney Grammar School containing tennis courts should be rezoned to Zone No. 6 (Open Space Zone).

Recommendation:

That consideration of the rezoning of Lot 1 DP633259, Neild Avenue, Paddington (owned by Sydney Grammar School), be included as part of the preparation of the Woollahra Consolidated LEP.

1.0 Background

At its meeting on 19 December 2005 the Council adopted the following Notice of Motion:

That a report be presented to the Urban Planning Committee on whether or not the land owned by Sydney Grammar School containing tennis and multi-purpose courts to the south of the Weigall Playing fields between Neild Avenue and Vialoux Avenue should be rezoned to 6. Open Space to reflect the current use for open space and recreational activities

This report responds to this notion of motion, describes the subject site and surrounding areas and includes a preliminary outline of the findings of the zoning review.

2.0 Site Description

Subject Site

Address: Neild Avenue, Paddington
Lot Description: Lot 1 DP633259.
Area: 3,149 square metres (approx)
Current Zone: Zone No. 2(b) (Residential “B” zone)
Ownership: Trustees of the Sydney Grammar School

Adjoining Land

North:	Weigall Sportsground	Zone 6 (Open Space)	Trustees of Sydney Grammar School
South East	Residential flat building	Zone 2(b) (Residential)	Privately owned
South	Housing commission	Zone 2(b) (Residential)	Department of Housing

Adjacent Land

East	Semis and terrace houses	Zone 2(a) (Residential)	Privately owned
	Sydney Grammar Prep School	Zone 5(a) (Special Use – School)	Trustees of Sydney Grammar School
North East	White City Tennis Courts	Zone 6 (Open Space)	Sydney Maccabi Tennis Club Ltd & Trustees of Sydney Grammar School
West	Factories/light industrial	n/a	(City of Sydney local government area)

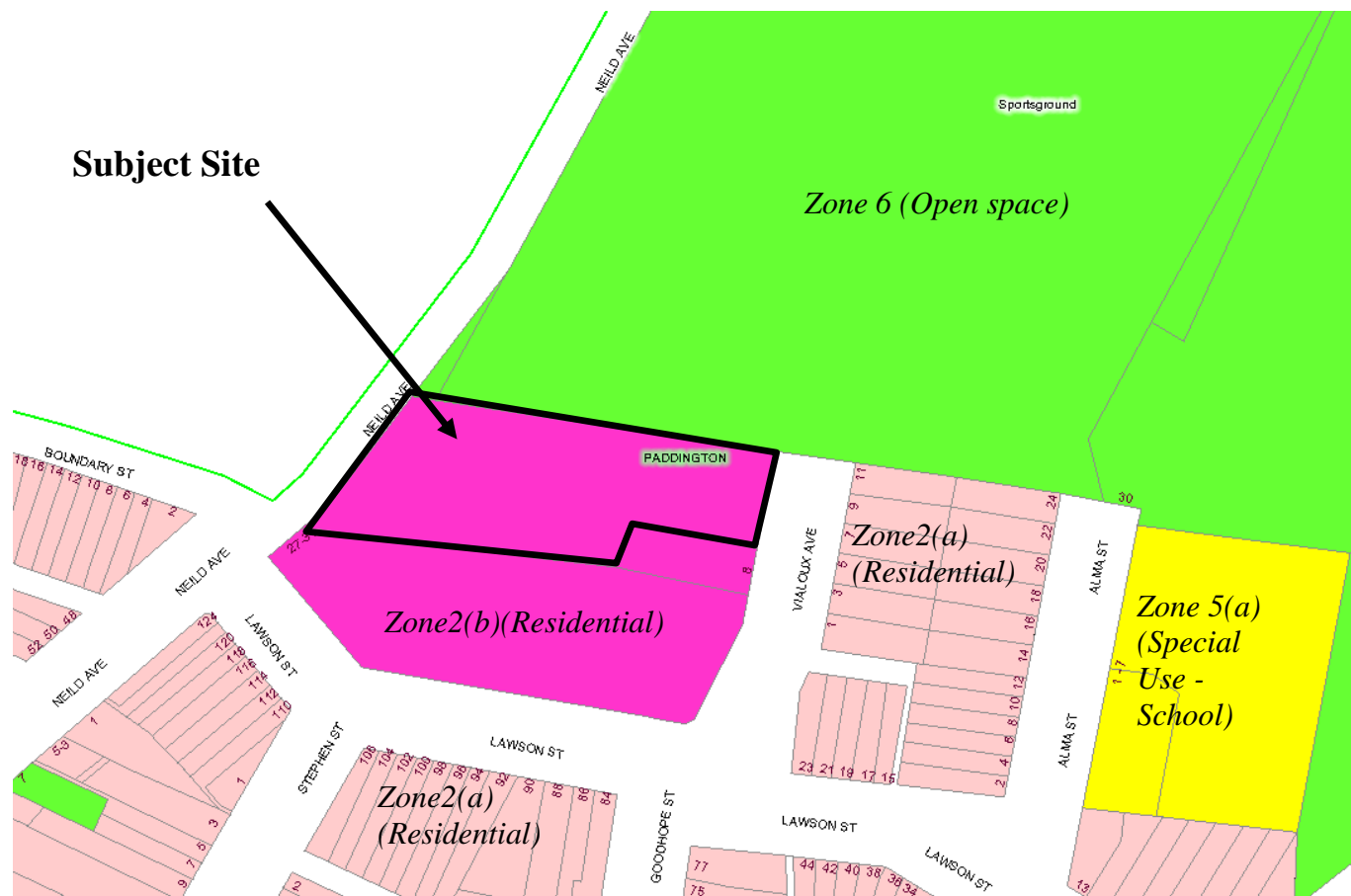


Figure 1. Zoning Map

Current Uses

The site is used as a tennis facility, contiguous with the Weigall Sportsground. The site contains six tennis courts, with four of the tennis courts extending across the northern property boundary with the Weigall sportsground site (as shown on Figure 2. Aerial Photo).

The subject site does not contain any car parking areas. Car parking for the tennis courts is provided on the Weigall sportsground site, with an access driveway and small car parking area off Neild Avenue to the north west and the main car parking area for the sportground is located to the north east.

Surrounding Uses

The Weigall sportsground adjoins the subject site directly to the north. The Weigall sportsground adjoins the White City site and the Sydney Grammar Preparatory School to the east.

Residential uses surround the subject site to the south and south east, primarily comprising terrace houses and semi-detached dwellings. The subject site is adjoined directly to the south by Department of Housing public housing and a modest privately owned residential flat building.



Figure 2. Aerial Photo

Note. The black line denotes the property boundary of the subject site (Lot 1 DP633259). The Sydney Grammar tennis courts are located on the subject site and four of the tennis courts extend across the northern property boundary with the Weigall Sportsground site.

3.0 Grounds for Zoning Review:

The Council has requested a review of whether or not the subject site should be rezoned to Zone 6 to reflect its current use. The objectives of Zone 6 (Open Space) are:

- (a) to identify existing publicly and privately owned land used or capable of being used for recreational purposes;
- (b) to identify areas which are reserved for future public open space;
- (c) to increase provision of public open space within the Council's area to meet the needs of the population;
- (d) to enable development for the purpose of public and private recreation and community facilities sympathetic to the environmental characteristics of the land and surrounding areas; and
- (e) to protect the visual and environmental attributes of the foreshores.

A review of the site context and uses of the subject site, as described above, indicates a rezoning of the subject site from Zone 2(b) to Zone 6 may be appropriate for the following reasons:

- Current use of the site as tennis courts meets objectives (a), (c), and (d) of Zone 6.
- The site is contiguous with and relies on the adjoining sportsground, tennis complex and school sites.
- The continuing future use of the site for sport and recreation purposes is preferred on the basis that the size of this site in inner Sydney for sport and recreation purposes are rare and therefore need to be protected.
- The draft Rushcutters Bay Catchment Flood Study (as publicly exhibited late 2006) identifies part of the subject site as flood prone (refer to Figure 25). The flood prone risk is high hazard at the north-eastern part of the site, and transitions to low hazard at the southern part of the site.

4.0 Department of Planning's Position on Spot Rezoning

The Department of Planning issued a Planning Circular on 15 June 2006 stating their current position on spot rezoning (**Annexure 1**). In summary, the Department is seeking to reduce the number of spot rezonings, and any spot rezoning needs to address a significant planning issue and have a compelling case for the Department to progress the amendment.

The Department is encouraging all councils to defer resolving to prepare LEP amendments to progress a spot rezoning, and to consider these as part of the principal review of the local environmental plan, consistent with the Standard Instrument.

5.0 Principal LEP Review

We have commenced the principal review of the Woollahra Local Environmental Plan 1995 in line with requirements of the *Environmental Planning and Assessment Act 1979* and the Standard Instrument.

In the context of current project commitments and in view of the Department of Planning's instructions regarding spot rezonings, we consider it appropriate for the rezoning review of the subject site to be included with the preparation of the new Woollahra Comprehensive LEP.

It is anticipated that several rezonings will be proposed for consideration during the review process, including matters such as the subject site discussed in this report.

We have initiated a register of sites for zoning review to research and present to the Council for consideration. It is recommended that the subject site is added to this register.

In the course of reviewing and rezoning, consultation will need to occur with property owners.

6.0 Conclusion

Initial investigations suggest that Zone 6 (Open Space) is a more appropriate land use zone for the site than the current Residential 2(b) zone. However, rezoning the subject site is not considered to be a matter of urgency.

It is recommended that the consideration and rezoning of the subject site is deferred and considered as part of this principal LEP review.

Katina Marchbank
Senior Strategic Planner

Chris Bluett
Manager – Strategic Planning

ANNEXURES:

1. Planning Circular PS 06-015 - Spot rezoning

Item No: R3 Recommendation to Council
Subject: **Unauthorised & Illegal Works & Uses – Draft Enforcement Policy**
Author: Tim Tuxford, Manager - Compliance
File No: 885.G ENF
Reason for Report: To respond to the Notice of Motion adopted at the Council meeting of 1 May 2006 with regard to "Unauthorised and illegal works and uses".
To present a revised Enforcement Policy for Council's approval.

Recommendation

That the Council adopt the revised 'Enforcement Policy' attached to the report of the Manager – Compliance as **annexure 3** to the Urban Planning Committee on 26 March 2007, to replace Council's current 'Policy on Unauthorised Uses, Buildings & Works' adopted on 12 July 1999.

1. Background

At the Council meeting of 1 May 2006 the following Notice of Motion was adopted by Council;

"That a report be presented to the Urban Planning Committee on the following;

- Council's means of identifying and prosecuting unauthorised and illegal works and uses.*
- Council's financial and legal position in relation to the way we manage these processes.*
- There be an audit of development consents that have been granted for more than 18 months without a construction certificate being issued.*
- Recommendations on how Council can best prevent and control the extent of unauthorised works and uses."*

In response, a report and revised Enforcement Policy were presented to the Urban Planning Committee meeting of 29 January 2007. Subsequently the Council, at its meeting of 12 February 2007, resolved as follows;

- "1. That the matter be deferred to allow amendments to be made to Sections 1.4, 3.4, 4.3 and 4.5 of the draft Policy as discussed at the Committee meeting.*
- 2. That notice of the Committee meeting that will consider the draft policy with the amendments included in part 1 of the recommendation be given to those residents who have made submissions on this matter.*
- 3. That a further report be submitted to the Committee considering methods of promoting Council's PCA service."*

Copies of the report submitted to the Urban Planning Committee meeting of 29 January 2007 and Council's current 'Policy on Unauthorised Uses, Buildings & Works' are attached as Annexures "1" and "2", respectively.

Consideration

The draft Enforcement Policy submitted to the Urban Planning Committee meeting of 29 January 2007 has been revised to address item 1 of the Council resolution of 12 February 2007. The revised draft policy includes a new 'Policy Statement' section in the introduction to reinforce Council's position on unauthorised work.

The revised draft policy is attached as Annexure "3", with the changes made to address the Council's resolution of 12 February 2007 underlined and in red text.

Comment was also sought on the revised draft Enforcement Policy from Dr Lindsay Taylor, of Lindsay Taylor Lawyers. Dr Taylor was consulted in 1999 when Council's current 'Policy on Unauthorised Uses, Buildings & Works' was prepared and adopted. Dr Taylor has recommended a number of changes to the draft policy, expanding it to encompass the *Protection of the Environment Operations Act 1997* and the *Local Government Act 1993*. Mr Taylor's recommended changes are highlighted in the revised draft policy by being underlined and in blue text.

Dr Taylor's recommended changes can be summarised as follows;

1. Where appropriate, the Policy has been extended to encompass relevant provisions of the *Protection of the Environment Operations Act 1997* and the *Local Government Act 1993*.
2. Section 5 of the Policy has been amended to include the recovery of penalties in criminal proceedings brought in the Land and Environment Court.
3. When taking civil enforcement proceedings, it is not sufficient for Council to establish a relevant breach of the Act. It is also necessary to present evidence that persuades the court to make an order remedying or restraining the breach. 'Section 2.3.2 – Civil Proceedings' has been amended to reflect this position.
4. 'Section 2.2.3 – Criminal or Civil' has been amended to identify that ancillary orders are available for some offences against the *Environmental Planning & Assessment Act 1979* in respect of destruction of or damage to a tree or vegetation and also more widely for offences against the *Protection of the Environment Operations Act 1997*.
5. Dr Taylor does not consider it is necessary for Council to have collected all of the evidence for a criminal prosecution at the time of issuing a penalty infringement notice. The important thing is that it must appear to the Council or issuing officer that the offence has been committed. In this respect, 'Section 4.1 – PINs' has been amended to indicate that before issuing a PIN, Council should be in a position to obtain prima facie evidence of the offence in admissible form.

In accordance with item 2 of the Council resolution of 12 February 2007, notice of the meeting has been sent to two (2) local residents that have previously made submissions on this matter, being Mr John McLoughlin and Mr Richard D'Apice.

Item 3 of the Council resolution will be the subject of a future report to the Urban Planning Committee.

Conclusion

It is considered the revised draft Enforcement Policy has been amended to reflect the Urban Planning Committee's comments and the recommendations of Mr Lindsay Taylor of Lindsay Taylor Lawyers. The policy will provide a sound guide to staff on, and explain to the community, the various discretionary enforcement action that is available and how this action will be consistently applied.

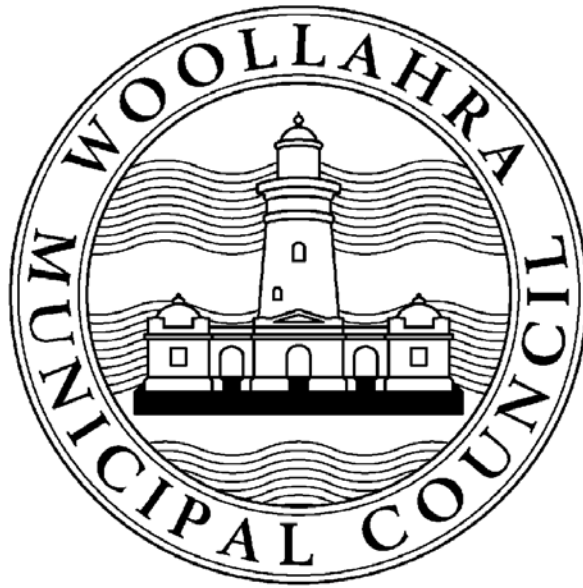
Accordingly, it is recommended that the Council adopt the revised and expanded Enforcement Policy, replacing its existing 'Policy on Unauthorised Uses, Buildings and Works'

Tim Tuxford
Manager - Compliance

Allan Coker
Director Planning and Development

ANNEXURE

1. Urban Planning Committee report on 'Unauthorised and illegal works & uses' dated 29 January 2007.
2. 'Policy on Unauthorised Uses, Buildings and Works' adopted on 12 July 1999.
3. Revised Draft Enforcement Policy.



DRAFT Enforcement Policy

Adopted Date: ~~12 July 1999~~

CONTENTS

1. INTRODUCTION	2
1.1 The Policy	2
1.2 Commencement	2
1.3 Purpose	2
<u>1.4 Policy Statement</u>	2
1.5 Policy Objective	2
1.6 Application	3
1.7 Definitions	3
2. BACKGROUND	4
2.1 Submitting complaints or requests	4
2.2 Procedural fairness and natural justice	5
2.3 Options for dealing with unlawful activity	5
2.3.1 Criminal proceedings	5
2.3.2 Civil proceedings	6
2.3.3 Criminal v Civil?	7
3. WHEN WILL COUNCIL COMMENCE ENFORCEMENT ACTION?	7
3.1 The nature and seriousness of the breach	7
3.2 Balancing of public interest and cost to Council	7
3.3 The available methods of enforcement	8
3.4 The circumstances of each case	8
4. DECIDING ON THE METHOD OF ENFORCEMENT	9
4.1 PINs	9
4.2 Consents, Orders and Building Certificates	9
4.3 Land & Environment Court proceedings	9
4.4 Local Court proceedings	10
5. RECOVERY OF LEGAL COSTS	10
6. COMMUNITY AWARENESS	11
7. ACKNOWLEDGEMENTS	11

1. INTRODUCTION

1.1 The Policy

This policy is called “Woollahra Municipal Council’s Enforcement Policy” and replaces Council’s “Policy on Unauthorised Uses, Buildings and Works”, which was adopted on 12 July 1999.

1.2 Commencement

This Policy was adopted by Council on ~~12 July 1999~~ and commences on ~~13 July 1999~~.

1.3 Purpose

The purpose of this policy is to assist Council staff to act promptly, consistently and effectively in response to allegations of unlawful activity primarily associated with development and building matters.

1.4 Policy Statement

Council does not condone unlawful activity at any time or under any circumstances and Council will initiate enforcement action in accordance with this policy document as appropriate.

1.5 Policy Objective

The aim of this policy is to establish clear guidelines for the exercise of the discretion the Council must use in dealing with unlawful activity, having regard to the available evidence, cost to the community and the circumstances of the individual case.

The policy;

- Provides a legal and administrative framework to assist Council in making decisions in its enforcement functions;
- Specifies the criteria which the Council will take into consideration when deciding:
 - (a) if enforcement action is necessary; and
 - (b) the most appropriate type of action.
- Provides information to the public about the Council’s role and policy on enforcement; and
- Ensures that the enforcement process is conducted with maximum speed and minimal delay.

1.6 Application

This policy applies to the investigation and enforcement of unlawful activity or failure to comply with terms or conditions of approvals, licences and orders. While it is primarily directed at the regulation of development activity, the policy may also be applied to other matters such as pollution control, regulation of parking and animal control, where applicable.

1.7 Definitions

The following defined terms are used in the policy:

CAN: means a court attendance notice issued and filed in accordance with the Criminal Procedure Act 1986. A CAN may be used to commence summary proceedings in the local court. A CAN specifies the offence and its essential particulars as well as the address of the court where the matter is to be heard. If a person does not attend court on the day specified in a CAN, a warrant may be issued for the arrest of the person or the matter may be dealt with in the absence of the person.

defendant: means the accused person against whom criminal proceedings are brought.

EPAA: means the *Environmental Planning and Assessment Act 1979*.

LGA: means the *Local Government Act 1993*.

PIN: means penalty infringement notice. Sometimes referred to as an 'on-the-spot' fine. PINs may only be issued for prescribed offences and the value of the fine is also prescribed by legislation.

POEO: means the Protection of the Environment Operations Act 1997.

respondent: means the party against whom civil proceedings are brought in Land & Environment Court proceedings.

unlawful activity: means any activity or work that has been or is being carried out;

- contrary to the terms or conditions of a development consent, approval, permit or licence;
- contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land;
- contrary to a legislative provision regulating a particular activity or work; and/or
- without a required development consent, approval, permit or licence.

2. BACKGROUND

Council will become aware of unlawful activities in a variety of ways, from the proactive actions of Council staff to the receipt of complaints or requests from members of the public.

When Council is appointed the Principal Certifying Authority for development and building works, Council staff will identify breaches of consent and unauthorised building work and uses. In our environmental protection or public health roles, we may discover pollution incidents and unhealthy premises that require enforcement action. Furthermore, Rangers and Parking Enforcement Officers issue [PINs](#) for parking, dog, pollution and building site offences.

Council officers who are not involved directly in enforcement matters will also commonly identify potential unlawful activities and report them for investigation and action pursuant to this policy.

Nevertheless, while Council is proactive in the detection of unlawful activities, not all offences are readily discernible and early detection can only be achieved with support and direct advise from our community.

2.1 Submitting complaints or requests

Complaints or requests alleging unlawful activity can be submitted to Council either in writing or verbally. In either case the allegation will be recorded in Council's computerised customer request management system and will be allocated a unique reference number. The request will be referred to the relevant Compliance officer to commence [any necessary](#) investigation.

The name, address and contact details of the person submitting the complaint will also be recorded. This information is critical as Council may need to rely on evidence from the complainant to prove [any alleged](#) offence and commence [enforcement](#) action.

Council will take all reasonable measures to protect the privacy of the person submitting the complaint and generally information on this person will not be released. However, Council may be required to disclose this information [in](#) a variety of circumstances including the following;

- Access to the information is permitted under legislation, including the *Freedom of Information Act 1989* [or the LGA](#);
- Access to the information is permitted under another Council policy;
- Legal proceedings are commenced [and the information is disclosed in evidence served](#); and
- The nature of the allegation [otherwise](#) makes it a necessity.

Also, [in](#) some circumstances it may be possible to ascertain the identity of the person submitting the complaint by the nature of the allegation.

2.2 Procedural fairness and natural justice

There is an overriding duty on the Council to act fairly and ensure the principles of procedural fairness and natural justice are adhered to. In this regard Council will;

- Provide information on the substance of the complaint to the alleged offender. This may not occur until an appropriate stage in the investigation;
- Provide an opportunity for the alleged offender to put their case. This will not be necessary if there is a serious risk to personal or public safety or risk of serious environmental harm;
- Consider any submission put forward by the parties to the matter;
- Make reasonable inquiries or investigations before making a decision;
- Ensure no person decides a case in which they have an interest; and
- [Otherwise](#) act fairly and without bias.

2.3 Options for dealing with unlawful activity

Council has discretion in deciding whether to take enforcement action on the basis of the available evidence and the circumstances of the individual case. At the conclusion of an investigation, Council [may have one or more](#) of the following options;

- Take no action;
- Counsel the [alleged](#) offender;
- Issue a formal letter of warning;
- Commence criminal proceedings; and
- Commence civil proceedings.

2.3.1 Criminal Proceedings

Criminal proceedings are punitive. [The sentence which a court may impose if an offence is proven is usually a fine.](#)

[The amount of a fine imposed by a court will be based on the need for specific deterrence and the rehabilitation of the offender, the need for general deterrence of similar offences by other members of the community and any aggravating or mitigating circumstances.](#)

The types of criminal proceedings available to Council include;

- Issuing a PIN;
- [Prosecuting the offence in the Local Court by](#) issuing a CAN; and
- [Prosecuting the offence in](#) the Land & Environment Court in its summary jurisdiction (Class 5)

In criminal proceedings an offence must be proved 'beyond a reasonable doubt'.

PINs [for offences](#) currently vary from \$100 up to \$2,000 [under the EPAA and Environmental Planning and Assessment Regulation 2000](#) depending on whether the offender is an individual or a corporation and the nature of the unlawful activity. [Under the POEO, a corporation could be fined up to \\$5,000 by PIN.](#) The offender can either pay the fine stated on a PIN or elect to have the matter heard before a court.

Where prosecution action is taken rather than the issuing of a PIN, the maximum penalty is usually considerably higher. For example, the maximum penalty for an offence under the EPAA is the amount specified or, if no penalty is specified for the particular offence, 10,000 penalty units and a further daily penalty not exceeding 1,000 penalty units. At present 1 penalty unit equals \$110. However, if the offence is prosecuted in the Local Court the maximum monetary penalty the court can impose is 1,000 penalty units, or the maximum penalty specified for the offence, whichever is the lesser.

In criminal proceedings for offences against the EPAA there is often no provision which enables the Court to order the offender to remedy the breach or restrain the unlawful activity. These powers are available to the court in some other kinds of cases, for example, offences against the EPAA involving the destruction of or damage to a tree or vegetation or in appropriate cases where an offence is committed against the POEO or the regulations under that Act.

A person can not be convicted of an offence against the EPAA or the regulations where;

- the matter is the subject of civil proceedings under Section 123 of the EPAA and those proceedings have not been concluded; or
- an Order of the Court has been made to remedy or restrain the breach.
(Section 127(7) of the EPPA)

These restrictions, and the practice of the court, usually favour civil proceedings being taken where it is necessary to remedy or restrain an unlawful activity.

Criminal proceedings for an offence against the EPAA must be commenced within two (2) years of the offence being committed or within two (2) years from the date when evidence of the offence first came to the attention of an authorised officer. (Section 127(5), (5A), (5B) & (5C) of the EPPA)

2.3.2 Civil Proceedings

The objective of civil proceedings is to rectify the consequences of, or restrain an unlawful activity, by requiring the offender to do or refrain from doing something. Civil proceedings include the following;

- Notices and orders issued by Council pursuant to various legislation;
- Class 4 proceedings before the Land & Environment Court, seeking an order of the Court to remedy or strain a breach of the EPAA (Section 123), the LGA (Section 673), the POEO (Sections 252 & 253), or any other Act, if the breach is causing or is likely to cause harm to the environment; and
- Interlocutory relief for matters causing, or with the reasonable potential to cause, serious environmental harm. In such proceedings it is likely the Council would be required to provide an undertaking as to damages.

For civil proceedings to be successful Council must prove the breach on the balance of probabilities. This is a less onerous burden of proof than is required in a criminal prosecution. However, even if the breach is established, the court has discretion not to make any order. Council must therefore be in a position to lead evidence that persuades the court that an order to remedy or restrain the breach should be made.

Civil proceedings can be held over to provide the person responsible for the unlawful activity [with an opportunity](#) to lodge [any](#) required application and have it determined [or otherwise to cease or remedy the breach voluntarily](#).

2.2.3 Criminal or Civil?

Deciding whether to commence criminal or civil proceedings depends on the outcome that is being sought. If Council [were](#) willing, [retrospectively](#), to accept the [results of the](#) unlawful activity or if the unlawful activity can not be undone or is not ongoing and Council wishes to punish the offender, criminal proceedings may be [preferred](#) subject to the considerations detailed below.

Conversely, if Council is not willing to accept the unlawful activity ([and particularly for alleged offences against the EPAA where the court may not have any jurisdiction to make an ancillary order requiring rectification of the unlawful activity](#)), it is [often](#) more appropriate for Council to commence civil proceedings.

Council generally favours the commencement of civil proceedings.

If Council decides not to commence proceedings under the EPAA, [LGA or POEO](#), any person may commence their own proceedings for an order to remedy or restrain a [relevant](#) breach. (Section 123 of the EPAA; [Section 674 of the LGA](#); [Section 253 of the POEO](#))

3. WHEN WILL COUNCIL COMMENCE ENFORCEMENT ACTION?

Council will decide whether to take enforcement action after it has considered, among other things, the following matters:

3.1 The nature and seriousness of the breach

Council will have regard to the impact the unlawful activity is causing on amenity or harm to the environment. If action is required, Council will consider what is reasonable [in](#) the circumstances and ensure the action is not disproportionate to the level of harm or damage arising from the breach.

3.2 Balancing of public interest and cost to Council

Council will weigh up the public interest or benefits that will be served against the cost to the Council, and the community, of taking enforcement action.

In considering the 'public interest' Council will have regard to whether the unlawful activity;

- will impact on a significant number of people;
- will impact on disadvantaged or marginalised groups;
- is indicative of a systemic flaw;
- is individual in nature but [often](#) occurs; and
- has attracted sustained public attention and no alternative resolution is proposed or likely.

Council will also consider whether more effective means of rectifying an unlawful activity are available before formal legal proceedings are initiated. This may include one or a combination of the following:

- Reporting a breach to a professional association; and
- Use of statutory powers such as;
 - granting consent [to a relevant application](#);
 - making an order under the EPAA, LGA or [POEO](#); or
 - issuing a building certificate [under the EPAA](#).

3.3 The available methods of enforcement

If formal proceedings are considered to be the best option, the decision on which court to bring proceedings [in](#) will be informed by considerations such as the following:

- Likely cost of proceedings;
- [Prospects of](#) recovery of those costs from the respondent or defendant;
- Remedies available;
- Available methods of enforcement; and
- Circumstances of each case.

3.4 The circumstances of each case

The Council will in all prosecution and enforcement matters consider the following;

- [Whether](#) the unlawful activity has caused a breach which is technical in nature and does not cause harm to amenity or to the environment;
- [Whether](#) the unlawful activity is ongoing. If it has ceased, Council must consider the length of time that has expired;
- [Whether](#) the impact of the unlawful activity on the natural or built environment and on health, safety and amenity;
- [Whether](#) development consent or other approval would have been granted by Council if the appropriate application had been submitted prior to the unlawful activity being undertaken;
- [Whether](#) the person(s) who committed the breach has shown contrition and, where possible, has remedied the [unlawful activity](#);
- [Whether](#) the person(s) who committed the breach has made submissions to the Council that [provide reasonable grounds for the Council to conclude that the person was](#) under a genuine mistaken belief as to [a relevant factual](#) or legal matter;
- [Whether](#) the person(s) who committed the breach has shown deliberate or wilful conduct in their actions;
- [Whether](#) the person(s) who committed the breach should have been aware of their obligations because they have:
 - particular knowledge eg: a builder or company that regularly carries out work and is generally aware of [the relevant](#) Council [or other](#) requirements;
 - received a previous warning; or
 - been subject to previous formal legal action.
- [Whether](#) the unlawful activity was unavoidable; and
- [Such other matters that may appear to be relevant to the individual case.](#)

4. DECIDING ON THE METHOD OF ENFORCEMENT

When deciding on the method of enforcement, it is necessary to consider the principles explained above in Section 2.3 – ‘Options for Dealing with Unlawful Activity’ and the outcome being sought.

4.1 PINs

PINs will be issued for offences of a minor nature, where it is considered a small monetary penalty may prevent a recurrence of the unlawful activity or stop the unlawful activity from continuing. The issuing of a PIN will only occur where a decision has been made not to commence other criminal proceedings and if the Council has obtained, or could obtain sufficient evidence in admissible form to prove the offence beyond reasonable doubt in any subsequent criminal proceedings. A PIN can only be issued where it appears to the issuer that the defendant has committed the relevant offence.

PINs should be issued as soon as possible after the conclusion of an investigation.

PINs may be used in conjunction with other enforcement action, as permitted by the applicable legislation.

4.2 Consents, Orders and Building Certificates

Consideration will be given to whether a breach can be rectified by a consent or building certificate or whether enforcement can occur by way of an order under the EPAA, LGA, POEO or some similar means.

The Orders provisions of the EPAA, LGA and POEO are described as “self-help” provisions that provide Council with a formal cost effective mechanism to direct land owners and occupiers to do or refrain from doing something. They generally operate on the ‘principles of natural justice’ and, where appropriate, should be used prior to the commencement of civil proceedings in the Land & Environment Court.

Enforcement action of this nature may occur in conjunction with criminal proceedings, where it is considered appropriate and necessary for punitive action to also be taken, having regard to the restrictions provided under Section 127(7) of the EPAA.

4.3 Land & Environment Court Proceedings

Where possible Council will give preference to civil proceedings in the Land & Environment Court over criminal prosecution in either the Local Court or the Land & Environment Court where Council requires the offender to do or refrain from doing something, such as comply with a development consent or demolish unauthorised works. Generally civil proceedings in the Land & Environment Court will be preceded by formal notices and/or orders, unless the circumstances warrant the immediate commencement of court proceedings.

The following matters will be considered in determining whether to commence civil or criminal proceedings in the Land & Environment Court:

- Is there a liable respondent;
- Does Council have sufficient evidence to prove its case either on the ‘balance of probabilities’ (civil) or ‘beyond a reasonable doubt’ (criminal);
- Does Council require an order from the court restraining the respondent from doing something or ordering the respondent to remedy the breach;
- Is an interlocutory injunction required because the unlawful activity is causing serious, or has the potential to cause, serious environmental harm;
- Is the matter urgent;
- The severity of the alleged offence;
- Is the respondent a repeat offender; and
- The cost of proceedings.

4.4 Local Court Proceedings

The following matters will be considered in determining whether to commence criminal proceedings in the Local Court:

- Is there a liable defendant;
- Is a monetary penalty all that is required;
- Does Council have sufficient evidence to prove its case ‘beyond a reasonable doubt’;
- Are works proceeding – consider CAN to commence proceedings quickly;
- The severity of the offence;
- Is the defendant a repeat offender; and
- The cost of proceedings

5. RECOVERY OF LEGAL COSTS

The Council’s policy for recovery of its costs in the Land and Environment Court is:

- That the Council will seek to recover its fair and reasonable costs in all matters where the Court awards the Council costs costs are recoverable, either by consent or by order of the court;
- The Council will seek to recover the penalty imposed by the court where such penalty is imposed; and

- The Council will adopt the recommendations of its solicitors to accept a lesser amount than the full legal costs incurred by the Council if, in the circumstances, the acceptance of such an offer will result in the Council not incurring further and unnecessary legal costs.

The Council's policy for recovery of costs in the Local Court is:

- That the Council will seek to recover its fair and reasonable costs in all matters where ~~the Court awards the Council costs~~ costs are recoverable, either by consent or by order of the court; and
- The Council will seek to recover the penalty imposed by the court where such penalty is imposed.

6. COMMUNITY AWARENESS

The Council will carry out a community awareness campaign about enforcement by the publication of press releases, by the publication of a pamphlet, and by providing information on its website.

7. ACKNOWLEDGEMENTS

This policy is based on the 'Model Policy' developed by the NSW Ombudsman and the following documents were used in its preparation;

1. *Enforcement Guidelines for Councils – 1st Edition*, NSW Ombudsman (2002)
2. *Leichhardt Town Plan – Enforcement Supplementary Issue Paper*, Leichhardt Council (March 1995)