

Urban Planning Committee

Agenda: *Urban Planning Committee*

Date: *Monday 7 April 2014*

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).

Recommendation only to the Full Council:

- 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.
- Planning Proposals and Local Environment Plans.
- Residential and Commercial Development Control Plans.
- Rezoning applications.
- Heritage Conservation Controls.
- 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.

Delegated Authority:

- To require such investigations, reports or actions as considered necessary in respect of matters contained within the Business Agendas (and as may be limited by specific Council resolutions).
- Confirmation of the Minutes of its Meetings.
- 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 above.
- Statutory reviews of Council's Delivery Program and Operational Plan.

Committee Membership:

7 Councillors

Quorum:

The quorum for a committee meeting is 4 Councillors.

WOOLLAHRA MUNICIPAL COUNCIL

Notice of Meeting

3 April 2014

To: Her Worship the Mayor, Councillor Toni Zeltzer ex-officio
Councillors Katherine O'Regan (Chair)
Ted Bennett
Anthony Boskovitz
Luise Elsing (Deputy Chair)
James Keulemans
Greg Levenston
Matthew Robertson

Dear Councillors

Urban Planning Committee Meeting – 7 April 2014

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 **Thornton Room (Committee Room), 536 New South Head Road, Double Bay, on Monday 7 April 2014 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 Note Council resolution of 27 June 2011 to read late correspondence in conjunction with the relevant Agenda Item	
3	Declarations of Interest	

Items to be Decided by this Committee using its Delegated Authority

D1	Confirmation of Minutes of Meeting held on 24 March 2014	1
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Items to be Submitted to the Council for Decision with Recommendations from this Committee

R1	Babworth House Stairs & Foreshore Access – DA712/2000 (part 43) *Note Confidential Report Circulated Under Separate Cover	2
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Item No: D1 Delegated to Committee
Subject: **Confirmation of Minutes of Meeting held on 24 March 2014**
Author: Les Windle, Manager – Governance
File No: See Council Minutes
Reason for Report: The Minutes of the Meeting of Monday 24 March 2014 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 24 March 2014 be taken as read and confirmed.

Les Windle
Manager - Governance

Item No: R1 Recommendation to Council
Subject: **Babworth House Stairs & Foreshore Access**
Address: 103 Darling Point Road Darling Point
Part Lot 1 in DP 270253
Owner: Community Association DP 270253
Author: Tim Tuxford, Manager - Compliance
File No: DA 712/2000 (Part 43)
Reason for Report: To consider options following the outcome of a Class 1 Land & Environment Court appeal of Council's Order dated 3 August 2012 with regard to the above property.

Recommendation:

- A. THAT the Committee resolves to enter into closed session with the press and public excluded to consider the confidential report on this matter in accordance with the provisions of Section 10A(2)(g) of the *Local Government Act 1993*.
- B. THAT in accordance with Council's Policy of Confidentiality, the confidential report remains confidential for a period of six (6) months after the finalisation of the matter.

Reason for report:

On 3 August 2012 Council served an order pursuant to Section 121B of the *Environmental Planning & Assessment Act 1979* on the Community Association DP 270253 requiring compliance with development consent DA 712/2000 with regard to an area of foreshore land and associated pedestrian access handle zoned 'Open Space' on the Babworth House redevelopment site in Darling Point. On appeal to the Land & Environment Court the order was revoked by the Court on 31 October 2013.

The purpose of this report is to consider the options that are now available to Council having regard to the Land & Environment Court decision and the positive covenant that remains on the land "*to permit full and free right to all members of the public over so much of the lot burdened*".

Background:

This matter has a lengthy and complicated planning and development history dating back to the late 1990's, including numerous Section 96 applications that are not of relevance to the current matter. Therefore, the following is a summary of the key milestones relevant to the current matter.

In June 1999 Woollahra Local Environmental Plan 1995 (LEP) was modified by Amendment 15 to rezone Babworth House and surrounds from hospital use to residential 2(b) and open space uses, as shown on figure 1 below.

On 15 June 1999 the Babworth House Development Control Plan (Babworth DCP) was adopted and took effect on 19 November 1999.

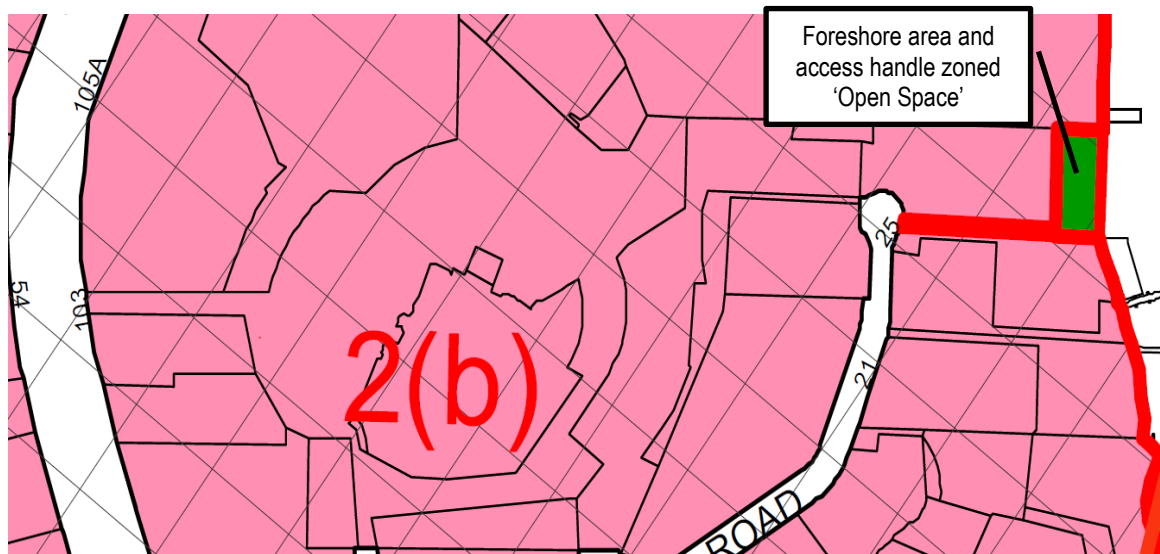


Figure 1: Extract from Council's LEP Zoning Map

On or about 4 August 2000 Kimberley Securities Ltd lodged development application DA 712/2000 with Council which proposed the restoration of Babworth House and the redevelopment of its extensive grounds. The development included five apartments within Babworth House, the construction of nine dwellings in the grounds, adaption of garage into resident, restoration of the estates gardens, 53 parking spaces and associated development.

On 5 February 2001 the Council granted development consent DA 712/2000 subject to a number of conditions including the following;

Condition 1 required the development to be carried out in accordance with plans numbered: "... 000 23 - 0112 (Issue B) Dated 10/1/01 as drawn by Conybeare Morrison and Partners and on which there is a Council stamp, "Approved DA Plans" and a signature of a Council officer, except where amended by the following conditions."

“Condition 29 Foreshore Access

The applicant is to provide suitable pedestrian access (stairway) to the foreshore along the southern side of the "finger of land" between Eastbourne Road and the land within Councils foreshore building line in accordance with Council's S 94 plan and Woollahra LEP 95. The design of the stairway is to be to the satisfaction of Council's technical Services Division and Council's Urban Design Team Leader (prior discussions with the Technical Services Division and Councils Urban Design Team Leader will be necessary). Details are to be provided to Council prior to the issue of the Construction Certificate. Public access to the foreshore is to be available between sunrise and sunset and at other times such access is to be locked.”

“30 Public Positive Covenant

A public positive covenant shall be created over the land zoned Local Open Space Reservation. Evidence as to the creation of the public positive covenant shall be provided to Council or the PCA prior to the issue of the Occupation Certificate. This condition is imposed so as to provide a legal right for the public to access the site in order to gain access to the foreshore.”

“53 Foreshore Access Width

The plans are to be amended so as to incorporate a 2 m wide access corridor along the southern boundary of the site between Eastbourne Road and the foreshore building line. No residential development is to occur within this area. Details are to be provided to Council or the PCA prior to the issue of the Construction Certificate. This condition is imposed so as to prevent residential development on land zoned Local Open Space Reservation.”

On 7 June 2001 the Community Association DP 270253 (the “Community Association”) was constituted and is now responsible for the remaining land identified as community property – ie. Lot 1 in DP 270253.

At the same time DP 270253 was registered with the Land & Property Management Authority (LMPA). The documents lodged with the LMPA included plans, a Section 88B Instrument and a Community Management Statement. The Section 88B Instrument created a positive covenant giving full and free right to all members of the public over that part of Lot 1 marked “J” in the plan lodged with the Section 88B Instrument (as shown in the DP plan attached and marked ‘Annexure 1’). The positive covenant was in the following terms;

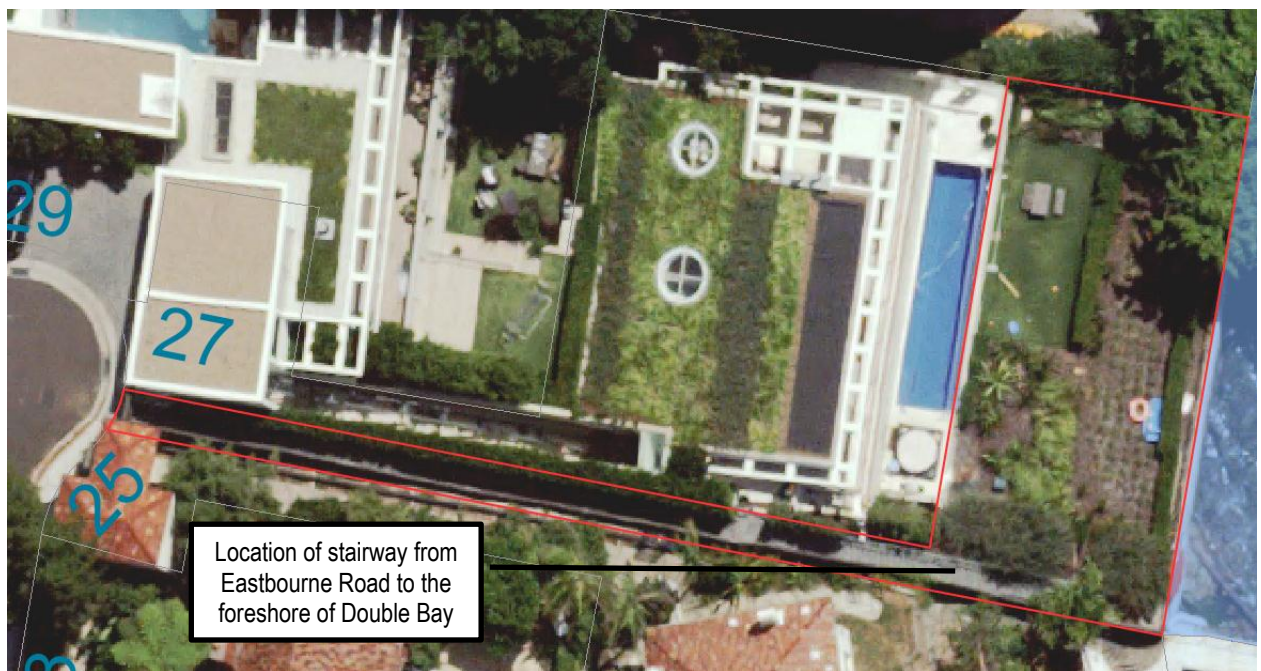
“The owner of the lot burdened covenants and agrees with Woollahra Municipal Council to permit full and free right to all members of the public over so much of the lot burdened and marked "J" in the plan as is zoned Local Open Space Reservation, to go pass and repass on foot without animals or vehicles between the hours of sunrise and sunset in order to gain access to the harbour foreshore of Double Bay.”

In approximately September 2001 works commenced on the development. Over the course of the development numerous construction certificates were issued by several accredited certifiers.

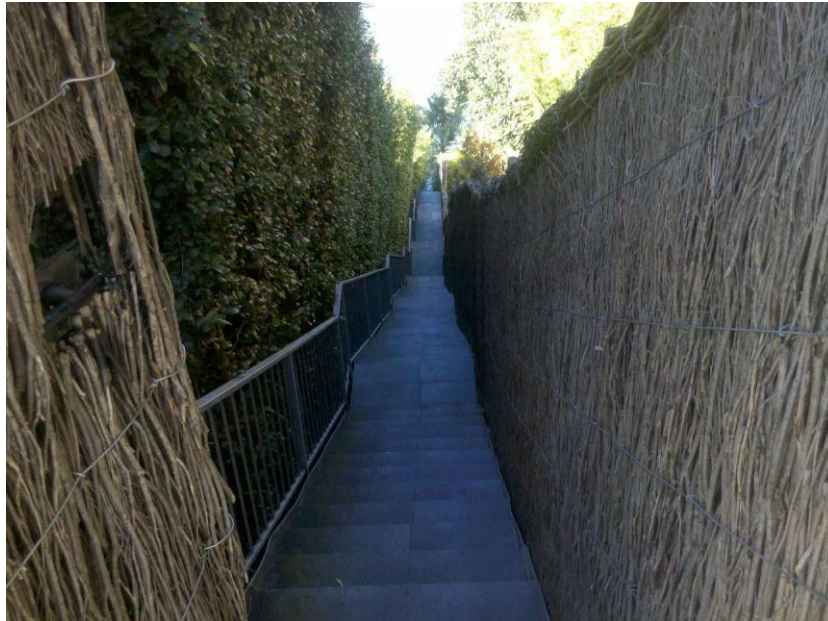
Evidence indicates that a stairway was constructed along the axe-handle portion of Lot 1 adjacent to Lots 16 and 17 in DP 270253 in 2005. The stairway travels from the boundary of Lot 1 with Eastbourne Road along the southern boundary to a point near the foreshore of Double Bay. Photographs 1, 2 and 3 below show the stairs and their location.



Photograph 1 – 2005 aerial photograph of land described as “J” in the positive covenant



Photograph 2 – 2011 aerial photograph of land described as “J” in the positive covenant



Photograph 3 – June 2012 taken from Eastbourne Road facing east towards the foreshore of Double Bay

Development Consent DA 712/2000 was modified pursuant to Section 96 of the *Environmental Planning & Assessment Act 1979* on numerous occasions during the development. Critical to this matter was the modification granted by Council on 21 November 2005 being for “... *alterations to internal, forecourt & entry layout & lift access for buildings B6 and B7 including new lift/inclinorator along southern boundary.*” At that time development consent DA 712/2000 was modified, in part, as follows;

“2. *The following conditions be added to the consent:*

.....

176. Deletion of public access gate

*The gate at the top of the public access stair to the foreshore along the southern side of the “finger of land” between Eastbourne Road and the land within Council’s foreshore building line shall **to** be deleted so as the Double Bay foreshore is accessible by the public at all times. The plans submitted with the Construction Certificate application are to be noted accordingly. **This condition has been imposed to achieve the objectives of the Environmental Planning and Assessment Act 1979, relevant EPI including, specifically, clause 2(2)(h)(vii) of Woollahra Local Environmental Plan 1995.**”*

“3. Condition No 29 of the original consent is to be modified to read as follows:

29. Foreshore Access

The applicant is to provide suitable pedestrian access (stairway) to the foreshore along the southern side of the “finger of land” between Eastbourne Road and the land within Council’s foreshore building line in accordance with Council’s s94 plan and Woollahra LEP95. The design of the stairway is to be to the satisfaction of Council’s Technical Services Division and Council’s Urban Design Team Leader (prior discussions with the Technical Services Division and Council’s Urban Design Team Leader will be necessary). Details are to be provided to Council prior to the issue of the Construction Certificate. Public access to the foreshore is to be available at all times. This condition has been imposed to achieve the objectives of the Environmental Planning and Assessment Act 1979, relevant EPI including, specifically, clause 2(2)(h)(vii) of Woollahra Local Environmental Plan 1995.”

During 2009 to 2011 Council issued a number of ‘Notices of Intention to Give an Order’ in an attempt to ensure public access to the foreshore and compliance with the applicable development consent conditions.

On 3 August 2012 Council issued an order to the Community Association in the following terms;

- “1. To complete the pedestrian access (stairway) to the foreshore along the southern side of the “finger of land” between Eastbourne Road and the land within Council’s foreshore building line, in accordance with the location and design of approved DA Masterplan Layout Plan 00023-0112 (Issue B) dated 10 January 2001 and Construction Certificate drawing Masterplan Layout Level 1 – Drawing No. 20381 approved on 23 August 2001.”*

The period for compliance with the order was twelve (12) months and one (1) week.

The Community Association lodged a Class 1 appeal with the Land & Environment Court and the matter was heard by Justice Pain on 13 to 16 May 2013. The grounds of the appeal were summarised by Justice Pain as follows;

“Conditions 29 and 30 of the 2001 consent are invalid because:

- 1. The conditions are beyond the Council's power to impose;*
- 2. are manifestly unreasonable;*
- 3. the dedication of land or an interest in land being the exclusive use area free of cost was not authorised by s 94(1); and*
- 4. conditions 29, 30 and 59 are not reasonable in the manner required by s 94(2) as applying on 5 February 2001 (currently s 94(4)).*

Consequently conditions 29 and 30 are invalid and can be severed from the consent. Further,

- 5. The operation of s 42 of the Real Property Act 1900 means that conditions 29 and 30 are not enforceable (indefeasibility of title).*
- 6. Conditions 29 and 30 have been complied with in any event.¹”*

On 31 October 2013 Justice Pain handed down her written judgment, revoking Council’s order dated 3 August 2012. In making this order Justice Pain made the following findings;

¹ Paragraph 58 of the Land & Environment Council decision ‘Community Association DP 270253 v Woollahra Municipal Council [2013] NSWLEC 184’ dated 31 October 2013.

- “78 *I agree with the Council's submission that area "J" in various plans constituting DP 270253 is the area bounded by the unbroken black line depicted as "L" in Amendment No 15. This accords with the terms of the public positive covenant in the DP. ... That part of lot 1 in front of and beside (now) lot 17 is the same area as "L" in Amendment No 15 zoned Local Open Space Reservation.*”
- “93 *That the public positive covenant was offered voluntarily by the developer in 2001 is immaterial to whether the conditions are within the Council's power to impose*”.
- “96 *In conclusion, there is no nexus between the Babworth Estate development and the requirement in condition 30 to create a public positive covenant over the land zoned Local Open Space Reservation as required by s 80A(1)(a) and the second test in Newbury. The requirement under condition 29 to provide suitable pedestrian access to the foreshore land for the public also does not satisfy the requirement in s 80A(1)(a) and the second test in Newbury. The plan in condition 1 the subject of the order contains the stairway the subject of condition 29 and the same findings apply to it.*”
- “105 *Public land managed by a council has the benefit of council rangers exercising control over members of the public, limiting access to land where necessary such as by locking access gates and expenditure by a council on infrastructure such as lighting to ensure public safety. The assumption in the conditions is that the Community Association bears these responsibilities. That assumption is unreasonable in the circumstances of this case. I consider that conditions 29 and 30 and condition 1 in part are unreasonable in the Wednesbury sense and therefore that the third Newbury test is not satisfied.*”
- “106 *...I consider that conditions 29, 30 and condition 1 to the extent these are implemented through a plan were imposed without lawful power to do so.*”
- “123 *My findings in relation to grounds 1 and 2 result in the exercise of my discretion not to enforce the order the subject of this appeal. In light of the circumstances outlined in grounds 1 and 2 the appropriate course is that I revoke the order issued under s 121B of the EPA Act, as I am empowered to do under s 121ZK(4)(a). I will ask the parties what they wish to do in relation to costs before determining whether a costs order ought be made.*”

A copy of Justice Pain’s written judgement is attached and marked ‘Annexure 2’.

Initially costs were reserved in the Class 1 appeal proceedings.

On 14 November 2013 the Community Association submitted a ‘Notice of Motion’ to the Land & Environment Court seeking indemnity costs against the Council.

On 5 February 2014 the costs hearing was heard by Justice Pain, with the decision handed down on 7 February 2014. Justice Pain dismissed the ‘Notice of Motion’ dated 14 November 2013 and ordered the Community Association to pay the Council’s costs of the ‘Notice of Motion’.

On 5 March 2014 the Community Association filed a 'Notice of Intention to Appeal' the cost hearing decision. The appeal is in effect a ‘holding appeal’, with the Community Association having until 7 May 2014 to decide whether they will go forward with the appeal.

Council's legal expenditure on enforcement proceedings over the 2012/13 and 2013/14 financial years is currently \$115,530. Approximately \$10,000 of this expenditure represents Council's legal costs in the costs hearing, which may, in part, be recoverable subject to the outstanding 'Notice of Intention to Appeal'.

Consideration:

The Land & Environment Court decision of 31 October 2013 has largely struck out the conditions of development consent DA 712/2000 that require the owner of the property to provide a pedestrian stairway and access to the foreshore. However, the decision did confirm the existence of the positive covenant over that part of the land shown in Figure 1, Photographs 1 and 2 above that is presently zoned 'Open Space' pursuant to Council's LEP.

Following the Court's decision legal advice was provided by Mr Peter Rigg of Norton Rose Fulbright on 24 February 2014. Mr Rigg was Council's legal representative in the Class 1 appeal of Council's order dated 3 August 2012 and has extensive knowledge of the Babworth House development. Mr Rigg is considered to be in the best position to provide legal advice to Council on this matter at this time.

The information within Mr Rigg's advice contains privileged information which needs to be considered in a closed session.

Tim Tuxford
Manager - Compliance

Allan Coker
Director – Planning & Development

Annexures:

1. Sheet 3 of 3 of DP 270253 as annexed to the Land & Environment Court decision for Community Association DP 270253 v Woollahra Municipal Council [2013] NSWLEC 184 dated 31 October 2013.
2. Land & Environment Court decision Community Association DP 270253 v Woollahra Municipal Council [2013] NSWLEC 184 dated 31 October 2013.

Political Donations – matters to be considered by Councillors at Meetings

