

ITEM NUMBER: 18.2

CONFIDENTIAL REPORT

SEAWALL APARTMENTS REDEVELOPMENT
(Report No: 110/22)

Pursuant to Section 83(5) of the Local Government Act 1999 the Report attached to this agenda and the accompanying documentation is delivered to the Council Members upon the basis that the Council consider the Report and the documents in confidence under Part 3 of the Act, specifically on the basis that Council will receive, discuss or consider:

- h. legal advice.**
- i. information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council.**

Recommendation – Exclusion of the Public – Section 90(3)(b & d) Order

1. That pursuant to Section 90(2) of the *Local Government Act 1999* Council hereby orders that the public be excluded from attendance at this meeting with the exception of the Chief Executive Officer and Staff in attendance at the meeting in order to consider Report No: 110/22 Seawall Apartments Redevelopment in confidence.
 2. That in accordance with Section 90(3) of the *Local Government Act 1999* Council is satisfied that it is necessary that the public be excluded to consider the information contained in Report No: 110/22 Seawall Apartments Redevelopment in confidence on the following grounds:
 - h. pursuant to section 90(3)(h) of the Act, the information to be received, discussed or considered in relation to this Agenda Item constitutes legal advice the disclosure of which would prejudice the legal position of the Council.
 - i. pursuant to section 90(3)(i) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council.

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information.
 3. The Council is satisfied, the principle that the meeting be conducted in a place open to the public, has been outweighed by the need to keep the information or discussion confidential.
-

Item No: 18.2

Subject: **SEAWALL APARTMENTS REDEVELOPMENT**

Date: 12 April 2022

Written By: Manager, Development Services

General Manager: Strategy and Corporate, Ms P Jackson

SUMMARY

Following the decision of the Environment, Resources and Development Court to allow parties to be joined to an appeal against the State Commission Assessment Panel (SCAP) decision to refuse consent to a multi-storey redevelopment of the Seawall Apartments at 21-25 South Esplanade, Glenelg, the developer has in turn appealed that decision to the Supreme Court. As a result, Council must now decide whether it wishes to actively participate in the defence of that appeal. Based on legal advice around the costings and likelihood of success, and in light of the changed position of the SCAP since its initial decision, this report recommends that Council withdraw its continued participation in the appeal. The developer has also requested a meeting with the Mayor and Chief Executive Officer to discuss a possible out-of-court resolution, which is recommended as a means to reach an agreement on the pursuit of costs, and to commence some positive dialogue on the design of the public-private interface between the development and the foreshore.

RECOMMENDATION

That, in relation to the active appeal relating to the development application for the redevelopment of the Seawall Apartments located at 21-25 South Esplanade, Glenelg, Council:

- 1. discontinue the City of Holdfast Bay's active participation in the appeal to the Supreme Court in response to the appeal by the developer against the decision of the Environment, Resources and Development Court to allow the City of Holdfast Bay to be joined to that appeal;**
- 2. authorise the Mayor and Chief Executive Officer to meet with the developers and their counsel to discuss a cost effective resolution to the matter that is in the best interest of the broader community.**
- 3. is informed via a report of any in-principle agreement reached at the aforementioned meeting in Part 3 of the recommendation, with any formal decision regarding a resolution to be made by Council.**

RETAIN IN CONFIDENCE - Section 91(7) Order

4. **having considered Agenda Item 18.2 Seawall Apartments Redevelopment (Report No: 110/22) in confidence under Section 90(2), 90(3)(h) and 90(3)(i) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the Report and Attachment be retained in confidence for a period of 24 months with the Chief Executive Officer authorised to release the documents following conclusion of the court proceedings or the expiry of the 24 month confidentiality period.**
-

STRATEGIC PLAN

The recommendation supports the Vision in the Strategic Plan in that it seeks to work towards creating a beautiful coast and healthy place to live.

STATUTORY PROVISIONS

Local Government Act 1999

BACKGROUND

At its Meeting held on 9 February 2021, Council resolved to make a representation to the State Commission Assessment Panel (SCAP) following an invitation to provide comment as an adjoining landowner for a development application involving a 13 storey apartment building located at 21-25 South Esplanade, Glenelg (C090221/2221). The development application was subsequently refused approval by the SCAP at its meeting held on 30 June 2021, being a decision that was subsequently appealed by the developer. Council had the opportunity to be joined to the appeal as a means to ensure that its expressed views about the proposal continued to be recognised, and to reserve its rights to remain involved in the discussion on any compromise proposals that might be put forward by the developer to the SCAP. As a result, Council further resolved at its meeting held on 28 September 2021 (C280921/2428) to make an application to the Environment, Resources and Development Court for Council to be joined to the appeal for the reasons expressed in its previous resolution on the matter. Part 4 of that resolutions requires:

“That Council receive a further report seeking permission to proceed with the legal process based on a costed strategy should Council be successful in being joined to the appeal.”

At the Directions Hearing held on 21 March 2022, the ERD Court resolved to allow Council’s application to be joined, in response to which the developer has lodged an appeal with the Supreme Court to review that decision. Council is now left with the decision whether to actively participate in that appeal or not, and whether to fund such participation.

REPORT

In light of the ERD Court's decision to allow the City of Holdfast Bay to be joined to the legal proceedings relating to the Seawall Apartment redevelopment, and in response to a subsequent appeal by the developer to the Supreme Court to overturn that decision, Administration is required to now seek instructions from Council on whether to proceed with the legal process or seek a cost effective outcome that involves discontinuing the legal process.

A cost estimate for Council's continued active participation in the appeal has been obtained from the solicitors assisting Council with this matter, Mellor Olsson Lawyers. Included in the cost estimate are the Council's chances of success. It is anticipated that the cost of engaging legal services for Council's active participation in the appeal is in the order of \$25,000-\$30,000 (plus GST) plus an additional cost of \$2,000-\$4,000 in disbursement fees.

Refer Attachment 1

The cost estimates include all of the solicitor's preparation fees and the estimated fees required to engage special counsel (given that the matter is being litigated in the Supreme Court). Solicitors from Mellor Olsson have been retained due to their previous assistance with this matter, as it may be more cost effective to continue with their services given their already considerable knowledge of the matter. Notwithstanding, the Council is not bound to continue with their services, and if Council were to approve the continued participation in the appeal, it can do so with a cost ceiling that can be applied to alternative legal provider.

It is important to note that the Council is not compelled to actively litigate in response to the appeal, although there may be an expectation on the part of the community that Council's prior resolution to apply to be joined to the matter had no bounds. Notwithstanding, Council's formal involvement was limited to its participation in the ERD Court, not the higher Supreme Court, which is where the matter now finds itself.

As a means to possibly avoid a costly hearing, the developer has requested a meeting with the Mayor and Chief Executive Officer to understand whether a resolution might be possible. It is recommended that Council authorise the attendance of both the Mayor and Chief Executive Officer at such a meeting, and that a report be brought back to Council should a decision be required as to the terms of any agreement.

Risks and Costs

The consequence of Council's successful application to be joined to the ERD Court proceedings is that even if Council does not participate in the subsequent appeal proceedings, it is potentially exposed to having to pay costs to the developer (which will usually be about 60-70% of those actually incurred). It is therefore recommended that any negotiated out-of-court outcome with the developer that would involve Council's discontinuance in the legal process include a condition that parties do not seek costs against each other. Should the Council continue with the legal process, and if the developer is successful in its appeal that the parties, including the Council, should not have been joined, Council will likely be liable to the developer for its costs of the appeal.

(likely to order that costs be paid to the successful party/parties). In this scenario the costs would likely be shared by the Council and the other parties who have been joined.

In the event that the developer loses its appeal, the Council will be entitled to recover a portion of its costs (usually 60-70% of the actual costs incurred). If Council does not actively participate in the appeal those costs will be minimal. As such, there is a risk that Council will have to pay the costs of the developer irrespective of whether it actively participates in the appeal proceedings or not.

Change of Circumstances

Since the time of Council's original decision to seek to be joined to the appeal against the State Commission Assessment Panel's (SCAP) refusal of the multi-storey development, circumstances have changed markedly. Council now needs to apply due diligence in light of these changed circumstances by considering its position moving forward, and whether continuing with the legal process is in the broader community's interest. The circumstances that have changed are discussed below.

1. SCAP Compromise

Council Administration are reliably informed that the developer and the SCAP have reached an agreement behind the scenes on a compromise proposal that would resolve the SCAP's reasons for initially refusing the development. It is understood that the SCAP has endorsed a proposal for an eleven (11) storey development. In this regard, if the Council were to pursue its opposition to the development, it would do so without the continued support of the SCAP. The Council would effectively be leading the appeal, to which it only initially sought to be joined as an interested party as a means to support the SCAP in its opposition to the proposal. The financial impost would be high, and even if the Council was successful, the developer could simply submit a new development application to the SCAP for approval for substantially the same development, for which an agreement has purportedly already been struck.

2. Supreme Court Involvement

The matter has now progressed to the Supreme Court, where as Council only ever intended to make representation to the lower Environment, Resources and Development (ERD) Court. The implications for Council being embroiled in lengthy litigation in the Supreme Court are high. Council would have to retain a barrister to pursue the matter, which would come at great cost. Litigation costs aside, there is also the prospect of Council having to contribute to the costs of other parties in the Supreme Court, whereas costs can be managed in the ERD Court as costs are not awarded there.

3. Prolonged Stagnancy for the Site

By continuing with a protracted legal process, the site remains dormant and an eyesore in this prominent location. It is clear that the SCAP will support a future multi-storey redevelopment of the site, including the demolition of the heritage listed Seawall Apartments, so it may be time to

accept the inevitable and withdraw from the proceedings, investing Council's time and resources more effectively. It may be opportune to now seek to build some goodwill and work collaboratively with the developer to ensure a joint design of the public-private interface to benefit the broader community.

BUDGET

Whilst there is a budget line dedicated to the defence of legal appeals that involve decisions on development applications, the amount is limited to \$50,000, which is designed to cover the cost of all appeals across a twelve (12) month period. Notwithstanding the limited budget allocation in the Annual Business Plan, the previous Council resolution on this matter required that Administration seek Council's permission for any further expenditure on this particular matter.

LIFE CYCLE COSTS

The cost of actively participating in the appeal may extend to future appeals. Should the developer's appeal fail and the Supreme Court ratify the ERD Court's decision to allow Council to be joined as a party to the appeal, the developer can seek a review from a higher Court again.

Attachment 1



From: Anthony Kelly [<mailto:akelly@molawyers.com.au>]
Sent: Monday, 28 March 2022 2:35 PM
To: Anthony Marroncelli <amarroncelli@holdfast.sa.gov.au>
Cc: Duncan Soang <dsoang@molawyers.com.au>
Subject: 21-25 South Esplanade

Dear Anthony,

Further to our recent discussions, I set out below a summary of the current status of the proceedings and an estimate of the costs for the appeal.

Status of proceedings

As you know, the developer of the land at 21-25 South Esplanade appealed to the ERD Court against the decision of the State Planning Commission to refuse consent to its proposed multi-storey development.

The Council, together with a number of adjoining neighbours (Mark Forgie, Peter Moloney, Dale Hanson, Bruce and H Kay), applied to be joined to the ERD Court appeal proceedings so they could present a case against the proposed development.

The applications for joinder were opposed by the developer, with a significant reason for this being that a compromise position had been reached with the State Planning Commission.

The applications for joinder were argued on 24 September 2021. On 16 February 2022 the Court handed down its decision in respect of the joinder applications (a copy is attached for your convenience). At that stage the adjoining neighbours were joined but not the Council. The reason for the Council not being joined at this stage was that the Court wasn't satisfied that the Council had in fact made a decision to apply to be joined. This was a procedural issue which became evident shortly before the hearing, with the issue being that neither the CEO, Mayor or Council staff had the delegated authority to make a decision to apply to be joined to an appeal in the ERD Court (put another way, only the Elected Member body was able to make a decision to be joined, which did not occur here). Due to the timing of the Council meetings, it was not possible to obtain a resolution before the Court hearing.

At its meeting on 28 September 2021, which was after the Court hearing, the Council formally resolved to apply to be joined to the ERD Court proceedings. This resolution was provided to the Court after the delivery of its decision and, on 21 March 2022, Council was joined as a party to the ERD Court proceedings.

The developer has appealed to the Supreme Court against the decision of the ERD Court to join the parties. We expect that this appeal will take place in May or June.

Costs of appeal

In terms of the cost of the Supreme Court appeal proceedings, we estimate that this will be in the order of \$25,000-\$30,000 (plus GST). We have provided a more detailed breakdown of the estimate below.

Whilst we can't say with certainty that the costs won't be more than this estimate as we don't know how the matter will play out, generally I have taken the approach of erring on the side of a higher

estimate than a lower estimate, to try and give Council some comfort that the costs won't exceed this amount.

Mellor Olsson fees

We have utilised the partner rate of \$410 per hour plus GST but will endeavour to use junior staff where possible.

1. Correspondence with Botten Levinson and other parties in respect of appeal (which will include matters such as exchange of documents, production of book of documents for appeal, etc): 3-6 hours
2. Reviewing court documents lodged in appeal proceedings, including Outlines of Argument/Submissions of the other parties: 2-4 hours
3. Attendance at preliminary hearings (say 2 attendances of one hour): 2 hours
4. Transcript of original hearing and attendance on copy documents and reviewing documents: 2-4 hours
5. Meetings with counsel: 3 hours
6. Attendance on research issues and cases for counsel and on submissions: 2-5 hours
7. Attendance at appeal hearing: 6 hours

Total: \$8,200-\$12,300 (20-30 hours)

Counsel fees

We will need to obtain exact fees to be charged, but have based this on counsel fees of \$450 per hour and \$4,500 plus GST per day.

1. Attendance on correspondence and the like: 1 hour
2. Reviewing transcript, documents lodged in the ERD Court and cases referred to in ERD Court: 1 day
3. Meetings: 3 hours
4. Attendance on preparation for appeal, including submissions: 1-1.5 days
5. Attendance at appeal: 1 day

Total: \$15,750-\$18,000 (3.5-4 days)

We note that we have engaged Tom Besanko to appear as counsel on a tentative basis, pending Council's formal resolution to participate in the Supreme Court appeal.

Disbursements

In addition to the above, we are likely to incur other out of pocket costs, such as costs for the transcript of the original hearing. An additional allowance of \$2,000-\$4,000 should be factored in to the costs.

Risk and costs

The other issue Council needs to be aware of is that, now it has been joined to the ERD Court proceedings, even if Council does not participate in the Supreme Court appeal proceedings it is potentially liable for having to pay the costs of the Supreme Court proceedings to the developer (which will usually be about 60-70% of the costs the developer has actually incurred). If the

developer is successful in arguing that the parties, including the Council, should not have been joined, Council will likely be liable to the developer for its costs of the Supreme Court appeal (I say likely as the Court retains a discretion on costs, but it is likely to order that costs be paid to the successful party/parties). In this scenario the costs would likely be shared by the Council and the other parties who have been joined. It is also possible, although unlikely, that some parties remain joined whilst others are not. If Council was not joined but others were, Council would again have to pay the developers costs, albeit in this scenario the costs would likely be shared by fewer parties.

In the event that the developer is loses its appeal, the Council will be entitled to recover a portion of its costs (usually 60-70% of the actual costs incurred). Obviously if Council does not actively participate in the appeal those costs will be minimal.

We raise this as I think it is important that Council is aware that there is a risk that it will have to pay the costs of the developer irrespective of whether it actively participates in the Supreme Court appeal proceedings or not.

Meeting

The developer has indicated that it would like to meet with Mayor Wilson and Mr Bria, together with the respective legal representatives, to discuss what Council may be prepared to accept as a development on the subject land. Given the potential for a compromise position and avoiding protracted legal proceedings, we recommend that Council agree to meeting to explore potential compromises- Council has little to lose and much to gain in this scenario, as it may avoid legal costs and potentially give a more certain outcome as to what is built on the land.

Please let us know if you would like to discuss any of the above.

Regards

Anthony Kelly

Partner



Pirie House
Level 6, 89 Pirie Street
Adelaide SA 5000

P 08 8414 3449
E akelly@molawyers.com.au
W www.molawyers.com.au