

10.9. Legal Costs - IOF Custodians v NSC

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ATTACHMENTS:

1. CONFIDENTIAL - Legal fees and disbursements incurred todate [10.9.1 - 1 page]

PURPOSE:

The purpose of this report is to seek Council approval for expenditure over \$1,000,000 that has not gone to tender and will be placed on the GIPA report as a class 2 contract on all costs associated with the matter of IOF Custodians v NSC.

EXECUTIVE SUMMARY:

Council is the Respondent in Class 1 Appeal Proceedings filed on 1 September 2021 in the Land and Environment Court. IOF Custodian Pty Limited atf the 105 Miller Street North Sydney Trust is the Applicant. The matter is the deemed refusal of DA 147/20 in respect of 105-153 Miller Street North Sydney.

Council's legal expenses for this matter will exceed \$1,000,000. Legal services to Council are procured through a panel appointed through a competitive procurement process. Expenditure up to \$1,000,000 under the Procurement Policy can be by way of quotations from a panel. Where expenditure is over \$1,000,000 Council is the approval authority. For this reason, Council approval is being sought for the additional expenditure in this matter.

Reasons for this level of expenditure are due to the length of the hearing and the expert evidence required.

Should Council wish to discuss this report it is noted that the attached confidential document includes commercial information that would, if disclosed, prejudice the commercial position of the person who supplied it. Further, release of the information would, on balance be contrary to the public interest as publication of provided amounts would discourage potential providers from submitting commercial information in future and would affect Council's ability to obtain value for money services. As such should this matter be discussed it should be considered in closed session

FINANCIAL IMPLICATIONS:

The total cost for this matter is estimated to be \$1,296,705.60 .

An adjustment to the budget for legal costs was approved as part of the December Quarterly Budget review. Consideration as to whether a further adjustment is required will be done as part of the March Quarterly Budget review.

RECOMMENDATION:

1. THAT Council endorse the exemption of tendering in relation to the matter of IOF Custodians v NSC for the reasons set out in this report.

2. THAT Council approve all works associated with the matter of IOF Custodians v NSC be placed on the GIPA register as a class 2 contract (No tender process) in accordance with the Government Information (Public Access) Act.

3. THAT Council resolves that the identified attachment to this report is to be treated as confidential in accordance with section 11(3) of the Local Government Act for the following reason under section 10A(2) of the Local Government Act:

(d) commercial information of a confidential nature that would, if disclosed (i) prejudice the commercial position of the person who supplied it

It is further noted that release of this information would, on balance be contrary to the public interest as publication of all provided amounts would discourage potential providers from submitting commercial information in future and would affect Council's ability to obtain value for money services.

LINK TO COMMUNITY STRATEGIC PLAN

The relationship with the Community Strategic Plan is as follows:

- 3. Our Innovative City
 - 3.3 Distinctive sense of place and design excellence

- 5. Our Civic Leadership
 - 5.1 Lead North Sydney's strategic direction

BACKGROUND

Council is the Respondent in Class 1 Appeal Proceedings filed on 1 September 2021 in the Land and Environment Court. IOF Custodian Pty Limited atf the 105 Miller Street North Sydney Trust is the Applicant. The matter is the deemed refusal of DA147/20 in respect of 105-153 Miller Street North Sydney.

CONSULTATION REQUIREMENTS

Community engagement is not required.

DETAIL

Upon receipt of the filed proceedings, Council engaged HWL Ebsworth to act in this matter.

HWL Ebsworth advised that at the commencement of the proceedings there were a number of unknowns which made providing an estimate of fees very difficult.

Then, throughout the proceedings a number of matters changed, including the Court declaring that the listing on the Register of Items of State Heritage Significance was invalid, and this impacted the hearing time.

The proceedings were listed for a conciliation conference on 22 July and 3 August 2022 which was attended by Senior Counsel, two instructing solicitors and seven expert witnesses.

After termination of the conciliation conference, on 16 August 2022 the proceedings were set down for a 10-day hearing in December 2022. Subsequent to the 16 August 2022 directions hearing, the Applicant amended its Application which resulted in further contentions being raised. This required an additional four expert witnesses to be briefed for the hearing.

The hearing took place over 14 days (between 5-16 and 21 December 2022, and 17-19 January 2023) involving Senior Counsel (Tim Robertson SC) and Junior Counsel (Robert White), along with 11 experts (comprising Heritage, Town Planning, Urban Design, Traffic, Wind, Visual Impact, Arboriculture, Architecture, Engineering, Quantity Surveyor, Land Economics).

In preparation of the matter for hearing there were a significant number of documents that were prepared for tender (in addition to the usual Bundle of Documents from Council) relating to Council's public domain strategy and other approvals, historical heritage information regarding the building and its architect, and other financial documents relating to the building and the site. This caused Notices to Produce to be issued. Many of these matters were not foreseen at the time that the proceedings were set down for hearing.

There were also a number of factors that contributed to the hearing going longer than estimated. This included the following matters:

1. a number of Notices to Produce were responded to by the applicant which required a number of the experts (Traffic, Arboriculture, Visual Impact, Engineering, Quantity Surveying, Land Economics to reconvene joint conferencing and produce further joint reports in order to deal with the further documents produced by the applicant.
2. provisions in the Approval for the Metro Station which required access to the site from the Station site.
3. the above, together with the Senior Commissioner's request for detailed written submissions, resulted in the hearing time being expanded to 14 days (from the original 10) and further costs being incurred to bring the hearing to finalisation.

The attached confidential table sets out the total legal fees and disbursements (comprising Counsel fees and expert fees) incurred in the matter to date.

The matter is now reserved pending judgment.

It is noted that the Land and Environment Court is generally a no costs jurisdiction although there are some exceptions.

Council engages legal providers through a panel which was the subject of a tender process. There are restrictions on the approval for various levels of expenditure in matters. In this instance Council approval is required and sought because the expenditure is above \$1,000,000.