

10.8. North Sydney Council v Transport for NSW – Update on Proceedings

AUTHOR	Kathy Simpson, Administration Officer
ENDORSED BY	Shane Sullivan, Acting Director Corporate Services
ATTACHMENTS	<ol style="list-style-type: none">1. Signed - Public - Memorandum to Council - 3 April 2023 [10.8.1 - 3 pages]2. CONFIDENTIAL - Privileged confidential - Report to Council [10.8.2 - 3 pages]3. CONFIDENTIAL - Privileged confidential - Compared - Memorandum to Council [10.8.3 - 4 pages]
CSP LINK	<ol style="list-style-type: none">3. Our Innovative City3.3 Distinctive sense of place and design excellence5. Our Civic Leadership5.1 Lead North Sydney's strategic direction

PURPOSE:

The purpose of this report is to provide Council with an update in relation to Land and Environment Court Proceedings 2022/00161074 (the Proceedings).

EXECUTIVE SUMMARY:

- This update report has been provided by Council's engaged Solicitors to update Council on the North Sydney Council v Transport for NSW proceedings with respect to the compulsory acquisition of land within Anzac Park and Cammeray Park.
- Council's objectives in this matter have been to ensure the land is returned after the acquisition period to an acceptable standard, to obtain reimbursement of legal and valuation costs connected to the matter, and to ensure that the loss attributable to the reduction in public benefit from any loss of public open space is adequately compensated.
- A separate Confidential report is provided. The Confidential report also includes additional detail (as highlighted) on the legal nature of the appeal, status, and legal issues relating to this matter which is still afoot, including prospects.
- Should Council wish to discuss this report it is noted that the attached confidential document includes advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the grounds of legal professional privilege and because consideration of the matter in open Council would be, on balance, contrary to the public interest as it would affect Council's ability to manage legal matters effectively and in the best interests of the community. As such should this matter be discussed it should be considered in closed session.

RECOMMENDATION:

1. THAT Council note the attached advice and the attached confidential (legal professional privilege advice) in relation to this matter and endorse the continuation and funding of this matter as per the advice and as briefed to Council.

2. 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:

(g) advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege

It is further noted that release of this information would be, on balance, contrary to the public interest as it would affect Council's ability to manage legal matters effectively and in the best interests of the community.

Background

TfNSW has compulsorily acquired a leasehold interest in land within Anzac Park, St Leonards Park and Cammeray Park for a term of four years and 11 months for the purposes of the Warringah Freeway Upgrade project.

Council has brought proceedings against TfNSW to, in part, ensure there is adequate compensation for any loss of public open space.

Status of Proceedings and provision of advice

Attached are

- A public update from Council's Solicitors;
- A confidential report, subject to legal professional privilege; and
- A confidential update from Council's Solicitors - the highlighted parts of the memo are subject to legal professional privilege.

The timetable has been changed somewhat with the Court having granted an adjournment of the subpoena to Transport for NSW which became returnable on 14 April 2023.

Consultation requirements

Community engagement is not required.

Financial/Resource Implications

In proceedings of this kind, the usual position is that if the Court determines Council is entitled to an amount of compensation greater than the compensation determined by the Valuer-General (in this case, \$3), Council can expect an order that its costs of the proceedings be paid by TfNSW on an 'ordinary basis'. Council is required to fund the matter until any relevant costs determination.

To date Council has incurred costs of \$305,732.31 on legal fees, of the \$650,000 budgeted for this matter.

The attached confidential information provides further advice as to Council's potential entitlements for compensation and costs.

Legislation

The schedule of the court timetable is attached for the information of Council.

Memorandum

To Simone Brew, Legal Counsel
Copy To Therese Manns, General Manager
From Allens
Date 3 April 2023
Matter No 121098289
Subject North Sydney Council v Transport for NSW – Update on Proceedings

The purpose of this memorandum is to assist with the Council briefing to be held on 26 April 2023 in relation to Land and Environment Court Proceedings 2022/00161074 (the **Proceedings**).

1 Context of proceedings

- 1.1 TfNSW has compulsorily acquired a leasehold interest in land within Anzac Park, St Leonards Park and Cammeray Park (the **Land**) for a term of four years and 11 months (**Acquisition Period**) for the purposes of the Warringah Freeway Upgrade project (the **Project**).
- 1.2 The Proceedings have been brought by Council against Transport for NSW (**TfNSW**), to object to the offer of compensation by TfNSW for the acquisition of the Land.
- 1.3 At the end of the Acquisition Period, the Land will be returned to Council as Crown land manager under the *Crown Land Management Act 2016* (**CLM Act**). TfNSW may, at a later time, compulsorily acquire some or all of the Land in freehold, however we are instructed no steps to do so have yet been taken by TfNSW.
- 1.4 We understand Council's key objectives are to:
 - (a) ensure the Land to be returned by TfNSW after the Acquisition Period is reinstated to a standard at least equivalent to its prior condition;
 - (b) be reimbursed in full for legal and valuation costs incurred in connection with the acquisition; and
 - (c) ensure that the loss attributable to the reduction in public benefit from any loss of public open space is adequately compensated.
- 1.5 We also understand that Council has broader concerns about the impact of the Warringah Freeway Upgrade project (the **Project**) and the future use of the Land, particularly Cammeray Park. We understand that one of Council's concerns is the design of any permanent traffic facility to be built on Cammeray Park, and Council's preference is for the facility to be underground to minimise the loss of public open space.
- 1.6 The Proceedings are only concerned with the leasehold acquisition of the Land for the Acquisition Period. While it is apparent from the Project approval documents that TfNSW intends to compulsorily acquire a section of Cammeray Park in freehold (ie permanently), permanent acquisition of that land and the impacts which may result from it are not relevant to the Proceedings. Council will have separate entitlements to compensation arising from any future acquisitions.

2 Status of Proceedings

- 2.1 The parties participated in a conciliation conference on a 'without prejudice' basis on 7 December 2022.
- 2.2 By consent on 16 January 2023, the Court made orders terminating the conciliation conference at the request of the parties. While the formal conciliation process has been terminated, without

North Sydney Council v Transport for NSW

prejudice negotiations can continue with TfNSW up to the hearing. As the Proceedings progress, we can consider with Council whether there is utility in such negotiations.

- 2.3 The Proceedings were listed for further directions on 3 February 2023, at which time the Court set a timetable up to and including the hearing. A summary of the key steps in that timetable is set out in the table in Schedule 1 of this memorandum.

3 Evidence in the proceedings

Generally

- 3.1 In addition to Dr Fahrer (an environmental economist), Council has retained experts in the disciplines of quantity surveying (David Yong of Northcroft) and real estate valuation (Michael Dyson).
- 3.2 The timetable provides for each of the parties' experts to prepare individual expert reports, followed by a joint expert report that is to be the product of a conference between the relevant experts, to identify the matters on which they agree and disagree, and why.
- 3.3 The first individual expert report to be served is that of Council's quantity surveying expert, by 5 May 2023.

4 Costs of the proceedings

- 4.1 In proceedings of this kind, the usual position is that if the Court determines Council is entitled to an amount of compensation greater than the compensation determined by the Valuer-General (in this case, \$3), Council can expect an order that its costs of the proceedings be paid by TfNSW on an 'ordinary basis'.

Yours sincerely,



Felicity Rourke
Partner
Allens
Felicity.Rourke@allens.com.au
T +61 2 9230 4366



Rebecca Ritchie
Senior Associate
Allens
Rebecca.Ritchie@allens.com.au
T +61 2 9230 4558

Memorandum

Schedule 1 – Court timetable

Date	Details of Court timetable	Status
15 March 2023	Council to: (a) file and serve any notices to produce and subpoenas (b) serve any lay evidence and evidence of other financial losses under s59(1)(f)	These steps are complete. Subpoenas were filed for Council on 15 March 2023 and were returnable before the Court on 29 March 2023. Council has also served lay evidence on which it intends to rely, to support its environmental economic evidence.
6 April 2023	TfNSW to: (a) file and serve any notices to produce and subpoenas (b) serve any lay evidence and evidence of other financial losses under s59(1)(f)	
5 May 2023	Council to serve individual report of quantity surveying expert	
2 June 2023	TfNSW to serve individual report of quantity surveying expert	
16 June 2023	Quantity surveyors' joint expert report due	
20 July 2023	Council to serve individual report of environmental economics expert	
9 August 2023	TfNSW to serve individual report of environmental economics expert	
25 August 2023	Environmental economists' joint expert report due	
1 September 2023	Council to serve individual report of valuation expert	
20 September 2023	TfNSW to serve individual report of valuation expert	
6 October 2023	Valuers' joint expert report due	
11 October 2023	Council to make any application to amend points of claim	
16 October 2023	TfNSW to amend points of defence	
23 October to 2 November 2023	Hearing (9 days)	