

CITY OF MOUNT GAMBIER

Meeting to be held at the Council Chamber, Civic Centre, 10 Watson Terrace, Mount Gambier  
on Tuesday 17<sup>th</sup> March, 2015 at 6.00 p.m.

AGENDA

**CONSIDERATION FOR EXCLUSION OF PUBLIC**

moved that the following item be received, discussed and considered in confidence by excluding the public pursuant to Section 90 (2) of the Local Government Act 1999, and an order be made that the public (with the exception of other Council Members and Council Officers now present) be excluded from the meeting in order for the item to be considered in confidence as the Council is satisfied that the item is a matter that can be considered in confidence pursuant to the grounds referenced in Section 90 (3) of the said Act as follows:

- S.90(3)(a) - information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead); and
- S.90(3)(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.

The Council is satisfied that the information to be received, discussed or considered in relation to this item is information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of a person. The information that is to be received, discussed or considered in relation to this item relates to the commencement of prosecution proceedings pursuant to the Development Act 1993.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances as the matter is of a personal nature.

<u>Item No.</u>	<u>Subject Matter</u>	<u>S90 (3) Grounds</u>
<b><u>OPERATIONAL SERVICES COMMITTEE – 10<sup>th</sup> February, 2015</u></b>		
9.	<u>DEVELOPMENT CONTROL</u> - Illegal Development - Demolition of a Contributory Place - Ref. AF11/304	(a) (i)

seconded

**IN CONFIDENCE**

**9. DEVELOPMENT CONTROL - Illegal Development - Demolition of a Contributory Place - Ref. AF11/304**

Goal: Governance

Strategic Objective: (i) Demonstrate innovative and responsive organisational governance.

The Presiding Member reported:

(a) Council at its meeting held Tuesday, 27<sup>th</sup> January 2015, resolved the following:

*“(a) The report be received;*

*(b) Council seek advice from Mellor Olsson Lawyers of Adelaide in regard to the likelihood of successful prosecution and the likely outcome of any prosecution proceedings (including approximate costs to Council); and this information, when available, be provided in a further report to Council.”*

(b) Mellor Olsson has provided the above requested information to Council (copy of advice was attached to the Operational Services Committee agenda);

(c) Mellor Olsson has advised that prosecution proceedings are likely to be successful; and based on recent prosecution proceedings, may result in a penalty of up to \$20,000 and a recorded conviction;

(d) should the defendant/s enter a guilty plea, Mellor Olsson’s costs will be in the vicinity of \$2,000 - \$5,000;

(e) if the defendant/s does not enter a guilty plea, Mellor Olsson’s costs will be in the vicinity of \$5,000 - \$15,000;

(f) the above costings are estimates only and actual costs may change, depending on the work that will be required;

(g) Council must now consider its response to the unapproved demolition of the Contributory Place, as it is a clear breach of the *Development Act 1993* and appropriate action should be undertaken;

(h) in determining its direction, Council should be aware of any precedence being established.

**Cr Richardson moved it be recommended:**

**(a) The report be received;**

**(b) Council engage Mellor Olsson Lawyers of Adelaide to commence prosecution proceedings against the property owner of 41 Jubilee Highway West, Mount Gambier.**

**Mayor Lee seconded**

**Carried**

**CONSIDERATION FOR KEEPING MATTERS CONFIDENTIAL**

moved that an order be made pursuant to Section 91 (7) of the Local Government Act, 1999 that the document in relation to item 1 which has been considered by the Council on a confidential basis pursuant to Section 90 (3) be kept confidential as follows:

<u>Date</u>	<u>Subject Matter</u>	<u>S.90(3) Grounds</u>	<u>Element To Be Kept Confidential</u>	<u>Duration</u>
<b><u>OPERATIONAL SERVICES COMMITTEE – 10<sup>th</sup> March, 2015</u></b>				
9.	<b><u>DEVELOPMENT CONTROL</u> - Illegal Development - Demolition of a Contributory Place - Ref. AF11/304</b>	(a) (i)	All details	12 months

**seconded**

Meeting closed at .....

MJT

MINUTES OF THE MEETING OF THE CITY OF MOUNT GAMBIER HELD AT THE COUNCIL CHAMBER, CIVIC CENTRE, 10 WATSON TERRACE, MOUNT GAMBIER ON TUESDAY, 17<sup>th</sup> MARCH, 2015 AT 6.00 P.M.

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## **CONSIDERATION FOR EXCLUSION OF PUBLIC**

Cr Mutton moved that the following item be received, discussed and considered in confidence by excluding the public pursuant to Section 90 (2) of the Local Government Act 1999, and an order be made that the public (with the exception of other Council Members and Council Officers now present) be excluded from the meeting in order for the item to be considered in confidence as the Council is satisfied that the item is a matter that can be considered in confidence pursuant to the grounds referenced in Section 90 (3) of the said Act as follows:

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The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances as the matter is of a personal nature.

<b><u>Item No.</u></b>	<b><u>Subject Matter</u></b>	<b><u>S90 (3) Grounds</u></b>
<b><u>OPERATIONAL SERVICES COMMITTEE</u></b> – 10 <sup>th</sup> February, 2015		
9.	<b><u>DEVELOPMENT CONTROL</u></b> - Illegal Development - Demolition of a Contributory Place - Ref. AF11/304	(a) (i)

Cr Greco seconded

**Carried**

**IN CONFIDENCE**

**9. DEVELOPMENT CONTROL - Illegal Development - Demolition of a Contributory Place - Ref. AF11/304**

Goal: Governance

Strategic Objective: (i) Demonstrate innovative and responsive organisational governance.

The Presiding Member reported:

(a) Council at its meeting held Tuesday, 27<sup>th</sup> January 2015, resolved the following:

*“(a) The report be received;*

*(b) Council seek advice from Mellor Olsson Lawyers of Adelaide in regard to the likelihood of successful prosecution and the likely outcome of any prosecution proceedings (including approximate costs to Council); and this information, when available, be provided in a further report to Council.”*

(b) Mellor Olsson has provided the above requested information to Council (copy of advice was attached to the Operational Services Committee agenda);

(c) Mellor Olsson has advised that prosecution proceedings are likely to be successful; and based on recent prosecution proceedings, may result in a penalty of up to \$20,000 and a recorded conviction;

(d) should the defendant/s enter a guilty plea, Mellor Olsson’s costs will be in the vicinity of \$2,000 - \$5,000;

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(f) the above costings are estimates only and actual costs may change, depending on the work that will be required;

(g) Council must now consider its response to the unapproved demolition of the Contributory Place, as it is a clear breach of the *Development Act 1993* and appropriate action should be undertaken;

(h) in determining its direction, Council should be aware of any precedence being established.

Cr Richardson moved it be recommended:

(a) The report be received;

- (b) Council engage Mellor Olsson Lawyers of Adelaide to commence prosecution proceedings against the property owner of 41 Jubilee Highway West, Mount Gambier.

Mayor Lee seconded

Carried

**Cr Mutton moved the recommendation of the Operational Services Committee as contained in item 9 be adopted.**

**Cr Greco seconded**

Carried

### CONSIDERATION FOR KEEPING MATTERS CONFIDENTIAL

Cr Perryman moved that an order be made pursuant to Section 91 (7) of the Local Government Act, 1999 that the document in relation to item 1 which has been considered by the Council on a confidential basis pursuant to Section 90 (3) be kept confidential as follows:

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<b><u>OPERATIONAL SERVICES COMMITTEE – 10<sup>th</sup> March, 2015</u></b>				
9.	<b><u>DEVELOPMENT CONTROL</u></b> - Illegal Development - Demolition of a Contributory Place - Ref. AF11/304	(a) (i)	All details	12 months or until the matter is resolved

**Cr Mutton seconded**

Carried

Meeting closed at 7.35 p.m.  
LD



OPERATIONAL SERVICES COMMITTEE

Meeting to be held in the Conference Room, Operational Services Area, Level One of Civic Centre, 10 Watson Terrace, Mount Gambier, on Tuesday 10<sup>th</sup> March 2015 at 7.30 a.m.

AGENDA

## MOTIONS WITHOUT NOTICE -

### 8. CONSIDERATION FOR EXCLUSION OF PUBLIC

moved that the following item be received, discussed and considered in confidence by excluding the public pursuant to Section 90 (2) of the Local Government Act 1999, and an order be made that the public (with the exception of other Council Members and Council Officers now present) be excluded from the meeting in order for the item to be considered in confidence as the Council is satisfied that the item is a matter that can be considered in confidence pursuant to the grounds referenced in Section 90 (3) of the said Act as follows:

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<u>Item No.</u>	<u>Subject Matter</u>	<u>S90 (3) Grounds</u>
Operational Services		
9.	<u>DEVELOPMENT CONTROL</u> - Illegal Development - Demolition of a Contributory Place - Ref. AF11/304	(a) (i)
10.	CONSIDERATION FOR KEEPING MATTERS CONFIDENTIAL	

seconded

**IN CONFIDENCE**

**9. DEVELOPMENT CONTROL - Illegal Development - Demolition of a Contributory Place - Ref. AF11/304**

Goal: Governance

Strategic Objective: (i) *Demonstrate innovative and responsive organisational governance.*

The Director - Operational Services reported:

(a) Council at its meeting held Tuesday, 27 January 2015, resolved the following:

*“(a) The report be received;*

*(b) Council seek advice from Mellor Olsson Lawyers of Adelaide in regard to the likelihood of successful prosecution and the likely outcome of any prosecution proceedings (including approximate costs to Council); and this information, when available, be provided in a further report to Council.”*

(b) Mellor Olsson has provided the above requested information to Council (copy of advice is attached);

(a) Mellor Olsson has advised that prosecution proceedings are likely to be successful; and based on recent prosecution proceedings, may result in a penalty of up to \$20,000 and a recorded conviction;

(b) should the defendant/s enter a guilty plea, Mellor Olsson’s costs will be in the vicinity of \$2,000 - \$5,000;

(c) if the defendant/s does not enter a guilty plea, Mellor Olsson’s costs will be in the vicinity of \$5,000 - \$15,000;

(d) the above costings are estimates only and actual costs may change, depending on the work that will be required;

(e) Council must now consider its response to the unapproved demolition of the Contributory Place, as it is a clear breach of the *Development Act 1993* and appropriate action should be undertaken;

(f) in determining its direction, Council should be aware of any precedence being established.

moved it be recommended:

(a) The report be received;

(b) Council engage Mellor Olsson Lawyers of Adelaide to commence prosecution proceedings against the property owner of 41 Jubilee Highway West, Mount Gambier.

seconded

10. **CONSIDERATION FOR KEEPING MATTERS CONFIDENTIAL**

moved that an order be made pursuant to Section 91 (7) of the Local Government Act 1999 that the documents in relation to the following items, which have been considered by Council on a confidential basis pursuant to Section 90 (3) be kept confidential as follows:

<u>Item No.</u>	<u>Subject Matter</u>	<u>Element To Be Kept Confidential</u>	<u>Duration</u>
Operational Services			
9.	<u>DEVELOPMENT CONTROL</u> - Illegal Development - Demolition of a Contributory Place - Ref. AF11/304	All details	12 months

seconded

The meeting closed at \_\_\_\_\_ a.m.  
 AF13/66  
 SW

Our Ref: AK:EB:M150282

18 February 2015

Mrs Jessica Porter  
Planning Officer  
City of Mount Gambier  
PO Box 56  
MOUNT GAMBIER SA 5290

By email : [jporter@mountgambier.sa.gov.au](mailto:jporter@mountgambier.sa.gov.au)

Dear Jess

**RE: ADVICE REGARDING PROSECUTION PROCEEDINGS -  
41 JUBILEE HIGHWAY WEST, MT GAMBIER**

We refer to previous correspondence.

You have asked us to provide advice to Council in relation to the unapproved demolition of a dwelling situated at 41 Jubilee Highway West, Mount Gambier (**'the Land'**). The dwelling is listed as a Contributory Place in the Development Plan.

In particular, you have asked us to provide advice in respect of the following:

1. the likelihood of success, and the outcome, if the landowner was prosecuted; and
2. the cost to Council to undertake the prosecution proceedings.

We note that the Land is located in the St Andrews (Residential) Local Heritage Policy Area of the Residential Zone of the City of Mount Gambier.

Relevantly, the Development Plan states, at page 226, the following concerning Contributory Places:

*'Places which are worthy of retention and protection due to their contribution to the streetscape. Individually, these buildings are less significant than Local Heritage Places but are still important for their contribution to the physical character of the recommended Local Heritage Policy Areas.'*

It is a Principle of Development Control (PDC 4 on page 99) that:

Adelaide  
Level 5 80 King William Street  
Adelaide SA 5000  
GPO Box 74  
Adelaide SA 5001 DX 543  
Phone: +61 8 8414 3400  
Fax: +61 8 8414 3444

Port Lincoln  
11 Mortlock Terrace  
Port Lincoln SA 5606  
PO Box 411  
Port Lincoln SA 5606 DX 51050  
Phone: (08) 8682 3133  
Fax: (08) 8682 6030

Clare  
165 Main North Road  
Clare SA 5453  
PO Box 671  
Clare SA 5453  
Phone: (08) 8842 1833  
Fax: (08) 8842 1811

Regional Offices (By Appointment Only)

**Bordertown**  
22 Binnie Street  
Bordertown SA 5268  
**McLaren Vale**  
178 Main Road  
McLaren Vale SA 5171

**Kadina**  
26 Taylor Street  
Kadina SA 5554

**Nuriootpa**  
45 Murray Street  
Nuriootpa SA 5355  
pm150282\_001.doc

**Keith**  
Cnr Makin & Hender Street  
Keith SA 5267

Phone: 1300 414 414  
Fax: (08) 8414 3444

LAWYERS

Philip Page  
Greg Anderson  
Con Traianos  
Greg Arthur  
Phil McGovern  
Andrew Goode  
John Dempster  
Tim Mellor  
Karen Olsson  
Anthony Kelly  
Joanna Andrew  
Joseph Anderson  
Phil Dorman  
Jennifer Goodale  
Matthew Dorman  
Henry Ringwood  
David Parrish  
Leonie Millard  
Elizabeth Olsson  
Helen Stratford  
Jenny Tummel  
Carmel Homes  
Catherine Leis  
Vanessa Paunkov  
Sarah Vinall  
Matt Noonan  
Zeena Anthony-Qureshi  
Maria Demosthenous  
Andrew Smith  
Callen Bubner  
Melanie Meaney  
Cecilia Pascale  
Erin Moll  
Emily Barrett  
Kate McShane

CONVEYANCERS

Judith Phillips  
Michelle Colmer  
Kristy Tohl  
Mary Parr

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*'The building and structures which contribute to the historic character of the Local Heritage Policy Area identified in... Fig MtG(HP)/10... should:*

1. *be retained and conserved...'*

We set out our advice below.

### **Summary**

Council is able to prosecute the landowner and/or the person who authorised the demolition of the dwelling on the Land for breaches of sections 32 and 44(1) of the *Development Act 1993* (SA).

It is our view that prosecution proceedings are likely to be successful and may involve penalties in the \$15,000 - \$20,000 range or more, as well as recorded convictions.

Our costs if the defendant/s enter a guilty plea are likely to be in the vicinity of \$2,000 to \$5,000. This encompasses the costs for preparing the Complaint and Summons, preparing the Prosecution Brief, preparing any affidavits and attending at Court.

If the defendant/s do not enter a guilty plea, our costs are likely to be in the vicinity of \$5,000 to \$15,000. This estimate incorporates the same work as above, together with attendances on witnesses, preparing for trial and the cost of the trial itself.

Please note that the above is an estimate only and that our actual costs may in fact be less or more than this amount.

### **Prosecution Proceedings**

As you are no doubt aware, the demolition of the dwelling is 'building work' as defined in the *Development Act*. Consequently, the conduct of the landowner and/or any other person who authorised the demolition of the dwelling amounts to a breach of sections 32 and 44(1) of the Act, namely, undertaking development without approval.

Having said that, we note that Schedule 1A of the *Development Regulations 2008* (SA), at clause 12, lists demolition as a type of development not requiring Development Plan Consent, other than, relevantly, demolition in a Historic Conservation Zone/Area or an area designated by the Minister. This means that unless the dwelling is located in a Historic Conservation Zone or Area or a 'designated area' that if the landowner applied to have the dwelling demolished, any such application would not have required Development Plan Consent but would have required Building Rules Consent and final Development Approval.

You have instructed us that the dwelling is not in a designated area.

Schedule 1A defines a 'Historic Conservation Zone/Area' as:

*'... any...zone or area in which the word "Historic" appears in the title of the zone or area in the relevant Development Plan.'*

We note that the Development Plan for the City of Mount Gambier does not have any zones or areas which use the word "Historic" in their title. Rather, the Development Plan utilises

the word “Heritage” in the title of zones and areas for the purposes of outlining those areas that have historic or heritage significance (as is the case with the St Andrews (Residential) Local Heritage Policy Area). With this in mind, it is arguable that the drafters of the Development Plan intended “Historic” to be given a wide interpretation and for it to apply to any zones or areas utilising the word “Heritage” in their title.

Although the above is not a barrier to prosecution proceedings (the demolition of the dwelling required Building Rules Consent and Development Approval in any event), it is important that Council bears it in mind as an argument on this basis might be raised in defence to any prosecution proceedings.

Nevertheless, it is our view that prosecution proceedings for the above breaches are likely to be successful, especially given the nature of the dwelling as a Contributory Place, the emphasis placed in the Development Plan on protecting and conserving such places and from what you have told us regarding the numerous discussions that took place with the owner, Mr Giacomo Gabrielli, and his representative, Ms Abbey Gabrielli, prior to the demolition of the dwelling. In due course we will need to obtain from you all the correspondence with the owner and Ms Gabrielli as well details of any discussions with them.

The Court recently handed down a decision in *City of Charles Sturt v Jollydocmates Pty Ltd & Anor*,<sup>1</sup> where a company and its director were each ordered to pay fines of \$42,500 and \$21,500 respectively in respect of the unauthorised demolition of a storage building which was listed as a Local Heritage Place in the relevant Development Plan. The Court determined that the offences were far from trifling given the heritage nature of the storage building and it was not for the owner of a heritage place to substitute their assessment of the worth of the building for the authority charged with that function under the legislation.

In light of this decision, it is our view that a Court would similarly consider the demolition of the Contributory Place to be of a serious nature warranting substantial penalties. However, demolition of a Contributory Place is likely to be viewed as a less serious offence than the demolition of a Local Heritage Place, and it is therefore more reasonable to expect the Court to hand down lesser penalties. The penalties might be in the vicinity of \$15,000 to \$20,000.

### **Our costs**

If the defendant/s plead guilty to the charges, our involvement in the matter should be fairly straightforward and involve preparing the Complaint and Summons, preparing the Prosecution Brief, preparing any affidavits and attending at Court to make submissions as to penalties and convictions. We estimate that our costs for this aspect will be in the vicinity of \$2,000 to \$5,000.

If, however, the defendant/s do not plead guilty to the charges, our involvement in the matter will involve substantially more time, including attendances on witnesses, preparing for trial and the cost of the trial itself. We estimate that our costs if there is no guilty plea will be in the vicinity of \$5,000 to \$15,000.

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<sup>1</sup> [2014] SAERDC 46.

18 February 2015

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It is important to note that the above costs are estimates only and our actual costs may in fact be less or more, depending upon the actual work that we are required to undertake. If we are likely to exceed the above estimates at any stage, we will provide you with further and updated estimates.

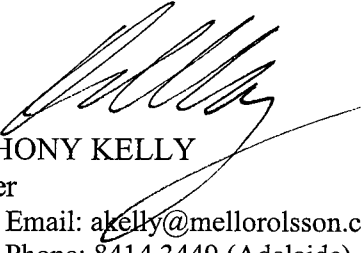
It will be necessary for us to consider, as precursor to issuing prosecution proceedings, all of the evidence that Council has in respect of the unauthorised demolition of the dwelling, including the relevant correspondence with the landowner and/or other persons, SAPOL and the SES. This will assist us in determining whether:

1. there are any risks with pursuing the proceedings (that is, contrary to what we have said above, the evidence makes it unlikely that Council would be successful in any prosecution proceedings); and
2. anyone, in addition to the landowner, should be prosecuted.

If you would like to discuss any of the above, please do not hesitate to contact Emily Barrett or me.

Yours faithfully  
MELLOR OLSSON

Per:

  
ANTHONY KELLY  
Partner  
Direct Email: [akelly@mellorolsson.com.au](mailto:akelly@mellorolsson.com.au)  
Direct Phone: 8414 3449 (Adelaide)



## OPERATIONAL SERVICES COMMITTEE

Meeting held in the Conference Room, Operational Services Area, Level One of Civic Centre,  
10 Watson Terrace, Mount Gambier, on Tuesday 10<sup>th</sup> March 2015 at 7.30 a.m.

MINUTES

**8. CONSIDERATION FOR EXCLUSION OF PUBLIC**

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Operational Services Committee Minutes of 10<sup>th</sup> March 2015 Cont'd...

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Operational Services		
9.	<u>DEVELOPMENT CONTROL</u> - Illegal Development - Demolition of a Contributory Place - Ref. AF11/304	(a) (i)
10.	CONSIDERATION FOR KEEPING MATTERS CONFIDENTIAL	

Cr Morello seconded

Carried

**IN CONFIDENCE**

**9. DEVELOPMENT CONTROL - Illegal Development - Demolition of a Contributory Place - Ref. AF11/304**

Goal: Governance

Strategic Objective: (i) *Demonstrate innovative and responsive organisational governance.*

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(a) Council at its meeting held Tuesday, 27<sup>th</sup> January 2015, resolved the following:

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**Cr Richardson moved it be recommended:**

**(a) The report be received;**

**(b) Council engage Mellor Olsson Lawyers of Adelaide to commence prosecution proceedings against the property owner of 41 Jubilee Highway West, Mount Gambier.**

**Mayor Lee seconded**

**Carried**

Operational Services Committee Minutes of 10<sup>th</sup> March 2015 Cont'd...

**10. CONSIDERATION FOR KEEPING MATTERS CONFIDENTIAL**

Cr Richardson moved that an order be made pursuant to Section 91 (7) of the Local Government Act 1999 that the documents in relation to the following items, which have been considered by Council on a confidential basis pursuant to Section 90 (3) be kept confidential as follows:

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<b>Operational Services</b>			
9.	<u>DEVELOPMENT CONTROL</u> - Illegal Development - Demolition of a Contributory Place - Ref. AF11/304	All details	12 months

**Mayor Lee seconded**

**Carried**

CONFIRMED THIS

DAY OF

2015.

.....  
PRESIDING MEMBER

The meeting closed at 8:11 a.m.  
AF13/66  
SW