

## REPORT TO COUNCIL

### Status of Birrell Street Action Plan – Public Actions (A05/2046-02)

Report dated 12 July 2010 from the General Manager.

**Recommendation:** That Council:

1. Receive and note the report of the General Manager on the status of the Birrell Street Action Plan – Public Actions.
2. Authorise the General Manager to prepare concept plans and a photo montage of an inclinometer or alternate methods of mechanised access to 281, 362 & 364 Birrell Street.
3. Authorise the General Manager to seek legal advice and undertake further investigation in respect to the parcel of land north of the cliff face within Tamarama Park and adjoining 10, 12, 14 & 16 Illawong Avenue.

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### Purpose of Report

To advise Council on the current status of actions relating to the proposed road closure of Birrell Street and associated actions.

### Background / Introduction

Following the Council resolution at its June meeting the status report on the Birrell Street Action Plan is to be processed as two separate reports, one detailing the public actions and one detailing the confidential actions. The status report on the public actions has been updated and is summarised below:

Action	By Whom	When	Status
<b>PUBLIC ACTION 1</b> Prepare and lodge a Road Closure Application of the unformed section of Birrell Street including the crown road east of Lot 18, Section 2, DP 716	Peter Brennan / Greg Worner	Following appeal determination	Application prepared and lodged on 23 March 2010. Land & Property Management Authority confirmed receipt of the application on 11 April 2010. Preliminary discussion with Sam Haddad (Director General responsible for Department of Lands) regarding lodgement of application 29 March 2010. Follow up conversations were held with Andrew McAnespie, Regional Manager Crown Lands Division, in regard to the progress of Council's application. He indicated that a briefing had been prepared for the Minister. A letter was subsequently forwarded to Andrew McAnespie seeking confirmation of current status on 3 June 2010.  A meeting was held with Andrew McAnespie on 22 June 2010 to discuss

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Action	By Whom	When	Status
			<p>the road closure at Birrell Street. He indicated that notification had now progressed, however it was unlikely that approval would be granted unless the valid objections arriving from the application were resolved. This was based on legal advice that an approval of closure whilst valid objections remain would expose the crown to compensation claims in relation to the extinguishment of adjoining owners rights under Section 6 of the Roads Act.</p> <p>A letter was received on 24 June from the Minister for Lands, The Honourable Tony Kelly MLC where he advises that it is apparent at this time that Waverley Council's new application cannot be given favourable consideration under the provisions of the Roads Act 1993 and long standing policy unless the objections are resolved.</p>
<p><b>PUBLIC ACTION 2</b></p> <p>Prepare concept plan and seek quotes for the installation of an inclinator on the northern boundary of the existing Birrell Street road reserve to service 362 &amp; 364 Birrell Street</p>	<p>Tony Reed</p>	<p>March 2010</p>	<p>Quotes sought for installation of an inclinator to service 281, 362 &amp; 364 Birrell Street located within the current road reserve adjoining the southern property boundary of 362 &amp; 364 Birrell Street. Two options were sought one for a four person inclinator (does not provide true wheel chair access) and one for a ten person inclinator which provides wheel chair access.</p> <p>Option 1: \$92,056 plus construction costs estimated at \$80,000.</p> <p>Option 2: \$228,122 plus construction costs estimated at \$100,000.</p>
<p><b>PUBLIC ACTION 3</b></p> <p>Arrange to meet with the owners of 281, 362 &amp; 364 Birrell Street to discuss Council's decision to lodge another application to close the road and commence negotiations to have their objections withdrawn.</p>	<p>Tony Reed / Peter Brennan</p>	<p>April 2010</p>	<p>Meeting held with owner of 362 Birrell Street. Confirmed that he was likely to withdraw his objection if an inclinator was installed to provide access to his property. Meeting held with property owner of 364 Birrell Street confirmed that they were likely to withdraw their objection if an inclinator was installed to provide access to their property. Meeting held with property owner of 281 Birrell Street confirmed that she</p>

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Action	By Whom	When	Status
			was likely to withdraw her objection if an inclinor was installed to provide access to her property.
<b>PUBLIC ACTION 4</b> Confirm sale price of 364 Birrell Street	Greg Worner	March 2010	The property was passed in at auction. It would appear that there are two interested buyers. McGrath Real Estate Agents have confirmed that there has been no sale of 364 Birrell Street but that they are in serious negotiations. At a meeting with the property owner of 364 Birrell Street it was confirmed that the property had not been sold at auction but was currently listed for sale.
<b>PUBLIC ACTION 5</b> Prepare report to Council following determination of the Land & Environment Court appeal in regard to the current DA on 362 Birrell Street and if the appeal is upheld, include legal advice as to the prospects of success with a Supreme Court appeal	Peter Brennan	Likely March / April 2010	15 March 2010 the Land & Environment Court rules against the 362 Birrell Street DA appeal.
<b>PUBLIC ACTION 6</b> Prepare and lodge Supreme Court appeal	Peter Brennan	Following appeal determination	Not required.
<b>PUBLIC ACTION 7</b> Action Plan reviewed for consideration by Council	Tony Reed, Peter Brennan & Bronwyn Kelly	Following appeal determination	Action Plan to be reviewed following workshop with Councillors to be held on Thursday 22 April 2010. Action Plan updated for review by Council at the meeting to be held on 15 June 2010.
<b>PUBLIC ACTION 8</b> That Council moves without delay to complete registration of its title to the lands in Tamarama Gully acquired in 1963 (conveyance number 576 book 2662) and reports to Council prior to lodgement of the Plan of Survey with	Greg Worner	June 2010	A comprehensive survey is currently underway of Tamarama Park with particular emphasis on the western parts adjoining the unmade section of Birrell St, properties at 362, 364 Birrell, properties at 12,14 Illawong Ave and the unidentified parcel of land 576 book 2662. Competitive quotes were sought from Council's panel surveyors and

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Action	By Whom	When	Status
the Registrar General, and notes that a survey of the land in question will be required.			Linke & Linke Surveys who did not lodge a quote. JRK Surveys were awarded the job which is anticipated to be complete by early May. Documentation on the acquisition of the unidentified parcel in 1963 has also been located which will assist in Council commencing the legal process and substantiating its claim to seeking registration of a Torrens title.  The survey has been completed. Council is now in the process of registering the survey in respect to its title on the land.
<p><b>PUBLIC ACTION 9</b></p> <p>Establish the size of the unregistered rear lot and an estimation of what portion of the rear lot covers the water course.</p>	Tony Reed, Peter Brennan	April 2010	The estimate for the creek influence areas has been established using the survey drawing which formed part of the development application for 362 Birrell Street. The approved subdivision plan provides for lot 1 with an area of 451.4m <sup>2</sup> including a 3m right of carriageway and easement for services parallel to the western boundary 1m inset. The rear lot, lot 2, is the large lot comprising of 615.6m <sup>2</sup> . The creek line is contained approximately within the first third of the rear lot. The estimated area of the creek proper is 120m <sup>2</sup> with the area influenced by the creek being 245m <sup>2</sup> within lot 2.

### **Meeting with Andrew McAnespie, Regional Manager Crown Lands Division**

At the meeting with Mr McAnespie it was strongly indicated that the application to close the road would not be supported unless the objectors to the previous application did not object to the new application. He acknowledged that in Council's new application it had indicated that it was attempting to work with the previous objectors so that the issues with the previous road closure application could be resolved and consequently their objections withdrawn or not made to the new application.

Mr McAnespie advised that the notification of the road closure was to proceed in June. He encouraged Council to continue with their contact with the previous objectors and to pursue all reasonable attempts to resolve their objection to the road closure.

The Land & Property Management Authority had sought legal advice which indicates that approval of closure whilst valid objections remain would expose the Crown to compensation claims in relation to the extinguishment of adjoining owners rights under s 6 of the Roads Act 1993:

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### 6 *Right of access to public road by owners of adjoining land*

- (1) *The owner of land adjoining a public road is entitled, as of right, to access (whether on foot, in a vehicle or otherwise) across the boundary between the land and the public road.*
- (2) *The right conferred by this section does not derogate from any right of access that is conferred by the common law, but those rights are subject to such restrictions as are imposed by or under this or any other Act or law.*

Mr McAnespie also indicated that their legal advice suggests that Council could compulsorily acquire the adjoining landowner's interest in land, being the right to access to the public road by vehicle. The following cases may assist Council in investigating this avenue:

*Tanner v The Minister for Education and Training [2002] NSWLEC40, and  
Minister for Education and Training v Tanner [2003] NSWCA 164*

Although this may be an option any such acquisition would require the consent of the Minister for Local Government and would also need to address similar legal issues regarding access rights.

#### **Letter from the Minister**

The attached letter from the Minister for Lands, The Hon Tony Kelly, MLC was received on 24 June 2010. As detailed in the letter the Minister refers to Council's previous application lodged in October 2007 and states "*it is unfortunate that Council did not exhaust all options in resolving the objections prior to requesting determination of the application, given governments current policy position that public roads required for legitimate access purposes will not be closed.*" The letter reaffirms the Minister's position indicating that consent of land owners directly affected by a road closure must be forthcoming.

#### **Meetings with immediate neighbours**

As detailed in the status report Council officers have met with the owners of 281, 263 & 364 Birrell Street in respect to the current application before the Land & Property Management Authority to close the unformed section of Birrell Street. The property owners have indicated at these meetings that they would be prepared to withdraw any objections to the road closure subject to the construction of an inclinator or similar access device.

The owner of 362 Birrell Street has suggested a different means of access to the three properties with the construction of an elevator system within his property and access through to 362 and 281 Birrell Street. An investigation of this proposal will be undertaken if the Council indicates interest in this option.

#### **Survey of Tamarama Park**

JRK Surveyors were commissioned to prepare a detailed survey of Council's holdings within Tamarama Park. The survey has been completed. A number of issues have been identified in undertaking the survey. Action is proceeding to have the parcel of land approximately running from the rear of 362 & 364 Birrell St to the bottom of the cliff face identified as old system title Book 2662 No 576 registered as a Torrens title in Council's name. Note the surveyor reports this land extends only to the base of the cliff on the northern side of the Tamarama Park and does not extend to Illawong Ave.

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The strip of land running from Illawong Ave (between numbers 10 & 16) to the top of the cliff face on Tamarama Park is old system title with searches indicating it does not appear to be in Council's name or a declared public reserve and appears to be still in the name of Marianne Fletcher. This land carries a formal Right of Way benefitting 12 Illawong Ave but is used fairly exclusively by owners of numbers 10, 14, 16 Illawong Ave. It appears that the owner of 14 Illawong Avenue has fenced off a part of this land which may be an encroachment but may be able to establish possessory title to this portion depending on the length of time it has been occupied.

Clearly the above issues are complex and more detailed investigation of the ownership of this portion of land involving specialised land title and legal advisors will be required if the Council wishes to make claim to the land as part of Tamarama Park.

**Recommendation:** That Council:

1. Receive and note the report of the General Manager on the status of the Birrell Street Action Plan – Public Actions.
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Tony Reed  
General Manager



Hon Tony Kelly MLC  
Minister for Planning  
Minister for Infrastructure  
Minister for Lands  
Deputy Leader of the Government in the Legislative Council  
Leader of the House in the Legislative Council

*Scanned To file*

*Sent  
Copy To G.M.*

FILE No: *A05/2046-02.*

ACTION OFFICER: *Mayon*

MIN10/773/3

RECORDS No: *D10/20346* 24 JUN 2010

Councillor Sally Betts  
Mayor of Waverley  
P.O. Box 9  
BONDI JUNCTION NSW 2022

Dear Cllr Betts,

I refer to your letter to the Premier regarding an application by Waverley Council to close part of Birrell Street, Tamarama.

The section of Birrell Street in question is shown by red edging on the attached diagrams "A" and "B". Investigations by the Land and Property Management Authority have revealed that it provides the sole legal access to the three freehold properties shown by green edging on diagram "A", and public pedestrian access to Tamarama Park via the stairs visible on diagram "B".

Waverley Council lodged its first road closing application with the former Department of Lands in October 2007 with the stated intention that, if approved, the land would be added to Tamarama Park. Three objections were received on the grounds of access (including future vehicular access) from the respective owners of lands shown by green edge on diagram "A". These objections were considered to be validly based and were subsequently referred to Waverley Council to be resolved.

Despite acknowledging all three objections remained unresolved, Waverley Council nevertheless requested that a determination of the road closing application be made. Council was advised in December 2009 that given there were valid, unresolved objections, the former Department of Lands (now the Land and Property Management Authority) was not in a position to approve the closure of the road. It is unfortunate that Council did not exhaust all options in resolving the objections prior to requesting determination of the application, given Government's current policy position that public roads required for legitimate access purposes will not be closed.

On 23 March 2010 Waverley Council lodged a further application to close the section of Birrell Street shown by yellow colour on diagram "A" with the Land and Property Management Authority (LPMA) and further, indicated its support for the closure of the extension of Birrell Street shown by yellow edging on the diagram.

Council's position regarding any future objections is unclear. It is apparent at this time that Waverley Council's new application cannot be given favourable consideration under the provisions of the Roads Act 1993 and long standing policy unless the objections are resolved, essentially due to the fact that the road in question provides the only legal access to each of the properties owned by the objectors.

Alternatively, Council has the option to consider the compulsory acquisition of the road under the provisions of the Land Acquisition (Just Terms Compensation) Act. Any such acquisition would require the consent of the Minister for Local Government and may also need to address the same legal issues regarding access, however LPMA would not have a significant involvement in the process or the outcome.

I am not in a position where I am at liberty to circumvent applicable legislation administered by the LPMA, in this case being the Roads Act 1993, and in the circumstances it is not possible to rely on this Act to progress a road closure in this instance where the consents of landowners directly affected by the proposal are not forthcoming.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Tony Kelly'.

**Tony Kelly MLC**  
Minister for Lands