



# **Draft**

# **Litigation Protocol Policy**

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Responsible Officer:	Manager Governance & Risk
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# 1 Introduction

## 1.1 Purpose

In view of the unique character, heritage and urban living environment of the various areas and precincts within the Woollahra Municipality, Council from time to time has to deal with litigation matters, which arise for a range of reasons, mostly around regulatory enforcement including building and development control. Significant litigation also occurs in relation planning appeals to the NSW Land and Environment Court.

The objective of this policy is to recognise the need for Council to confer certain powers on the General Manager under the Act and other acts and regulations to enable the effective and efficient carrying out of regulatory enforcement and legal proceedings on behalf of Council. Following delegation to the General Manager from the Council, where appropriate, the General Manager delegates under section 378 of the *Local Government Act 1993* (the Act) powers and functions to Council officers to:

- Commence legal proceedings for offences under various legislative provisions;
- Represent the Council and act as a party to court proceedings; and
- Appoint and instruct Council legal representatives and expert advisers as required in accordance with Council policy and procedures.

This policy also aims to establish an appropriate protocol to ensure that the elected members are kept informed and are consulted on key litigation matters. Under section 232(1) of the Act, Councillors as members of the governing body, play a key role in the creation and review of the Council's policies and objectives, including those that relate to Council's regulatory functions.

## 1.2 Scope

The scope of this policy considers:

- The General Manager's powers to conduct the day-to-day management of the Council under section 335 of the Act.
- Council's delegation of its powers and functions to the General Manager under section 378 of the Act from time to time.
- In accordance with section 378 of the Act, the General Manager's approving of instruments of delegation to Council officers to undertake effective and efficient legal proceedings on behalf of the Council.
- Code of Conduct obligations for Council officials including to act honestly and fairly and follow statutory requirements in its dealings with the community and the public and to apply appropriate conduct obligations in the exercise of land use planning, development assessment and other regulatory functions of the Council.
- In accordance with section 4.8(2) of the *Environmental and Planning and Assessment Act 1979*, Council's consent authority functions are not exercisable by Councillors, but rather the functions are to be exercised by the Woollahra Local Planning Panel, and an officer of Council to whom the power has been delegated by the General Manager.

### 1.3 Accountability

This policy supports the Council's *Enforcement Policy* as adopted by Council from time to time. The aim of the *Enforcement Policy* is to assist Council officers to act promptly, consistently, and effectively in response to allegations of unlawful activity and establishes guidelines for the exercise of discretion by officers. This policy can be viewed on Council's website at

[https://www.woollahra.nsw.gov.au/council/forms\\_and\\_publications/publications](https://www.woollahra.nsw.gov.au/council/forms_and_publications/publications).

In cases of litigation, Council officers are obligated to comply with various statutory and court rules in acting in and representing the Council in legal proceedings. Enforcement activities necessarily involve the use of discretion by Council officers. Council officers are required to comply with Council policy and the Code of Conduct in taking enforcement action, including behaving in an ethical manner and the requirement to formally disclose conflicts of interest. Council officers will seek legal advice prior to proceeding with more serious enforcement action such as a prosecution.

In relation to development appeals to the Land and Environment Court, Council is required to participate in conciliation conferences arranged by the Court in accordance with the Land and *Environment Court Act 1979*. The Court can proceed to a conciliation conference with or without the consent of the parties to the appeal. It is the statutory duty of each party to proceedings where a conciliation conference has been arranged, to participate in good faith. For clarity, this is a court ordered process that Council (as a party to the appeal), is required to participate in.

Council officers, the appointed legal advisers and planning experts engaged are subject to the powers and directions of the Land and Environment Court processes once a development appeal has been lodged. To support its processes, Council's representatives must familiarise themselves with the Court's range of Practice Notes which explain the practice and procedure and the process to be followed for diverse types of cases from their commencement, through to the preliminary stages and preparation, to their resolution. It is a Court requirement that Council officers or their legal or expert representatives:

- Have the appropriate authority to reach agreement, on behalf of the Council, during a conciliation conference with the applicant in a Class 1 merit review appeal in accordance with section 34(3) of the *Land and Environment Court Act 1979*; and
- have the appropriate authority to give consent, on behalf of Council, to a Commissioner disposing of a Class 1 merit review appeal during a conciliation conference in accordance with section 34(4)(b) of the *Land and Environment Court Act 1979*.

The disclosure of information relating to Council's compliance and enforcement activities and other legal proceedings is undertaken in accordance with the requirements of the *Government Information (Public Access) Act 2009 (GIPA Act)* and *Council's Access to Information Policy*. Under clause 217 of the Local Government (General Regulation 2021, Council discloses a summary of amounts

incurred during the year in relation to legal proceedings taken by or against the Council and a summary of the state of progress of each legal proceeding and the result.

Where there are resident objectors to development applications lodged before the Land and Environment Court and/or neighbours seeking to be joined in proceedings, information to assist with their participation process will be provided by Council free of charge without submitting a GIPA Act application, unless such information would not be provided under the GIPA Act, such as involving legal professional privilege.

In accordance with section 352 of the Local Government Act, Council officers are not subject to direction by Council or Individual Councillors in their day-to-day activities, including directing the performance of their functions. Councillors can however help individuals who raise concerns with them, by satisfying themselves that Council's policies are being complied with.

## **2 Consultation on litigation matters**

### **2.1 Matters for consideration**

This policy acknowledges that circumstances may arise in which the General Manager may need to confer with the governing body prior to commencing legal proceedings or involve a situation arising during legal proceedings, that may require consideration by the Council and/or a resolution of the Council to proceed further.

Legal proceedings can involve matters that are commenced by the Council as well as legal proceedings which are taken against the Council. While both types of legal proceedings fall within the ambit of the General Manager's obligations in conducting the day-to-day management of the Council, there is an obligation to advise Council of proceedings in circumstances where there is potential for a significant lawsuit and/or involve matters that impact on the Council's finances and its reputation. In such instances, the General Manager must seek written legal advice and advise the Council accordingly.

Such matters might include:

- Public liability compensation claims that arise from operational issues not able to be settled through insurance policy;
- Contractual matters involving other government agencies, companies and individuals involving financial or other significant issues; and
- Lease agreement issues involving community organisations and others.
- A particular matter that involves significant public interest.

Additionally, there are legal proceedings that are initiated by the Council on a recommendation by the General Manager, based on written legal advice, in which remedies are sought through the court system. The General Manager would keep the Council informed of progress in such matters.

A key matter that arises from litigation is the recovery of legal costs. Council policy is to seek recovery of Council costs in all matters where costs are recoverable, either by consent or by court order, unless there is a recommendation from Council's solicitors to accept a lesser amount than the full legal costs incurred.

## 2.2 Protocol process on litigation matters

The following approach will apply in consulting with Councillors in relation to litigation matters and notification of planning proceedings to resident objectors of planning appeals:

- 1 The General Manager and/or the Mayor will consult with the Council in a timely manner when the potential for significant litigation is to arise particularly of a financial and/or reputational nature in line with their delegated authority. This would involve a confidential report to Council and/or a confidential briefing on the matter being provided in a timely manner.
- 2 On legal proceedings outside existing normal policy arrangements, the General Manager to report to Council on matters that may require consideration by the Council and/or a resolution of the Council to proceed further. Such specific matters may relate to:
  - Public liability compensation claims that arise from operation issues not able to be settled through insurance policy;
  - Contractual matters involving other government agencies, companies and individuals involving financial or other significant issues; and
  - Lease agreement issues involving community organisations and others.
- 3 In relation to enforcement matters being dealt with under Council policy, the General Manager may report on legal matters to be endorsed by the Council if it is considered necessary, having regard to Councillors' right to call for a report about particular issues in line with Council's role in the creation and review of policies and objectives and criteria relating to the exercise of the Council's regulatory functions.
- 4 In respect of Land and Environment Class 1 litigation, including section 34 conciliation conferences, consultation with, and notification to, resident objectors to be undertaken in accordance with an approved Community Fact Sheet providing information on the process of appeals to the Land and Environment Court.
- 5 The decision made in a planning appeal before the Land and Environment Court, including section 34 conference, to be released to resident objectors without undue delay and with the case outcome report for the matter being published on Council's website as soon as practical, subject to protecting information identified as privileged.
- 6 A post Land and Environment Court report to be made available to the Council via the Environmental Planning Committee on a quarterly progress report basis in line with Delivery Program Operational Plan (DPOP) quarterly performance reporting. Such report to be made available to the public and published on Council website.

### 3 Related Legislation, Guidelines and Council Policy

This policy statement supports Council's ethical framework including the following policy documents and legislation:

- *Code of Conduct 2020 and Code of Conduct Procedures 2020*
- *Local Government Act 1993*
- *Environmental Planning and Assessment Act 1979*
- *Protection of the Environment Operations Act 1997*
- *Land and Environment Court Act 1979*
- *Government Information (Public Access) Act 2009*
- *Access to Information Policy*
- *Enforcement Policy*
- *Community Fact Sheet – Appeals to the Land and Environment Court*

### 4 Documentation/References

	HPECM Reference
Draft Community Fact Sheet	TBC

### 5 Related Policies and Procedures

	HPECM Reference

### 6 Policy Review

This Policy will be reviewed every two years or in accordance with legislative requirements, and/or publication by Government agencies of new or revised guidelines relevant to the policy provisions. This Policy may also be changed as a result of other amendments that are to the advantage of Council and in the spirit of this Policy.

Any amendment to this Policy must be by way of a Council Resolution.

### Policy Amendments

Date	Responsible Officer	Description