

Minutes 13 March 2007



Minutes of Ordinary meeting of the Port Stephens Council held in the Council Chambers, Raymond Terrace on 13 March 2007, commencing at 8.11pm

PRESENT: Councillors R. Swan (Mayor); S. Tucker (Deputy Mayor); H. Brown; G. Dingle; S. Dover; G. Francis; J. Hodges; K. Jordan; J. Nell; G. Robinson; General Manager; Executive Manager – Corporate Management, Facilities and Services Group Manager; Sustainable Planning Group Manager; Business and Support Group Manager, Governance Co-Ordinator.

043	Councillor Jordan Councillor Hodges	It was resolved that the apology from Councillor Westbury and Councillor Baumann be received and noted.
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ORDINARY MEETING OF COUNCIL -13 March 2007

RESOLUTION:		
044	Councillor Jordan Councillor Hodges	It was resolved that the Mayoral Minutes be dealt with following the Operations Committee Recommendation.

OPERATIONS COMMITTEE RECOMMENDATIONS

ITEM NO 1

FILE NO: 16-2006-99-1

DEVELOPMENT APPLICATION FOR A DUAL OCCUPANCY AND TWO (2) LOT SUBDIVISION AT NO. 116 PORT STEPHENS STREET, RAYMOND TERRACE

REPORT OF: SCOTT ANSON - MANAGER, DEVELOPMENT & BUILDING

RECOMMENDATION IS THAT COUNCIL:

- 1) Refuse Development Application 16-2006-99-1 for the reasons below:
- The development is inconsistent with the provision of Port Stephens Local Environmental Plan 2000, in particular the 5(g) Special Urban (Flood Affected) Zone objectives and planning considerations for development on flood prone land.
 - The development is categorised as being a very high flood hazard by the draft Lower Hunter River Floodplain Management Study, which recommends that no additional dwellings should be permitted in this location.
 - Approval of this application would have an undesirable cumulative effect of increasing the community's susceptibility to flooding, in terms of social, economic and environmental consequences.
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RECOMMENDATION:

That Council expressed its support for the Development Application and requests the Group Manager, Sustainable Planning draft Conditions of Consent to the Ordinary Council meeting in February.

ORDINARY MEETING OF COUNCIL – 27 February 2007

RESOLUTION:		
011	Councillor Robinson Councillor Jordan	That the matter be deferred to the Ordinary Meeting of Council on 13 March 2007

ORDINARY MEETING OF COUNCIL – 13 March 2007

RESOLUTION:		
045	Councillor Hodges Councillor Jordan	That Council approve the Development Application Number - 16 -2006-99-1 in line with the Conditions of Consent, Items 1-51, contained in Supplementary Information of 13 March 2007.

Councillors Nell, Francis and Brown recorded their vote against the Motion.

BACKGROUND

DA 16-2006-99-1 was submitted to the Council Meeting on 19 December 2006 and was subsequently deferred until February 2007.

This Development Application is therefore resubmitted for further consideration.

The purpose of this report is to present a development application to Council for determination at the request of Cr Jordan.

This application seeks consent for a detached dual occupancy and 2 lot Torrens title subdivision at Lot 13 DP 846114 (No. 116) Port Stephens St, Raymond Terrace. The site is within the 5(g) Special Urban (Flood Affected) Zone and dual occupancy development is permissible in the zone.

This site is identified as flood prone, so the application was referred to Council's Strategic Engineer who recommended that the application be refused based on the site being identified as a very high flood hazard in the *Draft Lower Hunter Flood Management Study (Paterson Britton)*. This document recommends that habitable dwellings be prohibited in this location.

The proposal does not comply with the objectives of the 5(g) zone or the requirements of Clauses 28 and 37 of LEP 2000, which applies to development on flood prone land. It is considered that increasing the residential density of the site will increase the risk of loss of life and damage to property during flood events.

The applicant was informed of Council's flooding concerns on 5 April 2006. The applicant provided justification for the proposal, stating that 2 single dwellings and a dual occupancy have recently been constructed in the immediate vicinity of the site.

The subject dwellings identified by the applicant were approved on existing lots with dwelling entitlement and do not increase the residential density of the area. The dual occupancy example was approved in 1996, prior to the current flooding regulations. The justification submitted by the applicant is not supported in light of the recommendation of the *Draft Lower Hunter Flood Management Study (Paterson Britton)*.

The applicant was advised on 14 June 2006 and 8 August 2006 that the justification was insufficient and that it was recommended that the application be withdrawn. A Notice of Intent to refuse the application was sent to the applicant on 28 August 2006.

A meeting was held on 9 October 2006 involving the applicant, AcroPlan Consultants and Council's Strategic Engineer, Group Manager Sustainable Planning and Manager Development & Building. The applicant's consultant requested an opportunity to respond to Council's flooding concerns.

The applicant was advised that Council was willing to consider additional information, but that the flooding concerns were a significant impediment to supporting the proposal. To date, no additional information or justification has been received.

Although the proposal complies with the requirements of DCP PS1 – Dual Occupancy & Urban Housing Guidelines, approval of this application would create an undesirable precedent for development in this locality and similar areas subject to flooding identified in the *Draft Lower Hunter Flood Management Study (Paterson Britton)*.

Increased residential densities in very high flood hazard areas will have an unacceptable social and economic impact on existing future residents. Increased demands will be placed on emergency services assisting additional dwellings during flood events.

Council received one (1) submission during the submission period, which did not object to the development but raised concern about location of the clothes drying area for Unit 2.

It is recommended that this application be refused as it, does not comply with Council's flooding policies including the objectives of the 5(g) Special Urban "Flood Affected" Zone, Clause 28s and 37 of LEP 2000 and the *Draft Lower Hunter Flood Management Study (Paterson Britton)*, which identifies the site as being in the floodway and a very high flood hazard area. The application also poses an unacceptable risk to existing and future residents and emergency services due to the flood prone nature of the subject land.

LINKS TO CORPORATE PLANS

This report relates to the Goal in the Assessment and Approvals program of Council's Management Plan, which is an ordered and predictable built environment in Port Stephens.

FINANCIAL/RESOURCE IMPLICATIONS

Nil

LEGAL AND POLICY IMPLICATIONS

The development application is inconsistent with Council's Policy, as it contravenes the principals and objectives of the 5(g) Special Urban (Flood) Zone and the provisions of Port Stephens Local Environmental Plan 2000 for development on flood prone land.

Australian Business Excellence Framework

This aligns with the following ABEF Principles.

- 8) Effective use of facts, data and knowledge leads to improved decisions
- 10) Organisations provide value to their community through their actions to ensure a clean, safe, fair and prosperous society
- 11) Sustainability is determined by an organisation's ability to create and deliver value for all stakeholders

SUSTAINABILITY IMPLICATIONS

SOCIAL IMPLICATIONS

The proposed dual occupancy is located on flood prone land in close proximity to the Hunter River. The proposal will have the effect of increasing residential density in a flood prone area.

The proposal is likely to have a significant and detrimental social impact on future occupants of the development due to flooding.

ECONOMIC IMPLICATIONS

Any future flooding of the site is likely to have a significant and detrimental economic impact on the future residents of the development.

ENVIRONMENTAL IMPLICATIONS

The proposal is likely to increase the risk of loss of life and damage to property during flood events. In addition to the increased risk, the design of the proposal is not compatible for the flood zone and is likely to divert flood waters onto adjacent properties.

CONSULTATION

The application was exhibited in accordance with Council policy. One (1) submission was received during the submission period. These are discussed in the Attachments.

OPTIONS

- 1) Adopt the recommendation.
- 2) Reject or amend the Recommendation.

ATTACHMENTS

- 1) Locality Plan
- 2) Assessment

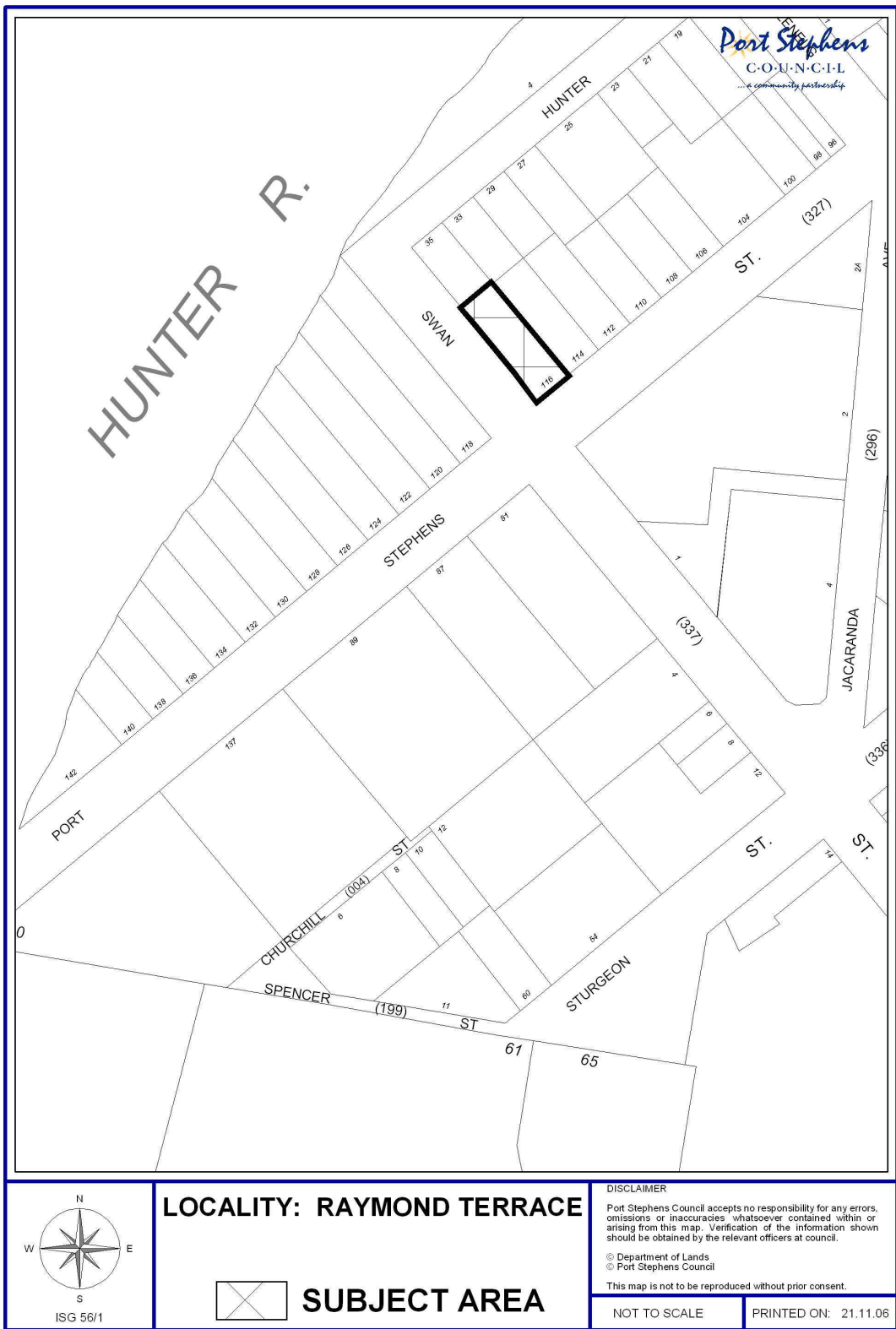
COUNCILLORS ROOM

Development Plans (Site Plan, Floor Plan and Elevations)

Justification submitted by applicant and received by Council on 31 May 2006

Advice provided from Council's Strategic Engineer dated 28 March 2006

ATTACHMENT 1
LOCALITY PLAN



**ATTACHMENT 2
ASSESSMENT**

The application has been assessed pursuant to Section 79C of the Environmental Planning and Assessment Act 1979 and the following is a summary of those matters considered relevant in this instance.

THE PROPOSAL

The proposal is for a detached dual occupancy and two (2) lot Torrens title subdivision.

THE APPLICATION

Owner	Malone Enterprises (NSW)
Applicant	Anthony Malone
Detail Submitted	Development Plans (including a Site Plan, Stormwater Plan, Sediment Control & Shadow Diagram Plan, Floor Plan and Elevations Plan) Statement of Environmental Effects BASIX Certificate

THE LAND

Property Description	Lot 13 DP 846114
Address	116 Port Stephens St, Raymond Terrace
Area	1197sqm
Dimensions	20.1m x 59.6m
Characteristics	Regularly-shaped corner lot at intersection of Port Stephens and Swan Street

THE ASSESSMENT

1. Planning Provisions

LEP 2000 – Zoning Relevant Clauses	5(g) Special Urban (Flood) Zone Clauses 28, 37
Development Control Plan	LD1 - Development Guidelines for the Raymond Terrace Town Centre PS1 – Dual Occupancy & Urban Housing Guidelines PS2 – Parking and Traffic Guidelines PS10 – Building Standards and Notification Procedures for Development Applications
State Environmental Planning Policies	Hunter REP NSW Floodplain Development Manual

MINUTES FOR ORDINARY MEETING – 13 MARCH 2007

ATTRIBUTE	PROPOSED	REQUIRED	COMPLIES
DCP LD1 Requirements (Residential Precinct)			
Design	Complies with specified controls or can be conditioned to comply	Pitched roof, good façade articulation, garage design and front fencing	Yes
DCP PS1 Requirements			
Floor Space Ratio	0.25:1	0.5:1	Yes
Minimum Site Area per Dwelling	598.5sqm	300sqm	Yes
Site Coverage	37%	60%	Yes
Building Line Setback	6m to primary and 4.99m to secondary	6m to primary and 3m to secondary	Yes
Setbacks	3.585m and 1.35m	1.8m and 1m	Yes
Height	7.63m	8m	Yes
Carparking	House 1 – 2 spaces House 2 – 3 spaces	2 spaces per dwelling	Yes
Open Space	Open Space exceeds required amounts	35sqm principal and 50sqm total	Yes

The following flooding abbreviations have been described below:

AHD = Australian Height Datum – refers to metres above mean sea level (or mean tide)

RL = Reduced level –normally to AHD datum

AEP = Annual Exceedance Probability (eg 2% AEP flood has a 2% chance of happening in any one year)

PMF = Probable Maximum Flood.

Example – At this site, if the ground is RL 0.8 metres AHD this will have a 10% chance of a flood matching this level in any one year and 5% or less chance of a flood exceeding this level in any one year. The chance of a particular size flood happening in the following years is not reduced because that flood did not occur in that year.

Discussion

The proposed development is permissible in the 5(g) Special Urban (Flood) Zone and complies with the relevant controls for requirements of both DCP LD1 – Raymond Terrace Town Centre Guidelines and PS1 – Dual Occupancy & Urban Housing. The proposal also complies with the number of parking spaces required by DCP PS2.

The proposal does not comply with all the requirements of LEP 2000, as it contravenes the relevant objectives of the 5(g) Special Urban (Flood) Zone, being (a), (c), and (d) and the requirements of Clauses 28 and 37, which are applicable to development on flood prone land.

The application was referred to Council's Strategic Engineers, who recommended refusal of the application on flooding grounds. The comments below relating to the development's non-compliance with flooding requirements were provided:

The application was advertised and notified in accordance with DCP PS10. One submission was received which is discussed below.

Port Stephens Local Environmental Plan 2000

Objectives of the 5(g) Special Urban (Flood) Zone

- (a) *to enable a range of urban development compatible with the constraints of the land such as flood water inundation*

The proposal is not compatible with the constraints of the land such as floodwater inundation.

- (c) *to allow only development of a kind that is, or can be rendered to be, compatible with inundation by flood waters*

The proposed development is not compatible with inundation by flood waters.

- (d) *to reduce the incidence of loss of life and damage to property and the environment in areas subject to flooding*

The proposal development is likely to increase the incidence of loss of life and damage to property and the environment in areas subject to flooding.

Clause 28 – Subdivision in the Special Urban (Flood) Zone

The site is mapped as being within the Raymond Terrance residential precinct. Although the proposed lots to be created are capable of supporting residential development, the draft Lower Hunter Floodplain Management Study lists this site as a very high flood hazard and that dwellings should be prohibited. The proposed subdivision is considered non-compliant with the matters for consideration of Clause 28.

Clause 37 Development on flood prone land

Clause 37 lists matters that must be considered before granting consent to development on flood prone land. Council's Strategic Engineer provided the following assessment comments:

- (a) *The extent and nature of the flooding or inundation hazard affecting the land*

The site is severely affected by flooding. The existing ground level is approximately 1.4m to 2.2m AHD. The Lower Hunter Flood Study (Lawson and Teloar 1994) indicates flood levels of 2.7m AHD for a 10% AEP flood with velocities of 0.8m/s to 1.6m/s. The 1% AEP flood shows a level of 4.7m AHD and velocity of 1.8m/s to 2.3m/s.

This means that this property would be flooded in relatively small floods. Given such depths and velocities the draft Lower Hunter Floodplain Management Study (Paterson Britton 2001) has classified this location as Floodway and subject to very high flood hazard in a 1% AEP Flood and an Extreme Flood Hazard in a 0.2% AEP Flood.

- (b) *Whether or not the proposed development would increase the risk or severity of flooding or inundation affecting other land or buildings, works or other land uses in the vicinity*

The fully enclosed ground floors will divert flood waters and may affect other land and buildings in the vicinity.

- (c) *Whether the risk of flooding or inundation affecting the proposed development could be reasonable mitigated and whether conditions should be imposed on any consent to further the objectives of this plan*

Due to the floodway and very high flood hazard nature of the site, the flood risk could not be mitigated.

- (d) *The social impact of flooding on occupants, including the ability of emergency services to access, rescue and support residents of flood prone areas*

Due to the very high flood hazard nature and distance of the evacuation route to high ground, support, access and emergency rescue would be stretched by the additional residences.

- (e) The provisions of any floodplain management plan or development control plan adopted by the Council

Whilst not adopted by Council, the *Draft Lower Hunter Floodplain Management Study (Paterson Britton)* recommends that habitable dwellings should be prohibited on land in the floodway or below the 2% AEP flood (3.5m AHD). This information has been given determining weight in the assessment of this dual occupancy development.

Section 94 Contribution Plan 6 – Tomaree Peninsula

The proposed development will result in an increase in residential density of the subject site and therefore would require payment of Section 94 contributions for an additional dwelling.

Hunter Regional Environmental Plan 1989

The proposal is considered to be inconsistent with Clause 52 of the HREP 1989, being an inappropriate land use, increasing the number of people susceptible to the effects of flooding.

NSW Floodplain Development Manual 2005

Under the provisions of the Floodplain Manual, Council is responsible for managing development on flood prone land. In this regard, Council has adopted specific provisions in LEP 2000 relating to development on flood prone land and has considered the *Draft Lower Hunter Floodplain Management Study (Paterson Britton)* in the assessment of this application. Following a planning merit assessment of the proposal against those documents, it is considered that it is unsuitable for the site and should be refused.

It is considered that the proposal does not comply with Council's flooding requirements, as it will increase residential density in a very high flood hazard area.

The applicant has stated that Council has recently approved other development in the immediate vicinity of the site, quoting the construction of three (3) nearby developments as justification. These developments are listed below:

- 16-2000-583-1 for a two storey dwelling at 108 Port Stephens St, Raymond Terrace
- 16-2000-1960-1 for a two storey dwelling at 106 Port Stephens St, Raymond Terrace
- 7-1996-1428-1 for an attached dual occupancy at 110 Port Stephens St, Raymond Terrace

The dwellings approved by 16-2000-583-1 and 16-2000-1960-1, on 29 May 2000 and 31 January 2001 respectively, were located on existing allotments that had dwelling entitlement and did not increase the residential density of the area.

The dwellings were designed so that the ground floor levels only consisted of garage space that could be opened to allow flood water to pass through the building unobstructed, reducing minimising the potential for diverted flood waters onto adjoining properties.

The dual occupancy approved by 7-1996-1428-1, on 24 March 1997, occurred prior to the current flooding information becoming available.

This application is distinctly different from the above-mentioned dwellings as it seeks to construct 2 dwellings and subdivide the existing allotment into 2 lots. This will increase the residential density of the site and could have a significant cumulative impact if other dual occupancies are approved in the area.

Councillor's attention is specifically drawn to Section 733(1) and Section 733 (4) of the Local Government Act 1993 relating to exemption from liability with respect to flood prone land and the basis of a "good faith" defence established in legal case law.

If Council approves the subject application, Council will be establishing a significant planning and environmental precedent in this locality effectively encouraging dual occupancy development in an area known as a very high flood hazard.

To date Council has assessed applications for single dwelling houses on existing, lawfully created allotments in this locality, mindful of the risk management considerations encapsulated in the NSW Floodplain Development Manual.

The proposal dual occupancy cannot be supported in this instance on either sound planning or environmental grounds.

2. Likely Impact of the Development

Although the proposal is unlikely to have any direct impacts on surrounding properties, Council is concerned about increase residential density in flood affected areas due to likely detrimental impacts on both the future occupants of the development and the subsequent increase demand on emergency services in times of flooding. The additional dwellings and their design will also increase the risk of flood waters being diverted to adjoining properties.

3. Suitability of the Site

Although the proposed development is permissible on the subject site, it is considered unsuitable due to it increasing the residential density of the site, which is considered to be a very high flood hazard. The proposal is likely to increase the risk of loss of life and damage to property.

4. Submissions

One (1) submission was received during the submission period. The submission raised concern about the location of the clothes drying area for unit 2, but did not object to the development in general.

5. Public Interest

The development is not in accordance with Council's requirements for development on flood prone land and is considered likely to increase the risk of loss of life and damage to property. It is considered that refusing this application is in the public interest.

MOTION TO CLOSE

MAYORAL MINUTE

ITEM NO. 1

FILE NO: A2004-0573

MOTION TO CLOSE MEETING TO THE PUBLIC

REPORT OF: JUNE SHINE – EXECUTIVE MANAGER CORPORATE MANAGEMENT

RECOMMENDATION:

- 1) That pursuant to section 10A(2)(g) of the Local Government Act, 1993, the Committee and Council resolve to close to the public that part of its meetings to discuss Confidential Item 1 (Mayoral Minute) on the Ordinary agenda namely ***Legal Appeal – Sansom vs Port Stephens Council***.
- 2) That the reasons for closing the meeting to the public to consider this item is that the discussion will include information concerning the legal costs and advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege.
- 3) That disclosure of the information would, on balance, be contrary to the public interest, as it would prejudice Council's legal position and Council has an obligation to protect its interests and the interests of ratepayers.
- 4) That the report and the minutes of the closed part of the meeting remain confidential until the matter is settled.

ORDINARY MEETING OF COUNCIL – 13 March 2007

RESOLUTION:		
046	Councillor Jordan Councillor Hodges	That the Recommendation be adopted.

MAYORAL MINUTE

ITEM NO. 2

FILE NO: 5120-022

MOTION TO CLOSE MEETING TO THE PUBLIC

REPORT OF: JUNE SHINE – EXECUTIVE MANAGER CORPORATE MANAGEMENT

RECOMMENDATION:

- 1) That pursuant to section 10A(2)(c) of the Local Government Act, 1993, the Committee and Council resolve to close to the public that part of its meetings to discuss Confidential Mayoral Minute Item 2 on the Ordinary meeting agenda namely ***Acquisition of Land***.
- 2) That the reasons for closing the meeting to the public to consider this item be that it contains commercial information of a confidential nature that would, if disclosed, confer a commercial advantage on a person with whom the Council proposes to conduct business.
- 2) In particular, the information and discussion concerns Acquisition of Land.
- 3) On balance it is considered that receipt and discussion of the matter in open Council would be contrary to the public interest, as the information and discussion need to be carried out confidentially to protect the interests of both parties. Any breach of such confidentiality could prejudice Council's position.
- 4) That the minutes relating to this item be made public on settlement if the proposed acquisition goes ahead or when negotiations are ended.

ORDINARY MEETING OF COUNCIL – 13 March 2007

RESOLUTION:		
047	Councillor Jordan Councillor Hodges	That the Recommendation be adopted.

CONFIDENTIAL ITEMS



In accordance with Section 10A, of the Local Government Act 1993, Council can close part of a meeting to the public to consider matters involving personnel, personal ratepayer hardship, commercial information, nature and location of a place or item of Aboriginal significance on community land, matters affecting the security of council, councillors, staff or council property and matters that could be prejudice to the maintenance of law.

Further information on any item that is listed for consideration as a confidential item can be sought by contacting Council.

ORDINARY MEETING OF COUNCIL – 13 March 2007

RESOLUTION:

048	Councillor Jordan Councillor Hodges	That Council move into Confidential Session.
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I certify that pages 1-29 of the Ordinary Meeting of Council dated 13 March 2007 were confirmed by Council at its meeting held on Tuesday 24 April 2007.

**Cr Ron Swan
MAYOR**