

Pittwater Council

Assessment Protocol

Newport Project

August 2009

Contents

1.	Purpose of this protocol	4
2.	Background to the Project	4
3.	Council's roles	5
4.	Probity Concerns	5
5.	Assessment Protocol	6

1. Purpose of this protocol

The purpose of this Protocol is to formalise a framework for the assessment of the rezoning and development applications, and other related applications, to be submitted by Fabcot Pty Ltd in order to progress the proposed Newport project.

The Protocol is intended to address probity issues arising from Council's roles as an assessment authority (subject to the role of the Joint Regional Planning Panel), as a current land owner which will enter into a conditional contract for sale with Fabcot Pty Ltd., and as the future owner of a car park stratum on the site.

2. Background to the Project

2.1 Land ownership and current land use

Currently Pittwater Council, on behalf of the community, owns four lots of land in two parcels, being 15-17 and 23-25 Foamcrest Avenue. These parcels are zoned Special Use 5(a) Parking. Between these separate parcels of land, Fabcot Pty Ltd (Woolworths) owns a lot of land known as 343 Barrenjoey Road. This lot is zoned General Business 3(A). This privately owned lot has frontage to both Barrenjoey Road and Foamcrest Avenue. At the moment the two parcels of land owned by Council are used for car parking. The privately owned lot, on the Foamcrest frontage, is also used for parking. The public and private lots appear as a single 'public carpark'. The Barrenjoey Road frontage of 343 Barrenjoey Road is developed for retail commercial purposes.

2.2 Precinct/area aims

A number of development proposals relating to 343 Barrenjoey Road, by a previous owner, raised concerns that the two Council parking lots, if separated by development of 343 Barrenjoey Road, would substantially reduce the availability of public parking and future parking opportunities in the Newport Village. Council and the community have an interest in the development of this area of land as car parking is an important component of the amenity of the village and the commercial viability of the Village. The role of car parking in this precinct of the Newport Village is highlighted in the Newport Village Commercial Centre Masterplan. The Masterplan states in relation to this site that *"Foamcrest Avenue will continue to provide an off road public car parking function. Existing and additional parking will be accommodated in a consolidated and integrated parking solution that is not visible from Foamcrest Avenue."*

2.3 The project

The applications by Woolworths will be for a development incorporating floorspace for a supermarket, a number of specialist retail shops, car parking, loading dock and ancillaries. Access will be from Foamcrest Avenue. The applicant is seeking a rezoning of the two Council parcels (four lots) of land from the existing Special Use (carparking) zone to General Business 3(A).

2.4 Planning Framework

The Masterplan for the Newport Villages establishes the future direction for the centre. Other State government and local documents that are relevant and set a context for the future of the Village are the State Plan, the Metropolitan plan, the Subregional Plan for the North East Region, the Centres Policy, the zoning parameters in the State Governments LEP template, and the SHOROC Region Employment study.

3. Council's roles

- Council has a role as a land and asset manager, which includes acquisition and divestment of property
- Council will need to give its approval as landowner for the submission of a proposal to rezone and for any development application that includes its land
- Council will undertake assessment of proposals to rezone and of any development application for the project

4. Probity Concerns

There have been concerns expressed about the involvement of the Council in the project. Some of these can be characterised as probity concerns.

The generally accepted ICAC probity principles are:

- transparency
- accountability
- maintaining security and confidentiality
- impartiality
- obtaining value for money.

Some commentary has been made to the effect that Council faces a conflict of interest, but that is not the case because a conflict of interest is a conflict between a private interest and a public duty. Council as an elected corporate body has no private interest in this project. Council has two roles to play and both are legitimate *public* interest roles. ICAC's publication *Corruption risks in the development approval process* (September 2007) notes that in this type of situation there may be a "conflict of roles", that is, it is possible for the two roles to come into conflict. The relevant probity aim is to ensure that both roles are properly performed, that is, that they are carried out with due regard to the probity principles set out above.

In this instance, there are two key areas of concern – one relates to commercial outcomes and the other to planning outcomes:

1. Whether the approach being taken by Council will achieve the best price for the land and whether it will obtain the benefits it seeks (i.e. public car-parking) for the best possible price (a "value for money" issue)
2. Whether the approach being taken by Council will produce optimal ongoing management arrangements for the proposed public carpark over the longer term, in relation to such matters as maintenance obligations and operational costs (a "value for money" issue)
3. Whether the building eventually constructed (a Woolworths Supermarket) will conform with planning controls and requirements for the area, or whether concessions will be given that would not be given were Council not a party to the development agreement (an "impartiality" issue).

This assessment protocol addresses the third of these concerns. Council has brought in expert valuation advisers and legal advisors to deal with the first two issues.

The ICAC publication referred to above contains guidance to councils on ways in which a conflict of roles can be dealt with¹, and this assessment protocol has taken that guidance into account.

¹ *Corruption Risks in the development approval process*, ICAC, September 2007, Chapter 6.

5. Assessment Protocol

5.1 Determination of rezoning proposal and development applications

This assessment protocol is broadly in line with the recommendations made by ICAC in relation to projects within Category 3². Those recommendations include referral of matters in which council may have a conflict of roles to an Independent Hearing and Assessment Panel before a decision is taken by the council.

Since the publication of the ICAC Position Paper *Corruption Risks in the Development Approval Process* the State government has however introduced a system of Joint Regional Planning Panels which in some cases act as consent authorities for development applications in lieu of the local council. The Newport project proposal is such a case, and the DA for the project will be decided by the Joint Regional Planning Panel. This will result in a higher degree of independence in the making of the decision on the development application to be submitted by Fabcot Pty Ltd.

The final decision in relation to the rezoning of land will also not be taken by the council. Any local environmental plan having that effect will be made by the Minister, who has the option of seeking the advice of the Joint Regional Planning Panel.

5.2 Establishment and composition of Assessment Team

The ICAC position paper suggests the use of appropriate external consultants or officers from another council to undertake development assessment, including rezoning, in cases of this kind. This protocol adopts that approach, as Council intends to appoint an external expert planner for this assessment role. However, this protocol also recognises that Council's planners are an important source of advice and local knowledge and have a clear statutory role as part of the assessment team.

Consequently the appointed expert planner will undertake the majority of assessment tasks independently of Council officers but will be assisted by Council's Principal Planner and Director, Environmental Planning and Community, as required. This assessment team will be segregated from the Property Team responsible for the commercial negotiations.

5.3 Responsibilities of Assessment Team

The assessment tasks listed below will be the responsibility of the Assessment Team. These tasks are intended to be read in conjunction with the consultant brief, consistent with a DA and rezoning assessment role. The tasks are to assess:

- whether design documentation constitutes the "design documentation" to be specified for the purposes of the development agreement
- whether the proposed application meets the requirements set out in clause 6.5 of the development agreement
- whether the proposal that the land be rezoned to 3a general business should be supported and progressed by Council
- whether the DA should be approved and if so, subject to what conditions; this will constitute advice to the Joint Regional Planning Panel.

No pre- DA discussions should take place without the independent expert planner/team leader and such discussions should be appropriately minuted. The content of the final recommendations will be the responsibility of the independent expert planner/ team leader who will have the final say. Any assessment report issued by the Assessment Team will be under the authority of the Director, Environmental Planning and Community.

² *Corruption Risks in the development approval process*, ICAC, September 2007, Chapter 6, p.57.

5.4 Conflicts of interest

Provisions relating to conflict of interest will apply to members of staff and to any other person engaged in assessments. In particular, any independent expert planner engaged by council in connection with the assessment of the Newport Project will be subject to the measures recommended by ICAC in Chapter 8 of *Corruption Risks in the Development Approval Process*. Any contract will include:

- a requirement that consultants declare any personal conflicts of interest that may emerge throughout their engagement, for example, where they are currently engaged in a private capacity by a client with an interest in the work they are performing for the council
- consequences for failure to comply with contractual requirements such as the declaration of conflicts of interest
- a prohibition on consultants working for specified clients that would present a conflict during the term of the contract. In view of the importance of demonstrating probity in this case, any consultant involved in a current or recent engagement by Fabcot Pty Ltd or an associated entity will also be excluded from consideration
- a requirement that consultants make a declaration on their final report that they had no personal pecuniary or non-pecuniary interest in the matter or its outcome
- a requirement that consultants be bound by a set of guiding principles such as a code of ethics. In addition to any industry code of conduct to which the consultant is subject, the consultant is required to comply with the Local Government Code of Conduct as it applies to members of council staff carrying out similar functions.

5.5 Councillors

Councillors will be briefed at appropriate intervals, but they will as far as practicable refrain from public comments in advance of the assessment of the rezoning and DA.

Councillors will consider the assessment of the rezoning proposal (unless the matter is otherwise directed by the Minister). Once the independent expert planner has finalised the DA assessment report and it is authorised by the Director of Planning it will be sent to the Joint Regional Planning Panel.

Prior to referral, if time permits, the DA assessment report will be referred to the Elected Council for its notation. The Elected Council will as a whole (except those Councillors (or alternate) nominated for the Panel), retain the right to make a submission of its own to the Panel.

5.6 General Manager

The General Manager consistent with his overall management role under the Local Government Act, will be mindful of the issues raised in Point 4 of this Protocol and make all reasonable endeavours to ensure that the community achieves the best commercial and planning outcomes. The General Manager must to the best of his ability ensure the Assessment Team and Property Team roles are properly performed.

The General Manager can seek advice of the former Project Steering Committee, or other relevant experts, as required.

5.7 Contact between Assessment Team and Property Team

The Property Team may enquire of the Assessment Team on the progress of the project and the assessment process, but not on the content of assessments and recommendations. These discussions are to take place at meetings which are appropriately minuted.

5.8 Internal and external probity advisors

Internal and external probity advisors will be used to provide an appropriate level of assurance to Council that the assessment protocol has been acted upon by all relevant parties, and to provide advice and assistance as required.

Assessment Protocol Flowchart

