

15.1 COUNCIL'S ROLE AS A MEMBER OF THE DOUGHERTY APARTMENTS RETIREMENT HOUSING PROJECT

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CITY STRATEGY LINK:	6.1.1 A COUNCIL THAT IS OPEN, ACCOUNTABLE AND REPRESENTS ITS CONSTITUENTS
MEETING DATE:	24 OCTOBER 2016

Purpose of Report

The purpose of this report is to brief Council on legal advice received regarding governance arrangements for the Dougherty Apartments Retirement Housing Project ("**Dougherty Company**") and to outline what actions need to be taken as a result.

Background

The Dougherty Company is a company limited by guarantee registered with the Australian Charities and Not-For-Profit Commission, with the primary aim to provide accommodation for aged persons, retired persons and disabled persons in an integrated living environment.

Willoughby City Council has maintained an interest in the Dougherty Company over the past thirty years, initially under tripartite arrangements with NSW Land and Housing Corporation ("**Land and Housing**") and Uniting Church in Australia Property Trust ("**Uniting**") (when Dougherty was an unincorporated association), and more recently as a member of the Dougherty Company (following its incorporation as a company) underpinned by a constitution. Uniting recently withdrew as a member of the Dougherty Company (which is technically a resignation under the constitution), with Council and Land and Housing the remaining members. Council provides the land on which the Dougherty Apartments operates through a 99-year lease established in 1985 with Land and Housing.

A pre-amalgamation review of governance arrangements across different Council entities has highlighted the need for Council to better understand the arrangements for the Dougherty Company. Council's role was also highlighted when Council was asked to attend and vote at a special general meeting on matters of constitutional concern triggered by the withdrawal of Uniting Care as a member from the Company. Legal advice was received to the effect that Council was unable to take part in voting as a member as Council had not delegated to any person, the authority to represent Council's interest.

A Councillor briefing was held on Monday 5 September with David Friedlander (Partner - King & Wood Mallesons). Council's legal advisors have subsequently held a number of discussions with the Dougherty Board's legal advisor. The Chair, Councillor Stuart Coppock, joined the most important of those discussions.

King & Wood Mallesons have provided legal advice for consideration in confidential session and David Friedlander will be attending the meeting to address any questions or concerns.

Discussion

The legal advice has identified that, as a high priority, Council should address the issue of Council's representation as a member of the Dougherty Company as well as developing a more formal arrangement with Council's appointees to the Dougherty Board of Directors. Further, it is proposed in the legal advice that, as a medium-high priority, Council adopts formal communication protocols for communications and information flows between Council (as a member) and the Dougherty Company.

There are a number of further matters in relation to the Dougherty Company that arise out of the withdrawal of Uniting as a member of the Dougherty Company. These will require resolution at a later date and are not proposed for resolution at this meeting.

Appointment of Member's Representative

As a member of the Dougherty Company, Council has the following rights:

- To appoint two directors to the board;
- To appoint one of these directors as Chair of the board; and
- To attend and vote as a member on resolutions at general meetings of the Dougherty Company as called from time to time.

The role of Council as a member of the Dougherty Company is distinct from the role undertaken by the Board of Directors ("**Dougherty Board**") which is responsible for the day-to-day management of the Dougherty Company. In the past, Council has habitually appointed two directors to the Dougherty Board, but has not nominated or provided a separate delegation to an individual to represent Council as a member.

Legal advice recommends Council appoint a member's representative ("**Member's Representative**") to perform the following tasks:

- Represent Council and vote on its behalf on matters at general meetings of the Dougherty Company in accordance with resolutions of Council;
- Deal with matters of urgency in the circumstance where seeking a resolution from Council which, from a timing perspective, would unreasonably inconvenience or adversely impact the Dougherty Company's business requirements;
- Formally and informally meet with other members of the Dougherty Company such as Land and Housing in order to discuss and socialise Council's position on the strategic and constitutional direction of the Dougherty Company or other matters; and
- Communicate with the Dougherty Company on behalf of Council in accordance with communication protocols to be established with the Dougherty Company and Land and Housing.

It is proposed that Council would retain the responsibility for the appointment of its appointee Directors to the Board (and the Chair of the Board) and that this would continue to be decided by Council resolution on an annual basis.

The Member's Representative should:

- be nominated on the basis of a position, rather than a natural person, to ensure the appointment remains valid if an individual were to leave the Council;
- have ready access to administrative resources and advice from Council;
- possess the understanding, trust and experience to execute the will of Council under delegation; and
- not be a current Director of the Board of Dougherty as there is an inherent conflict between these two roles. The Member's Representative represents the interests of the Council while Directors on the Board are required to act in the interest of all members of the Company.

In their advice, Council's legal advisors have compared the potential advantages and disadvantages of appointing different Council positions in the role of Member's Representative, including the position of Mayor.

The position of Mayor is considered an appropriate choice.

Additionally, the legal advice suggests the appointment of a second-named person in the event that the first is not available. The General Manager is considered as an appropriate choice for this appointment.

Unless there is anything unusual in the relevant proclamation that enacts Council's amalgamation, the appointment of the Member's Representative should remain in place post amalgamation (unless and until the administrator revokes or alters the appointment).

Instruments of Appointment of Directors

Council's current appointments to the Dougherty Board are Councillors Norton and Coppock with Councillor Coppock as Chair.

Currently, Council appoints Directors to the Dougherty Board on an annual basis ("**Director Appointees**"). However, there is currently no formal arrangement in place with the Director Appointees to ensure the seamless transition of Directors. Legal advice recommends that Council adopt a standard form of agreement with its Director Appointees, stipulating that the Director Appointees are required to step down from their position at the conclusion of their appointment period unless re-appointed which would provide a clearer intention to the Director Appointees, the Dougherty Board and Council.

Establishment of Communication Protocols

The legal advice recommends the establishment of communication protocols between the members of the Dougherty Company and the Dougherty Company itself which would assist in establishing sufficient and more timely information flows. It is proposed that these protocols be put into place between:

- the Dougherty Company and its members so that the Dougherty Company provides board papers and any other financial information directly to the members, and not just to the Directors on the Board; and
- Council and its Director Appointees so that Council obtains quarterly or half-yearly briefings.

These protocols would allow Council's Director Appointees to discuss and provide information to Council without having to determine first whether they would be breaching their director's duties which are owed to the Dougherty Company. They would also assist Council's Director Appointees

in the management of any conflict of duties that may arise from time-to-time, owing to their dual role as Councillors and Directors of the Dougherty Board.

The communications protocols would state that the Dougherty Company may withhold sensitive information in relation to a member if that information would affect the Dougherty Company's dealings with that member or would benefit that member unfairly against other members.

Any proposed communication protocols should be discussed with the Dougherty Company and Land and Housing.

Conclusion

Legal advice has indicated that as a matter of high priority, Council should appoint a Member's Representative. Also of high priority, is the establishment of a standard form of agreement for Director appointments in order to provide clear intentions with regards to Director tenure and transition arrangements. It is also proposed that, as a medium-high priority, Council adopt formal communication protocols for communication and information flows between the Dougherty Company and its members.

OFFICER'S RECOMMENDATION

That Council in respect of the Dougherty Company:

- 1. appoint the Mayor as the Member's Representative and the General Manager as the second-named appointment, with delegation to:**
 - Represent Council and exercise all or any of the powers Council as a member of the Dougherty Company may exercise, in a meeting of the Dougherty Company's members;**
 - Vote on matters at meetings of the Dougherty Company's members in accordance with resolutions of Council, subject to the following point;**
 - Deal with matters of urgency in the circumstance where seeking a resolution from Council, which from a timing perspective, would unreasonably inconvenience or impact on the Dougherty Company's business requirements;**
 - Represent Council in meetings with other members of the Dougherty Company, such as Land and Housing;**
 - Communicate with the Dougherty Company and the Dougherty Board on behalf of Council in accordance with the communication protocols which are to be developed.**
- 2. delegates authority to the General Manager to establish a standard form of agreement for Director appointments and execute these on behalf of Council, in line with the term of service as resolved at the Ordinary Council Meeting of the 26 September 2016; and**
- 3. receive a report in November 2016 regarding proposed communication protocols between the Dougherty Board and Members of the Company.**