

13.2 Current legal matters - status update

CSP Objective: Outcome 5.2: Governance is transparent and builds trust

CSP Strategy: 5.2.1 Build strong relationships and ensure our partners and community share the responsibilities and benefits of putting plans into practice.

Delivery Program: 5.2.1.2 Support good governance through systems and processes for legislative compliance.

Item 13.2

Summary

This report is being provided to update Council on current legal matters and investigations, together with advice on the status and costings for each matter as at the end of March 2024.

The list of Current Litigation Matters attached provides a comprehensive list of matters currently being litigated in various jurisdictions.

Financial implication

As evidenced in the attached document, legal matters have a significant cost implication for Council.

Risk implication

The LEC has jurisdiction to hear and finalise a development application or modification when Council has made a determination or, is taken to have refused an application and the applicant is dissatisfied with the decision.

As demonstrated in the attached document 12 of the 22 current legal proceedings are LEC matters (55%).

The LEC encourages conciliation between parties in an attempt to identify the issues in dispute, develop options, consider alternatives and endeavour to reach agreement. Dealing with matters in this way avoids the added costs of a matter proceeding to hearing which is usually for multiple days.

Risks can be also be mitigated through timely decision making and appropriate staff delegations for making determinations.

Appropriate compliance with the Code of Conduct would also mitigate risks associated with conduct matters.

Policy

All engagement of legal services occurs in accordance with Council's Procurement Policy

Consultation (internal)

Internal consultation with the Director Planning Environment and Communities has occurred.

Communication/Community engagement

Not applicable

Report of the Chief Executive Officer

13.2 Current legal matters - status update (cont)

Attachments

1 Current Litigation Matters [↓](#)

Enclosures

Nil

RECOMMENDATION

That Council receive this report and note that, as of March 2024, Council expended the following amounts on legal matters generally:

- Development Application appeals and/or Mediation Conferences within the NSW Land & Environment Court = \$536,765.58
- NSW Civil & Administrative Tribunal matters = \$176,945.60
- Councillor Code of Conduct related matters (including associated Supreme Court listings) = \$444,511.99
- Legal/Probity Advice = \$149,180.87
- Property Development, including road closures, caveats etc. matters = \$76,061.94
- Federal Court matters = \$3,285,222.50
- Anti-Discrimination matters = \$43,795.84.

Background

Litigation involves the engaging of solicitors and often barristers to represent Council and guide staff through the process. Often, a variety of specialists are also required to act as both expert witnesses and to prepare and review reports.

In Class 1 appeals to the Land and Environment Court (LEC), there is a presumption that, excluding unreasonable conduct or delay, each party pays its own costs. However, if the applicant is granted leave to amend its development application, the respondent Council may seek an order for costs thrown away.

That being said, the Court very rarely makes an order of costs against a party in Class 1 proceedings as it does not wish to discourage applicants from exercising their right to appeal against an administrative decision to refuse a development application.

Likewise, the primary rule in appeals to the NSW Civil & Administrative Tribunal (NCAT) is that each party pays their own costs. The Tribunal will not order a person to pay someone else's costs unless there are special circumstances as defined in the legislation.

At the Council Meeting on 19 March 2024, a Supplementary Report (Item 18.1) was submitted to Council providing a response to the Notice of Intention to Vary a Performance Improvement Order (PIO). The report advised that work undertaken to support the PIO to date included the creation of a temporary Implementation Team whose responsibilities would include the consolidation of legal services.

Report of the Chief Executive Officer

13.2 Current legal matters - status update (cont)

Part of the role of the Legal and Governance Implementation Lead is the oversight of Council's legal portfolio, ensuring that Council staff utilise the services of Council's panel of external legal services providers in an efficient and cost-effective manner.

There is a process in place requiring all requests for legal services, be it advice or representation, to be coordinated by the above role. Some of the benefits of centralising this process include –

- fee estimates are sought from at two legal panel members
- requests are spread evenly across all members of the legal panel
- requests are not sought for the same or similar advice
- requests will require approval at least at Manager level.

It is worth noting that in some instances actual billed costs exceed the initial fee estimate received. This is a result of these legal matters progressing to full hearings etc. which may have been beyond the level legal services initially quoted. Council's Legal and Governance Implementation Lead will work with the broader organisation and Council's legal service panel members to ensure accurate tracking of legal matters escalation occurs.

It is anticipated that this report will be submitted on a bi-monthly basis to keep the Elected representatives and public informed of costs associated with legal expenses.

Item 13.2

DATE INSTRUCTED	MATTER DESCRIPTION and details of Jurisdiction	STATUS	COUNCIL OFFICER	FEE ESTIMATE (ex GST)	BILLED COSTS TO END OF MARCH	UNBILLED COSTS TO DATE
BAL LAWYERS						
1/09/2022	Michael Joseph v KMC NCAT GIPA Reviews x 3	Decision handed down on substantive GIPA Appeals on 11/09/2023. Council's 3 access application decisions affirmed. Appeal lodged against decision. Judgment containing written reasons for NCATs interlocutory decision on 05/06/2023 to set aside two summonses issued by Mr Joseph handed down on 09/08/2023. Mr Joseph has also appealed that decision.	R.Winston	\$ 135,600.00	\$ 135,591.90	-
14/08/2023	Michael Joseph v KMC NCAT Interlocutory/Summons Appeal	Internal appeal against the Tribunal's decision to set aside two summonses issued to the Council by Mr Joseph in the above matter. The appeal hearing took place on 02/02/2024. Appeal dismissed on 15/03/2024. Council not seeking costs of appeal in light of decision and advice on costs prospects. Matter appears complete.	R.Winston	\$ 24,857.00	\$ 22,251.40	-
19/09/2023	Michael Joseph v KMC NCAT Appeal against substantive decision	Internal appeal against the Tribunal's decision on 11/09/2023 to affirm the Council's decisions in respect of Mr Joseph's 3 GIPA Access Applications. The appeal hearing took place on 02/02/2024. Appeal dismissed on 15/03/2024. Council not seeking costs of appeal in light of decision and advice on costs prospects. Matter appears complete.	R.Winston	\$ 35,464.00	\$ 19,102.30	\$ 249.00
BARTIER PERRY						
15/04/2024	DA House v KMC Class 1 - L&E Court Refusal of DA 10.2022.175.1 31 & 37 Cooina Place, Kiama	DA for a multi dwelling (12) development and subdivision. Refusal based on car parking, solar access, design, access and other matters that could not be resolved through the DA process and were not compliant with Council's DCP. Listed for first directions hearing 22/04/2024.	J.Rippon	\$ 39,000.00	-	

DATE INSTRUCTED	MATTER DESCRIPTION and details of Jurisdiction	STATUS	COUNCIL OFFICER	FEE ESTIMATE (ex GST)	BILLED COSTS TO END OF MARCH	UNBILLED COSTS TO DATE
HALL & WILCOX (as at end of April)						
22/02/2024	Karen Renkema-Lang v KMC Judicial Review - Supreme Court Revocation of Censure of Councillor	On 22/04/2024 the Court made Orders noting the parties agreement on the invalidity of the Final Investigation Report and Resolution 23/250C and regarding filing & serving evidence. Matter listed for hearing 30/05/2024 (parties have requested that the matter be determined on the papers).	J.Stroud	\$ 280,000.00	\$ 97,237.80	\$ 17,739.00
				\$ 35,850.00	\$ 26,224.19	Conduct reviewer's legal costs - represented by Lindsay Taylor Lawyers
6/07/2022	Probity Advice - Terralong, Akuna & Shoalhaven Streets	This matter is subject to a Section 11, The Commission has not completed its investigation. This matter will escalate at the conclusion of the Federal Court Proceedings in the matter of KMC v Daoud.	J.Stroud	\$ 90,000.00	\$ 73,824.87	-
6/10/2022	KMC v Daoud Federal Court Proceedings	Matter set down for Mediation 23/05/2024. If the matter does not settle, it will proceed to trial. The date for trial is not yet fixed.	J.Stroud	\$ 2,500,000.00	\$ 3,285,222.50	\$ 41,835.00
LINDSAY TAYLOR LAWYERS						
1/05/2023	Fountaindale v KMC Class 1 - L&E Court Refusal of DA 10.2021.26.1 15 Golden Valley Road, Jamberoo	Judgement handed down 17/04/2024 following S 34 agreement - Appeal upheld. DA for Torrens title subdivision of land to create 50 residential lots, signage, roads and related infrastructure granted subject to conditions. Costs issue to be determined.	J.Rippon	\$ 95,000.00	\$ 59,450.50	\$ 8,277.69
McCULLOUGH ROBERTSON						
	Michael Joseph v KMC & Spencers Class 4 Refusal of DA10.2023.98.1 110 North Kiama Drive, Kiama	Appeal discontinued. Awaiting judgement on an application made by Council seeking Orders that Mr Joseph pay Council's costs as agreed or assessed.	J.Rippon	\$ 93,000.00	\$ 72,660.66	

DATE INSTRUCTED	MATTER DESCRIPTION and details of Jurisdiction	STATUS	COUNCIL OFFICER	FEE ESTIMATE (ex GST)	BILLED COSTS TO END OF MARCH	UNBILLED COSTS TO DATE
MADDOCKS						
15/09/2022	Vortex Developments et al v KMC Class 1 - L&E Court Refusal of DA 10.2021.156.1 96 Rose Valley Road, Rose Valley (Abattoir)	Matter listed for hearing on 20-22, 27-28 May 2024.	J.Rippon	\$ 140,711.50	\$ 75,407.50	\$ 232.50
23/08/2023	Blue Haven (Bonaira) Ongoing probity advice	Negotiations with preferred candidate	J.Gaudiosi	\$ 95,350.00	\$ 75,356.00	
MARSDENS						
7/12/2022	Enzo Developments (McElhone) v KMC Class 4 - L&E Court Deemed refusal of DA 10.2021.344.1 92 Jerrara Road, Jerrara	Development Consent surrendered - new DA lodged (see below). Proceedings to be deferred until the determination of the Class 1 appeal.	J.Rippon	\$ 40,000.00	\$ 20,871.74	
12/04/2024	Enzo Developments (McElhone) v KMC Class 1 - L&E Court Deemed refusal of DA 10.2023.109.1 92 Jerrara Road, Jerrara	Listed for first directions hearing 22/04/2024.	J.Rippon	\$ 32,000.00	-	\$ 1,997.10
12/01/2024	Forte Kiama Heights Development v KMC Class1 - L&E Court Refusal of DA 10.2022.113.1 4 Elanora Road, Kiama	A modification of the original consent was sought seeking an increase in height for the overall development. Fixed for conciliation conference 31/05/2024	C.Lappin	\$ 29,000.00	\$ 2,677.70	\$ 1,128.30

DATE INSTRUCTED	MATTER DESCRIPTION and details of Jurisdiction	STATUS	COUNCIL OFFICER	FEE ESTIMATE (ex GST)	BILLED COSTS TO END OF MARCH	UNBILLED COSTS TO DATE
RMB						
20/12/2019	Gardos V KMC Supreme Court Dedication of land as a Public Road Burra Creek Road, Jamberoo	Awaiting response from other side regarding outstanding actions required for finalisation of matter.	B.Ramaekers	\$ 30,000.00	\$ 30,470.00	\$ 1,573.00
27/10/2021	Grant v KMC Class 4 - L&E Court Grantie's Village 219 Donovan Road, Broughton Village	Final hearing 21/02/2024 - sought to establish the removal of certain rides from the park that do not have development consent. It was also established through an independent expert that a number of the rides are unsafe and should be decommissioned. Judgement reserved.	J.Rippon	\$ 128,786.19	\$ 119,602.01	\$ 382.00
12/10/2023	KMC v Josef Fischer Supreme Court proceedings Extension of Caveat Swamp Road Cycleway, 11 Thornett Way, Kiama Downs	Listed for directions hearing on 10 May 2024	B.Ramaekers	\$ 45,908.15	\$ 45,591.94	\$ 4,259.00
SHAW REYNOLDS						
21/04/2022	John Giles v KMC Federal Court of Australia	Application alleging unlawful discrimination by Council. Matter not resolved following mediation on 09/11/2022. Parties have exchanged correspondence over a considerable period of time to try and reach settlement and some in principle agreement has been reached. On 07/02/2024, the Applicant forwarded a request for particular works to be carried out by Council as part of settlement, having regard to a stormwater assessment and requesting amendments to a proposed indemnity. The amendments sought by the Applicant were not supported by Council. If no settlement is to be reached, Council is due to file their evidence by 22/04/2024. The next Court directions hearing is 07/06/2024.	M.Malone	\$ 43,725.00	\$ 43,795.84	-

DATE INSTRUCTED	MATTER DESCRIPTION and details of Jurisdiction	STATUS	COUNCIL OFFICER	FEE ESTIMATE (ex GST)	BILLED COSTS TO END OF MARCH	UNBILLED COSTS TO DATE
SPARKE HELMORE						
23/08/2023	D & L Sharp v KMC Class 1 - L&E Court Refusal of DA10.2022.43.1 44 Halls Road, Jerrara	Matter heard on 22-23/02/2024. Judgement reserved.	C.Lappin	\$ 15,000.00	\$ 70,715.07	-
17/01/2024	Cole & Hennessy v KMC Class 1 - L&E Court Refusal of DA 10.2022.152.1 50 Riverleigh Avenue, Gerroa	Matter is listed for s34AA conciliation conference and hearing on 15 & 16/07/2024.	C.Lappin	\$ 20,000.00	\$ 7,599.60	\$ 117.00
13/03/2024	Harwood v KMC Class 1 - L&E Court Deemed refusal of DA 10.2023.134.1 110-114 Terralong Street, Kiama	This matter relates to a deemed refusal of a multi dwelling/shop top housing development. The applicant has sought significant variation to existing DCP controls and has refused to meet any requirements set by Council for their proposal Matter is listed for conciliation on 06/06/2024.	C.Lappin	\$ 28,000.00	\$ 7,780.80	\$ 1,125.60
WILSHIRE WEBB STAUNTON BEATTIE						
4/03/2024	EPLANNING v KMC Class 1 - L&E Court Deemed refusal of DA 10.2023.176.1 261 Jamberoo Mountainn Road, Jamberoo	Matter is listed for s34AA conciliation conference and hearing on 14/06/2024.	C.Lappin	\$ 28,000.00	-	\$ 1,758.00
INVESTIGATIONS						
30/04/2024	Code of Conduct Complaint (Councillor)	Matter referred to Pinnacle Integrity for Investigation	K.Norton	\$ 5,200.00		