

HAWKESBURY CITY COUNCIL
SPECIAL MEETING

Where People Make the Difference!

SPECIAL BUSINESS PAPER

DATE OF MEETING: 30 November 1995

LOCATION: Council Chambers

TIME: 7.30pm

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SPECIAL MEETING

Table of Contents

Meeting Date: 30 November 1995

Page 2

ITEM	SUBJECT	PAGE
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AGENDA

- **Apologies.**

- **SECTION 4 - Reports for Determination**

115:	MUSHROOM COMPOSTERS PTY LTD - LEGAL ACTION	
	P1609/110/GMA	4

******* END OF TABLE OF CONTENTS *******

SPECIAL

Section 4 **Reports for Determination**

ITEM: 115 MUSHROOM COMPOSTERS PTY LTD - LEGAL ACTION

FILE NUMBER: P1609/110/GMA

REPORT:

This report has been compiled today for the Special Meeting called as a result of the written request from Councillors Paine, Books and Allan. It is to deal with the current negotiations, endeavouring to finalise the issues between Mushroom Composters Pty Ltd., Peter Foster (on behalf of the Concerned Ebenezer Residents) and the Council. Those issues relate to alleged continuing contempt, cessation of the nuisance and composting on the site.

In 1989 action was commenced in the Land and Environment Court regarding the alleged nuisance emanating from the operation of Mushroom Composters Pty Ltd at Ebenezer. That action was between the Council and Mushroom Composters Pty Ltd with later, the Court granting Mr Peter Foster (on behalf of the Ebenezer Residents), the right to join as a second applicant.

In May 1993, the Court handed down a decision in favour of the Council. As a result, Mushroom Composters lodged an appeal with the Court of Appeal against their decision and Peter Foster lodged a cross appeal. In this matter Orders for Costs were ordered against Mushroom Composters Pty Ltd (80%) and Peter Foster (20%) in favour of the Council.

There were later contempt proceedings with the Court imposing a fine and a penalty for continuing breach of the orders.

Mushroom Composters are now keen to finalise the matter to avoid further costs and the possibility of the company not being financially able to relocate and continue operation.

Total legal costs to the Council since 1989 in all the matters will be around \$93,000. These costs relate to all proceedings against Mushroom Composters, including the original Class 4 proceedings, two Notices of Motion, the Contempt proceedings and Court of Appeal proceedings.

Brief History of the Matter

1. October 1978 Council grants development consent to Mushroom Composters Pty Ltd for the establishment of a mushroom compost production operation
2. September 1985 - Council grants development consent for the upgrading of existing mushroom composting operations, including the augmentation of the existing waste water treatment plant.
3. April 1987 - Council grants development consent to upgrade existing mushroom composting development, including the erection of certain buildings.

SPECIAL MEETING

Meeting Date: 30 November 1995

Item: 115

4. July 1992 - Council grants development consent to mushroom composting ducting tunnels, but only to Stage One of the proposed works.
5. Commencing in 1989 Council attempts to negotiate a time limit to have odour nuisance abated. Negotiations are unsuccessful and Class 4 proceedings are commenced in the Land and Environment Court alleging that the company is in breach of development conditions.
6. Mr Peter Foster is joined to the Class 4 proceedings and claims that Mushroom Composters are carrying out development, mainly the construction of a concrete slab without development consent and the development consent granted by the Council in 1992 is invalid.
7. Chief Justice Pearlman hands down her decision in May 1993 in relation to the Class 4 proceedings finding that the operation of Mushroom Composting was in breach of conditions of development consent as sought by the Council. There was an order that the respondents (Mushroom Composters Pty Ltd) be restrained from using the premises so as not to interfere with the amenity of the neighbourhood in respect of smell. Composters are given twelve months from the date of the judgement to stop emitting the odour.
8. Following the expiration of the twelve month period to 20th May 1994 Mushroom Composters sought, by two Notices of Motion to have the time extended. This was denied by the Court. Costs were awarded to Council.
9. Chief Justice Pearlman awards the Council costs of the Class 4 proceedings, 80% to be paid by Mushroom Composters and 20% to be paid by Peter Foster.
10. Mushroom Composters lodge an appeal to the Court of Appeal against Chief Justice Pearlman's decision of May 1993.
11. Peter Foster lodges a cross-appeal in the Court of Appeal against Chief Justice Pearlman's decision of May 1993 in respect of her failing to find the consent of May 1992 void and also against the cost order.
12. December 1994 - Council files a Notice of Motion for contempt regarding Mushroom Composters failing to cease emitting a smell from the premises.
13. Peter Foster also files a Notice of Motion for contempt of the Court Orders.
14. July 1995 - hearing of both Contempt Motions.
15. August 1995 - Judgement handed down by Justice Pearlman finding that Mushroom Composters were in contempt.
16. Matters set down for hearing on the question of costs on 18th December 1995. Council seeks indemnity costs of the contempt proceedings.

SPECIAL MEETING

Meeting Date: 30 November 1995

Item: 115

17. November 1995 - Peter Foster relists Contempt Motion alleging Company's still in contempt.
18. Hearing of Notice of Motion regarding continuing Contempt listed for hearing January 1996.
19. Current settlement negotiations.

Settlement Negotiations.

The settlement negotiations have now been continuing for some time with the solicitors for Mushroom Composters Pty Ltd offering the Council \$70,000 as full settlement with payment to be made in eight equal instalments over two years.

Draft Terms of Settlement have been prepared and these are attached to this report as forwarded by solicitors for Mushroom Composters Pty Ltd. Council needs to add an additional term to these in relation to its costs. In this regard, with the Court of Appeal costs now to be borne by the Council in the amount of \$4,500 it is recommended that the Council accept settlement from Mushroom Composters Pty Ltd of \$75,000 with this paid over eight equal instalments over two years.

The Draft Terms of Settlement refer to existing use rights to the land and it is not acknowledged that there are any such rights, but that all development is undertaken due to development consents.

Late this morning the Environmental Defenders Office (Solicitors for Peter Foster) wrote to the Council's solicitors in part as follows:

"We refer to the settlement negotiations currently taking place between your client, Mushroom Composters, and Mr Foster in this matter.

As you know, Mushroom Composters has requested that Mr Foster discontinue his cross-appeal in the Court of Appeal against Mushroom Composters as a term of settlement.

To the extent that Foster's cross-appeal relates to the validity of Mushroom Composters' 1992 consent, the cross-appeal is academic given that Mushroom Composters has agreed as part of the settlement to vacate its Ebenezer premises and to surrender all development consents it holds in relation to those premises.

However, Foster's cross-appeal is not academic with regard to the costs order made in the court below by Chief Justice Pearlman on 14 September 1993, in which the Council obtained a costs order in its favour that Mushroom Composters pay 80% of Council's costs, and Mr foster pay the remaining 20%."

The Legal Aid Commission will not consent to Mr Foster discontinuing his cross-appeal, as this will result in the Commission being liable for 20% of the Council's costs.

SPECIAL MEETING

Meeting Date: 30 November 1995

Item: 115

Mr Foster is therefore obliged, and we are so instructed, to continue his cross-appeal against both the Council and Mushroom Composters. Mr Foster has been granted legal aid for his cross-appeal.

It would however, be preferable for the three parties to comprehensively resolve all the matters in dispute between them in the current settlement negotiations if possible. This would avoid further costs being incurred by all parties.

We therefore request that you obtain your client's instructions as to whether it will agree not to press its order for costs against Mr Foster in the court below, on the basis that Mr Foster withdraws his cross-appeal against your client in the Court of Appeal."

RECOMMENDATION:

It is recommended that the Council settle the current matters with Mushroom Composters Pty Ltd and Peter Foster on the basis of:

1. Accepting an amount of \$75,000 (seventy five thousand dollars) for its costs from Mushroom Composters Pty Ltd, with such amount paid over a period of two years, based on eight equal instalments.
2. Mushroom Composters will cease producing compost on its premises at Post Office Road Ebenezer by 5pm on the 15th December 1995.
3. Mushroom Composters Pty Ltd surrender all development consents it presently holds in respect of the land.
4. Those matters directly related to the issues between Council, the nuisances and Mushroom Composters Pty Ltd contained in the Draft Terms of Settlement.
5. The Council Seal being affixed to all necessary documents.

ATTACHMENTS:

Draft Terms of Settlement

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**SPECIAL
MEETING**

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