

Submission
No 7

INQUIRY INTO FUNERAL INDUSTRY

Organisation:

Name: Mrs V Duffie

Telephone:

Date Received: 6/05/2005

Theme:

Summary

Ms. Jan Burnswoods
Committee Chair Inquiry
Funeral Industry
Parliament House
Macquarie Street
Sydney N.S.W. 2000

Mrs V Duffie

Dear Ms Burnswoods,

I understand you are currently conducting an inquiry into the funeral industry and I would like to draw to your attention the operational guidelines of a cremation facility operated by Smythes Funeral Directors in my local area. Development Consent to the establishment of a cremation facility at Nulkaba on the site of the former St. Patrick's church was granted by Council on November 21, 2001. At the time a number of concerns were raised by local residents and an air quality and health risk assessment was required by Council in order to determine whether there were any health risks to the local community arising from the proposal.

As at January 2005 Nulkaba crematorium data shows 1098 breaches of council conditions in the first two years of operation and 830 failures to meet the temperature requirements set by the council to ensure complete combustion of bodies.

The site is small and originally meant to fill local needs with the nearest house being 50 metres away. The Nulkaba facility was only approved so close to houses because originally the maximum cremation rate was 400 bodies per year. Now the owner wants council to consider his application to increase the number of cremations to 1600 bodies per year. Now we are not experiencing an increase in death rates in our area, the owner is cremating bodies for funeral directors located outside of our local government area.

Several complaints have been made by local residents of the facility operating after the facility should have been shut for the day.

Emission tests done in 2003 showed dioxin levels (I believe there is no safe level) equal to the maximum prescribed for municipal incinerators. Would a municipal incinerator be allowed to operate so close to houses?

We are now being asked to supply to council any objections we have as the owner now wants to 1) increase the number of bodies to be processed at the cremation facility from 400 to 1600 per annum.

- 2) seek a reduction in the temperature in the primary combustion chamber.
- 3) increase the hours of operation.

I have included, for your perusal, a copy of minutes which were distributed at the last Cessnock Council meeting held Wednesday 16th March 2005. These minutes include a Director Corporate & Regulatory Services Report No.4/2005 and Report No 18/2005. I have also included the Development Application No 8/2000/433/2 with the current details of modification to the conditions of consent.

At the Cessnock Council meeting held 16th March 2005 the councillors voted for the seeking of \$ 9,000 infringement notices. It was explained to me by one of the councillors that by doing so the applicant would have to pay the fine and if they had sought higher amounts the applicant would have the opportunity to sue the council and the legal advice given to council was that council would have lost the case.

I have also rang several councillors who voted for the smaller fine and asked what was their stand on the current development proposal to increase the number of cremations and hours of operation. One councillor refused to comment, another wouldn't commit himself and another told me I was wasting my time and the local residents meeting which was held recently was overkill. My question to the councillor who told me I was wasting my time was - why is it up to local residents to gather this information? His reply to me was - you can't expect council to pay someone \$30,000 per year to monitor one operation

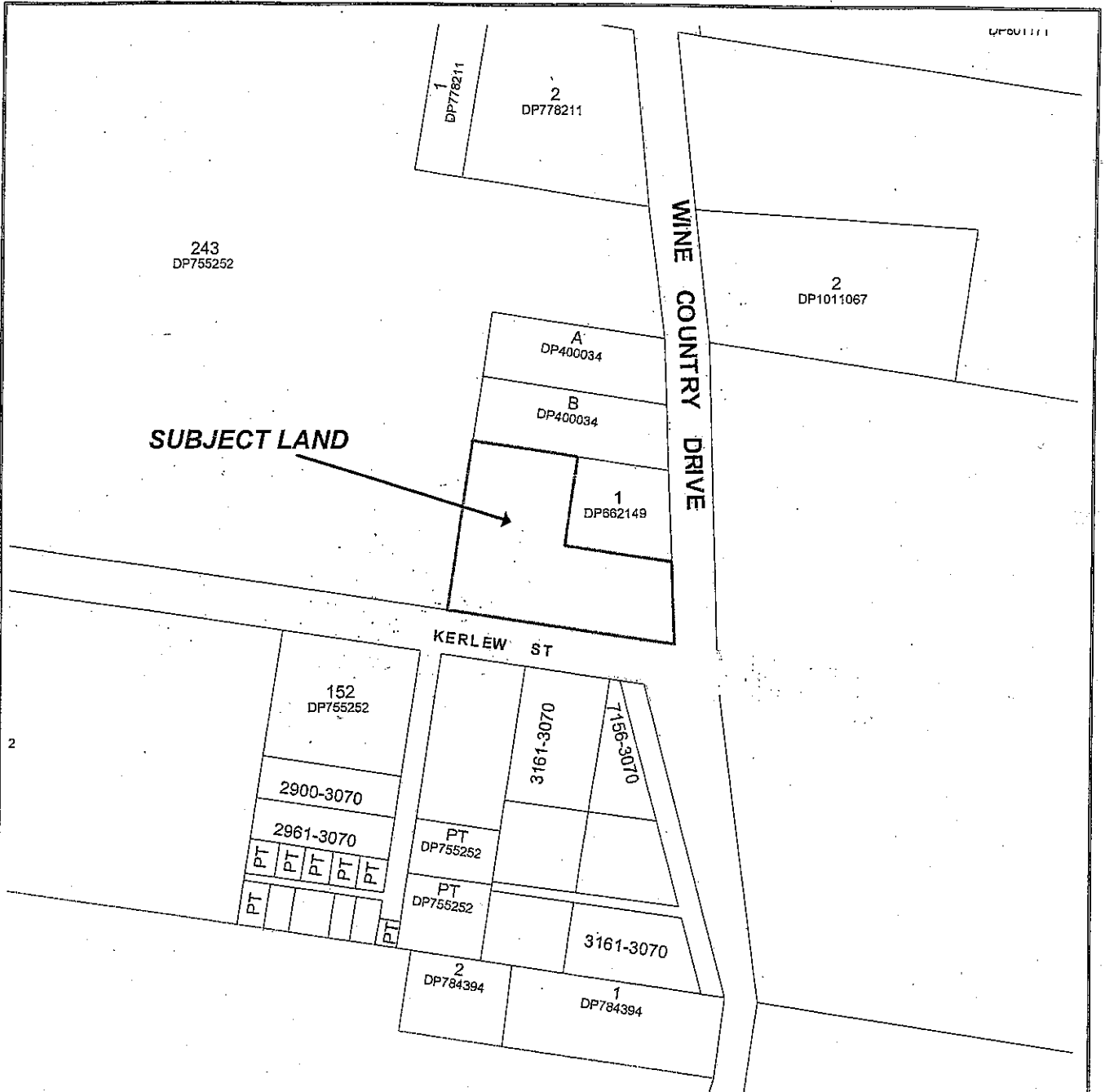
I am sure you will receive correspondence from other concerned local residents. As you can see our concerns are falling on deaf ears.

I look forward to a reply from you .

Regards



Mrs V. Duffie

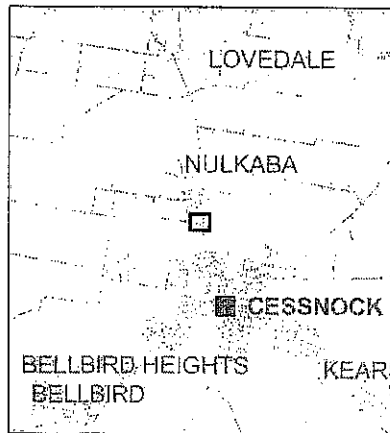


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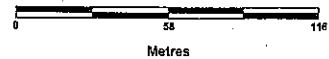
Property Information Legend

- Property Boundary
- Proposed Development
- Strata Boundary
- Easements
- Lot / Section Deposited Plan Number
- State Forests
- National Parks
- Crown Leased Areas
- Council Leased Areas

OverView



Date : 23 Mar 2005



Scale 1 : 2880

WHILST EVERY EFFORT IS MADE TO PROVIDE ACCURATE MAPS, CESSNOCK CITY COUNCIL ACCEPTS NO RESPONSIBILITY FOR ANY ERROR OR OMISSION IN THIS MAP.

A PERSON INTENDING TO RELY ON SURVEY ACCURATE DIMENSIONS SHOULD OBTAIN THE APPROPRIATE DEPOSITED PLAN.

A PRODUCT OF THE MAPPING / GIS SECTION



The Occupant
1 Occident ST
NULKABA 2325

Contact: Mr R J Sandell
Our Ref: DA 8/2000/433/2
Your Ref:

Dear Sir/Madam

**DEVELOPMENT APPLICATION NO. 8/2000/433/2
FOR AMENDED CONSENT – APPLICANT SEEKING MODIFICATION TO THE
CONDITIONS OF DEVELOPMENT CONSENT NO. 8/2000/433/2 FOR CREMATORIUM
ON DP 1052896 LOT 100 KERLEW STREET NULKABA 2325
APPLICANT – ACM LANDMARK PTY LTD**

Council wishes to advise that it has received an application seeking permission to amend the conditions of Development Consent 8/2000/433/2 for the crematorium on the above property. Conditions relate to the number of cremations permitted, the hours of operation of the cremation facility and the temperature in the primary combustion chamber. The amendment alters the modifications to the consent previously applied for and as yet undetermined. A locality map and details of the development proposal are included.

Cessnock City Council is the consent authority. Before determining the application, Council is seeking public comment on the proposal. Where a submission is made by way of an objection, the objection must be in writing and the grounds for objection must be clearly specified. Council will consider all submissions in the fifteen (15) day notification period commencing 30 March 2005 and finishing 13 April 2005 before determination of the abovementioned application.

For further information, please contact Council's Corporate & Regulatory Services Department on (02) 4993 4300, quoting reference no. 8/2000/433/2, where staff will be pleased to assist.

Yours faithfully

JD WALPOLE,
For CESSNOCK CITY COUNCIL

24 March 2005
Enc.

**SUMMARY OF DETAILS OF MODIFICATION TO THE CONDITIONS OF
DEVELOPMENT CONSENT NO. 8/2000/433/2**

1. Condition 2 (cremation numbers) – proposed amendment seeks an increase in the number of bodies to be processed at the cremation facility from 400 per annum to 1000 per annum.
2. Condition 4 (temperature in the primary combustion chamber) – proposed amendment seeks a reduction in the temperature in the primary combustion chamber.
3. Condition 44 (hours of operation) – proposed amendment seeks the changes to the approved hours of operation which state that the premises shall operate or trade only between the times stated as follows:-

Mondays to Fridays	8.30a.m. to 4.00p.m.
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The applicant seeks the following hours of operation:-

Monday to Friday (Normal Time)	8.00a.m. to 5.00p.m.
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Monday to Friday (Daylight Saving Time)	8.00a.m. to 6.00p.m.
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Saturday	8.00a.m. to 1.00p.m.
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The applicant has also requested that the hours of operation nominated above apply only to the cremation process and that these times not include the "heating-up" and "cooling-down" times of the cremation facility.

**DIRECTOR CORPORATE & REGULATORY SERVICES
REPORT NO. 18/2005**

GALLERY

DEVELOPMENT APPLICATION NO:	8/2000/433/1
APPLICANT:	ACM LANDMARK PTY LTD
OWNER:	ST PATRICKS OF NULKABA PTY LTD
PROPERTY:	LOT 100 DP 1052896 KERLEW STREET, NULKABA
AREA:	6,098 SQM
ZONING:	RURAL 1 (A)
PROPOSAL:	CONSIDERATION BY COUNCIL OF BREACHES OF DEVELOPMENT CONSENT

Senior Planning Assessment Officer, Rod Sandell, reports:-

SUMMARY:

The purpose of this report is to provide Council with details of the alleged breaches of the Development Consent No. 8/2000/433/1 following its Extraordinary Meeting on Wednesday, 9 March 2005. At this meeting Council was addressed by representatives of Sparke Helmore – Lawyers who advised on options available to Council in order to address past breaches of consent conditions.

This report will also reference the previous report to Council submitted on 19 January 2005 which outlined the breaches of consent and made a recommendation as to the action considered appropriate. This report will provide clarification and alteration to that report.

BACKGROUND:

Council at its meeting on 19 January 2005 considered two (2) reports from the Director concerning the proposed amendments to the consent conditions for the crematorium (Report No: 150/2004) and the breaches to the existing development consent (Report No. 4/2005).

Council resolved with respect to the breaches to the conditions of consent *“that consideration of Director Corporate and Regulatory Services Report No. 4/2005 be deferred pending the receipt of a further report on possible action available to Council including:*

1. *The commencement of a Class 5 Prosecution in the Land and Environment Court against the owner and operator of the Nulkaba Crematorium, seeking the imposition of penalties pursuant to S125 of the environmental Protection Act for breaches of all conditions of Development Consent that occurred after 12 December, 2003.*
2. *The commencement of Class 4 proceedings in the Land and Environment Court seeking orders that the owner and operator of the Nulkaba Crematorium be restrained from operating the Crematorium until such time as soot tests and stack emissions tests are carried out fully, in compliance with conditions 9 and 12 of D.A. Consent 8/2000/433/1 dated 13/12/2001 and submitted to Council.*

With respect to the report relating to the application for amendments to the consent for the crematorium Council resolved:-

1. *That consideration of Director Corporate and Regulatory Services Report No. 150/2004 be deferred pending the receipt of the advice requested in the recommendation of Director Corporate and Regulatory Services report No. 4/2005.*

At Council's meeting held on 2 March 2005 the Director of Corporate and Regulatory Services advised that Council was in receipt of legal advice from Sparke Helmore based on the above resolutions. Council resolved that this report be noted.

An Extraordinary Meeting of Council was then held on Wednesday, 9 March, 2005 when the legal representatives of Sparke Helmore (Messrs Gray & McKelvey) were present to answer questions relating to the legal advice that had been provided. A copy of the legal advice was forwarded to Councillors prior to the meeting.

LIMITATION ON LEGAL ACTION

Councillors will recall that the legal representatives present made reference to a limitation in time relating to proceedings against offences. Section 127 (5) of the Environmental Planning & Assessment Act, 1979, introduced on 10 December 2003 states that the proceedings for an offence against the Act may be commenced no later than 2 years after the offence was alleged to be committed. Therefore in the circumstances of this matter an offence would have to have been committed between 10 December 2003 and the present time.

Prior to 10 December, 2003 the Act contained provisions which stated that proceedings for an offence against the Act may be commenced no later than 12 months after the offence was alleged to be committed. These provisions no longer apply as a 12 month period has elapsed since these provisions were in force.

PREVIOUS REPORT TO COUNCIL ON CONSENT BREACHES

With reference to the report submitted to Council to its meeting of 19 January 2005 and having regard to the legal advice now provided it is recommended that Council does not pursue Class 4 or Class 5 proceedings. In relation to the enforcement options available to Council it is noted that Penalty Infringement Notices (at \$600.00 for each breach of consent conditions) provide an appropriate alternative to the criminal prosecution of planning offences.

During the previous consideration of breaches to the conditions of consent it was determined that only condition 2 (exceedence of number of bodies to be cremated), condition 11 (late submission of reports to Council) and condition 44 (operating hours) were conditions where appropriate legal action could be taken.

The present recommended course of action is consistent with that recommended to Council on 19 January with the exception that the number of clear breaches to the hours of operation have increased to 13 and legal advice has revealed that the amount for each Penalty Infringement Notice is limited to \$600.00.

It should be noted that residents objecting to the crematorium have also recently pointed out that on a number of occasions bodies have been delivered at the crematorium on a Saturday morning. Residents claim that this is also a breach of condition 44 of the consent as the crematorium is operating or trading outside the approved hours of operation.

However, it is not clear whether the delivery and receipt of bodies on a Saturday morning would constitute a breach of the consent conditions as the crematorium itself is not operating on these days.

PROOF OF BREACHES OF CONSENT

Council's legal representatives point out in their advice that whether a breach has occurred is ultimately a question of fact and will rely on whether evidence establishing the breach can be obtained.

The 24 monthly report submitted by the applicant provides a clear and concise record of the number of bodies cremated and the times when these cremations have occurred. Therefore in regard to the evidence required to establish each breach the following information is provided:-

Condition 2 – (exceedence of cremation numbers)

To ensure that this breach has occurred within the allowable time frame for action against breaches the total number of cremations has been calculated for the time period 1 January 2004 till 31 December 2004. Evidence available to Council indicates the total number of cremations in 2004 is 484, clearly exceeding the maximum of 400 as stipulated in condition 2 of the consent.

Condition 11 – (late submission of reports)

The condition requires the submission of summary reports to Council within six, twelve and twenty four months of the conclusion of the commissioning phase of the cremator. The 24 monthly report was submitted to Council on 7 December 2004 and had been due to be submitted on 1 November 2004.

Condition 44 – (hours of operation)

In addition to the 24 monthly report required as a condition of consent Council officers have obtained through the cooperation of the cremator operator the daily monitoring records of the cremator unit up until 4 March 2005. This information includes details of the person being cremated together with the date and time of cremation. The records indicate that cremations were commenced on or after 4.00pm on 60 occasions since 10 December 2003 and on 13 occasions since 30 September 2004 when Council issued a formal notice to comply with this condition.

Council therefore has sufficient clear and concise records in relation to conditions 2, 11 & 44 with which to proceed with the serving of penalty notices.

NUMBER OF ALLEGED BREACHES OF CONSENT

The legal advice provided verbally to Council on 9 March 2005 also made reference to how many penalty notices may be issued. This advice provided that individual breaches of the conditions of consent may be the subject of the issue of a penalty notice. However, where several cremations occurred one after the other outside of the hours of operation then only one penalty notice may be issued as the activity was continual with there being no severance of the activity.

With regard to condition 44 it is advised that the available records do not indicate when heat-up cool-down occurs. From observations and discussions with the cremator operator heat-up takes approximately 1 hour but depends on ambient temperatures. Cool-down times can vary greatly also depending on ambient temperatures. During the summer months the cool-down phase can take in excess of three (3) hours. From the records available to Council the only indisputable way of identifying a breach is on those occasions where the records indicate that a cremation has commenced either on or after the approved operating hours (which under the present conditions of consent is 4.00pm – Monday to Friday).

Therefore the options considered most appropriate for issuing of penalty notices are as per below:

OPTION 1.

CONDITION 2.(exceedence of cremation numbers) – 1 breach x \$600.00.

CONDITION 11 (late submission of reports) – 1 breach x \$600.00.

CONDITION 44 (hours of operation) – this figure based on cremations commenced on or after 4.00pm since 10 December 2003. – 60 breaches x \$600.00 = \$36,000. (figures taken from 24 monthly report and recent monthly reports.)

TOTAL AMOUNT OF PENALTY INFRINGEMENT NOTICES = \$37,200.00

OPTION 2

CONDITION 2.(exceedence of cremation numbers) – 1 breach x \$600.00.

CONDITION 11 (late submission of reports) – 1 breach x \$600.00.

CONDITION 44 (hours of operation) – this figure based on cremations commenced on or after 4.00pm since Council's warning notice served on 30 September 2004. – 13 breaches x \$600.00 = \$7,800.00 (figures taken from 24 monthly report and recent monthly reports.)

TOTAL AMOUNT OF PENALTY INFRINGEMENT NOTICES = \$9,000.00

OPTION 3

Take no action against the owners of the Nulkaba crematorium for alleged breaches of the conditions of Development Consent No. 8/2000/433/1 to date but resolve to advise St Patricks of Nulkaba Pty Ltd that Council intends to strictly monitor the conditions of consent from the date of this Council resolution. Should any breach of the consent occur after this time Council intends to issue "On the Spot" Penalty Infringement Notices for any future breach of the consent for the operation of the crematorium where it is clearly evident that the condition has been breached.

CONCLUSION

This report provides information in relation to the actions that may be taken against the owner of the cremation facility for past breaches of consent conditions.

This report also references the previous report to Council submitted on 19 January 2005 which outlined the breaches of consent and made a recommendation as to the action considered appropriate. This report provides clarification and alteration to that report.

Option 2 has been recommended to Council as it is consistent with the previous recommendation to Council on this matter and it is also consistent with Council's general approach to issue warning notices on development matters prior to the issue of penalty infringement notices.

Further to this report, it is proposed that the Section 96 application continue to be assessed and ultimately determined, including the clarification of conditions to enable clear understanding of what constitutes a breach of the consent conditions.

RECOMMENDATION that Council resolve to commence the issue of Penalty Infringement Notices against St Patricks of Nulkaba Pty Ltd for breaches to conditions 2, 11 and 44 of Development Consent No. 8/2000/433/1 on the following basis:-

OPTION 2

CONDITION 2.(exceedence of cremation numbers) – 1 breach x \$600.00.

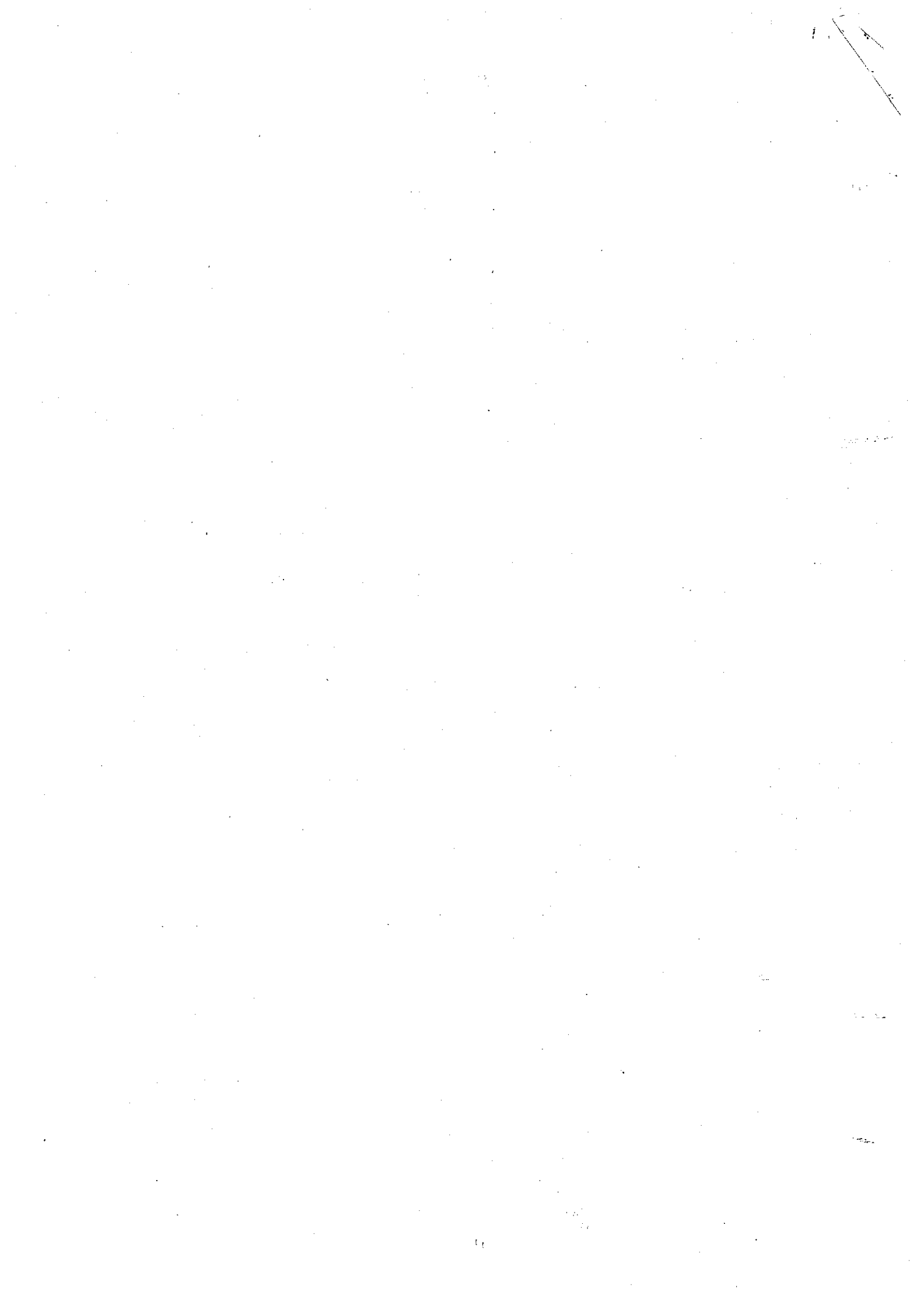
CONDITION 11 (late submission of reports) – 1 breach x \$600.00.

CONDITION 44 (hours of operation) – this figure based on cremations commenced on or after 4.00pm since Council's warningnotice served on 30 September 2004. – 13 breaches x \$600.00 = \$7,800.00 (figures taken from 24 monthly report and recent monthly reports.)

TOTAL AMOUNT OF PENALTY INFRINGEMENT NOTICES = \$9,000.00

To: **The General Manager**
Corporate & Regulatory Services
Committee - March 16, 2005

J R STAPLETON
DIRECTOR CORPORATE & REGULATORY
SERVICES
March 16, 2005



DEFERRED BUSINESS

DIRECTOR CORPORATE & REGULATORY SERVICES REPORT NO. 4/2005

DEVELOPMENT APPLICATION NO: 8/2000/433/1
APPLICANT: ACM LANDMARK PTY LTD
OWNER: ST. PATRICKS OF NULKABA PTY LTD
PROPERTY: LOT 100, D.P.1052896, KERLEW STREET,
NULKABA.
AREA: 6,098 SQM
ZONING: RURAL 1(A)
PROPOSAL: CONSIDERATION BY COUNCIL OF
BREACHES OF DEVELOPMENT CONSENT

Senior Planning Assessment Officer, Mr R J Sandell, reports:-

SUMMARY:

Development Consent to the establishment of a cremation facility at Nulkaba on the site of the former St. Patrick's church was granted by Council on November 21, 2001 (Development Consent No 8/2000/433/1). At the time of assessment a number of concerns were raised by residents of the area to the proposed crematorium and an air quality and health risk assessment was required by Council in order to determine whether there was any significant health risks to the local community arising from the proposal. In determining the application, fifty six (56) conditions were placed on the consent including conditions requiring the testing of emissions from the cremator.

The Nulkaba crematorium has been in operation for approximately two (2) years. The testing of emissions has been conducted and the results analysed. Council's consultant Mr John Court, an Environmental Engineer, has reviewed the test results and provided comment on the operation of the facility. There have been several complaints concerning the operation of the cremation facility and concerns of breaches of the consent conditions.

The purpose of this report is to provide Council with information on the operation of the cremation facility and details of the complaints and breaches of the consent conditions in order to determine any further action that may be appropriate against the crematorium owner. This report also considers those matters raised at Council's meeting of 8 December 2004 by Ms Therese Mallik and Mr Paul Smyth who addressed Council at that meeting. The matters raised have been dealt with in conjunction with the breaches of consent as detailed below, with some issues already addressed in the report presented to Council on 8 December 2004.

It has been established that the facility has operated outside the terms of some of the conditions of consent as issued by Council with the applicant in acknowledgment of some of those breaches. However, it is the opinion of Council's consultant, based on the reports and evidence presented, that no negative environmental outcomes have occurred as a result of these breaches. It is recommended that penalty infringement notices be issued to the owner/operator of the facility in relation to certain breaches as explained in detail below.

BACKGROUND:

Development Application No. 8/2000/433/1 was considered by Council at its meeting of 21 November 2001 when it granted consent to the establishment of a cremation facility on the subject site. The consent was granted after considering a statement of environmental effects and a report on risk assessment by Holmes Air Sciences (*HAS Risk Report*) and two (2) reports on air quality impacts by Council's consultant, J D Court and Associates Pty Ltd. Aspects of air quality impact were considered in these reports and in addition to considerations of compliance with regulatory limits, close attention was given to assessment of impacts of mercury, dioxin and fine particulate emissions on health in the Nulkaba area.

The risk assessment conducted by Holmes Air Sciences led to the conclusion that, not only would the cremator comply with the regulatory limits, but that the health risks from mercury, dioxin and fine particulate emissions were very low and within acceptable criteria. Such criteria are set down under the *Clean Air Plant and Equipment Regulations* (Regulation) pursuant to the *Protection of the Environment Operations Act, 1997*.

The development consent contained 56 conditions including conditions requiring emission testing and monitoring of cremations conducted on the premises. The emission testing was completed in September, 2003 and the final report submitted to Council on 8 March 2004. A copy of the consent has been attached for Council's information and reference.

SUBMISSION BY APPLICANT

Following the submission of recent detailed complaints by a resident of the Nulkaba area the owners of the cremation facility were required to provide Council with an explanation as to why breaches of the consent had occurred. A response from the owner of the facility has been provided by the applicant and is attached for Council's information.

The applicant's submission addresses the issues relating to the proposed amendments to conditions 2, 4 and 44 of the consent. These refer to the number of cremations, the temperature of the primary combustion chamber and the hours of operation respectively. The applicant points to the fact that the initial application for amendment was submitted on 3 November 2003 following the first twelve (12) months operation of the facility.

The applicant's submission asserts that Condition No. 2 of the consent has been complied with. The applicant states *"In the first year of operation including the commissioning period from 28th August, 2002 to 28th August, 2003 a total of 394 cremations were undertaken."*

The applicant further asserts that in relation to the temperature within the primary combustion chamber *"through numerous discussions between Council's consultant and Major Engineering who manufactured the cremator unit, it became quite clear that the facility did not operate under normal conditions with a consistent temperature of 900 degrees Celsius within the primary combustion chamber."*

Further explanation is provided later in this report in relation to the temperature within the primary combustion chamber.

DETAILS OF BREACHES TO THE CONSENT CONDITIONS

The following is a summary of alleged breaches to Development Consent No. 8/2000/433/1 identified by residents of the Nulkaba community. Each point is accompanied by a comment outlining any actions taken in respect of each matter and whether any action can be recommended to Council:-

- a) *Condition No 2 of the consent required the number of cremations to be limited to 400 per annum. This figure has been exceeded by 25%.*

Comment:

The applicant has stated that in the first year of operation, including the commissioning period, a total of 394 cremations were undertaken and therefore condition 4 of the consent has been satisfied. This was the period between 28 August 2002 and 28 August 2003.

The summary report prepared for the applicant by Environmental Resources Management (ERM) and dated 15 December 2003 refers to the commissioning period being a period of two (2) months from the first cremation which occurred on 28 August 2002 until the full operation of the facility which began on 1 November, 2002.

During 1st November, 2002 to 1st November, 2003 the report indicates that a total of 451 cremations were conducted within this period. Recent figures received from the cremator operator indicate that these figures have increased to 489 between August 2003 and August 2004 and 527 between November 2003 and November 2004.

While it is clear that when in full operation the cremation unit exceeds 400 cremations per annum condition 2 of the consent did not specify when this period would commence. It is reasonable for the applicant to assume that the first year would commence from the first cremation. It is therefore clear that the applicant has breached condition No. 2 of the consent in a 12-month period, whether that time period commenced in line with the "commissioning period" or the "full operation" of the facility.

The applicant has within the second year of the operation of the cremation facility sought an increase in the number of cremations. This application was received in November, 2003 and was not processed at this time as the results of the emission testing had not been received and analysed. Regardless of the applicant's application seeking an increase in the number of cremations, the applicant was still bound by the conditions of the original consent. As such, a breach of Condition No. 2 has occurred, verified by the applicant's own submission.

Given that Council was notified of the number of cremations as at November 2004, and this number exceeds the maximum of 400 as stipulated in Condition No. 2, it is recommended that Council pursue the issuing of an infringement notice for development carried out not in accordance with the consent.

- b) *Condition No 3 of the consent requiring the facility to be operated in a proper and efficient manner was breached on 8 August 2003 when a resident of the area reported black smoke coming from the stack.*

Comment:-

The complaint concerning this incident was investigated at the time and was substantiated from the records provided by the crematorium manager. The incident however is an isolated one having regard to the overall number of cremations performed and was due to human error rather than any malfunction of the cremation unit. Discussions between Council's staff and the operator of the unit have confirmed that on the day the incident occurred the trained operator was unavailable due to illness and the facility was incorrectly operated by a person not fully trained in its use. In this regard, it is not reasonable to state that the facility is not operating in a proper and efficient manner in this instance.

This incident, however, did highlight the fact that an operation procedure needs to be put in place that ensures that a person trained and experienced in the operation of the cremation facility will be available at the facility at all times. This matter has been addressed in the deferred report presented to Council in relation to the Section 96 Amendment for the Development Consent.

- c) *Condition No 4 of the consent which requires the temperature in the primary combustion chamber to be above 900 degrees Celsius whenever a body is being cremated has been breached on 337 occasions in the first year of operation.*

Comment:-

Condition 4 was imposed on the consent following the recommendation of Council's consultant, Mr John Court. The intent of specifying this condition was to ensure complete combustion for minimisation of soot emissions and reduction of dioxin emissions.

Following the issue of the consent discussions were held between Council's consultant and the cremation unit manufacturer relating to compliance with Council's requirements. As referred to by the applicant through these discussions it became clear during the first year of operation that it was not practical or necessary to maintain the temperature of 900 degrees Celsius in the primary combustion chamber in order to achieve the objective of complete combustion and minimisation of emissions.

From a practical point of view the insertion of a coffin into the cremation unit that has been held in a cool store will result in a natural reduction in the temperature of the primary combustion chamber. It was also established that the cremation unit could operate efficiently to ensure compliance with the objective of complete combustion and minimisation of emissions if the temperature in the primary combustion chamber were to be reduced to no lower than 700 degrees Celsius. This matter has been addressed in the deferred report presented to Council in relation to the Section 96 Amendment for the Development Consent.

As stated by the applicant, Council and its consultant have been aware through discussions and documentation, that the 900 degree Celsius operating temperature was not required to achieve the desired environmental outcomes. It is recommended that this matter is not one which Council should pursue in terms of any legal action as Council's consultant has determined that the facility is operating without significant risk to public health and Council was made aware of the alteration to the operating temperatures through discussions with Council's consultant.

- d) *Condition No 9 of the consent requires soot tests to be carried out on ten (10) cremations within six months after commissioning and the results reported to Council. The tests were undertaken outside the time set down, on only 6 cremations and outside the permitted hours of operation.*

Comment:

As referenced above Council has relied on its technical consultant both in terms of the conditions that have been imposed and in the assessment of the emission test results that were received. The test results have been analysed by Council's consultant in his report dated April 30, 2004 and his comment was as follows:- "I note that only six cremations were undertaken during the day of testing, whereas ten are required by condition 9 of the Consent. However, given that the result is well below the regulation limit, I do not consider further testing is warranted at this time." Given the low results achieved when testing was carried out on six (6) bodies it is not expected that testing of ten (10) bodies will herald results which surpass the regulation limit.

6 vs 10

- e) *Condition 11 of the consent requires a 24 monthly summary report to be submitted providing monitoring information on the operation of the cremation unit. This report should have been submitted by now and the data should be available for consideration by Council and residents.*

Comment:

Condition 11 states that "Summary reports shall be submitted to Council within six, twelve and twenty four months of the conclusion of the commissioning phase of the cremator..." The 24 monthly summary report was submitted to Council on 7 December 2004, which actually covers the last twelve (12) months of operation of the facility. The report has been reproduced in the enclosures for Council's information.

The report covers the twelve-(12) month period of the operation of the cremation facility between the beginning of November 2003 until the end of October, 2004.

In accordance with the provisions contained in Condition No. 11, the report was submitted outside the allowed timeframe which was due to be submitted on 1 November 2004 and as such it is recommended that an infringement notice be issued for breaching this consent condition.

- f) *Condition No 12 requires stack emission tests to be carried out on at least 4 bodies where specifically not more than one body is toothless. The testing was carried out during 5 cremations on 26 September 2003 when 3 bodies were toothless and one had only 50% teeth.*

Comment:

In this instance again Council has relied on its consultant to provide an appropriate condition of consent and at the same time undertake an assessment of the test results. The consultant did note that the parameters required by Condition No. 12 had not been met, however based on the testing that was carried out, concluded that *"...the test result is not inconsistent with the mercury emission rate of 2 grams per cremation as assumed for the assessment (for the original DA). It is half the emission rate of 3g/cremation assumed in the Emission Report...Hence the original assessment that mercury emissions do not present a health risk is supported by this testing and the consent reporting."*

Mr. Court also acknowledged in his report that although the testing was not carried out by a laboratory accredited to perform analyses as required by the condition (approved methods), the sampling of emissions was undertaken by Mr Peter Stephenson's organisation SEMA. *"Mr Stephenson had been testing for emissions in NSW for over two decades and I understand that his results are generally accepted by the EPA."* Mr. Court goes on to say that he does *"not consider these deviation from the strict letter of the Approved Methods compromise the results. There are few organisations available for commercial emission testing in Australia and even fewer that are NATA accredited for the full range of tests."*

Mr. Court concludes that *"the testing undertaken and the consent reports provided indicate that the current operation of the Nulkaba facility is without significant risk to public health, in agreement with the assessment at the Consent stage. The facility complies with the regulatory emission requirements for non-scheduled premises and would also comply with those scheduled premises."*

- g) *Condition 13 of the consent requires compliance with the publication "Environmental Guideline for Crematoria and Cremators" produced by the Australasian Cemeteries and Crematoria Association. The cremation facility does not comply with the guidelines in a number of respects:-*

- a buffer zone of not less than 100 metres – the nearest residence is 50 metres away
- clearly audible noise not being detected beyond crematoria site boundaries – claim noise can be heard from outside boundaries
- correct furnace temperature – breach of consent condition 4 referenced
- a stack of no less than 3 metres above the peak of the roof – claim that stack is below that height
- continual monitoring of the facility –referral to consent breaches and that no provision exists for further monitoring of the facility.

Comment:

The above guidelines relate to the establishment of a cremation facility, which has been consented to by Council. In terms of the points referred to above the following comments are provided:-

- this matter has been previously considered at the time of the granting of consent. The guidelines specify buffer zones when no other assessment of the impact of such facility on the environment is proposed. In the circumstances of the Nulkaba cremation facility Council required a comprehensive health risk assessment from the applicant prior to its consideration by Council. The nearest residence is approximately 50 metres from the facility and is owned by a part owner of the facility.
- the subject site is located adjacent Wine Country Drive which is a main thoroughfare between Branxton and Cessnock carrying large volumes of traffic. The cremation unit is located within a brick building and operates at similar times during the day when the road network is in constant use. Only one complaint during the past two years has been received from a resident walking past the site. When investigated there did not appear to be any noise emitted from the unit that could be regarded as excessive or capable of causing a nuisance in the locality
- this matter has been considered already in this report
- the development plans submitted and approved for the cremation facility indicate the height of the cremator stack 3 metres above the peak of the roof
- further monitoring of the cremation facility is proposed as a condition of any amendment to the consent that increases the number of cremations proposed at the facility.

h) Condition 44 of the consent limits the hours of operation or trade from 8.30am to 4.00pm Monday to Friday. This condition has been breached on 111 occasions during the first year of operation.

Comment:

The applicant has requested an extension to the hours of operation of the cremation facility. The reason for this extension of operating hours was to enable bodies to be cremated to comply with Health Department regulations. The proposed extension has been recommended as it is considered that the revised hours of operation of the cremator will not cause significant change in environmental impacts from the cremator operation.

However, in addition to the 111 breaches to the hours of operation in the first year there are also a regular number of breaches throughout the past year to the hours of operation. The principal objector has also pointed out that from the monitoring records cremations have been carried out on three (3) Saturdays and one Sunday in 2003.

In the last six (6) months twenty four (24) cremations have occurred outside the approved hours of operation, sixteen (16) being on Friday afternoons/evenings.

Although the extended hours during 2004 may conform to the hours sought under the amended application, until such time as Council has considered and consented to a variation, the applicant is bound to comply with the original consent conditions.

The request for extended operating hours and the argument in relation to the time limits available to cremate a body is not able to be reconciled with the fact that the funeral director has 7 days to cremate under the provisions of the Public Health Act. So, while at the cremator they are only able to hold a body in a "holding room" for 48 hours, the funeral director (Smythes) are able to hold a body in a morgue for up to 7 days. This facility is available at Mr Smythe's premises in Wollombi Road, thereby negating the need for "rushed" cremations on a Friday afternoon.

After receipt of complaints in relation to the hours of operation of the facility in late September 2004, Council's Development Surveillance Officer was instructed to observe the operation of the facility in terms of its compliance with the hours of operation condition on a regular basis. As a result, the owners were verbally advised and forwarded correspondence requiring that the facility be operated in accordance with the consent conditions as imposed by Council.

A review of the 24 monthly report has revealed that on two (2) Fridays during October 2004, the facility operated outside the approved hours, once on October 1 where four (4) bodies were cremated (this being a Friday before a long weekend) and one cremation occurring at 5pm on 8 October.

It is recommended that Council issue infringement notices for each time that the facility operated outside the approved hours as issued by Council after such time as the operator/owner was advised by Council to comply with Consent Condition No. 44.

- i) *The consent granted by Council was for a cremation facility. Bodies are being stored on the site which has not been approved for the purpose of a mortuary and may be in breach of the Department of Health regulations.*

Comment:

The Public Health (Disposal of Bodies) Regulation 2002 distinguishes between a "mortuary" and a "holding room" as follows;

"Mortuary" means that part of premises that is used, or intended to be used, for the preparation or storage of bodies before their burial or cremation."

"Holding room" means a room that includes refrigerated body storage facilities for at least 2 adult bodies but does not include a body preparation room.

Section 17 of the Regulation only permits a body to be kept in a "holding room" for a maximum of 48 hours, while Section 33 requires a cremation authority to cremate a body within 4 hours of the delivery of the body, unless it places the body in a holding room.

As such, the cremation facility is able to use the "holding room" for up to 48 hours for the storage of bodies and is not defined as a "mortuary."

- j) *Other breaches of consent identified by residents include:-*
- i) *work on the construction phase of the crematorium was conducted outside the specified hours.*
 - ii) *cremations took place on the site before the facility was completed to Council specifications.*
 - iii) *Car parking and signage issues were only addressed after much pressure from Councillors.*

Comment:

In relation to the breaches referred to above the following comment is provided:-

- a search of Council's records has failed to indicate that Council received any complaints that the construction of the crematorium had taken place outside the standard hours of construction stipulated in Condition 41 of the consent, ie Mondays to Fridays 7.00am to 6.00pm, Saturdays 8.00am to 1.00pm and no construction work on Sundays and public holidays
- a search of Council's records indicates and the applicant has confirmed that the first cremation took place on 28 August 2002. The Occupation Certificate issued by Council on 23 September 2002, meaning that the use of the facility had commenced prior to Council issuing the Occupation Certificate. Given the timeframe, which has lapsed since this breach, it is not considered that Council is able to pursue this issue with any form of legal action.
- These matters were addressed by the applicant.

CONCLUSION:

This report has aimed to provide Council with information on the operation of the cremation facility and details of the complaints and breaches of the consent conditions in order to determine any further action that may be appropriate against the crematorium owner. The report has also considered those matters raised at Council's meeting of 8 December 2004 by Ms Therese Mallik and Mr Paul Smyth. Various breaches of the consent issued by Council have been identified and it is recommended to Council that infringement notices be issued to the owner of the facility. In relation to breaches, which fall outside the timeframe allowable for the pursuing of legal action, this information be noted. Whilst those matters which relate to the operation of the facility are being dealt with under the assessment of the amended application also being considered by Council.

RECOMMENDATION that:-

1. Council issue a total of four (4) Penalty Infringement Notices (at \$1500 each for a corporation) for each breach of consent conditions, being;
Condition No. 2 – exceeding the number of bodies to be cremated
Condition No. 11 – late submission of reports to Council
Condition No. 44 – operating outside the approved hours of operation on two (2) occasions after being advised by Council to comply – two (2) occurrences.
2. Council's Development Surveillance Officer undertake ongoing monitoring on a regular basis and report any further breaches to Council.

To: **The General Manager**
Corporate & Regulatory Services
Committee – 19 January 2005

J R STAPLETON
DIRECTOR CORPORATE & REGULATORY
SERVICES
8 December 2004.

(19/1/2005)

Councillor Pynsent declared an interest in Director Corporate and Regulatory Services Report No. 4/2005 and left the meeting.

DEFERRED REPORT CONTINUED

MOTION Moved: Councillor Olsen **Seconded:** Councillor Ryan

That consideration of Director Corporate and Regulatory Services Report No. 4/2005 be Deferred pending the receipt of a further report on possible action available to Council including:

1. The commencement of a Class 5 Prosecution in the Land and Environment Court against the owner and operator of the Nulkaba Crematorium, seeking the imposition of penalties pursuant to S125 of the Environmental Protection Act for breaches of all conditions of Development Consent that occurred after 12 December, 2003.
2. The commencement of Class 4 proceedings in the Land and Environment Court seeking Orders that the owner and operator of the Nulkaba Crematorium be restrained from operating the Crematorium until such time as soot tests and stack emission tests are carried out fully, in compliance with conditions 9 and 12 of D.A. Consent 8/2000/433/1 dated 13/12/2001 and submitted to Council.

AMENDMENT Moved: Councillor Maybury **Seconded:** Councillor Bedford

That

2. Council issue a total of four (4) Penalty Infringement Notices (at \$1500 each for a corporation) for each breach of consent conditions, being;
Condition No. 2 – exceeding the number of bodies to be cremated
Condition No. 11 – late submission of reports to Council
Condition No. 44 – operating outside the approved hours of operation on two (2) occasions after being advised by Council to comply – two (2) occurrences.
2. Council's Development Surveillance Officer undertake ongoing monitoring on a regular basis and report any further breaches to Council.
3. A six-monthly report showing concurrence or otherwise with conditions, be provided to Councillors.

The Amendment was Put and **LOST**.

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The Motion was Put and **CARRIED**.

Councillor Pynsent returned to the meeting.