

19.4.00

SUPPLEMENTARY REPORT BY THE CHAIRMAN OF THE STRATEGY AND RESOURCES COMMITTEE

3. CELL PHONE TOWERS CELL PHONE TOWER SITE SUBCOMMITTEE

Officer responsible Environmental Services Manager and Legal Services Manager	Authors Jane Donaldson and Peter Mitchell
Corporate Plan Output: Resource Consents/Legal Advice	

1. INTRODUCTION

The purpose of this report is to provide the advice sought by the Strategy and Resources Committee at its meeting on Monday, 10 April 2000, regarding a motion proposed at that meeting. The motion was moved and seconded but not passed by the Committee as it wished advice to be available for the Council to consider the motion before a decision was made on it. The motion as put to the Committee was:

“That all decisions relating to applications for cell phone towers (including whether or not to notify the application and whether or not to grant consent) be made by the Cell Site Subcommittee.”

This report is the advice requested by the Strategy and Resources Committee.

2. BACKGROUND

The motion was put forward in the context of a report to the Committee concerning the establishment of a Cell Site Subcommittee and the recommendations passed by the Committee in that respect were:

“That a Cell Site Subcommittee be appointed to:

- (i) Advise the Council on the policy framework and further develop the protocol.*
- (ii) Consider future applications for cell sites on Council-owned land.*
- (iii) That the subcommittee operate on the principle of achieving siting of cell sites and locations which provide the best practical outcome.”*

Another recommendation in the Committee report provided that clause 2 of the Council's current policy on cell sites be revised by the new Subcommittee to include the use of Council-owned land where appropriate, subject to the development of a protocol setting out the procedure that has to be followed before any lease or licence can be granted by the Council.

The Strategy and Resources Committee is recommending to the Council that this Subcommittee be 6 persons consisting of the chairpersons of the Resource Management, Parks and Recreation, City Services and Environmental Committees and Councillors Stewart and Sheriff.

We note in passing that the Environmental Services Unit and Legal Services Unit are currently reviewing the Council's processes relating to notification/non-notification of resource consents generally.

3. ADVICE

It is our joint advice opinion that the Council should not pass the motion and extend the authority of the Cell Site Subcommittee to include making decisions under the Resource Management Act 1991, or any other statute such as the Reserves Act 1977.

We will now set out the reasons for giving this advice.

4. REASONS

(A) Roles

In considering the subject of the location of cell phone towers in Christchurch, it is critical that Councillors bear in mind that the Council has potentially a number of roles to play in the location of a cell phone tower. Those roles to some extent overlap and may conflict. The roles are:

- (a) The Council as landowner of land held under the Local Government Act 1974 may be requested to provide its consent to the location of cell phone towers on its land in the same way as any other landowner. That consent generally can be subject to such conditions as the Council sees fit subject to the normal proviso for the Council that such conditions would be "reasonable" in administrative law terms;
- (b) The Council is the "landowner" under the Reserves Act 1977 and may agree to the use of its reserves for use by cell phone towers;

- (c) The Council is the resource consent authority for its district under the Resource Management Act 1991; and
- (d) The Council is the administering body for its reserves and in that capacity is responsible for the hearing of submissions and objections where hearings are held under the Reserves Act 1977 for proposed activities on reserves.

Each of those four roles carries separate legal frameworks within which the Council must operate in reaching a decision on any one of those roles.

Regarding its role under the Local Government Act as landowner, and as administering body of reserves, agreeing to a proposed use of land/reserve for a cell phone tower the Council is acting in a political sense in which decisions are taken by a majority vote as occurs with most of the Council's decision-making processes.

However, with regard to its roles under the Resource Management Act and the Reserves Act, the Council in considering applications, is acting in a quasi judicial capacity and not in a political capacity. It listens to the evidence before it and reaches a decision based on the evidence.

It is always important that councillors appreciate the role in which they are operating and consequently, the statutory framework which is applicable to that role.

(B) Section 223C Local Government Act

We would also remind councillors of the requirement in section 223C of the Local Government Act 1974 which provides:

“Every local authority...shall, in conducting its affairs, ensure that,--

(d) So far as is practicable, its regulatory functions are separated from its other functions.”

Applying that provision in the present context, in my opinion, would require the Council to ensure that its roles under (a) and (b) above are separated from its role under (c) and (d) above.

The Council currently meets that requirement by the system of delegations to the Council Hearings Panel to act in a quasi-judicial role with regard to the hearing of applications for the purposes of Resource Management Act and Reserves Act

(C) Proposed Extension To Cell Phone Subcommittee

The difficulty we have with the proposed motion that all decisions relating to applications for cell phone towers be made by the Cell Site Subcommittee is that it in effect mixes the roles under (a), (b), (c) and (d) above.

It would mean that the same subcommittee which decides whether or not Council land or reserves is to be used and liaises with the telecommunication companies on the use of such land would be also the same Subcommittee that would be making decisions under the Resource Management Act and the Reserves Act.

We believe that members of the public who are parties to that resource consent or reserve process may take the view that because the Subcommittee had already indicated support for a particular location, then there was an element of pre-determination when that same Subcommittee was appointed by the Council to hear the subsequent resource consent or reserve application.

There would also be the practical issue that the Subcommittee now comprises 6 councillors, including the chairs of 4 standing committees, and there would be significant resourcing issues involved in the conduct of quasi-judicial hearings by the Subcommittee which could involve very lengthy hearings on cell phone tower applications.

In our view, the concept of having the Subcommittee acting on the Council's behalf as landowner, and as administering body of reserves in giving approval to a proposal is worthwhile insofar as it will provide consistency across the city, will develop expertise in relation to the property and reserves issues involved, and will play an important facilitation role in relation to the telecommunication companies in the siting of towers in Christchurch.

However, we believe that the Subcommittee's role should be limited to acting on the Council's behalf as landowner and as administering body and not extending into Resource Management or hearing submissions under the Reserves Act

Councillors will also appreciate that because of the variety of ways the Council holds land advice will need to be taken regarding a particular piece of land as to the appropriate statutory process to be used.

One other matter that has arisen in recent discussion is that as landowner, the Council require that as a condition of its approval, the applicant seek and obtain a publicly-notified application for its resource consent application.

That is a lawful condition for the Council to impose upon an applicant telecommunication company, but may have the side-effect of steering the company towards the use of private land in an endeavour to obtain a non-notified resource consent application.

However, the Council is not allowed to pass a resolution which directs a Council Hearings Panel or a commissioner to decide that all applications for cell phone towers must be publicly notified in the future. Such a resolution would contravene the principle of administrative law that where the Council has a statutory discretion, as with the notification issue under the Resource Management Act, then it must not fetter that discretion in advance by stating that it will make a decision in a certain way regardless of the circumstances. The Council must always be prepared to maintain an open mind in relation to the exercise of its powers for applications under the Resource Management Act and the Reserves Act. It would also contravene the principle that a decision-maker, in exercising statutory powers, such as the Council Hearings Panel and/or a commissioner, are not allowed to act effectively under dictation from the Council as to what the final outcome of any application may be.

(D) Elected Member Involvement

If the Council wished to have elected member involvement in the consideration of applications under the Resource Management Act and the hearing of objections under the Reserves Act issue of cell phone towers, rather than the staff involvement as has occurred to date, the Council can direct that all applications for cell phone towers (including the decision whether or not to notify and the decision on the application itself under the Resource Management Act) be dealt with by the Council Hearings Panel (which normally comprises two councillors and a community board member) and not the staff. There is no legal difficulty in the Council passing a resolution to that effect nor to saying that the hearing of objections under the Reserves Act be dealt with by the same Panel.

(E) Commissioners

There will sometimes be situations where the Council may have to appoint a commissioner to consider an application.

Regarding these situations where the Council has to appoint a commissioner, then administratively steps could be taken to retain the same person or persons as commissioners (and it is an option for the Council to utilise more than one commissioner for these types of applications) again to ensure consistency and the development of experience in handling resource consent for this subject.

5. SUMMARY

In conclusion, our advice is that if the Council chooses to appoint the Cell Sites Subcommittee, that it appoint it with the purpose of:

- (i) acting on behalf of the Council as landowner; and
- (ii) facilitating the identification of appropriate sites in Christchurch; and
- (iii) acting on behalf of the Council as administering body under the Reserves Act in approving proposals to use reserves for cell phone towers,

but that the Council not delegate to that Subcommittee, authority to make decisions on behalf of the Council under the Resource Management Act or the Reserves Act.

One further matter is that the recommendation by the Strategy and Resources Committees says the Cell Site Subcommittee is to have the power to “consider” applications to use Council land. The word “consider” does not make it clear that the Subcommittee has a power to recommend, or the power to make a decision on behalf of the Council. The draft motions below are framed in the alternative at this stage.

If the Council wished to consider motions which implement the advice set out in this report then it could consider the following draft motions:

1. *The Cell Site Subcommittee be delegated the power to [recommend to the Council] [make a decision on behalf of the Council]:*
 - (a) *regarding applications for the use of reserves under the Reserves Act 1977; and*
 - (b) *regarding applications for leases and licences of Council-owned land not held under the Reserves Act.*
2. *That all decisions relating to applications for cell phone towers (including whether or not to notify the application and whether or not to grant consent) under the Resource Management Act 1991 or the Reserves Act 1977 be made by the Council’s Hearing Panel.*
3. *That, in all situations where commissioners are appointed by the Council to consider applications involving cell phone towers, as far as possible, the same commissioner be appointed by the Council.*

19. 4. 2000

- 7 -

The Chairman comments:

I have given careful consideration to the advice from the Legal Services Manager and the Environmental Services Manager. I consider that the objectives of the Council (consistency, facilitation of process, sensitivity to residents) can be achieved by the dual system of a separate subcommittee and hearings panel and/or commissioner.

Recommendation: That the officers' recommendations be adopted.