

9. **REPORT OF THE COUNCIL HEARINGS PANEL: PROPOSED REVOCATION OF APPROXIMATELY 560 SQUARE METRES OF MOUNTFORT RESERVE TO ENABLE THE CONSTRUCTION OF A PUBLIC CAR PARK ON THE SITE – CHANGE OF RESOLUTION**

<b>General Manager responsible:</b>	General Manager City Environment
<b>Officer responsible:</b>	Greenspace Manager
<b>Authors:</b>	Dale Wreford, Committee Secretary, John Allen, Policy & Leasing Administrator, DDI 941-8699

**PURPOSE OF REPORT**

1. This report is in three parts. The first is the report back from the Council Hearings Panel acting as a Reserves Hearings Panel in accordance with section 24 of the Reserves Act 1977 and its amendments, making recommendations to the Council for its consideration. These recommendations are set out at the end of the first part of the report (see items 39 and 40).
2. The second part of this report (from item 41) is to address the second part of the Council's resolution, made at the Council meeting of 16 December 2004:  
  
*"That the Council's preference be to retain the land in Council ownership, and consider leasing it to a third party."*
3. The third part of this report (from item 51) is to consider the Reserves Hearings Panel's recommendations further, including those in the revised recommendations where appropriate.

**EXECUTIVE SUMMARY**

4. After considering the single objector's submission to which he spoke in support at the hearing, the Reserve Hearings Panel is recommending to the Council that the original resolution to remove the reserve designation from approximately 560 square metres of Mountfort Reserve to enable a public car park to be built on the area for third party use not connected with the reserve, be confirmed. The panel is recommending that a further four conditions be added to the resolution, as set out at the end of the first section of this report.
5. Officers have investigated the Council's wish that the land be retained in Council ownership, and advise that this is possible. However this will require changes to be made to the Council resolution made on this matter at the Council meeting of 16 December 2004, so as to reflect that the land is now not being sold. The second part of the report discusses in some detail the legal issues, which need to be taken into account when retaining the land in Council ownership for other than a park. One outcome of these considerations is that the Council will not be able to lease the land to the applicant for the third party car park.
6. The Reserve Hearings Panel's recommendations have been considered further, the first two of which have been included in the final recommendation basically unchanged. The third recommendation has been changed to better reflect what the Council's resolution is trying to do, and that is to provide car parking for an economic use of the former prison building, which is in sympathy with its fabric, to ensure that it does not become derelict. The last part of the third section of the report discusses the legal issues concerning the panel's recommendation that the Council seriously consider putting a covenant over the land from which the reserve designation has been revoked, to prevent a future Council from selling it. This part of the report expands upon the legal advice received upon this issue, the outcome of which is that the Council is not able to effectively prevent a future Council selling the land.

## RECOMMENDATIONS

It is recommended:

1. That the Council revoke the reserve designation of approx 560m<sup>2</sup> of Lot 2 DP 310356, a recreation reserve of approximately 1,210m<sup>2</sup> contained in certificate of title 40693, being part of Mountfort Reserve as shown in option 1 (attached). The reason for revoking the designation over the land is to enable a 13 bay public car park to be built on the land by the applicant to satisfy the resource consent car parking requirement for the proposed 88 bed backpackers to be built in the historic former Addington Prison Building, which is located on an adjacent lot, and the general public wishing to visit the reserve, the land being retained in council ownership.
2. That the revocation be subject to the following conditions:
  - (a) The outcome of the consultation process as required by section 24(2)(b)(c) of the Reserves Act 1977 being successful.
  - (b) That the Minister of Conservation approve the revocation by placing a notice in the New Zealand Gazette.
  - (c) That the applicant be responsible for forming the car park and undertaking the landscaping work, including the payment for all costs for undertaking the work.
  - (d) That a restrictive covenant be registered on the title of the revoked part of the reserve in favour of the remaining reserve prohibiting the building of any structures (excluding a ground level car park) on the land including those for the proposed car park, so as to ensure the visual link between Lincoln Road and the former Prison building is maintained.
  - (e) That the applicant be granted a non-exclusive licence to use the car park, thereby legalising the connection between the 13 bay car park and the 88 bed backpackers use of the historic former Addington Prison Building on the adjacent lot, thereby satisfying the resource consent car parking requirement.
  - (f) That the applicant, or the business that leases or buys the historic building, be responsible for the future maintenance, cleanliness, tidiness, and rubbish removal from the car park, and its immediate surrounds, this arrangement to be subject to an annual review by the Council.
  - (g) That no barrier be put in place that would prevent public access to the car park at all times.
  - (h) That should the backpacker operation cease in the future, and no economic use be found which is in sympathy with the historical significance of the building as decided by the resource consent process, and which requires the car parks located in the former reserve area to service that use as decided by the resource consent process, then the owner of the building at the time be responsible for paying all the costs incurred in undertaking the processes necessary to have the recreational reserve status reinstated over the car park area.

## **THE HEARING**

### **PROCESS**

7. The panel, comprising Councillors David Cox (Chair), Graham Condon and Gail Sheriff, met on Wednesday 1 June 2005 to consider an objection, lodged by Mr James Bell, 39 Balrudy Street, Christchurch, to the proposed revocation of the reserve status over approximately 560 square metres of Mountfort Reserve to enable the construction of a public car park on the site.
8. The process under the Reserves Act 1977 does not permit the Council to delegate its decision making powers to the hearings panel, the panel being required to make a recommendation back to the Council. The Council Hearings Panel comprised three elected members who had not taken part in any discussion or voting on this matter when it came before the Council on 16 December 2004.

### **RESERVES ACT 1977 – PROCESS**

9. The process by which the Council is able to revoke the reserve designation over a reserve is set out in section 24 of the Reserves Act 1977. The process is set out below:
  - The Council resolves to revoke the reserve designation over part of the reserve.
  - The Council publicly advertises its intention in a newspaper which circulates in the area, giving the public one calendar month to make a submission or object to the Council's proposal.
  - If submissions are received, and the submitters wish to be heard in support of their submission, they are given the opportunity to be heard, hence the appointment of the Reserve Hearings Panel.
  - The Reserve Hearings Panel hears submitters, and considers any other submissions received, before making a recommendation back to the Council.
  - The Council considers the Reserve Hearings Panel's recommendation deciding to either endorse the original decision or otherwise.
  - If the Council endorses the original decision, the file is sent to the Minister of Conservation to review. The Minister gazettes the revocation in the New Zealand Gazette if they decide in their sole discretion that the revocation should proceed.

### **BACKGROUND ON REPORT OF THE COUNCIL HEARINGS PANEL - CHANGE OF RESOLUTION**

10. Lincoln Road Property Limited (hereafter called "the applicant") owns the former Addington Prison building (a Group 2 Heritage building under the City Plan, built in 1872) which is situated on a fee simple lot, Lot 1 Deposit Plan 310356, of 812 square metres.
11. The applicant is unable to proceed with the proposed conversion of the building to accommodate backpackers, because there is insufficient room on their property or other adjacent properties to provide the 13 car parks required as a condition of the resource consent, which has been granted, to meet the requirements of the Christchurch City Plan.
12. The Council acquired Mountfort Reserve by way of a combination of reserve contribution and land purchase during the subdivision of the site.
13. The Council resolved on 16 December 2004:
  1. To revoke the reserve designation over approximately 560 square metres being Lot 2 DP 310356, contained in Certificate of Title 40693, being a recreational reserve of 1,210 square metres, known as Mountfort Reserve, as shown in Option 1. The reason for revoking the designation over the land is to enable it to be sold to the applicant in order for them to build the required car park. The car park is to service the proposed 88 bed backpackers which is to be located in the former historic Addington Prison building. That the revocation be subject to the following conditions:

- (a) That the outcome of the public consultation process as required by section 24(2)(b) and (c) of the Reserves Act 1977 is successful.
  - (b) That the Minister of Conservation approve the revocation by placing a notice in the New Zealand Gazette.
  - (c) That all existing rights over the existing land to be sold to the applicant be preserved by way of easements at the applicant's expense.
  - (d)
    - (i) That the present right-of-way, which is down the left hand side of the land as viewed from Lincoln Road, be maintained, with the addition of a right to the Council on the easement to enable maintenance vehicles etc to cross the land to gain access to the reserve.
    - (ii) That an addition of an easement right be placed over the land enabling the general public to have pedestrian access over the land to access the reserve.
  - (e) That, should it be found that section 40 of the Public Works Act is invoked, the Council facilitate the negotiations for the purchase of the land from the previous owner.
  - (f) That the responsibility for forming the car park and undertaking the associated landscape work, be the applicant's, including the payment of all costs for undertaking the work.
  - (g) That a covenant be put on the title of the revoked part of the reserve prior to sale, prohibiting the building of any structures on the land, including those for the purpose of car parking, so as to ensure the visual link between Lincoln Road and the former prison building is maintained.
2. That the Council's preference be to retain the land in Council ownership and consider leasing it to a third party.
14. As resolved by the Council on 16 December 2004, the officers have investigated the Council's preference to retain the land further, which has enabled the land to be retained in Council ownership. This issue is further reported on earlier in the second part of this report.
15. Appendix 1 (attached) "Addington Prison Car Park: Option 1" shows the layout of the proposed car park.
16. Part of the Council's objective in agreeing to revoke 560 square metres of Mountfort Reserve is to assist in preserving the 132 year old former Addington Prison building. The Group 2 Heritage protection of the building is over the building facade, internal cells and associated internal infrastructure, the requirements of which will limit the type of economic use. The proposed use is in sympathy with the Group 2 Heritage Classification of the building as major alternations are not required to be made to the internal structure and layout of the building. It is generally considered a viable commercial use of the building will ensure its preservation for future generations.
17. The area of the recreation reserve that is being revoked is narrow, being part of Lot 2 DP 310356 contained in Certificate of Title 40693, which is 1,210 square metres in area. This action will enable the applicant to build a 13 bay car park, associated driveway and turning area on the former reserve land.

## **LEGAL CONSIDERATIONS**

18. The Council has no legal authority under the Reserves Act 1977 to grant any approval for third party car parking for activities not associated with recreation reserves. The possibility of using the easement or leasing provisions contained in the Reserves Act to affect the transfer of the land to the applicant was discussed with the Department of Conservation. All agreed that it was not appropriate to use the leasing or easement provisions of the Reserves Act because of the large area of the reserve which would be permanently altered for the benefit of a third party, for a use not associated with the reserves, and therefore not for the original purpose for which this land was taken/purchased. Therefore the Council, which wishes to allow a third party to build car parks on the reserve to service the adjacent non-reserves act purpose, must revoke the reserve designation over that part of the land on which the car park is to be built in accordance with section 24 of the Reserves Act, prior to allowing the car park to be built on the land.
19. This is a public consultative process, the outcome of which must be approved by the Minister of Conservation, who grants the approval by placing a notice in the New Zealand Gazette.

## **NOTIFICATION PROCESS**

20. The Council has fulfilled the advertising requirements of section 24(2) of the Reserves Act 1977. A letter was also sent to 87 residential properties deemed to be most affected by the proposal, as well as the body corporate of the townhouses at 50 Poulson Street, in which there are 50 individually owned townhouses. The letter informed recipients of the Council's intention to revoke part of the reserve, and invited them to comment if they wished. The Spreydon/Heathcote Community Board members were also notified of the proposal by separate letter.
21. Two responses were subsequently received, one in the form of an enquiry which was subsequently formally satisfied; the other objected to the Council's proposal and wished to be heard in support of his submission.

## **SUBMISSIONS RECEIVED**

22. One written submission, in opposition to the proposed part-revocation of the Mountfort Reserve, was received from Mr James Bell of 39 Balrudy Street, Christchurch. Mr Bell is the owner of property in the vicinity of Mountfort Reserve. Mr Bell and his son met prior to the hearing with Council officers on site to try and address the concerns raised in his submission.
23. Mr Bell attended the hearing and spoke to his submission.

## **ISSUES RAISED BY THE SUBMITTER**

### **Written Submission**

24. Mr James Bell raised the following issues in his written submission, which was duly considered by the panel as part of the evidence at the subsequent hearing.
25. Mr James Bell submitted in writing his concerns, firstly that the car parks will not be used by park users, but by commercial parkers, commercial enterprises, including multiple housing developments, and student accommodation; and secondly that commercial enterprise should not expect to use public green space for car parking. Mr Bell also submitted that the area proposed for the car park should be used for "personal recreation and relaxing", and that this area should be attractively planted to encourage residents to walk through the area. Mr Bell considered that a sealed car parking area is not conducive to this.
26. Officer Response: It was noted that Lots 1 and 5 have vehicle access rights over the reserve in the form of a 3 metre wide easement along the boundary of Lot 5. There is also a 2 metre wide pedestrian easement alongside the vehicle easement. Currently 5 metres can be formed and sealed by adjoining land owners to service their properties as of right. Therefore part of this area of reserve is compromised in any case. As this part of Mountfort Reserve has an important commuting corridor function, a 2 metre wide footpath will be constructed across this part of the reserve in any case.

## On-Site Meeting

27. During an on-site meeting with Council officers (which was reported to the hearings panel as part of the evidence), Mr Bell questioned what would happen to the land if the proposed backpackers operation in the former prison building should cease to operate, in which case the car park would not be required for the backpackers.
28. Officer Response: It was noted that the present Council has clearly indicated (in the second condition of its resolution) that their preference is for the land to remain in Council ownership. The Council has also indicated in condition 1(g) that if the revoked part of the reserve was to be sold, that prior to sale a covenant be placed on the land, prohibiting the building of any structures on the land, including those for the purpose of car parking, so as to ensure that the visual link between Lincoln Road and the former prison building is maintained. This resolution of the Council remains in place until it is actioned, or another report has been prepared recommending that this resolution be rescinded.
29. Comment from the hearings panel: The panel could not foresee any reason why the present Council would wish to change its mind concerning these two resolutions, as one of the prime reasons for taking this land for reserve was to maintain the visual link from Lincoln Road through to the former prison building.

## The Hearing

30. Mr Bell spoke to his written submission at the hearing, endorsing his areas of concern. Mr Bell agreed with the Council's objective to find a viable commercial use for the former prison building, but had concerns at the reasoning behind the requirement for the provision of 13 car parks in order to preserve the building. He also questioned the need for 13 car parks as a condition of the resource consent when the proposed use was to provide 88 beds for backpackers, most of whom he considered would use public transport. He questioned if there was any way the Council could relax some of the rules in order to save the existing recreation reserve status of the land. The effect and progress of developments adjacent to the site were described, and concern was expressed as to whether this proposal, if given the "go ahead", would set a precedence for third parties to be involved should similar circumstances arise in the future.
31. A point of clarification was raised referring to the officer's comment on page 5 of the report, first paragraph, regarding the "3 metre wide easement along the boundary of Lot 5, acknowledging that Lot 5 does not need these rights, however Lot 2 does ...". It was noted *Lot 2* should read *Lot 1*.
32. Mr Bell also expressed concern:
  - That the car park might be used by "hoons", and for other unsavoury activities during the evening.
  - That the state of the historic stone wall gave cause for concern as big holes appeared to have been "hacked" out of it.
  - That the proposal would allow cars to cross a pedestrian easement.
  - That the use of the car park would not be monitored or controlled.
  - That the provision of the car park area could exacerbate the tagging problem in the area.
  - That this was a high density housing area, with very few parks. This land would be of more value to the community if retained as Recreation Reserve.
  - About how the Council came to be placed in this situation. How and who would prevent a repeat of this situation. Could it happen again?
33. At the request of the hearings panel the Council officer responded to the points raised by Mr Bell as follows:
  - The status of the historic wall was outside the consideration of this hearing, and was located on private land. This is an RMA enforcement matter, and would be brought to the notice of the appropriate Council staff.

- The provision of the 13 car parks was a requirement of the resource consent granted under the Resource Management Act and the Christchurch City Plan, based on a professional opinion given by the traffic consultant employed by the Council's Environmental Services Unit.
  - Backpacker operations in other parts of the central business district were not required to provide car parks, but it was a requirement in this particular zone, and the resource consent had been granted subject to the provision of 13 car parks being provided. It was understood the resource consent decision was not appealed, and was now "out of time" for appeal.
  - The applicant would have a licence from the Council to use the car park, not a lease with the Council. Under a licensing arrangement the applicant would not be able to control who uses the car park.
  - The public car park would be available for those who used the recreational reserve.
  - A barrier could be erected to enable the car park to be closed at night, should there be "hoon" problems.
  - The applicant would bear the cost of establishing the public car park, but would not be required to pay any rental to the Council under a licence arrangement.
  - Should the situation arise in the future, the purchase of the land by a third party, would be a matter which a subsequent Council may consider if they wish.
  - It was acknowledged part of the car park would extend over the pedestrian easement.
  - It was acknowledged that tagging in this area, as in other parts of the city, is a fact of life, and has to be managed.
34. At this point in the hearing, a plan of Option 2, which had inadvertently been omitted from the report to the panel and hearings adviser, was tabled for consideration.
35. The areas of the car parks proposed in the two options was discussed, along with the different visual aspects. The panel expressed its concerns about the "land-locked" location of the car park bays as shown in Option 2, resulting in less than satisfactory visibility from Lincoln Road.

## **DISCUSSION**

36. The panel considered the following as it formulated its decision:
- The purpose of the hearing was to consider only those matters relating to the proposed revocation of approximately 560 square metres of Mountfort Reserve to enable the construction of a public car park on the site, and to meet the requirements of the Reserves Act.
  - The panel had delegated power to consider this matter and make a recommendation to the Council, as the proposal involved Council land. The panel was not able to address concerns expressed during the hearing regarding land adjacent to the subject site, and land in private ownership.
  - The panel had a degree of sympathy with the concerns raised by Mr Bell, and the perceived oversight in recognising that the applicant had appeared not to anticipate the need to allocate land or make provision for car parking. This was despite Council staff advising the applicant at an early stage during the development of the site that there was a need to be conscious of the fact that there would be a requirement under the City Plan rules to provide car parks for any future use of the former Addington Prison building. Accordingly the requirement to provide 13 car parks was a condition of the applicant's resource consent.
  - The plan for Option 2 as tabled at the hearing was discussed by the panel. This option made provision for a parking area, which was not particularly visible from Lincoln Road when compared with Option 1. The panel recognised that one-way access/egress down a long narrow lane as proposed in Option 2 was not desirable, although it was acknowledged the roadway leading to either of the proposed parking areas would be well lit.
  - It was recognised that the applicant was required to meet the cost of constructing the car park. However, the panel would have been more agreeable to a proposal where the land could have remained Recreation Reserve with a car park on it.

- The panel recognised that revoking recreation reserve land for a car park was not an ideal situation, but considered the proposal will have minimal impact upon the usable recreation space provided by the existing reserve, given the affected strip of land is narrow and of minor use (providing a visual connection between Lincoln Road and the historic building, and a commuting corridor between adjacent properties and the larger adjacent reserve area to the east).
- The panel was of the view that appropriate legal requirements should be considered to ensure that the Council ownership of the land cannot be relinquished.
- The panel recognised that the car park construction costs will be borne by the applicant, but there will be no ownership of the car park by the applicant.
- The panel was of the firm view that the future maintenance, cleanliness, tidiness and the removal of rubbish from the car park and its immediate environs, be the responsibility of the applicant, and that this maintenance be the subject of an annual review by the Council.
- The panel did not support the locking of the car park, or the placement of a barrier, as the car park is to be available for public use at all times.
- The panel was of the strong view that, should the backpacker operation cease in the future, at the applicant's cost the public car park will then revert to Recreation Reserve status at the discretion of the Council.

#### **CONCLUSION**

37. The panel gave careful consideration to the submitter's views, both written and those presented orally at the hearing, and recognised the validity of the points made as part of Mr Bell's evidence.
38. However, in view of the desire to preserve the 132 year old building (which the panel understood would be assisted by encouraging a viable commercial use of the building to ensure its future protection in a maintained state), the panel was in agreement that the Council's proposal to revoke the recreational reserve designation over approximately 560 square metres of Mountfort Reserve as shown in the Addington Prison Car Park plan labelled Option 1, be endorsed, and recommended to the Council for adoption.

#### **HEARINGS PANEL RECOMMENDATION:**

39. That the Council endorse the 16 December 2004 resolution to revoke the reserve designation over approximately 560 square metres being Lot 2 DP 310356, contained in Certificate of Title 40693, being a recreation reserve of 1,210 square metres, known as Mountfort Reserve, as shown in Option 1 (attached). The reason for revoking the designation over the land, which will remain in the ownership of the Christchurch City Council, is to enable Lincoln Road Property Limited (the applicant) to build the required car park. The car park is to service the proposed 88 bed backpackers which is to be located in the former historic Addington Prison building.
40. The panel recommends to the Council that further conditions as set out below be placed upon the endorsement of the Council's 16 December 2004 resolution.
  - (a) That the applicant, or the business that leases or buys the historic building, be responsible for the future maintenance, cleanliness, tidiness, and rubbish removal from the car park, and its immediate surrounds; this arrangement to be subject to an annual review by the Council.
  - (b) That no barrier be put in place that prevents public access to the car park at all times.
  - (c) That should the backpacker operation cease in the future, the applicant pay to have the car parking area revert back to recreational reserve status at the discretion of the Council.
  - (d) That the Council seriously consider putting a covenant on the area of reserve that is being revoked, which effectively prevents future councils relinquishing ownership of the land, in the future.



## CHANGE OF RESOLUTION

41. This part of the report is to address the second part of the Council's resolution, made at the Council meeting of 16 December 2004:

*'That the Council's preference be to retain the land in Council ownership, and consider leasing it to a third party.'*

42. Council officers have investigated this preference and advise that this is possible. However the Council's resolution made at the aforementioned meeting, will need to be changed to reflect that the land will now not be sold, and consequently this is the purpose of this part of the report. The recommended changed resolution is set out at the end of this report, for the Council's consideration.

## FINANCIAL AND LEGAL CONSIDERATIONS

43. Further investigations into how the land was taken, have revealed that it was taken as reserve contribution under the Public Works Act 1981. If the land is now not required for the purpose it was taken, then section 40 of the Public Works Act 1981 applies. Set out below is a summary of section 40 of the Public Works Act 1981.
44. Any land which is held for a public work, which is no longer required for a public work, must be offered back to the person (or their successor) from whom the land was acquired. The land must be offered at current market value as determined by a valuation carried out by a registered valuer, or, if the authority considers it reasonable, at any lesser price. It should be noted under the section entitled '*Offeree's rights*', that the right does not accrue when the authority decides to sell, but rather as soon as the land is no longer required for a public work.
45. However, section 50 of the Public Works Act does allow the land which was originally taken for one public work (in this case for a public recreation reserve) to be transferred for another public work (in this case a public car park for reserve, and other users to use). Subsection 3 of section 50 states that the provisions of the Act as to the disposal of land held for a public work do not apply when this transfer of public works takes place. Section 50, subsections 1 and 3 of the Public Works Act 1981 are reproduced below for Councillors' information.
46. *'Transfer of existing public works*
- 1 *Notwithstanding anything to the contrary in this Act or in any other Act, but subject to section 40 of this Act, any existing public work or part of any existing public work may be disposed of by the Minister to a local authority, or by a local authority to the Minister or another local authority, for a public work, whether of the same kind or not, if reasonable provision for satisfying the requirements of the public in that work will continue to exist.*
3. *If any agreement under this section involves a change of ownership of any land, the land may be taken by the local authority or the Minister, as the case may require, by declaration under section 20 of this Act, and the provisions of this Act as to the disposal of land held for a public work shall not apply.*
47. Legal advice received from the Legal Services Unit is that although ownership of the land is not being transferred to another owner, the provisions contained in section 50(1) which allow the Council to transfer the land to another local authority, or the Minister **for a different public work**, also allow the Council to use the land for a different public work, as long as it is a reasonable provision for satisfying the requirements of the public interest in that work will continue to exist.
48. Councillors may recall that the Council has no legal authority under the Reserves Act 1977 to grant approval for third party car parking activities not associated with recreation reserves, and hence the reason for revoking the reserves designation over part of the adjacent reserve to enable a car park to be built on the land for that purpose.

49. There is a requirement that the car park be a public car park, because of the need under the Public Works Act 1981 to transfer the land from one public work (recreation reserve) to another public work (public car park), to negate the requirement to offer the land back to the original owner who undertook the subdivision, that owner being required to give the land for reserve contribution as part of the subdivision, which is a public work. The Council is therefore not able to lease this area to the applicant, because such an action would negate the transfer of the land from one public work (recreation reserve) to another public work (public car park).
50. Although the land will be held for a public car park, there is a requirement under the resource consent granted that the applicant, who will build the car parks, does have a non-exclusive legal right to use the car parks, thereby satisfying the Resource Management Act requirements to provide the 13 car parks. This action will not preclude the general public visiting the park, or wishing to view the historic building from using the car parks, but will preclude other people visiting the area for other than the two above mentioned purposes from using these car parks.

#### **HEARINGS PANELS RECOMMENDATIONS**

51. This part of the report is to discuss the Reserves Hearings Panel's recommendations further, where possible having them included in the final recommendation for the Council's consideration.

#### **FINANCIAL AND LEGAL CONSIDERATIONS**

52. There are no issues with the hearings panel's first, & second recommendations, see item 40, (a) & (b) above.
53. There are two issues with the third recommendation, (c). The first is that if the applicant "on-sells" the building, there is no legal requirement on the new owner of the property to pay for the process to declare the land to be a recreational reserve again. The second is that Councillors need to be mindful of what the Council is trying to accomplish, and that is to assist in ensuring that an economic use for the building can be found, so that the building does not fall into disrepair, and by doing so ensure its retention for future generations to enjoy. Therefore it is important if the backpacking operation fails, or is not successful, but another suitable commercial use can be found for the building, which is able to make economic use of the building, but requires the use of the car parks in the reserve, that this use is not precluded.
54. Officers therefore believe that the recommendation should be changed to take into account the two above mentioned situations. Officers are recommending that the recommendation be changed to read:

*"That should the backpacker operation cease in the future, and no economic use can be found, which is in sympathy with the historical significance of the building as decided by the resource consent process, and which requires the car parks located in the former reserve area to service that use as decided by the resource consent process, then the owner of the building at the time, is responsible for paying all the costs incurred in undertaking the processes necessary to have the recreational reserve status reinstated over the car park area."*

55. After receiving legal advice from the Legal Services Unit, officers wish to point out that whilst the fourth recommendation is laudable in principle, it may not be possible to place a legally binding covenant on the area of reserve that is being revoked to prevent future councils relinquishing ownership of the land in the future. The reasons that the Legal Services Unit gave for this opinion are elaborated upon below:
  - (a) The form the proposed 'covenant' to be used is possibly problematic. The first form of 'covenant' that could be employed is a 'restrictive covenant'. Most such restrictive covenants are used to prevent land being used in a particular way, such as limiting the height of a building erected on the land or the type of trees planted on it. Using a restrictive covenant to prevent the sale of the land may in fact be unenforceable as being contrary to general public policy.

- (b) The only other form of 'covenant' available is a Memorandum of Encumbrance. This type of document is similar to a mortgage. However, the monies secured by it only become payable if certain defined events occur. Using such a device the Council would be the person giving the charge and the person receiving the benefit of it. There is therefore some doubt as to whether such an Encumbrance would be registrable.
- (c) Even if it were possible to create an enforceable restrictive covenant or a Memorandum of Encumbrance, any such 'covenant' could easily be removed by the Council as the 'covenant holder' and therefore would not act as an effective bar to any sale. It would simply create one additional administrative step to be taken as part of the sale process.

56. The Legal Services Unit is therefore of the view the Council should not attempt to register some sort of 'covenant' on the title to the land as such would not prevent it being sold in the future. Registration of such a covenant would simply create one additional administrative step to be taken as part of the sale process. Officers are therefore recommending that the Council does not attempt to register a 'covenant' on the land from which it is proposed to remove the reserve reservation.

#### **CONCLUSION**

57. Officers are recommending that the Council resolution of 16 December 2004 be amended to reflect the fact that the land will now not be sold, but kept in Council ownership. Therefore all references in the original Council resolution to the sale of the land should be removed. Staff are therefore recommending that the resolution of Council on 16 December 2004 be amended to read as set out in this report, to include the recommendations of the Reserves Hearings Panel where appropriate.