

**CHRISTCHURCH CITY COUNCIL
AGENDA**

EXTRAORDINARY MEETING

THURSDAY 18 DECEMBER 2008

1PM

COUNCIL CHAMBER, CIVIC OFFICES

AGENDA - OPEN EXTRAORDINARY MEETING

CHRISTCHURCH CITY COUNCIL

**Thursday 18 December 2008 at 1pm
in the Council Chamber, Civic Offices**

Council: The Mayor, Bob Parker (Chairperson).
Councillors Helen Broughton, Sally Buck, Ngaire Button, Barry Corbett, David Cox, Yani Johanson,
Claudia Reid, Bob Shearing, Gail Sheriff, Mike Wall, Sue Wells, Chrissie Williams and Norm Withers.

ITEM NO	DESCRIPTION
1.	APOLOGIES
2.	DEPUTATIONS BY APPOINTMENT
3.	HIGH COURT PROCEEDINGS – COUNCIL OF SOCIAL SERVICES IN CHRISTCHURCH/OTAUTAHI INCORPORATED V CHRISTCHURCH CITY COUNCIL
4.	SOCIAL HOUSING FUNDING

1. APOLOGIES

2. DEPUTATIONS BY APPOINTMENT

3. HIGH COURT PROCEEDINGS – COUNCIL OF SOCIAL SERVICES IN CHRISTCHURCH/OTAUTAHU INCORPORATED V CHRISTCHURCH CITY COUNCIL

General Manager responsible:	General Manager, Community Services, DDI 941 8607
Officer responsible:	Legal Services Manager
Author:	Ian Thomson

PURPOSE OF REPORT

1. The purpose of this report is to:
 - (a) Formally advise Councillors of the decision of the High Court in COSS v CCC, including the terms of the order made against the Council and the prospects of an appeal.
 - (b) Recommend a process for dealing with funding issues in respect of the Council's social housing portfolio.

EXECUTIVE SUMMARY

2. On 27 March and 28 April 2008 the Council made decisions that increased by 24% the rentals charged in respect of its social housing units. This did not include the Whakahoia Village units.
3. The process adopted by the Council prior to it making those decisions was challenged by the Council of Social Services on behalf of tenants. An application for a judicial review of the process was granted by the Court.
4. The order made by the Court by consent effectively increases rentals by the level prescribed in the annual CGPI (2.3%) back-dated to May 2008. Orders for costs and interest on amounts overpaid by tenants were made against the Council.
5. Council staff hope to be able to refund rentals overpaid before Christmas.
6. Included in this report is advice to Councillors on the prospects of an appeal against the High Court decision.
7. Also included is a suggested process for addressing the funding issues relating to the Council's social housing portfolio with effect from 1 July 2009. If adopted and completed, this process will comply with the consultation and the decision making provisions of the Local Government Act 2002. It also reflects the judgement delivered by the Court.
8. It is recommended that a special consultative procedure be used to ascertain the views and preferences of tenants and the wider community. This reflects the High Court's view of the level of significance to be attached to this matter.
9. If the process is followed according to the timetable referred to in the report, it should be possible for the Council to make a final decision by the end of April 2009.

FINANCIAL IMPLICATIONS

10. The cost of refunding the overpayment of rentals, together with interest on those amounts, will be met from the social housing account. At the time of preparing this report, it was not possible to determine the amount required.
11. If the High Court decision is taken on appeal to the Court of Appeal, the estimated cost would be approximately \$100,000.
12. There will be a cost associated with adopting and completing a consultation process in respect of funding issues. This will be met from existing budgets.

3 Cont'd

LEGAL CONSIDERATIONS

13. The judgement delivered by the Court in COSS v CCC was that the application for judicial review was granted and that the parties were to consider the precise form of the order to be made. Initially it appeared that common ground could not be reached given that COSS applied for an order quashing the decisions of 27 March and 28 April 2008, which would have effectively meant a zero increase for this year. The Council's position in response was that the appropriate remedy would be an order requiring a re-consideration of the decision in respect of its social housing portfolio. This is the more usual remedy granted as the result of a successful application for a judicial review.
14. However, agreement has now been reached and an order has been made as follows:
 - (a) The decisions of 27 March and 28 April 2008 are quashed;
 - (b) The Council is directed to reconsider and determine the matter, notwithstanding anything in any other enactment (ie the Residential Tenancies Act 1986).
 - (c) The Council is to pay COSS the sum of \$17,148.20 by way of costs and disbursements.
15. The Council will undertake that the new decision will be made by the General Manager Community Services, acting pursuant to his delegated authority. This is to increase rentals by the level prescribed in the annual CGPI which is currently at 2.3%. The amount overpaid by each tenant will be refunded, with effect from July 2008 (May 2008 in respect of new tenancies). Interest on the amounts refunded will be paid in accordance with section 87 of the Judicature Act 1908. This is currently 7.50%.
16. Council staff are working towards completing the payment of refunds prior to Christmas.
17. **Attached** to this report is a letter dated 11 December 2008 from the Council's external legal adviser, Simpson Grierson. This canvasses the background to the judgement and reviews the merits of an appeal and the question of relief.
18. As stated in the letter, Simpson Grierson's advice is that there is considerable weaknesses in the Court's approach to compliance with the decision making processes contained in sections 77 and 78 of the Local Government Act 2002.
19. In summary, whilst there are reasonable prospects of a successful appeal against some of the conclusions reached by the High Court, the position is more finely balanced on others. For example, the Court of Appeal is likely to see similar difficulties as the High Court did on the issue of significance. Whilst the Court's treatment of significance is problematic, the question still remains whether or not the Council took the appropriate steps to consider significance even though it did not expressly characterise it as such.
20. So far as the other conclusions reached by the High Court are concerned, the Council is advised that:
 - (a) It is possible that the Court of Appeal would find that the Council had not breached section 78(1) of the Local Government Act 2002 because the Council was sufficiently aware of the views and preferences of tenants, and took them into account. The Council proceeded on the basis that tenants would prefer to see the lowest rent increase possible and there is no suggestion that this view was any different as a result of a 24% increase being proposed rather than a CGPI or CPI increase. The High Court may have been wrong to find that these views and preferences had to be "obtained", as they were already well known to the Council and it did not need to consult further on them.
 - (b) The High Court may also have been wrong to hold that Government funding was a reasonably practicable option that should have been more directly addressed. There was considerable evidence that the prospects of obtaining these funds for maintenance and improvement of existing housing units were poor and therefore this was not a reasonably practicable option. On the other, the Council itself treated this as an option that deserved serious consideration, in its resolution of 27 March 2008.

3 Cont'd

- (c) The Council was found to have been in breach of section 80 of the Act (with regard to any inconsistencies that existed between the Council's decisions and the 2006/16 LTCCP), although the Court considered that this was of a largely technical nature. It would be expected that the Court of Appeal is likely to take a similar view. If this was found to be the only respect in which the Council failed to comply with the decision making requirements in the Local Government Act 2002, it is also likely that the Court of Appeal would refuse to grant any relief. This was not the type of defect in the process that should result in a decision being set aside.
21. The situation is, therefore, that there reasonable prospects of a successful appeal on some issues, but the position is more finely balanced on others. If the Court of Appeal found that the only defect was a failure to comply with section 80 of the Act, there is a real prospect that the Court would refuse to grant relief against the Council. However, the odds of succeeding completely are at best even.
22. If Councillors were minded to bring an appeal, it must be filed before 23 December 2008. Process and timing matters relating to an appeal are set out in section 5 of Simpson Grierson's letter.
23. Whether or not the Council decides to appeal the decision, the problems identified in the High Court judgement need to be addressed. These include insuring that the following matters are properly dealt with:
- (a) The funding issues relating to the Council's social housing portfolio;
 - (b) Further consideration of the Government funding option;
 - (c) Recognition that the matter is in the medium/high range of significance, requiring extensive compliance with the requirements of sections 77 and 78 of the Local Government Act 2002.
24. The sections require the Council to identify all reasonably practicable options for the achievement of the objective of a decision and to assess those options by considering in respect of each of them, the benefits and costs, the extent to which community outcomes would be promoted or achieved, the impact on the Council's capacity to meet its present and future needs and any other matters that, in the Council's opinion, are relevant.
25. In the course of its decision making process in relation to the matter, the Council must give consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the funding issues that have to be addressed. These must be considered when:
- (a) The problems and objectives are defined;
 - (b) Reasonably practicable options of achieving those objectives are identified;
 - (c) Reasonably practicable options are assessed and proposals developed;
 - (d) Those proposals are adopted.
26. It is recommended that the Council use the special consultative procedure for the purpose of obtaining the views and preferences of tenants and the wider community with regard to the identification and also the assessment of practicable options for addressing the funding issues. If this recommendation is adopted, a statement of proposal that will include the Council's preferred option, along with the other practicable options identified, will be prepared and available for inclusion on the agenda for the Council's next ordinary meeting on 19 December 2008.
27. A report from the Housing Unit of the Council's Community Services Group will be considered by Councillors at the same meeting that this report is considered. This will set out a mechanism for obtaining the views and preferences of tenants, in addition to a wider community consultation process.

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28. So far as timing is concerned, the Council is required by the Residential Tenancies Act 1986 to notify its social housing tenants of any decision to increase rentals by 1 May 2009. The proposed timetable for the consultation and decision making process is therefore as follows:
- (a) The Council considers this report at its meeting on 18 December 2008;
 - (b) A statement of proposal is prepared and included on the agenda for the next ordinary meeting of the Council, on 19 December 2008;
 - (c) The special consultative procedure begins on 26 January 2009;
 - (d) The consultation period expires on 2 March 2009;
 - (e) Oral submissions are heard by a hearings panel in March 2009;
 - (f) The hearings panel considers the submissions and makes its recommendations by 19 March 2009;
 - (g) The hearings panel's report is considered by the Council and a decision made at its meeting on 9 April 2009;
 - (h) Tenants are notified of any increase in rentals prior to 30 April 2009.
29. The decision of the Council will be included in the 2009/2019 LTCCP. This will effectively deal with any issues arising from the requirement to comply with section 80 of the Local Government Act 2002.

STAFF RECOMMENDATION

It is recommended that the Council resolve to:

- (a) Note the order of the High Court in the matter of Council of Social Services in Christchurch in Christchurch/Otautahi Incorporated v Christchurch City Council and that the decision will be reconsidered under delegated authority by the General Manager Community Services.
- (b) Authorise the General Manager Community Services to take the appropriate steps to refund each current or former tenant of the Council's social housing units any amount by which rent paid to the Council by that tenant on or after 1 May 2008 exceeds the amount payable in accordance with the order of the High Court, together with interest from the date of receipt of any overpayment to the date of the refund at the rate prescribed under section 87 of the Judicature Act 1908 (7.50%).
- (c) Decide whether or not to appeal the decision of the High Court.
- (d) Authorise the General Manager Community Services to take the appropriate steps to put in place a special consultative procedure for the purpose of seeking the views and preferences of tenants and the wider community so far as options for addressing funding issues relating to the Council's social housing portfolio are concerned.
- (e) If the Council authorises the adoption of the special consultative procedure, to request that the appropriate statement of proposal be included on the agenda of the next available meeting of the Council together with the timetable for carrying out and completing the special consultative procedure referred to in the statement.

4. SOCIAL HOUSING FUNDING

General Manager responsible:	General Manager Community Services, DDI 941-8607
Officer responsible:	Catherine McDonald, Community Support Manager
Author:	Ian Thomson, Solicitor Legal Services Unit

PURPOSE OF REPORT

1. The purpose of this report is to provide information to councillors so that they can:
 - (a) consider the options for funding the Council's social housing portfolio;
 - (b) decide on the options to be consulted on through a special consultative procedure;
 - (c) make a decision on social housing rentals for 2009 before 1 May 2009.

EXECUTIVE SUMMARY

2. On 27 March and 28 April 2008 the Council made decisions that increased by 24% the rentals charged in respect of its social housing units. This did not include the Whakahoia Village units.
3. The process adopted by the Council prior to it making those decisions was challenged by the Council of Social Services on behalf of tenants. An application for a judicial review of the process was granted by the High Court.
4. The Council's decisions were overturned by the Council because the Council failed to have regard to the significance of the decisions and in that context failed to adequately consider the views and preferences of affected persons at the time it was identifying and assessing options for dealing with its social housing portfolio. The Court also found that the Council had not considered all reasonably practical options to meet the funding requirements of the portfolio.
5. The Court criticised the Council for defining too narrowly the issues to be determined. It was noted that rather than being inadequate rental income, the real problem was insufficient funding for maintenance and other costs associated with providing social housing.
6. Social Housing is currently under funded and has been for the past four (or more) years. This situation will become much more serious in the next 10 years when substantial maintenance and renewal issues will arise.
7. This report addresses that criticism and provides information for councillors to make decisions on the reasonably practicable options that have been identified by staff for addressing the funding issues facing the Council.
8. It also recommends a process for obtaining the views and preferences of social housing tenants and the wider community.
9. When that process is completed, the Council will be in a position to make a decision on the future funding of the social housing portfolio. This can be incorporated into the 2009-19 LTCCP and will enable rents to be adjusted for 2009.

FINANCIAL IMPLICATIONS

10. There are financial implications associated with each option that is identified in this report. They have been included in the information provided on those options.
11. Essentially, the Council's social housing portfolio must be funded from:
 - (a) rental income alone; or
 - (b) a mix of rental income and funding from other sources.

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12. One of those sources is the Council's income from rates. The Council's current policy, confirmed in the social housing strategy, is that social housing is to be rates neutral.
13. The financial effect of each option identified by the Council will be further addressed in the proposal going out for consideration.

Do the Recommendations of this Report Align with 2006-16 LTCCP budgets?

14. This report focuses on options for funding with effect from 1 May 2009. Any decisions made by the Council will follow the completion of a special consultative procedure. These decisions will be included in the 2009/19 LTCCP.

LEGAL CONSIDERATIONS

15. The High Court in the COSS case found against the Council in three areas. The Court's judgement said that the Council had failed to:
 - (a) identify and assess all reasonably practicable options, as required by section 77(1) of the Local Government Act 2002. In particular, the Council failed to properly assess the option of government funding;
 - (b) obtain and give consideration to the views and preferences of persons likely to be affected, in particular its social housing tenants, in the manner that the Court considered was required under section 78(1) of the Act;
 - (c) comply with the requirements of section 80 of the Act by not expressly addressing inconsistencies between the decisions made by the Council and its 2006/16 LTCCP;
16. The decision making process referred to in this report will address the failures identified by the Court.
17. Council staff have identified various options for funding the Council's social housing portfolio. These will be set out in the statement of proposal to be distributed under the special consultative procedure and will include the option of government funding.
18. The views and preferences of persons likely to be affected by or have an interest in the future funding of the social housing portfolio will be obtained through the adoption of the special consultative procedure.
19. The Court described the Council's breach of section 80 of the Act as being "largely of a technical nature". The special consultative procedure being adopted before the Council decides on funding issues in respect of the social housing portfolio is similar to the procedure required for amending the LTCCP. Any decisions made will be incorporated in the 2009/19 LTCCP.
20. The High Court criticised the Council for not having considered the significance of the decision to increase social housing rents by 24%. This will be addressed if a special consultative procedure is carried out before the Council makes a decision on the funding issues that it faces. If this procedure is adopted, a statement of proposal will be prepared and included on the agenda for the meeting on 19 December 2008.
21. It is recommended that the Council determine that the issue has a reasonably high degree of significance. This is because of the rental increases and the substantive change to Council policies if certain options are adopted (i.e. elements of rates funding or asset sales).
22. The process recommended in this report is consistent with the matter being determined as significant.

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ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

23. The activity management plans in respect of the Council's social housing portfolio will require amendment according to the decisions made by the Council in respect of funding issues.

Do the recommendations of this report support a level of service or project in the 2006-16 LTCCP?

24. The options referred to in this report will, to a lesser or greater degree, ensure that the Council is able to continue to maintain a portfolio of social housing units. This commitment is contained in the 2006/16 LTCCP.
25. Any change to that commitment as a result of public consultation through the special consultative procedure will need to be included in the 2009/19 LTCCP.

ALIGNMENT WITH STRATEGIES

26. The Council's housing policy states that this activity is to be financially self supporting (allowing for depreciation, loan servicing, administration and maintenance). It also records the Council's commitment to providing a safe and pleasant environment and a maintenance and support service responsive to the reasonable requirements of tenants.
27. Any decision on funding issues that may impact on these commitments will require amendment of the policy. This can be achieved at some future time, also by way of the special consultative procedure.
28. In October 2007 the Council adopted a Social Housing Strategy. This also included reference to the housing portfolio being self funding. Any change to this can also be made, depending on the outcome of the process for determining funding issues.
29. It is not envisaged that these amendments will have any effect on the considerable amount of work and consultation that preceded the decision to adopt the housing policy and Social Housing Strategy.
30. Any consideration of the possible sale or other disposal of the Council's social housing portfolio, however, will require a separate consultative process to that referred to in this report.

CONSULTATION FULFILMENT

31. Council staff have drawn on existing information and knowledge of the views and preferences of affected people and organisations in preparing this report. Whilst a preferred option can be identified, the statement of proposal will include other reasonably practicable options. This will be available for tenants and the wider community to consider during the special consultative procedure.

STAFF RECOMMENDATION

32. It is recommended that the Council:
- (a) address the funding issues arising from the Council's ownership of its social housing portfolio for the period commencing on 1 July 2009;
 - (b) determines that these issues are significant;
 - (c) considers the options for addressing those issues set out in the staff report;
 - (d) adopts the preferred option referred to in the appendix;
 - (e) obtains the views and preferences of tenants and the wider community through a special consultative procedure that will include the opportunity to consider all reasonably practicable options as well as the Council's preferred option;

4 Cont'd

- (f) makes no decision with regard to funding issues until the consultation process is completed;
- (g) before making any decisions, determines whether or not government funding is available;
- (h) incorporates its decisions into the 2009-19 LTCCP;
- (i) supports the proposal that the Council's housing working party meets with interested organisations to discuss the future of social housing in Christchurch.

BACKGROUND (THE ISSUES)

- 33. On 27 March and 28 April 2008 the Council made decisions that increased by 24% the rentals charged in respect of its social housing units (except the Whakahoia Village complex).
- 34. The process adopted by the Council prior to it making those decisions was challenged by the Council of Social Services on behalf of tenants. An application for a judicial review of the process was granted by the High Court in its decision dated 25 November 2008.
- 35. There were three grounds on which the Court granted the application. The council was found to have failed to:
 - (a) identify and assess all reasonably practicable options, as required by section 77(1) of the Local Government Act 2002. In particular, the Council did not assess the option of seeking government funding.
 - (b) obtain and give consideration to the views and preferences of persons likely to be affected, in particular tenants, in the manner in which the Court considered was required under section 78(1) of the Act;
 - (c) comply with the requirements of section 80 of the Act with regards to expressly addressing inconsistencies between the Council's decisions and its 2006/16 LTCCP.
- 36. The parties to the action were required to consider the precise form of the order to be made by the Court. Agreement was reached between them and an order has been made by the Court.
- 37. One of the requirements of that order is that the Council makes a new decision with regard to its social housing rentals for the period 1 July 2008 – 20 June 2009. This decision will be made by the General Manager, Community Services Group, acting pursuant to his delegated authority. Rentals will increase by the level prescribed in the annual CGPI which is currently at 2.3%.
- 38. The amount overpaid by each tenant will be refunded, probably prior to Christmas.
- 39. The purpose of this report is to provide information to councillors in respect of the reasonably practicable options identified by staff for dealing with the funding issues arising from ownership of the social housing portfolio. In doing so, staff have had regard to the judgement delivered by the Court in COSS v CCC and the steps required to address the Court's view of the Council's compliance with the consultation and decision making obligations set out in the Local Government Act 2002.
- 40. Whilst the Council may indicate its preferred option, all reasonably practicable options identified by staff will be included in the statement of proposal to be distributed in accordance with the special consultative procedure. This will meet the Court's concerns as they relate to this particular matter.
- 41. By adopting the special consultative procedure, the Council is recognising the significance of this matter at the level considered by the Court to be appropriate. Also, steps will be taken to determine whether or not government funding is available.

4 Cont'd

THE OBJECTIVES

42. The objectives of this report are to put in front of councillors the reasonably practicable options identified by staff for addressing funding issues arising from the Council's social housing portfolio. It also recommends that the views and preferences of tenants and the wider community with regard to these issues be obtained through a special consultative procedure. A decision on which of the options should form the basis of the Council's decision in the matter will not be made until those views and preferences have been heard.

THE OPTIONS

43. **Attached** to this report are the options that have been identified by Council staff and information with regard to each one. It is proposed that further work is carried out on these before they are included in the statement of proposal put out for consultation.

THE PREFERRED OPTION

44. It is recommended that Councillors adopt the preferred option referred to in the appendix.