

4. SECTION 94 CONSIDERATION – NORMANS ROAD CELL SITE

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Corporate Plan Output: Resource Consents	

The purpose of this report is to advise the Committee of the matters which were considered at the time a decision was made to process the proposed Telecom cell site at Normans Road on a non-notified basis.

LEGISLATIVE FRAMEWORK

The Resource Management Act 1991 provides for applications for non-complying activities to be either notified or non-notified. Section 93 details the procedure for the notification of applications. Section 94 details the circumstances in which applications need not require notification.

Section 94 (2) states that:

“An application for a resource consent need not be notified in accordance with Section 93, if the application relates to a ... non-complying activity and

- (a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and*
- (b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.”*

Section 94(5) permits a consent authority to require the notification of an application if it considers special circumstances exist in relation to any such application.

THE PLANNING FRAMEWORK

There has been extensive consultation over the planning framework since the Proposed Plan was publicly notified for submissions in June 1995. Many people made submissions about whether or not cell sites should be allowed in the City and how they should be controlled. Hearings were held before a Panel of Councillors who then considered all the evidence and decided on how the planning framework should apply. These decisions were ratified by the Council.

The decisions on the submissions were released in May 1999. All submitters had the opportunity to lodge appeals to the Environment Court if they wished to challenge the Council decisions. The Council has received a number of appeals, but the ones to do with cell sites all seek less restriction, not more. The rules in the Proposed City Plan are therefore beyond a point where they can be changed to be more restrictive, through this process. This is why the Council now gives a lot of weight to the Proposed Plan in its decision making in relation to cell sites.

Under the terms of the City Plan there are activities which are permitted without need for a resource consent and others are not permitted unless they obtain a resource consent. Different rules often apply to different types of activity.

The Transitional City Plan has no rules which deal with cell sites. The Proposed City Plan recognises that utilities such as telecommunications are an essential and expected part of urban and rural infrastructure. The environmental impacts of the utility have to be balanced against the need to establish, improve or maintain essential services quickly and at minimal financial cost to the community and end users. As a result of this balance, the Proposed Plan exempts certain utilities from many of the rules which apply to everyday development and applies different rules.

The Proposed Plan includes two sets of rules which apply to cell sites. These are attached. Rule 4.4.3 deals with the visual impact of these structures. Rule 4.4.5 deals with the issue of potential exposure to electromagnetic radiation about these facilities. All cell sites require resource consent in relation to the radiation rule under the Proposed Plan. That rule accepts that where exposure to radio frequency electromagnetic radiation is less than $200\mu\text{w}/\text{cm}^2$, then the Council needs only to consider whether the design of the facility is such that unnecessary exposures are reduced and to consider the need for monitoring.

While the processing of a resource consent involves detailed assessment under the Resource Management Act, as perusal of the officer's report shows, the following matters were important in processing the Normans Road application:

- The Transitional Plan is not accorded much weight in relation to the issue of cell sites, as the facilities and their effects are not considered at all in the Plan.
- The Proposed Plan is accorded much weight in relation to this issue as it has been formulated under the Resource Management Act, has been the subject of extensive public consultation, the Council has held hearings to consider the range of issues and have made decisions about the form of the Plan in this context.
- Under the provisions of the Proposed Plan the facility complied fully with the visual impact rules. That is to say, it had a visual impact which was entirely anticipated as appropriate by the rules in that Plan.
- Under the provisions of the Proposed Plan the facility required resource consent as a 'controlled activity' – if this Plan were operative, this would mean the application could not be declined, Council would have to approve it.
- The facility would have exposure levels at ground level of no more than $5\mu\text{w}/\text{cm}^2$.

THE PARTICULAR CIRCUMSTANCES

A copy of the report on the application under Sections 94, 104 and 105 of the Act is attached. The assessment of the actual and potential effects on the environment, in the context of the above planning framework, concluded that any adverse effects of the proposal were minor, given:

- the separation of the tower from dwellings
- the screening of the tower by vegetation backdrops
- the slimline design of the tower
- the proposed colour of the tower and antennae
- the method of fixing the antennae

AFFECTED PARTIES

In the context of the particular circumstances of the case and the planning framework, I considered only two written approvals were required in terms of Section 94 (2) (b), and those were obtained.

The only persons considered potentially adversely affected by the proposal were the landowner of the site and the owner of the adjoining site to the southwest, Tranz Rail. That was because both those parties had the ability to lawfully build upward on their sites to a point that they could be exposed to electromagnetic radiation in excess of the $200\mu\text{w}/\text{cm}^2$ prescribed in the Proposed Plan. Both these parties signed 'affected party approval forms' and this means the Council is unable to take account of any adverse effects on them.

The owners and occupiers of other adjoining sites were not considered adversely affected because the maximum potential exposure levels on their sites were very low. They would be a maximum of about $5\mu\text{w}/\text{cm}^2$, being less than 3% of the $200\mu\text{w}/\text{cm}^2$ level recognised in the Proposed Plan and just over 1% of the non-occupational exposure level recognised in the relevant New Zealand Standard ($450\mu\text{w}/\text{cm}^2$). In addition, they could not be affected by the area where $200\mu\text{w}/\text{cm}^2$ was exceeded, given its height above the ground, as development is limited in the Living 1 zone to a maximum height of eight metres.

No-one was considered adversely affected by the visual aspects of the proposed facility, given the conclusions about how much weight should be given to the Proposed Plan and the fact that the facility complied with the rule about visual impact under that Plan.

SPECIAL CIRCUMSTANCES

I was not aware of any special circumstances that would necessitate the application for resource consent being publicly notified and concluded that it would appropriately be dealt with on a non-notified basis.

SUMMARY

While these decisions do involve some discretion being exercised, caselaw provides clear guidance on how such discretion is to be exercised. It must be exercised fairly and reasonably in the context of the planning framework, whether the planning framework (objective, policies, rules and other provisions of the Plans) is controversial or not. While the existing environment is relevant, the environment as anticipated by the Plan is also relevant.

Chairman's

Recommendation: For information.