Christchurch City Council

REGULATORY AND PLANNING COMMITTEE AGENDA

THURSDAY 2 JULY 2009

AT 9AM

IN THE NO 3 COMMITTEE ROOM, CIVIC OFFICES

Committee: Councillor Sue Wells (Chairperson),
Councillors Helen Broughton, Sally Buck, Ngaire Button, Yani Johanson, Claudia Reid, Bob Shearing, Mike Wall, and Chrissie Williams.

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2. 7. 2009

1. APOLOGIES

2. DEPUTATIONS BY APPOINTMENT

3. REQUEST FOR CHANGE TO CITY PLAN – MADDISON PARK

General Manager responsible:	General Manager Strategy and Planning, DDI: 941 8281
Officer responsible:	Team Leader, District Planning
Author:	Andrew Long, Senior Planner

PURPOSE OF REPORT

1. This report describes a privately requested plan change to rezone Lot 2 DP 315110, 185 Kirk Road, Templeton, from *Special Purpose (Hospital) (SPH)* to a new *Business 4M (B4M) zone*, and recommends the process for dealing with the request in terms of the provisions of the Resource Management Act 1991 (RMA).

EXECUTIVE SUMMARY

2. The change request seeks to rezone Lot 2 DP 315110, 185 Kirk Road, Templeton (**Attachment 1**), from *Special Purpose (Hospital) (SPH)* to a new *Business 4M (B4M) zone.* The stated purpose of the zone is to provide for light industry, warehousing, offices, storage activities educational and community activities, with some retail, particularly in the service area.

3. The purpose of this report is not to consider the change request on its merits. Rather, it is to recommend which of several options under the RMA is to be used in processing the change request. The consideration of the merits of the change request would occur after submissions have closed, if the decision on this report is to select one of the process options that lead to public notification.

4. The change request was lodged on 30 March 2007 and has been on hold during an extended Request for Information (RFI) process, pursuant to Schedule 1 of the RMA. An amended application was lodged on 3 April 2009 which is considered to respond to the RFI. The application is considered to contain sufficient information for the Council to consider whether or not to notify the change. A number of key issues have been identified:

    - Transportation
    - Water supply
    - Sensitivity and reverse sensitivity issues
    - Energy efficiency
    - Urban consolidation.

5. The options for processing the change request available to the Council are to:

    - Accept the change request as a private plan change and publicly notify it for submissions and a hearing at the cost of the applicant.
    - Adopt the change as the Council's own change and accept the responsibility and costs of processing it.
    - Treat it as a resource consent application.
    - To reject the change request due to it falling within one of the limited grounds set out in the RMA.

6. With regard to the above options, staff consider that the appropriate action is to accept the change request and publicly notify it.

CONSULTATION

7. Advice has been obtained from various Council units, including Strategy and Planning (central city, heritage, urban design, landscape), Inspections and Enforcement (environmental health), and Asset and Network Planning (transport, stormwater, water, wastewater, botany, open space, and greenspace). Council staff have also engaged external experts in relation to transport and cultural matters. This consultation is related to the RFI process (pursuant to Schedule 1 to the RMA).

3 Cont'd

8. The matter has been presented to the Riccarton/Wigram Community Board for their consideration.

FINANCIAL IMPLICATIONS

9. The financial implications will differ depending on how the Council chooses to handle this change request. Should the Council accept and notify the change at the expense of the applicant, there will be minimal direct costs to the Council as the Council's costs are recoverable.

10. Should the Council adopt the change as its own then the Council will need to absorb all the costs, which may exceed $50,000.

11. Should the Council decide that it be treated as a resource consent, the applicant may challenge this decision in the Environment Court. Costs could be in the vicinity of $50,000. Costs of processing any consent applications are recoverable.

12. Should it reject the change request the applicant may challenge this decision in the Environment Court. Costs could be in the vicinity of $50,000.

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

13. Should this request be approved there may be Council expenditure required for future infrastructure. There is currently no specific provision within the LTCCP for any operational, maintenance, or capital costs associated with the development of infrastructure or potential reserve land in this instance.

LEGAL CONSIDERATIONS

Have you considered the legal implications of the issue under consideration?

14. The process set out in the RMA must be followed. It includes initial consideration of what process to follow, then notification, submissions, reporting, hearings, decisions and possible appeals.

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

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

15. Processing private plan change requests is a statutory Council process, and as such is consistent with the LTCCP and Activity Management Plans.

16. The planning aspects of this proposal are part of the District Planning levels of service within the LTCCP.

ALIGNMENT WITH STRATEGIES

17. The site is outside the Metropolitan Urban Limits in Proposed Change 1 (PC1) to the Regional Policy Statement. Until PC1 is operative the Council is not obliged to give effect to it, but must take it into account. This is a matter which goes to the merits of the current application, and will need to be considered at the hearing into the application. It is not a matter to consider at this stage.

3 Cont'd

18. The only relevance would be if this inconsistency amounted to being contrary to sound resource management practice, in which case the plan change could be rejected at this stage. PC1 is at a relatively early stage, is controversial, and this applicant has submitted on it, seeking to have its site included within the urban limit. It is the view of staff that in these circumstances the application should not be considered contrary to sound resource management practice.

19. It is also noted that Clause 25 deals separately with this situation. One of the grounds for rejection is that the application would make the plan inconsistent with Part 5 of the RMA. Part 5 includes the requirement to give effect to an operative Regional Policy Statement, but to only take into account a proposed statement. As this situation is specifically provided for, it would be inappropriate to invoke the more general resource management practice ground.

STAFF RECOMMENDATION

That the Regulatory and Planning Committee **recommend** to the Council that it:

(a) Accept the change request and proceed to publicly notify the request pursuant to Schedule 1 Clause 25(2)(b) of the Resource Management Act 1991.

(b) Notes that when accepting a private plan change, the costs of processing are borne in full by the applicant.

BACKGROUND AND DISCUSSION

The Change Request

20. The change seeks to rezone Lot 2 DP 315110 (known as 185 Kirk Road, Templeton) from *Special Purpose (Hospital) (SPH)* to a new *Business 4M (B4M) zone.*

RMA Timeframes

21. The change request was received on 30 March 2007. Further information was requested on 8 June 2007 (with an addendum for transport issues on 17 July 2007) and on 4 December 2007. Additional information was received on 23 October 2007 and 25 February 2008. An extension of time was approved on 12 March 2008 but the change request was placed on hold following a meeting between the Council and the applicant's consultant, held on 17 March 2008. Additional information was received on 17 November 2008 and on 3 April 2009. Under the RMA, the Council is required to make a decision whether to accept the change request or otherwise within 30 working days. The decision would therefore be required prior to 19 May 2009. An extension of time was required pursuant to Section 37 of the RMA, to provide the Council the opportunity to properly assess the new information, and to fit with the schedule of Regulatory and Planning Committee meetings. The extension allowed a further 30 working days (to 1 July 2009). To fit with the Regulatory and Planning Committee meeting schedule, a further extension pursuant to Section 37(2)(b) of the RMA was agreed to by the applicant. A maximum of 60 additional days is allowed under S37(2)(b).

Description of the site

22. The site is legally described as Lot 2 DP 315110, and is located at 185 Kirk Road, Templeton. Templeton Hospital previously occupied this site and a large number of hospital buildings remain, as well as a sports field, pool, hall, and infrastructure (including sewer and water). The site is now partly occupied by the Westmount School and a minor gravel stockpiling operation. Access to the site is from Kirk Road, although the site also has road frontage to Maddisons Road. The bulk of the site is grassed with established trees, including notable trees listed in the City Plan. The site is 66.4 hectares.

23. A number of notable trees are located on the site and although the proposal does not seek removal of such, it is possible that some may be removed in the future to accommodate roads, services, new commercial buildings, or car parks. Land-use consent would be required at that time. The site contains no registered historic places.

24. The subject site is zoned Special Purpose (Hospital) zone. The zone is intended to provide specifically for healthcare facilities. Where a use is proposed that is not a healthcare use, that use becomes subject to standards for the Rural 2 zone. The site has a land-use consent issued for an educational establishment.

25. Adjoining uses include the Brackenridge Estate (a residential facility for severely disabled people), an educational establishment (Waitaha Learning Centre), place of worship (Templeton Chapel of the Holy Trinity of the Family), and the Nova Trust (drug and alcohol rehabilitation centre). The Christchurch Men's and Christchurch Women's Prisons, Youth Detention Centre, and Ruapuna Raceway are also located in the area. Other surrounding land is rural land (some of which is owned by the Corrections Department). A number of dwellings are located in the area. Templeton township and State Highway 1 are approximately one kilometre south of the site. State Highway 73 is approximately two kilometres north of the site.

3 Cont'd

Description of the Change request

26. The requested plan change proposes to rezone the site to Business 4M, which is a new Business zone proposed by the applicant intended to provide for business uses in a 'park like' environment. The stated purpose of the zone is to provide for light industry, warehousing, offices, storage activities educational and community activities, with some retail, particularly in the service area. The proposed rules limit retail activities by floor area/percentage of floor area, and in the service area, to services required to service the B4M zone. The change request proposes to amend two planning maps and several rules, a policy and new zone description. The bulk of the proposed rules and standards are equivalent to those for other business 4 zones.

27. The proposed Outline Development Plan shows a primary road network within the site with access from Maddisons Road, and two accesses from Kirk Road. Significant open space is provided, and includes within it an existing sports field and proposed stormwater control functions.

Area	Minimum Lot Size	Maximum Building Density	Minimum Setbacks	Landscaping Requirement
LDBA	1000m^2	25%	Front – 15m Other – 5m	20%
MDBA	1000m^2	40%	Front – 15m Other – 5m	20%
Service Area	500m^2	No requirement	Front – 15m Other – 5m	No requirement

28. The setback provisions do contain some exceptions, for example on a corner site the setback is reduced to one road boundary, and in the service area the minimum is 5 metres. The setback to adjoining properties is 5 metres.

Discussion

29. Although the purpose of this report is not to discuss the merits of the change request, it is necessary to assess the change request in order to determine whether it is able to be notified. There are only very narrow grounds contained in section 25 of Schedule 1 to the RMA 1991 which would allow the Council to reject the change request. The Council may also reject the change request if the request contains insufficient information (section 23). The various options are discussed later in the report.

30. The change request consists largely of the section 32 assessment and attached expert evidence. The rest of the change request is made up of an introductory section and the proposed amendments to the City Plan.

Section 32 Assessment

31. The Section 32 assessment is complete in terms of RMA requirements and includes responses to the Council's RFI where appropriate (**Attachment 2**).

32. The application acknowledges that the site is not within the proposed urban limits in Proposed Change 1 to the RPS. Proposed Change 1 also includes a list of key activity and commercial centres. The list does not include this site. It could be argued that the proposal is not consistent with Proposed Change 1 or the Greater Christchurch Urban Development Strategy, largely due to the site's location. The location of the site also creates inconsistencies with the objectives of the Regional Land Transport Strategy (RLTS).

33. Relevant existing City Plan provisions are included in **Attachment 3** for the Council's information.

3 Cont'd

Reports Appended to Section 32 Assessment

34. The Section 32 assessment included in the change request includes nine separate reports. The table below summarises whether they address the RFIs and includes relevant Council comments:

REPORT SUBJECT	RFI MET	COMMENT
Transport	Yes	Abley Transportation Engineers Ltd (Ableys) have been engaged to provide expert analysis of the change request and possible affects of the proposal as they relate to transport matters. The Request for Further Information (RFI) process sought significant additional information in relation to transport. Abley advises that the application documents have not changed greatly since the RFI, other than the inclusion of a 'trigger rule'. Abley considers the trigger rule should refer to actual traffic movements (e.g. intersection delay) rather than Gross Floor Area (GFA). A trigger based on GFA assumes that uses which may establish at the site would generate an average traffic count per square metre. Discussions with Ableys confirm that, notwithstanding the above issues, the GFA figure included in the trigger rule may be a reasonable estimate of when road network upgrades would be required. Ableys advise of continuing fundamental disagreement with the application.
Stormwater	Yes	Minor clarifications were sought in the RFI process. Council's engineering staff have advised of no significant issues.
Groundwater	Yes	Minor clarifications were sought in the RFI process. Council engineering staff advise of no significant issues.
Social Impact	Yes	The assessment identified a number of potential adverse effects, specifically with regard to noise, traffic, and landscape issues. The assessment concludes that the proposed B4M zoning and rules are appropriate.
Landscape	Yes	Two landscape reports have been prepared. The second report (by Eliot Sinclair) was submitted (on 3 April 2009 as part of the amended application) in response to the RFI for a visual representation of likely built form. The applicant has addressed the questions contained in the RFI. Urban design and landscape staff are not fully satisfied with the application.
Noise Impact	Yes	The report appears to contain adequate information. The proposed plan change seeks to rely on existing noise provisions and categories within the City Plan to protect adjoining sensitive land uses. It is critical that the adjoining sensitive land-uses are protected.
Servicing	Yes	A services assessment was prepared and amended following the RFI process. Council engineering staff advise that the proposal is adequate in relation to wastewater and stormwater. Issues remain in relation to water supply.
Soil Contamination	Yes	A preliminary contamination assessment has been undertaken and finds no significant issues. Council Environmental Health officers are satisfied with the report.
Cultural Impact	Yes	A cultural impact assessment was prepared. An Accidental Discovery Protocol will be part of the site management during construction. Mahaanui Kurataiao Ltd were engaged to assess the change request. They advise that the cultural impact assessment included in the change request is adequate, but note several requirements to be met during any subsequent consenting process.

3 Cont'd

General Comment

35. There are a number of significant issues raised in the table above, including:

- Transport issues, both with the report submitted and with the application as a whole
- Water supply issues
- Energy efficiency
- Urban consolidation
- Sensitivity and reverse sensitivity issues.

These issues may be resolved via the hearings process, if the decision on this report is to publicly notify the change request.

36. The purpose of this report is to determine how the change request should be processed. The presumption in the RMA is in favour of testing a change request through the hearing process, rather than rejecting the request. Options for processing the request are further detailed below.

Processing of Private Plan Changes

37. The processing of private plan changes is set out in Sections 21 - 29 of the 1st Schedule to the RMA. In summary this provides:

- Section 21: Any person may make an request for a change to an operative district plan. The City Plan is operative.
- Section 22: Request to be in writing, with reasons, Assessment of Environmental Effects and assessment under section 32 of the RMA.
- Section 23: Further information may be required. The Council has done this in this case.
- Section 24: Council may modify the proposal but only with the consent of the applicant.
- Section 25: Council must consider the request, and make a decision to either:
  - "accept" it and proceed to public notification, or
  - "adopt" it as if it were its own proposal, and publicly notify it, or
  - treat it as if it were a resource consent, or
  - "reject" it if it falls within one of the limited grounds specified.
- Section 26: Where the Council accepts the change it must publicly notify it within 4 months.
- Section 27: The applicant may appeal the Council decision made under clause 25.
- Section 28: Applications may be withdrawn.
- Section 29: Unless rejected, the application is put through the standard process of public notification, submission, hearing, decision, and appeal (if any).

OPTIONS

38. The Council's options are:

(a) Reject the request pursuant to either section 23 or 25 of Schedule 1.

(b) Accept the request, proceed to publicly notify, and decide that the costs of processing the private plan change are borne in full by the applicant.

(c) Adopt the change as its own and assume the responsibility for putting it through the process outlined in the RMA including all costs.

(d) Treat the request as a resource consent application.

3 Cont'd

Rejecting the Change Request

39. There are very narrow grounds in the Act for rejecting a change request. These are discussed below. Schedule 1 Section 25(4) is as follows:

(4) The local authority may reject the request in whole or in part, but only on the grounds that—
- *(a) The request or part of the request is frivolous or vexatious; or*
- *(b) The substance of the request or part of the request has been considered and given effect to or rejected by the local authority or Environment Court within the last 2 years; or*
- *(c) The request or part of the request is not in accordance with sound resource management practice; or*
- *(d) The request or part of the request would make the policy statement or plan inconsistent with Part 5; or*
- *(e) In the case of a proposed change to a policy statement or plan, the policy statement or plan has been operative for less than 2 years.*

40. The change request is not frivolous or vexatious (a), the change request has not been considered within the last two years (b), and the relevant part of the Plan has been operative for more than two years (e).

41. Subsection (c) provides that the Council could reject a change request if the request or part thereof is not in accordance with sound resource management. In *Foodstuffs (Otago Southland) Properties v Dunedin City Council*, Judge Sheppard considered that the clear statutory intent was that in the normal course, private persons are entitled to apply for plan changes and to have their applications determined on their merits. There do not appear to be adequate grounds to reject the change request under subsection (c).

42. Subsection (d) provides that the change request must not be inconsistent with Part 5 (Standards, Policy Statements and Plans) of the RMA. Part 5 references sections 31 (functions of territorial authorities), 32 (consideration of alternatives, costs and benefits), 72 (purpose of district plans), 73 (preparation and change of district plans), 74 (matters to be considered by territorial authorities), and several others. This requires an overall judgement and the presumption again is that the change request should be tested through the submissions and hearing processes.

43. In this instance, it is considered that no grounds exist to reject the change request pursuant to Schedule 1 Section 25(4).

44. Schedule 1 Section 23(6) allows the Council to reject a change request where the applicant declines to provide the further or additional information, and it considers that it has insufficient information to enable it to consider or approve the change request. The applicant has the right of appeal against such a decision pursuant to Section 27(1A)(b) of Schedule 1 of the RMA. Section 23(6) is as follows:

(6) To avoid doubt, if the person who made the request declines under subclause (5) to provide the further or additional information, the local authority may at any time reject the request or decide not to approve the plan change requested, if it considers that it has insufficient information to enable it to consider or approve the request.

45. The applicant has not declined to provide information. It is considered that no grounds exist to reject the change request pursuant to Schedule 1 Section 23(6).

Accepting or Adopting the Change Request

46. There is a presumption that where a change request includes sufficient and adequate information, that it be either accepted or adopted.

3 Cont'd

47. With respect to the options of "accepting" and "adopting" the change request, there is a significant difference between the two. If the request is accepted, the plan change remains a private change and the entire cost of the process can be charged to the applicant. If it adopts the change request, the Council would be effectively promoting the request as if it had decided to propose the change itself, and the Council would be unable to charge the applicant for the costs incurred from this point.

48. The subject of the plan change is not a matter that the Council has identified as a project it wishes to pursue for itself. There is no apparent reason for the Council to adopt this plan change as its own.

49. Advice has been obtained from other Council units and external consultants where necessary, to assess the suitability of the change request documents. Two requests for further information were made by the Council. It is considered that the information requested has essentially been provided.

50. The Council is reminded that the required decision is not to be based on the merit of the change request.

Treating the Change Request as a Resource Consent

51. In terms of the option of dealing with the change request as a resource consent, it would be treated as a non-complying activity and, in our opinion, unlikely to meet the requirements for approval. It is considered that treating the request as a resource consent application would not promote integrated management of resources and is not appropriate in this instance.

Summary

52. In terms of matters to be considered under the RMA, we summarise as follows:

    (a) There are not sufficient grounds to reject the change request.
    (b) The change request would not be better dealt with as a resource consent.
    (c) There is no known reason for the Council to adopt the change request as its own.
    (d) The change request now includes sufficient information that it could be notified.

53. The Council has open to it the options outlined at paragraph 38, and it may decide to adopt any of these options. Therefore, the appropriate action is to accept the change request.

PREFERRED OPTION

54. The preferred option is **(b)**.

4. CONSULTATION ON DRAFT REGIONAL POLICY STATEMENT CHAPTERS ON SOILS AND BEDS OF RIVERS AND LAKES AND THEIR RIPARIAN ZONES

General Manager responsible:	General Manager Strategy and Planning, DDI: 941-8281
Officer responsible:	Programme Manager- Healthy Environment
Author:	Melissa Renganathan, Policy Analyst – Strategy and Planning Group

PURPOSE OF REPORT

1. The purpose of this report is to provide the Regulatory and Planning Committee with an overview of the issues arising in draft chapters of the Canterbury Regional Policy Statement (CRPS), currently being reviewed by Environment Canterbury (ECan), and to gain the Committee's support on recommendations for feedback to ECan with regard to the draft chapters on Soils and Beds of Rivers and Lakes and their Riparian Zones.

2. This is a non-statutory process which allows for consultation at an early stage of the review. It replaces the ECan seminars and workshops previously held for the Council. Instead, the Committee will be provided with a number of draft CRPS chapters, a Committee report, and staff recommendations for feedback to ECan. The Council has already provided comments on the draft Heritage, Energy and Air Chapters in November 2008, and draft Waste Minimisation and Management, Contaminated Land and Hazardous Substances Chapters in September 2008. The formal (RMA) consultation process will take place next year when the entire draft CRPS is completed and notified as a Proposed Policy Statement.

3. The Committee is requested to confirm the comments presented in the grey boxes in each draft chapter attached.

EXECUTIVE SUMMARY

4. The CRPS provides an overview of the resource management issues for the Canterbury region and is prepared to meet RMA 1991 requirements. The policies it contains affect the way the Council manages its District Plan as the Council will have to give effect to the CRPS (as required under s. 75 of the RMA). ECan is currently reviewing the CRPS and is seeking input from the Council as part of the review.

5. Draft Chapter 7 Soils and draft Chapter 10 Beds of Rivers and Lakes and their Riparian Zones (see **Attachments 1 and 2**) discuss issues with regard to induced soil erosion (erosion that is in excess of natural rates and can be attributed to human activities) and loss of soil quality in Canterbury, and issues relating to beds of rivers and lakes and their riparian zones, respectively. Staff have prepared proposed comments and recommendations on each chapter.

6. The ECan review of the current Chapter 7 Soils and Land Use concludes that soil and its degradation and erosion is a significant management issue in Canterbury and the CRPS should have policies addressing this issue. Council staff support the need for provisions on soil management in the CPRS and believe it is appropriate that the other important soil management issues are raised in the other CRPS Chapters. ECan has suggested investigation and monitoring of soil quality as one of the CRPS Methods to achieve Policy 7.4.1. Council staff suggest that a timeframe is needed to ensure an investigation and monitoring programme is prepared once the CRPS is adopted. In addition, Council staff also suggest that a monitoring programme be prepared in order to investigate the effectiveness of the proposed education programmes that will be used to achieve Policies 7.4.1, 7.4.2, 7.4.3. The results of the monitoring programmes could be used to evaluate the effectiveness of regional plans and the education programmes. The results could also provide the support for Rules in the National Resources Regional Plan (NRRP) Chapter 8 Soil Conservation, should they be required (at present NRRP Chapter 8 has no Rules). Detailed comments on the draft Soils Chapter are located throughout Attachment 1.

4 Cont'd

7. The ECan review of the current Chapter 10 Beds of Rivers and Lakes and their Margins has identified the need to redraft the chapter to more succinctly express the issues, objectives and policies. Council staff support the need for clear guidance on protecting and managing the region's rivers, lakes and beds and their riparian zones and ensuring public access where appropriate. Council staff generally support the proposed chapter and have suggested minor changes to the text to improve clarity. They also suggest that the concept of "integrated catchment management" should be introduced in Section 10.1 Introduction (at present it is mentioned in the Explanation under Policy 10.4.1). It is also recommended that the term "integrated catchment management" be changed to "integrated management", as the NRRP Chapter 4 Water Quality and the Council use "integrated catchment management" to refer to stormwater catchment management. Detailed comments on the draft Beds of Rivers and Lakes and their Riparian Zones Chapter are located throughout Attachment 2.

FINANCIAL IMPLICATIONS

8. The CRPS could result in additional resources being required to amend planning documents in order to give effect to the CPRS. Giving effect to the final CRPS will be achieved through a variety of mechanisms including the Christchurch City Plan and Banks Peninsula District Plan and the LTCCP. The extent of any resources required is unclear at this stage, however it is expected that they will be covered by the existing Strategy and Planning operational budget.

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

9. The cost of preparing and participating in the CRPS review is covered by existing unit budgets.

LEGAL CONSIDERATIONS

Have you considered the legal implications of the issue under consideration?

10. The RMA provides for the Regional Council (ECan) to prepare Regional Policy Statements and review them. The Council is participating in the ECan consultation process in the preparation of the proposed Chapters. The Council will also have the opportunity to influence and shape the proposed CRPS through the formal submission process which is scheduled for mid 2010.

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

11. The chapters support the draft LTCCP objectives that aim to ensure that the health of the city's land and soil is maintained, and to provide Christchurch's community with waterways that are protected and enhanced, where possible, through the management of the city's growth and development.

ALIGNMENT WITH STRATEGIES

12. The recommendations support the Urban Development Strategy, the Council's proposed Surface Water Strategy (in preparation), and the land management provisions relating to soils and surface waters in the Christchurch City Plan and the proposed Banks Peninsula District Plan.

Do the recommendations align with the Council's strategies?

13. As above.

CONSULTATION FULFILMENT

14. Not applicable.

STAFF RECOMMENDATION

That the Regulatory and Planning Committee recommend to the Council that it provide feedback to Environment Canterbury on draft chapters seven and ten of the Canterbury Regional Policy Statement.

4 Cont'd

BACKGROUND

15. The CRPS became operative in 1998 and is required to be reviewed within ten years of it becoming operative. ECan is responsible for the review of the CRPS and is consulting with all Canterbury territorial authorities throughout the review process.

16. This review is a separate process to the preparation of Proposed Change No. 1, which introduces a new Chapter 12A, (Development of Greater Christchurch). Chapter 12A sets out land use distribution, particularly for areas available for urban development, the household densities for various areas, and other key components for consolidated and integrated urban development. It also identifies land which is to remain rural for resource protection and enhancement, and other reasons.

17. ECan began discussions over the review of the CRPS with District Councils in late 2006. ECan has consulted with Territorial Authority (TA) Officers on the review process, issues and options papers and draft chapters of each CRPS chapter. Discussions have taken place (and will continue to) at the officer level through workshops and meetings and at the councillor level through Council and Committee meetings.

18. The current CRPS consists of 14 Chapters which discuss various regional issues (e.g. water, soil and landscape) and provide objectives, policies and methods with regards to these issues. During the review process it was decided that some issues would be better dealt with in new chapters (e.g. contaminated land which was previously dealt with in Chapter 7 Soils and Land Use) or better dealt with in conjunction with other issues (e.g. the proposed Settlement Chapter will also have transport provisions as well as deal with issues regarding versatile soils).

19. This section of the report summaries ECan's review of current Chapters 7 Soil and Land use and Chapter 10 Beds of Rivers and Lakes and their Margins.

20. The "Soils" Chapter (see Attachment 1) is a rewrite of the current Chapter 7 Soils and Land Use (which deals with land degradation as a result of land use, loss of versatile soils, soil contamination and land use effects on water quantity and quality). At present there are several documents (Environment Canterbury Land and Vegetation Regional Management Plan, the Canterbury Regional Council Transitional Regional Plan and Soil Conservation and Rivers Control Act 1941 bylaws which control ground cover on steep slopes and vegetation on riparian margins) that provide regional rules with regard to soil conservation. The CRPS policies for land degradation form the basis of Chapter 8 Soil Conservation of the Natural Resources Regional Plan (NRRP).

21. The ECan review of the CRPS Chapter, however, found that on the whole the issues have not been effectively dealt with through the provisions of this Chapter, as the land use activities which affect soil management are dealt with in other chapters. For example, the major part of the issue of the loss of versatile soils is one of settlement, including developments and subdivisions which affect the availability of productive land. The current Chapter 7 by itself has also not been effective in dealing with the issues of discharges and management of contaminated land. With regard to the issue of land use effects on water quantity and quality, the Chapter has no objectives, policies or methods and refers to the chapter on water.

22. The ECan review of the current Chapter 7 Soils and Land Use concludes that soil and its degradation and erosion is a significant management issue in Canterbury and the CRPS should have policies addressing this issue. The review recommended that policies dealing with soil degradation be maintained (perhaps with some modification) and that reference should be made to the versatility of soil, soil contamination and land use effects on water management in the proposed chapter on soils and that the chapter highlight the appropriate chapters (the Urban and Rural Development, Development of Greater Christchurch, Hazardous Substances, Contaminated Land and Water Chapters) of the CRPS that deal with these management issues. It was also recommended that the new chapter be renamed "Soils" (previously "Soils and Land Use").

4 Cont'd

23. The current CRPS Chapter 10 Beds of Rivers and Lakes and their Margins deals with four groups of issues relating to the management of Canterbury rivers, lakes and their associated riparian zones. The first deals the adverse effects of a number of land use activities on a large group of values including natural character, tangata whenua and indigenous flora and fauna. The second deals with the effects of land uses and the accumulation of plants and material on the flood carrying capacity of rivers. The third issue deals with the effects of land uses on the essential structures within river beds and margins and the fourth issues deals with public access needs and conflicts between different users of this environment.

24. The ECan review has identified the need to redraft the chapter to more succinctly express the issues, objectives and policies. The chapter as presently written does not provide policies, objectives and methods that can be achieved without first involving the completion of a large body of work (the inventory of significant sites for protection in Policy 1), the preparation of which may also create issues when attempting to prioritise sites. The review suggests that Issue 2 would be better expressed if more succinctly written while Issue 4 as presently written is confusing as it deals with three separate sub-issues that are often in conflict with each other. The review notes that Issue 3 is straightforward.

25. ECan's review recommends that Chapter 10 Beds of Rivers and Lakes and their Riparian Zones (see Attachment 2) clearly states the Regional Council's and TAs' responsibility in managing the control the use of river and lake beds (ECan) and the control of land use that would affect riparian zones (TAs). The review also suggests that the terms "bed", "margin" and "riparian zone" are clarified. It also suggests that the Policies requiring ECan to identify and protect important conservation areas be replaced with a Policy which provides more general protection of conservation values.

5. REVIEW OF THE CHRISTCHURCH CITY BROTHELS (LOCATION AND SIGNAGE) BYLAW 2004

General Manager responsible:	General Manager Strategy and Planning, DDI 941-8281
Officer responsible:	Programme Manager Strong Communities
Authors:	Terence Moody and Judith Cheyne

PURPOSE OF REPORT

1. The review of the Christchurch City Brothels (Location and Signage) Bylaw 2004 is required by 7 July 2009 and has been underway since July 2008. At its meeting in November 2008, the Council determined that it did not consider there was a need to control location by a bylaw. In light of new advice to the Committee, the revocation of the Christchurch City Brothels (Location and Signage) Bylaw 2004 should be recommended to the Council for consultation.

EXECUTIVE SUMMARY

2. At the Council meeting on 27 November 2008, the Council considered a report on the review of the Brothels (Location and Signage) Bylaw 2004 and resolved: "…that the Council:

   (a) *Determines that under the section 155(1) analysis, there is not sufficient evidence of a problem in regards the location of brothels that needs to be addressed by way of a bylaw.*

   (b) *Determines that under the section 155(1) analysis, there is sufficient evidence of a problem in regards signage advertising of commercial sexual services that needs to be addressed by way of a bylaw.*

   (c) *Consider a new bylaw controlling signage advertising commercial sexual services, in conjunction with the Brothels Location and Signage Subcommittee, for adoption under the provisions of the Prostitution Reform Act 2003, and that once any new bylaw is introduced the current Brothels (Location and Signage) Bylaw 2004 be revoked."*

3. The 2004 bylaw covered both the location of brothels and signage but the location provisions were quashed by the High Court in 2005. The remaining provisions controlled signage on brothels in the central city area and prohibited signs in any other areas. The review undertaken in 2008 revealed few problems relating to location of brothels and stated *"The location of businesses is controlled under the provisions of the City Plan in regard to the rules both for Living zones and Business zones. There is limited scope for a business of prostitution to be established in Living zones because of restrictions on the hours of operation for home activities, the area allowed to be used, and vehicle movement restrictions. In the case of businesses of prostitution in Business zones brothels would not be specifically precluded from being established subject to compliance with the zone standards some of which may limit the scale of such a business, or trigger the resource consent process. That would include having regard to whether the business of prostitution is likely to cause a nuisance or serious offence to ordinary members of the public using the area in which the land is situated; or is incompatible with the existing character or use of the area in which the land is situated."*[1] The Council therefore determined that a bylaw controlling location could not be justified.

4. Since November 2008, the Brothels Location and Signage Subcommittee has been investigating the development of a new bylaw to replace the existing bylaw in relation to signage. Following the Subcommittee's investigations, a report went to the Regulatory and Planning Committee on 2 April 2009 outlining the options and making recommendations in relation to a new bylaw. Accompanying the Subcommittee report was advice from Mr Kerry Smith of Buddle Findlay, dated 24 March 2009.

5. The Regulatory and Planning Committee received the report but instructed staff to "clarify and seek further legal advice on potential grey areas associated with the proposed bylaw". Further advice was then obtained from Mr Smith on the following:

[1] Report of the Regulatory and Planning Committee to the Council meeting of 27 November 2008

5 Cont'd

- Clarification on what amounts to a sign advertising commercial sexual services, including whether it covers signs simply advertising premises, or that contain innuendo or not.
- What role does "offensiveness" play in a bylaw made under the Prostitution Reform Act - because a sign advertises commercial sexual services, is that enough to make the sign offensive or is Council also required to assess offensiveness?

6. Mr Smith's further advice dated 26 May 2009 (**Attachment 1**) outlines the legal complexities and difficulties in drafting a bylaw to cover signs under the Prostitution Reform Act (PRA). He advises that it would be difficult to draft a bylaw that could be definitive as to which signs are covered, because it is the context surrounding the sign that will be determinative. The advice also clarifies the role "offensiveness" must play in a bylaw made under the PRA. He suggests that there are other tools that may be more appropriate for controlling such signage. This is important because section 155 of the Local Government Act 2002 (LGA), in addition to requiring identification of a problem, also requires consideration as to whether a bylaw is the most appropriate tool to deal with the problem.

7. As a result of the advice and further work by staff, an options paper/summary has been prepared which is attached to this report. The conclusion is that this report recommends the revocation of the current 2004 bylaw and that it not be replaced with a new bylaw, as other tools are available to deal with any problems, such as the Resource Management Act 1991 (RMA), rules in the City and District Plan, the Advertising Standards Authority (ASA), or the Films, Videos, and Publications Classification Act 1993 (FVPCA93). The report also contains a draft Statement of Proposal (**Attachment 2**) and Summary of Information (**Attachment 3**) for the Revocation of the Christchurch City Council Brothels (Location and Signage) Bylaw 2004.

FINANCIAL IMPLICATIONS

8. This report recommends the revocation of the current bylaw, which must be done by way of a Special Consultative Procedure (SCP), which means the usual costs associated with the SCP apply. Costs to carry out the SCP are budgeted in the Community and City Planning Activity in the LTCCP.

9. With the revocation of the current bylaw, the expectation is that inspection and enforcement action, of location and signage issues, if any, would be undertaken through the powers in the RMA. Compliance monitoring and enforcement in relation to signage should not be significantly more than is currently undertaken.

10. If a new bylaw was adopted the enforcement costs may be higher, as a result of the better understanding of what would be required to gather evidence for any prosecutions. However, under the Council's current bylaw there has not been a need to take any enforcement action, so arguably the costs might not be any different.

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

11. Funding exists in the LTCCP for the SCP.

LEGAL CONSIDERATIONS

The Prostitution Reform Act 2003 and the Local Government Act 2002

12. The PRA provides for territorial authorities to make bylaws prohibiting or regulating signage in, or visible from, a public place that advertises commercial sexual services.[2] Section 12 of the PRA states:

[2] Section 4(1) of the Prostitution Reform Act 2003 defines these as;
" commercial sexual services means sexual services that—
(a) involve physical participation by a person in sexual acts with, and for the gratification of, another person; and
(b) are provided for payment or other reward (irrespective of whether the reward is given to the person providing the services or another person)"

5 Cont'd

(1) A territorial authority may make bylaws for its district that prohibit or regulate signage that is in, or is visible from, a public place, and that advertises commercial sexual services.

(2) Bylaws may be made under this section only if the territorial authority is satisfied that the bylaw is necessary to prevent the public display of signage that:

(a) Is likely to cause a nuisance or serious offence to ordinary members of the public using the area; or
(b) Is incompatible with the existing character or use of that area.

(3) Bylaws made under this section may prohibit or regulate signage in any terms, including (without limitation) by imposing restrictions on the content, form, or amount of signage on display.

13. The Council has a bylaw that has already been made under this power: the Brothels (Location and Signage) Bylaw 2004. The Council must review any bylaws made under the PRA within the timeframes provided in section 158[3] of the LGA. The bylaw must be reviewed no later than five years after the date on which the bylaw was made if made under the LGA. Section 160[4] of the LGA provides that a bylaw review is done by making the determinations required by section 155.[5] If, following the review, the Council determines that the bylaw should be amended, revoked, or revoked and replaced, it must act under section 156, and use the special consultative procedure to make, amend or revoke a bylaw.

14. The legal considerations in relation to the review of existing bylaws and adoption of a new bylaw largely arise from section 155 of the LGA. This sets out the matters that must be determined to decide whether a bylaw is appropriate, as follows:

(1) A local authority must, before commencing the process for making a bylaw, determine whether a bylaw is the most appropriate way of addressing the perceived problem.

(2) If a local authority has determined that a bylaw is the most appropriate way of addressing the perceived problem, it must, before making the bylaw, determine whether the proposed bylaw—
(a) Is the most appropriate form of bylaw; and
(b) Gives rise to any implications under the New Zealand Bill of Rights Act 1990…."

15. In order to comply with section 155, the Council needs to identify the perceived problem and formally determine that a bylaw is the most appropriate way to deal with the perceived problem. It must also be able to draft a bylaw that is in "the most appropriate form". The recent experience of the Committee has been that it will be difficult to draft an appropriate form of bylaw covering signage advertising commercial sexual services that does not have "grey areas" (these difficulties are also identified in the attached options summary).

16. In November 2008, the Council determined there was sufficient evidence of a perceived problem, and also that a bylaw was the most appropriate method to deal with the problem. The Council determined that a bylaw was the most appropriate method to address the problem, without the current understanding about the scope of the bylaw (which has come about from the further work done by the Subcommittee in conjunction with the staff, and from Mr Smith's advice) and without the additional information about two other regulatory powers that can be exercised in relation to offensive signs.

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[3] Section 158 of the LGA requires bylaws made under the Act not later than 5 years after the bylaw was made if the bylaw was made after 1 July 2003. This applies to the Brothels (Location and Signage) Bylaw 2004.
[4] Section 160 of the LGA requires the review under section 158 to be undertaken in accordance with section 155 including identifying the perceived problem to be addressed and whether a bylaw is the appropriate way of addressing the problem.
[5] Note that "a bylaw may be made under section 12 even if, contrary to section 155 (3) of the Local Government Act 2002, it is inconsistent with the New Zealand Bill of Rights Act 1990." (section 13 (2) of the Act.

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Other methods to control signs

17. The methods, besides a bylaw, that were noted in November 2008, as being available to the Council to control signs advertising commercial sexual services, were the City Plan provisions relating to the display of outdoor advertisements (which has controls in regard to area, height, illumination, relationship to the site), and through complaints being made to the Advertising Standards Authority, which has a Code of Practice that includes criteria for offensiveness and decency of advertising.[6]

18. The other methods which can be used are the powers in the (RMA), and the Films, Videos, and Publications Classification Act 1993 (FVPCA). The RMA enforcement order and abatement notice powers allow the Council to take action in respect of a state of affairs that is offensive or objectionable to such an extent that it has or is likely to have an adverse effect on the environment (which includes on people in their surroundings), and is discussed by Mr Smith in his advice.

19. The FVPCA also provides some controls that appear to cover offensive signs as a "paper or other thing that has printed or impressed upon it, or otherwise shown upon it, 1 or more (or a combination of 1 or more) images, representations, signs, statements, or words". Section 3 of the FVPCA provides that "a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good."

20. The FVPCA is largely used to deal with the classification of films, videos and magazines etc, and also to prosecute those who have possession of such material in breach of the FVPCA. It is, however, a strict liability offence under that Act if any person "by way of advertisement, displays or exhibits an objectionable publication to any other person". Maximum fines are $10,000 for an individual or $30,000 for a corporate body, but as far as we have been able to ascertain, there have not been any prosecutions in relation to signs.

Enforcement powers under the various options

21. In analysing whether a bylaw is the most appropriate way to address problems, compared to any other methods/options, the enforcement tools under the various options should be considered. The other options, in particular, the ability to take action in respect of offensive signs under the RMA, provide for a much easier and efficient enforcement regime than a bylaw.

22. Tools under the bylaw include prosecution, issuing injunctions or seizing signs that are breaching the bylaw. Prosecutions and injunctions require applications to the Court, which can be expensive. A council officer can seize a sign that is on public land relatively easily, but if the sign is on private land (which most will be, particularly if they are attached to buildings etc), then the Council has to get a judicial officer to issue a warrant authorising an enforcement officer to enter the private property involved in the commission of an offence in order to seize and impound a sign. There is no current ability to issue infringement notices for a breach of a PRA bylaw.

23. In contrast, under the RMA, a Council enforcement officer can issue an abatement notice in respect of an offensive sign, and if that is not complied with an infringement notice can be issued (with a fine of $750). An abatement notice does not lapse until it is appealed against. There is also the ability to apply to the Environment Court under the RMA for an enforcement order, and any person, not just the Council, can seek such an order. Although other persons may be able to bring their own prosecution under a Council bylaw (see section 13 of the Summary Proceedings Act 1957), it is expected that the Council would prosecute breaches of its own bylaw, rather than other persons.

[6] Rule 4 Decency- "Advertisements should not contain anything which clearly offends against generally prevailing community standards taking into account the context, medium, audience and product (including services)" and Rule 5 Offensiveness – "Advertisements should not contain anything which in the light of generally prevailing community standards is likely to cause serious or widespread offence taking into account the context, medium, audience and product (including services)", NZ Advertising Standards Authority, Advertising Code of Ethics, 1 August 1996

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24. Any person, not just the Council, can also make a complaint to the Advertising Standards Authority (ASA), and this is an appropriate avenue which the Council can suggest to members of the public. The role of the ASA is to self-regulate advertising in New Zealand. Advertising Codes of Practice provide the rules by which all advertisements should comply. Members of the public may complain at no cost about any advertisement they believe breaches the Codes. Complaints are heard by an independent Complaints Board and there is a right of appeal to an Appeal Board. In the event of a complaint being upheld the advertiser, agency, and/or media are requested to withdraw the advertisement. These requests are invariably complied with, as all decisions are released to the public via the media and are widely reported.

25. Under the FVPCA a prosecution would still be required, but it would be in the hands of the police or another central government agency rather than the Council.

26. The Council should take into account the information set out in this report with regard to other methods that can be used to address the problem of offensive signage, and review its decision in relation to its section 155 analysis with respect to whether "a bylaw is the most appropriate way of addressing the perceived problem".

Legal requirements for amending the resolution of 27 November 2008

27. The Council's standing orders contain a number of provisions relating to the amending or revoking of previous resolutions of the Council. In the situation where the proposal to amend the resolution is included in a Committee report the following provision is relevant:

> **"3.9.18 Local authority may revoke or alter any previous resolution**
> A local authority meeting may, on a recommendation contained in a report by the chairperson or chief executive, or the report of any committee, revoke or alter all or part of resolutions previously passed at meetings. At least 2 clear working days notice of any meeting to consider such a proposal must be given to members, accompanied by details of the proposal to be considered."

28. This report will satisfy the requirements of Standing Order 3.9.18.

Legal requirements for the special consultative procedure

29. The special consultative procedure under the Local Government Act 2002, when revoking a bylaw, requires that the Council prepare a statement of proposal that must include: "

    (ii) A statement that the bylaw is to be revoked
    (iii) The reasons for the proposal
    (iv) A report on any relevant determinations by the local authority under section 155".

30. The Local Government Act 2002 also requires the Council to determine the form of the summary of information. Section 89(c) requires that it be distributed "as widely as reasonably practicable (in such a manner as is determined appropriate by the local authority, having regard to the matter to which the proposal relates)..." Section 83(e) of the Local Government Act 2002 also requires the Council to give public notice of the proposal and the consultation being undertaken.

31. Since the revocation of the current Brothels (Location and Signage) Bylaw 2004 is likely to be a matter of interest throughout the Christchurch City Council district, it is proposed that the a notice of the availability of the summary of information be published through local newspapers, and that this also serve as public notice of the proposal, as required under section 83(e). Copies of the consultation documents will be available from the Civic Offices, and all Council service centres and libraries and on the Council's "Have Your Say" Website.

32. Submissions called for on the proposal will be considered by the Council and any persons wishing to present orally would be heard prior to the final determination being made.

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Have you considered the legal implications of the issue under consideration?

33. Yes, as above.

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

34. Not applicable.

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

35. Not applicable

ALIGNMENT WITH STRATEGIES

36. There are no specific strategies in relation to this issue.

Do the recommendations align with the Council's strategies?

37. See above.

CONSULTATION FULFILMENT

38. A briefing covering the PRA; the Bylaw; the results of the judicial review of the bylaw; the findings of the Prostitution Law Reform Review Committee review; and the results of the initial section 155 analysis, was presented to the Brothels Location and Signage Bylaw Subcommittee and a Combined Community Boards' Seminar.

39. Information was obtained from the Council's Inspections and Enforcement Unit about the perceived extent of problems and whether or not current legislation and the City Plan was able to be used to control activities.

40. Consultation was undertaken with the New Zealand Police who have advised that there was no evidence as to problems associated with the location of brothels, or indeed any nuisances.

41. Discussions have taken place with the local branch of the Prostitutes Collective who advised they could see no need for controlling location, beyond the powers contained in the City Plan, for example. They were not aware of any problems with signage, but considered there may be a need to provide for controls over offensive signage. (Note: Controls could be through a bylaw or other means, such as the RMA powers.) These views were expressed without prejudice.

42. Discussions have been held with Community and Public Health representatives (a division of the Canterbury District Health Board), who operate under the PRA as Brothel Inspectors, and some owners of businesses of prostitution. They did not consider there were issues with the location of brothels or signage.

43 Some brothel operators who were contacted advised they were unlikely to install further signage as they wished to keep such signage discrete.

44. Formal public consultation of any proposal adopted by the Council will go out for public consultation in accordance with the SCP (section 83 of the LGA). Anyone can make a submission and will be given the opportunity to be heard before a hearings panel. A draft Statement of Proposal and Summary of Information are attached to this report for this purpose.

5 Cont'd

STAFF RECOMMENDATION

That the Committee recommend to the Council that it **resolve**:

(a) To revoke its resolutions made on 27 November 2008 on the Review of Christchurch City Brothels (Location and Signage) Bylaw 2004:

> *(b) That the Council Determines that under the section 155(1) analysis, there is sufficient evidence of a problem in regards signage advertising of commercial sexual services that needs to be addressed by way of a bylaw.*
>
> *(c) To consider a new bylaw controlling signage advertising commercial sexual services, in conjunction with the Brothels Location and Signage Subcommittee, for adoption under the provisions of the Prostitution Reform Act 2003, and that once any new bylaw is introduced the current Brothels (Location and Signage) Bylaw 2004 be revoked.*

(b) To determine that under the section 155(1) analysis, although there may be sufficient evidence of a perceived problem with regard to signage advertising commercial sexual services, the most appropriate way to address any such problem is not by way of a bylaw.

(c) That it notes that the Council can rely on the enforcement order and abatement notice powers which already exist under the Resource Management Act 1991, to take action in respect of any offensive signs about which complaints are received, and that it also has other powers it can exercise in relation to signs under the provisions of both the City and District Plans, as well as the ability to make a complaint, or advise members of the public that they can make complaints, to the Police in relation to the Films, Videos, Publications and Classifications Act 1993 and/or to the Advertising Standards Authority.

(d) To adopt the proposed Statement of Proposal and Summary of Information and to commence the special consultative procedure under section 83 of the Local Government Act 2002 to revoke the Brothels (Location and Signage) Bylaw 2004.

(e) That public notice of the consultation be given in The Press and on the Council's website on 29 July 2009, and that public notice of the proposal be given in the Christchurch Star newspaper, Akaroa Mail, and other community newspapers distributed in the Christchurch area, as close as possible to 29 July 2009.

(f) That the period within which written submissions may be made to the Council be between 29 July 2009 and 4 September 2009.

(g) That a hearings panel be appointed to hear submissions between 5-9 October 2009, deliberate on those submissions, and to report back to the Council on its recommendations.

(h) To dissolve the Brothels Location and Signage Subcommittee.

5 Cont'd

BACKGROUND (THE ISSUES)

45. At its meeting on 27 November 2008, on the recommendation of the Regulatory and Planning Committee, the Council resolved that it:

    (a) *Determines that under the section 155(1) analysis, there is not sufficient evidence of a problem in regards the location of brothels that needs to be addressed by way of a bylaw.*

    (b) *Determines that under the section 155(1) analysis, there is sufficient evidence of a problem in regards signage advertising of commercial sexual services that needs to be addressed by way of a bylaw.*

    (c) *Consider a new bylaw controlling signage advertising commercial sexual services, in conjunction with the Brothels Location and Signage Subcommittee, for adoption under the provisions of the Prostitution Reform Act 2003, and that once any new bylaw is introduced the current Brothels (Location and Signage) Bylaw 2004 be revoked.*

46. At the subsequent 10 December 2008 meeting of the Brothels Location and Signage Bylaw Subcommittee, the Subcommittee considered the criteria in the Prostitution Reform Act 2003 (PRA) under which the Council could introduce a bylaw controlling advertising in, or in view of, a public place of commercial sexual services. These criteria are contained in section 12(2) of the PRA and include the requirement that the Council be satisfied in enacting a bylaw that such signage is likely to cause a nuisance or serious offence to ordinary members of the public using the area, or is incompatible with the existing character or use of that area. The Subcommittee determined that the criteria of nuisance as legally defined[7] was likely to be difficult to justify, hence decided that the two remaining criteria "serious offence to ordinary members of the public" and "incompatible with the existing character or use of an area" should be considered as rationale for the examination.

47. The Subcommittee also requested further information on the following:

    - Clarification of the definition of commercial sexual services
    - The signage issues the Council can control through bylaws
    - Clarifying options of either City-wide regulation, or "grey areas" including industrial zones
    - Options for prohibition of such signage in smaller areas of the City.[8]

48. Advice was obtained from the Legal Services Unit in January 2009 with regard to the above matters the Council may control in relation to signage under the PRA (that signs, simply because they were related to a brothel, could not be controlled – they could only be controlled if they advertised commercial sexual services) some clarity in respect of the definition of "commercial sexual services" in the PRA, and on possible definitions to be included in the bylaw. As a result of the challenge raised to the location provisions in the 2004 bylaw, it was considered appropriate to have the Legal Services Unit advice peer reviewed.

49. Advice was received from Kerry Smith, partner at Buddle Findlay, dated 24 March 2009 which generally agreed with the Legal Services Unit advice. He agreed that it would be imprudent to attempt a more definitive expression of commercial sexual services within the bylaw, and to attempt to define what might be offensive. He thought that possible examples suggested in the Legal Services Unit advice of what might or might not be commercial sexual services might not be workable or desirable. He also had reservations as to whether a bylaw that amounted to a blanket ban across the whole of the Council's district would withstand scrutiny, but also recognised that the alternative, of trying to determine if some areas would be less offended by such advertising than others, would be equally unpalatable.

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[7] *To claim a public nuisance exists requires some consideration of an appreciable interference with a public right which causes damage, injury, discomfort or inconvenience to **all** members of the public.* Laws of New Zealand, Nuisance at Para 14

[8] Notes of meeting of the Brothels Location and Signage Bylaw Subcommittee, 10 December 2008

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50. Mr Smith's advice was not available to the Subcommittee, who had recommended (on 3 February 2009) that a bylaw be put to the Regulatory and Planning Committee for consideration. However, Mr Smith's advice was available at the time the Regulatory and Planning Committee considered the staff report recommending a bylaw. On 2 April 2009, after lengthy discussion on what the bylaw would cover and the form of the bylaw, the Committee made the following decision:

    "(a) Receive the report for information.

    (b) Instruct staff to clarify and seek further legal advice on potential grey areas associated with the proposed bylaw.

    (c) Provide a further report to the Regulatory and Planning Committee on the proposed bylaw at its May 2009 meeting."

51. After the April meeting, work was carried out by staff to clarify issues raised by the Committee, but following a meeting with the Chairperson of the Committee, in preparation for the May meeting, it was decided that further advice should be obtained from Kerry Smith. A memo went to the Committee to report that advice was being sought to address the following two matters:

    1. Further clarification on what amounts to a sign advertising commercial sexual services, including whether it covers signs simply advertising premises, or that contains innuendo or not.

    2. What role does "offensiveness" play in a bylaw made under the Prostitution Reform Act - because a sign advertises commercial sexual services, is that enough to make the sign offensive or is Council also required to assess offensiveness?

52. The advice from Kerry Smith dated 26 May 2009 is attached to this report. A summary of his advice is that:

    - Offensive activities are treated in many different ways but broadly fall into two categories in various legislation: Acts where offensive activities are expressly stated and the enforcement function is delegated, and Acts where the delegation is of the mechanism to determine what is offensive (as well as enforcement). This last category describes the PRA bylaw making power.

    - An objective test is the main test used to determine what is offensive, and will be the test for signs under a PRA bylaw, but cannot be isolated from the circumstances that are presented in each case.

    - Other "offensive activities" legislation does not attempt to anticipate every activity that must be regulated but provides a broad framework against which later activities can be assessed according to the surrounding context.

    - In trying to assess the different categories of sign that might come within the scope of a PRA bylaw, context is vital. Mr Smith considers that the validity of the bylaw (and its enforcement on any occasion) will be measured not only by the content of the sign but also on the tests in sections 12(1) and (2) of the PRA, namely whether there is a public display of the sign and the circumstances of that display is that it is causing nuisance or serious offence to ordinary members of the public or is incompatible with the existing character or use of that area. Both of these statutory references would be applied to assess whether or not offensiveness has been demonstrated in the circumstances of a particular case.

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- Some signs are likely to be universally offensive, no matter where they are located, but other signs will only be offensive in certain areas or contexts. Signs containing innuendo, if they are actually advertising commercial sexual services may be caught (if they are also offensive) but a conundrum could arise from the exact same signs displaying scantily clad men and women advertising two "bathhouses"; one of which is a brothel and one that is not. One bathhouse might be liable to prosecution under a PRA bylaw and one might not. Other examples of seemingly illogical applications of a bylaw are also given in the advice (see paragraphs 27-31 of Attachment 1). The conclusion Mr Smith reaches is that beyond his general comments on different types of signage it is not possible to say whether any of the examples of possible signs he was asked to consider are likely to be offensive, and it is the context surrounding the sign that will be determinative.

- If a PRA bylaw is enacted it will be necessary for an enforcement officer to go behind a sign that allegedly breaches the bylaw (in all but the most blatant cases) to be able to produce evidence (for the purposes of proving beyond reasonable doubt) that there are commercial sexual services that are being advertised by the sign.

- It is not possible to say that a sign advertising commercial sexual services is always going to be offensive, without seeing the sign in question and assessing it in context.

- The RMA has powers to seek enforcement orders and issue abatement notices in relation to activities that are offensive or objectionable, to such an extent that they have (is likely to have) an adverse effect on the environment, and provides an alternative to making a bylaw in relation to enforcing offensive signs.

- The RMA test is also an objective one, but there is case law guidance on assessing offensiveness. The Zdrahal case is an example of the abatement notice power being used to seek removal of offensive swastika signs on a house, and it was made clear in that case that the relevant environment includes not only the physical environment, but also encompasses the social economic, aesthetic and cultural conditions that affect people.

- The advantages of the RMA enforcement order procedure is that the standard of proof is the civil standard of balance of probability (not beyond reasonable doubt); there are wider remedies available than a fine, and an interim enforcement order can be sought. Although with a breach of a bylaw an interim injunction could be sought to prevent an activity continuing, there is no "interim" prosecution available. The advantages of an abatement notice is that there is no need to go to court at all (unless the abatement notice is appealed), and once issued, it is always in force and does not lapse. There is also the option of bringing a prosecution under the RMA.

53. The basis upon which the Council/Committee and Subcommittee had originally envisaged a new bylaw was that it would control signs advertising commercial sexual services because those signs were, in themselves, offensive/would cause serious offence (and is probably the thinking behind the current bylaw). However, Mr Smith's advice is that he doubts it is possible to say that "such a sign advertising commercial sexual services is always going to be offensive, and will be regarded as offensive, without seeing the sign in question and assessing it in context" (see paragraph 32 of Attachment 1).

54. The Committee is aware that there are likely to be less problems with the control of signs that are blatantly offensive, and that it is the "grey" area signs that are the issue. It is clear from Mr Smith's advice that it not possible to be more definitive about the "grey" areas and whether any particular sign is a sign that advertises commercial sexual services and is offensive, cannot be determined without seeing the particular sign in its context.

5 Cont'd

55. This also means that the investigation of any alleged breaches of a bylaw would generally require Council officers to go behind a sign in order to demonstrate that what is advertised is a commercial sexual service (see paragraphs 34-36 of Attachment 1). It may be difficult for the Council's enforcement officers to investigate alleged breaches of the bylaw, and may require that the Council hire private investigators to carry out this work instead.

56. At the November 2008 Council meeting the Council was advised that the reasons the Regulatory and Planning Committee were recommending (contrary to the recommendation of staff) that a bylaw was needed was that because of the provisions remaining in the existing bylaw, that prohibit signage in most of the city, it was hard to know if a nuisance exists, as the current bylaw may be having the effect of controlling the nuisance. The Prostitutes Collective was also approached for their views, and they supported the Council's current provisions, and said they wanted that protection retained. The Committee considered there was a real risk if the bylaw provisions were taken away and there was nothing to control signage.

57. These reasons of the Committee provide some support in identifying that there may be a perceived problem. However, these reasons do not address the second element of the section 155(1) test as to whether a bylaw is the most appropriate way to address the perceived problem. It is suggested that in light of the further advice received from Mr Smith, and the information on the powers under the RMA and the FVPCA set out in this report, that the Committee should now address this matter specifically.

58. The methods by which the Council can address the perceived problem of signs that advertise commercial sexual services that are offensive which, together, appear to be more appropriate than making a bylaw, are:

- The enforcement order and abatement notice powers in the RMA
- Complaints to the Advertising Standards Authority (by the Council or the public)
- Complaints to the Police under the FVPCA.

59. The Council can also take other action in relation to signs and their features (other than the content of the sign), through the City and District Plan provisions. These options are discussed further in the legal considerations section above.

Preferred Option

60. Staff recommend that the Committee recommend the revocation of the existing bylaw (with no replacement bylaw) which is set out as option 4 in the attached options summary. The advantages of this option, as set out in the options summary, compared to the disadvantages of adopting a new bylaw in one of the forms set out in options 1-3 are clear. The advantages and the discussion above also demonstrate that a bylaw is not the most appropriate way to address the perceived problem of signage advertising commercial sexual services.

61. Adopting Option 4 will require that the Committee recommend to the Council that it amend its previous resolutions and determine that under the section 155(1) analysis, the most appropriate way to address the perceived problem is not by way of a bylaw, and that it revoke the current bylaw (and not propose another in its place). The Committee should also ask the Council to note that other enforcement powers, which already exist under the RMA (and the other powers mentioned above), can be used instead, to take action in respect of any offensive signs about which complaints are received.

Commercial Sexual Services Signage Bylaw – Options Summary

The Regulatory and Planning Committee received a report entitled Proposed *Christchurch City Council Commercial Sexual Services Signage Bylaw* 2009 at its meeting of 2 April 2009. It has also now received two letters providing legal advice from Kerry Smith at Buddle Findlay (one considered at the 2 April meeting and one still to be considered). Given the involved nature of this advice it was considered helpful to summarise the main options available to the Committee to control signage advertising commercial sexual services in the light of the advice provided.

In considering the options, the Committee should take into account the four requirements for a valid bylaw as detailed below:

Empowerment: an Act of Parliament must empower the Council to make the bylaw. In other words, the Council must have clear statutory authority to make the proposed bylaw.

Repugnancy: the bylaw must not be repugnant to the general laws of New Zealand. The basic proposition is that delegated legislation must not override primary legislation. With respect to a bylaw, if it were to override another statute or the common law, then the bylaw could be found to be invalid because it is repugnant to the general laws of New Zealand.

Certainty: the bylaw must be certain. There must be adequate information as to the duties of those who are to obey it.

Reasonableness: the bylaw must be reasonable. The reasonableness of any bylaw is a major consideration.

The leading case setting out factors that the courts will consider when assessing the reasonableness of a bylaw is McCarthy v Madden (1914) 33 NZLR 1251. Relevant principles from this case include:

(i) where a bylaw necessarily affects a right common to all citizens, it must be scrutinised with greater care than a bylaw which simply affects the inhabitants of a particular district;
(ii) the reasonableness of the bylaw can only be ascertained in relation to the surrounding facts, including the nature and condition of the locality in which it takes effect, the danger or inconvenience it is designed to remedy, and whether or not public or private rights are unnecessarily or unjustly invaded;
(iii) a bylaw which unnecessarily interferes with a public right without producing a corresponding benefit to the inhabitants of the locality in which it applies must necessarily be unreasonable.

CSS – Commercial Sexual Services

Option	Pros	Cons	Risks
1. Prohibit all signage advertising CSS <u>and</u> that is offensive.	• Avoids the need to distinguish different parts of the city for this purpose.	• Doesn't regulate anything that isn't already covered by other regulation. • Difficulty in enforcement through need to determine that (a) CSS are being offered; and (b) signage is offensive, in the specific context.	• Extensive enforcement work – especially in determining CSS are being offered. • Individual cases where enforcement action has been taken being challenged in court.

Option	Pros	Cons	Risks
		• Unclear for operators about what is/is not allowed – lack of certainty. • Some uncertainty over Council's ability to make a bylaw covering the whole city	• Challenge to bylaw via judicial review
2. Prohibit specific CSS signage content because it is offensive i.e. specify in the bylaw what content on signs advertising CSS is considered to be offensive.	• Simple to understand – certainty provided. • Avoids need to establish offensiveness on a case by case basis. • Avoids the need to distinguish different parts of the city for this purpose.	• Need for Council to determine content that is deemed offensive without considering context – which may not be appropriate legally given the need to consider context in offensiveness "tests" for other statutes. • Difficulty in determining all content that will be offensive in all contexts (particularly graphic images). • Some uncertainty over Council's ability to make a bylaw covering the whole city.	• Risk of bylaw being challenged over content selected for prohibition. • Individual cases where enforcement action has been taken being challenged in court arguing context is necessary.
3. Differential regulation for different parts of the city	• Takes in to account context (to some degree) in determining whether signage advertising CSS is offensive. • Relatively simple to understand.	• Difficulty in determining justifiable basis for areas to regulate • Potential to catch existing signage advertising CSS that does not appear to be causing offence or any significant problems.	• Risk of being challenged on the form of the bylaw **and** the areas selected for inclusion in the bylaw.
4. No bylaw – rely on other regulation of offensive material (i.e. RMA and Advertising Standards)	• Simple from a bylaw perspective. • Easily understood (case law guidance already in the RMA in particular). • No legal risk of challenge to a bylaw. • No need to determine that sign is advertising CSS. • RMA easier for Council to enforce than a bylaw/ - legal tests not the same. • Easier for members of the public to initiate action themselves/ lower expectation of Council taking enforcement action.	• Not able to control signage advertising CSS that is not considered offensive under other regulations/standards. • Some lack of clarity – need to rely on interpretation of Acts and case law. This situation already exists	• Possible public perception that Council is ignoring the issue.

6. PLANNING ADMINISTRATION MONTHLY REPORT (NOVEMBER 2008 TO MAY 2009)

General Manager responsible:	General Manager Regulation and Democracy Services, DDI 941-8462
Officer responsible:	Environmental Policy and Approvals Manager
Author:	John Gibson, Planning Administration Manager

PURPOSE OF REPORT

1. This is the eighth report to the Regulatory and Planning Committee providing information about Resource Consent Applications received and processed by the Planning Administration and Subdivision teams. It contains information for the seven months from November 2008 to May 2009.

2. The report contains the following information:

   - The number of applications processed for the review period and the year to date (**Appendix 1**).
   - Notified and limited notified applications which went to a hearing for a Section 104 decision during the review period (**Appendix 2**).
   - Applications which went to a Hearings Panel for a Section 93/94 decision during the review period (**Appendix 3**).
   - Current appeals (**Appendix 4**).
   - Monthly decision of interest (**Appendix 5**).

EXECUTIVE SUMMARY

3. This report is designed to keep the Regulatory and Planning Committee and Community Boards appraised of Resource Management Act matters and issues actioned by the Environmental Policy and Approvals Unit.

4. It identifies notified and limited notified applications which went to a hearing in the months under review as well as current appeals against decisions made.

5. Feedback on what is included and what the Committee would like to see contained in further reports is welcome.

FINANCIAL IMPLICATIONS

6. Not applicable.

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

7. Not applicable.

LEGAL CONSIDERATIONS

8. The information provided in this report is held as public information. It is readily accessible and not legally privileged.

Have you considered the legal implications of the issue under consideration?

9. Not applicable.

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

10. Not applicable.

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

11. Not applicable.

ALIGNMENT WITH STRATEGIES

12. This report aligns with the Environmental Policy and Approvals Communication Strategy.

Do the recommendations align with the Council's strategies?

13. Not applicable.

CONSULTATION FULFILMENT

14. Not applicable.

STAFF RECOMMENDATION

It is recommended that the Regulatory and Planning Committee **receive** this report for information.