



27. 5. 2004

REPORT OF THE GENERAL MANAGER REGULATION AND DEMOCRACY SERVICES

1. SPECIAL ORDER REVOCATION - NEW BRIGHTON MALL APPEAL - COSTS

Officer responsible City Solutions Manager	Author Aidan Prebble, Solicitor, DDI 941-8581
------------------------------------------------------	---------------------------------------------------------

The purpose of this report is to make recommendations in respect of cost issues that arise from the appeal against the Council's decision partially revoking the special order for New Brighton Mall to allow a slow road.

BACKGROUND

By a decision dated 26 June 2003, the Council resolved to revoke the special order made in 1978 declaring part of New Brighton Road to be a pedestrian mall. The proposal leading up to this decision was the subject of a number of objections. Six objectors appealed the decision to the Environment Court (MIS 023/03 – *S Trayling & Ors v Christchurch City Council*).

The Trayling appeal has been the subject of an earlier report to the Council in respect of opposing an application by the six appellants to be substituted by an incorporated society. The Council resolved to oppose this application for substitution so that it could reserve its position in respect of a costs in the event that the appeals were unsuccessful. By a decision dated 1 December 2003, the Environment Court upheld the Council's opposition and declined to make the substitution on the basis that it was neither necessary nor desirable (see Decision C156/03).

APPEALS

The appeal of Mrs Trayling & Ors was heard by the Environment Court on 4 and 5 May 2004. By a decision dated 17 May 2004, Judge Thompson declined the appeal and confirmed the Council's decision to partially revoke the special order. In particular, the Court held:

"[26] For the reasons we have attempted to summarise, we are in no doubt that our decision should be to confirm the decision of the Council.

Costs

[27] We do not wish to be seen as encouraging any application for costs, given the nature of the dispute. But if there is to be an application it should be lodged within 15 working days of the release of this decision. Any response should be lodged within a further 5 working days."

It is suggested that two things can be taken from the decision. First, the fact that the Court was in no doubt that it should confirm the Council's decision suggests that it did not consider there to be much merit in the appellant's case. Second, notwithstanding this, it does not wish to encourage an application for costs but accepts that in the circumstances of the case one may be made.

Given this, the Council needs to quickly make a decision as to whether or not it wishes to apply for costs against the individual appellants. In this respect, the following comments can be made:

1. The Council's practice is not to seek costs against individual ratepayers who are seeking to exercise their statutory rights to pursue an appeal.
2. This practice has been applied even in cases where an appellant may have pursued an appeal with little or no merit or, in at least one case, where the appellant withdrew the appeal within days of the Environment Court hearing.
3. The main point of difference in this case, recognised at the time that the Council resolved to oppose the substitution of the incorporated society as appellant, is that the costs of the slow road project, including process costs, are to be met by the business owners at New Brighton from a targeted rate.

Ultimately, the issue of whether to pursue an application for costs in this case is a policy decision for the Council. I think it is fair to say that if it was not for the targeted rate, the Council would probably not be looking to pursue costs.

1 Cont'd

If the Council does decide to resolve to apply for costs, then I recommend that this be limited to the costs incurred by external consultants. As I understand the position, not all officer time is to be directly charged to the business owners under the targeted rate. In addition, in some costs decisions, the Environment Court has been reluctant to order contribution towards officer time on the basis that it amounts to time spent by an officer in the course of employment. There are conflicting authorities on this issue.

In this case the external costs are from Mr John Milligan, Barrister, Mr John Long, Retail Consultant, and Mr Antoni Facey, Traffic Engineer. The costs incurred by these consultants are as follows:

		\$
1.	Mr Facey	1,980
2.	Mr Long	12,900
3.	Mr Milligan	3,900
		18,780

COURT'S POWERS TO AWARD COSTS

The Court has a wide discretion to award costs under section 285 of the Resource Management Act. The general principles can be summarised as follows:

1. There is no general practice that costs shall follow the event or be awarded at a scale.
2. The purpose of a costs award is not to penalise an unsuccessful party. It is to provide a reasonable contribution to the costs incurred by a successful party.
3. Although, the Court has on occasion attempted to formulate lists of relevant considerations, they should be treated with caution and the Court should exercise its overall discretion in the circumstances of the particular case.

Often the Court will not award costs in reference proceedings and will generally only award costs in resource consent appeals if an unsuccessful party has conducted itself in a way that caused unnecessary costs to others. Often the determining factors will be issues such as the conduct of the parties, merit, and public interest. It follows that even if costs are sought, they may be declined or an award may be for a nominal figure. Typically an award of costs (in the absence of extraordinary circumstances) is about one third of costs incurred by the successful party.

Even if an award of costs is obtained, issues arise as to whether it will be enforced by the Council if it is not paid by the appellants.

It should also be recognised that the facts of this case are such that any award of costs that may be made by the Court is likely to be at the lower end of the scale – this is so notwithstanding the fact that the appellant's case was not presented as well as it could have been. The Courts traditionally do not seek to make costs awards that would act to discourage residents exercising their rights of appeal in respect of public projects. This has already been signalled by the Judge in his comments in paragraph 27 of the decision quoted above where he has stated that he does not wish to be seen to encourage any application for costs "given the nature of the dispute".

CONCLUSION

The Council's usual practice is not to pursue costs against ratepayers exercising rights of appeal. This case is unusual because the costs of this appeal are to be funded from a targeted rate. The Court does not necessarily award costs to a successful party. Any award of costs is a contribution to costs actually incurred. Usually, this is about one third of actual costs incurred.

CONSIDERED THIS 27TH DAY OF MAY 2004

MAYOR