

General Manager responsible:	General Manager Regulation and Democracy Services
Officer responsible:	Legal Services Manager
Author:	David Rolls, DDI 941-8892

PURPOSES OF REPORT

1. The purposes of this report are:
 - (a) to formally advise the Council that its application to the High Court for an order staying the High Court judgment of 29 July 2005 which quashed Clauses 6 and 7 of the Christchurch City Brothels (Location and Signage) Bylaw 2004 ("the Bylaw") was unsuccessful; and
 - (b) to make the Council aware that notwithstanding that failure it could nevertheless apply to the Court of Appeal for such a stay; and
 - (c) to advise the Council of the prospects of success of such an application; and
 - (d) to request that the Council appoint a subcommittee of Councillors to make any decision which may be required of the Council in relation to the conduct of the appeal against the High Court judgment of 29 July 2005 in the Court of Appeal.

EXECUTIVE SUMMARY

2. On 29 July 2005 Mr Justice Panckhurst delivered a decision in the High Court which quashed Clauses 6 and 7 of the Christchurch City Brothels (Location and Signage) Bylaw 2004 ("the Bylaw"). These clauses had earlier purported to restrict the location of brothels in the city.
3. On 4 August 2004 the Council resolved to appeal that decision to the Court of Appeal. The Council also resolved to apply to the High Court for a stay of that decision of the High Court pending the determination of the appeal by the Court of Appeal.
4. The application for the stay was considered in the High Court by Mr Justice Panckhurst on 20 September 2005. In a decision released on 21 September 2005 His Honour declined to order a stay on the grounds that he did not have jurisdiction to make such an order. He did, however, indicate that if he had found that he had jurisdiction then he would have been minded to grant a partial stay which would have confined all brothels other than small owner operated brothels ("SOOB's") to that area of the central business district of the city which is delineated in the First Schedule to the Bylaw. This, he said, would have reflected his findings in his earlier judgment that that Scheduled Area was not unreasonable except insofar as that it applied to SOOB's.
5. In declining to grant a stay His Honour awarded costs in favour of the Respondents, the Willowford Family Trust and Terry Rex Brown. Those costs have been calculated to be in the order of \$2,755.
6. Although the High Court has declined to grant a stay the Council should be aware that it may nevertheless apply to the Court of Appeal for a stay. A legal opinion, dated 3 August 2005, has been obtained from Simpson Grierson, the Council's legal advisers in this matter, as to the likelihood of the success of such an application. That opinion is attached to this report. It is Simpson Grierson's view that such an application has very little chance of success.
7. Aside from the issue of the stay, there may be matters which could arise in relation to the conduct of the appeal against the High Court judgment of 29 July 2005 which will require a decision of the Council. In the interests of obtaining timely instructions in this regard, it is recommended that the Council appoint a subcommittee of Councillors to make such decisions and to report those decisions to a subsequent meeting of Council.

FINANCIAL AND LEGAL CONSIDERATIONS

8. In their opinion dated 3 August 2005 which was provided to the Council at its meeting on 4 August 2005 Simpson Grierson indicated that in their view an application for a stay of the High Court decision pending the determination of the appeal by the Court of Appeal was unlikely to succeed. This has proved correct.
9. The total external cost incurred by the Council in bringing that stay application is estimated to be in the order of \$10,000. This is comprised of external legal fees of approximately \$7,000, a Filing fee of \$600 which has been paid to the High Court, and costs of approximately \$2,750 which the High Court has ordered the Council to pay to the Respondents, the Willowford Family Trust and Terry Rex Brown, in respect of that failed application. Further, the Council has incurred internal costs by way of staff time in relation to the failed application.
10. Simpson Grierson point out, in the attached opinion, that it is open to the Council to apply directly to the Court of Appeal for a stay of the High Court judgment notwithstanding the High Court having refused such a stay. However, the Council will, in the Court of Appeal, face the same issue regarding jurisdiction to grant a stay. There is a very strong likelihood that the Court of Appeal too will find that it has no jurisdiction to grant a stay. Simpson Grierson also point out that even if the Court of Appeal does find that it has jurisdiction, they doubt that the Court would order a stay based on the merits of the Council's application.
11. In summary, Simpson Grierson make a strong recommendation that the Council not make a fresh application to the Court of Appeal for a stay on the grounds that such application is likely to have little chance of success.
12. It is estimated that the external legal costs of applying to the Court of Appeal for a stay will be in the order of \$5,000 plus GST. A filing fee of \$600 will be payable to the Court of Appeal. There will also be liability for the costs of the Respondents in the event that such application is unsuccessful. These latter costs are likely to be higher than those awarded in the High Court given that the venue is the Court of Appeal.
13. The author of this report fully endorses the advice given to the Council by Simpson Grierson in the attached opinion. Further it is considered that Mr Justice Panckhurst's decision denying the stay is soundly based both in law and in common sense. While not bound by that decision it is highly unlikely that the Court of Appeal would reach a different conclusion. It is the author's view that any application by the Council to the Court of Appeal would be a costly exercise doomed to failure.
14. As matters stand, in the absence of a stay, any person may now operate a brothel anywhere within the city provided that they comply with the requirements of the City Plan.
15. If the Court of Appeal was to reverse the decision of the High Court of 29 July 2005 and uphold the validity of Clauses 6 and 7 of the Bylaw, then any brothel which had opened in the city in the meantime in a location which is contravention of Clauses 6 and 7 would have to close.
16. If the Court of Appeal was to affirm the judgment of the High Court of 29 July 2005 the Council could subsequently amend the Bylaw to provide new location controls on brothels. Provided that those new controls were lawful then any brothel which had, in the meantime, opened and which did not comply with the new location controls, would have to close.

STAFF RECOMMENDATIONS

17. That the Council resolve:
 - (a) Not to apply to the Court of Appeal for a stay of the decision of the High Court of 29 July 2005 which quashed Clauses 6 and 7 of the Christchurch City Brothels (Location and Signage) Bylaw 2004.
 - (b) To appoint a subcommittee of Councillors to make any decision which is required of the Council in the course of pursuing, in the Court of Appeal, the appeal against the High Court judgment of 29 July 2005.