

***Appendix 8.09 – Consultation and the Local Government Act 2002***



**Simpson  
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30 March 2009

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For: Karen Wallace

BY E-MAIL  
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### **Indoor Community Sports Centre: consultation and decision-making process**

1. We refer to your email instructions of 10 and 12 March 2009. You have asked us to review the Council's consultation and decision-making process in relation to the Cobham Drive Park Indoor Community Sports Centre (ICSC) for compliance with the Local Government Act 2002 (LGA). You have also asked whether the Council was legally required to consult on an alternative option to build the ICSC on the Westpac Stadium concourse, and whether the Council's consideration of this option was adequate. Finally you have asked what consultation is required should the Council now decide that its preferred option is an ICSC on the Westpac Stadium concourse.

### **Executive Summary**

2. Based on the documents we have seen, in our opinion the Council's processes have complied with the LGA. Specifically:
  - (a) The Council's options analysis has been appropriate and met the requirements of section 77 LGA;
  - (b) The Council has considered community views at stages of the decision-making process involving the identification of options, assessment of options and development of proposals, and adoption of the proposal to construct the ICSC at Cobham Drive Park. Accordingly we consider the Council has met the requirements of section 78 LGA;
  - (c) While the Council's 2006-16 LTCCP consultation was focussed on the Cobham Drive Park ICSC proposal, we consider adequate consideration has been given to the Westpac Stadium concourse option both before and as part of that LTCCP consultation;
  - (d) We consider the Council's 2006-16 LTCCP documentation in relation to the Cobham Drive Park ICSC proposal met the specific requirements in sections 84 and 89 of the LGA; and

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- (e) We do not consider increases in the scale and cost of the Cobham Drive Park ICSC since the draft and final versions of the 2006-16 LTCCP require the Council to consult further before constructing the ICSC as currently envisaged.
- (f) If the Council were now to decide that its favoured option was to construct the ICSC on the Westpac Stadium concourse, we consider a fresh special consultative procedure meeting the requirements of sections 97 and 84(3) would be required.

## Background

3. The two key documents we have seen which explain the consultation and decision-making process followed by the Council are the reports to the Strategy & Policy (S&P) Committee dated 1 March 2006 and 21 June 2006. We have also considered extracts from the draft 2005-2006 Annual Plan, the statement of proposal relating to the ICSC in the draft 2006-2016 LTCCP, and the summary of information brochure relating to that proposal. We have reviewed a folio of documents provided by Tim Harrod on 20 March which includes reports and papers dating back to November 2000, and the submission and engagement responses on preliminary design (for the resource consent application). Based on these documents we set out the key facts for present purposes:

- The Council's decision-making process in relation to an ICSC dates back at least to 2001, when it provided a grant to Sport Wellington Region for a needs assessment for an indoor multi-sport facility;
- A subsequent report by Global Leisure Group recommended the construction of a 14 court indoor facility on railway land north of the Westpac Stadium, but this option was rejected by the Council's Community, Health and Recreation Committee as too expensive;
- In July 2002 a proposal for a 12 court indoor facility on the Westpac Stadium concourse was presented to the Council, and the following year the Council approved funding to conduct additional planning and feasibility work in relation to that facility;
- The Council consulted on a proposal for an ICSC in its draft 2004-05 Annual Plan;
- The draft 2005-06 Annual Plan included information about the proposal to build the ICSC on the Westpac Stadium concourse;
- Following its formation in June 2005 the Council's Indoor Stadium Working Group analysed various options for an indoor stadium and concluded that Cobham Drive Park was the preferred site;
- A summary of the Working Group's assessment of six potential sites (Haitaitai Park, north of Westpac Stadium, Westpac Stadium concourse, Rongotai College exhibition ground, Dance and Drama Centre, and Cobham Drive Park) against ten criteria was included in the S&P Committee report dated 1 March 2006;

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- That report noted that the proposal to construct an ICSC involved construction of a significant activity and a "strategic asset";
  - The report recommended that a proposal to establish an ICSC at Cobham Drive Park be included in the draft 2006-16 LTCCP, and a proposal to construct an 8 court facility was included within that document;
  - On 21 June 2006 the S&P Committee recommended to the Council that it proceed to develop a 12 court ICSC at Cobham Drive Park;
  - The adopted 2006 – 16 LTCCP refers to the Council's commitment to build a 12 court ICSC at Cobham Drive Park with an estimated capital cost of \$40 million.

#### Local Government Act requirements

4. The Council's decision to proceed with the Cobham Drive Park ICSC was required to comply with the *decision-making* requirements set out in Part 6, Subpart 1 of the LGA. In particular it had to be made in accordance with such of sections 77, 78, 80, 81 and 82 as were applicable. For present purposes the most relevant requirements were those in:
  - (a) section 77, namely to identify and assess all reasonably practical options for achieving the objective of the decision; and
  - (b) section 78, namely to consider, at the four stages of the decision-making process identified in section 78(2), the views and preferences of persons likely to be affected by or have an interest in the matter.
5. Section 79 states that it is the Council's responsibility to make judgments as to how to achieve compliance with section 77 and 78 that is largely in proportion to the significance of the matters affected by the decision. Throughout the decision-making process it appears that the Council accepted that the proposal to construct an ICSC was a "significant" matter.
6. The importance of compliance with sections 77 and 78, particularly where the matter in question involves a high degree of significance, was recently emphasised in *Council of Social Services in Christchurch v Christchurch City Council* (unreported, HC Christchurch, Chisholm J, 25 November 2008) in which the Court considered a challenge to the Christchurch City Council's decision to increase rents on its city housing portfolio by 24%. The Court granted the judicial review application and concluded that the Council had:
  - (a) Failed to properly assess the significance of its decision to increase rents by 24%;
  - (b) Failed to properly consider the implications of one of the reasonably practicable options for achieving the objective i.e. Government funding;
  - (c) Failed to give proper consideration to the views and preferences of its tenants (who were interested or affected persons for the purposes of section 78) at all four stages of the decision-making process.

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7. In the COSS case Chisholm J concluded that the requirements of section 78 had to be rigorously applied at all four stages of the decision-making process identified in section 78(2), due to the significance of the decision in question. On that basis it is possible that the Council, in the event of judicial review proceedings challenging its consultation and decision-making process in relation to the ICSC, would need to demonstrate that it considered community views at all four stages envisaged in section 78(2): i.e. when the problem and objective were defined, when options were identified, when options were assessed and proposals developed, and when the proposal was adopted.
8. Wellington City Council also concluded throughout its decision-making process that the proposed ICSC would be a strategic asset for the purposes of section 97. That created additional obligations in terms of the consultation process to be followed before a decision could be made. Under section 97(2), a council must not make a decision to which section 97 applies, including construction of a strategic asset, unless:
- (a) *the decision is explicitly provided for in the council's long-term council community plan; and*
  - (b) *the proposal to provide for the decision was included in a statement of proposal prepared under section 84.*
9. Section 84(3) states that a statement of proposal which relates to a section 97 decision must include:
- (a) *the details of the proposal; and*
  - (b) *the reasons for the proposal; and*
  - (c) *an analysis of the reasonably practicable options, including the proposal, identified under section 77(1). . .*
10. In addition, section 89 of the LGA states that a summary of the information contained in a statement of proposal must:
- (a) *be a fair representation of the major matters in the statement of proposal; and*
  - (b) *be in a form determined by the local authority; and*
  - (c) *be distributed as widely as reasonably practicable (in such manner as is determined appropriate by the local authority, having regard to the matter to which the proposal relates) as a basis for general consultation; and*
  - (d) *indicate where the statement of proposal may be inspected, and how a copy may be obtained; and*
  - (e) *state the period within which submissions on the proposal may be made to the local authority.*

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## Issues

11. We consider the six key issues for present purposes to be:
- (a) Did the Council's options analysis meet the requirements of section 77?
  - (b) Did the Council's consideration of community views meet the requirements of section 78?
  - (c) Was the Council required to consult specifically on the Westpac Stadium concourse option, or was the 2006-16 LTCCP consultation focussed on the Cobham Drive Park ICSC sufficient?
  - (d) Did the Council's consultation as part of the 2006-16 LTCCP process meet the relevant LGA requirements, particularly those in sections 84 and 89?
  - (e) If the Council intends to proceed with construction of a 12 court facility at Cobham Drive at a total capital cost of approximately \$46 million, is its existing consultation on the Cobham Drive Park ICSC sufficient, given changes to the scope and cost of the project as set out in the draft and final 2006-16 LTCCP?
  - (f) Would further consultation be required if the Council now determined that it favoured an ICSC on the Westpac Stadium concourse?
12. We address each issue in turn.

### Issue 1: Compliance with section 77

13. The documents we have seen show that the Council has since 2002 considered a number of different options for the ICSC. The extent of its options analysis is most clearly set out in the S&P Committee report dated 1 March 2006. Whilst the ten criteria against which the six possible locations for the ICSC were assessed do not entirely match the various matters referred to in section 77(1)(b) of the Act, in our view the Council's options analysis supports the broad conclusion that each of those matters was considered. In particular we note the Committee's extensive consideration of the costs and benefits of the different options, and the extent to which community outcomes would be promoted or achieved.
14. Our view is therefore that the risk of non-compliance against section 77 of the LGA is low.

### Issue 2: Compliance with section 78

15. We have now seen documents which relate to the first stage of the decision-making process set out in section 78(2)(a), namely the stage at which problems and objectives related to the matter are defined. The issue appears to have been drawn to the Council's attention by external parties identifying that Wellington lacks a major indoor sports venue. In the COSS decision the Court criticised Christchurch City Council for too narrowly defining the objective of its decision-making process, with the result that it excluded a relevant option from consideration. We doubt that a similar criticism could be made in this case. By March and June 2006 the S&P Committee reports imply that the objective of the Council's decision-making process was to identify whether an

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ICSC should be built, and if so, to determine its most appropriate location and configuration. It would have been helpful had the reports been more explicit as to the wider objective of the Council's decision-making process.<sup>1</sup> However, the earlier dealings on the issue from late 2000 onwards generally refer to the issue being the lack of a large indoor sports venue for Wellington. From our consideration of the reports, we do not consider the council ruled out any reasonably practicable options due to the way it framed the objective to be achieved.

16. We note that the March 2006 report to the S&P Committee identified the views of some interested and affected parties in relation to the two main alternative sites, Cobham Drive Park and the Westpac Stadium concourse, through its survey of schools. It also noted Netball Wellington's support for a facility, without preference as to location. The report also referred to officer engagement with "sports codes" generally in relation to design and planning of the facility.
17. In March-April 2006 the S&P Committee and the Council decided on its preferred option (an eight court facility located at Cobham Drive Park) for inclusion in the draft LTCCP. In our view this was entirely appropriate, as a proposal under the LGA tends, by its very nature, to be a preferred option which is advanced by the Council for consultation. A statement of proposal does not, in general, need to include a summary of the various alternative options considered by the Council before its preferred option was chosen. An exception is where the decision to be made relates to a strategic asset. In that event, section 97(2) dictates that the statement of proposal must be prepared under section 84, and meet the requirements of section 84(3) noted in paragraph 9 above.
18. Accordingly, the Council was required to set out the details of its proposal (the eight court facility located at Cobham Drive Park), the reasons for that proposal and an analysis of reasonably practicable options (essentially, alternative locations and configurations for the ICSC). We have considered the statement of proposal that was included as an appendix to the draft 2006-16 LTCCP. In our view it was robust and met the requirements of section 84(3) noted in paragraph 9 above.
19. We have also seen the Council brochure entitled "Indoor Community Sports Centre – Have Your Say". The document identified itself as a summary of information of a statement of proposal as required by section 89 of the LGA. It clearly identified "the proposal" as "to build an indoor community sports centre at Cobham Drive Park in Kilbirnie". It also identified other options (in terms of site and facility configurations) that had been considered. The alternative sites identified were the railway land north of Westpac Stadium, Westpac Stadium concourse, Cobham Drive, the National Dance & Drama Centre site, Haitaitai Park, and an exhibition ground at Rongotai College. The same passage in the brochure summarised the advantages of the Cobham Drive Park site. In our view that document met the requirements for a summary of information set out in section 89 of the LGA noted in paragraph 10 above.
20. We also note that the 21 June 2006 report to the S&P Committee identified "*a preference for the Westpac Stadium site*", and "*location*" more generally, as key issues that had been raised in submissions. This suggests that submitters were aware of the alternative options, and took the opportunity to comment on them.

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<sup>1</sup> The statement of proposal in the draft 2006-16 LTCCP stated that the objective of the proposal was to "provide an indoor multi sport facility".

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21. We consider the March and June 2006 reports to the S&P Committee demonstrate reasonable compliance with the requirement to consider community views at the second and third stages of the decision-making process identified in section 78(2) i.e. the identification of reasonably practicable options, and the stage at which those options were assessed and proposals developed. The consideration of submissions received during the special consultative procedure as part of the 2006-16 LTCCP process, in our view satisfied the requirement to consider community views at the fourth stage identified in section 78(2), being the stage at which proposals were adopted.
22. Our view is that the Council's consideration of community views satisfied the requirements of section 78 of the LGA.

**Issue 3: Was the Council required to consult specifically on the Westpac Stadium concourse option?**

23. The Council did consult on the Westpac Stadium concourse proposal as part of the 2004-05 and 2005-06 Annual Plans: while this option was also discussed in the statement of proposal for the Cobham Drive Park ICSC included in the draft 2006-16 LTCCP. In our view no further consultation in relation to the Westpac Stadium concourse option was legally required.

**Issue 4: Did the Council's consultation as part of the 2006-16 LTCCP process meet the relevant LGA requirements?**

24. In our view the answer to this question is yes. In particular, as noted in paragraphs 18 and 19 above, we consider the requirements of sections 84 and 89 were met.

**Issue 5: Is the Council's consultation adequate given subsequent changes to the project?**

25. In our view, it is necessary to consider:
- (a) The change between the proposal included in the draft 2006-16 LTCCP, and the proposal adopted by the Council at the end of the LTCCP process;
  - (b) The change between the proposal adopted in the 2006-16 LTCCP and the facility the Council now intends to construct.
26. It is implicit in the special consultative procedure (**SCP**) process that the proposal as confirmed following consultation may be different from that which was put out for consultation. However, in order not to offend against the rule that submitters be fairly informed of the proposal, there are obviously limits to the extent to which changes can be made without recommencing the consultation process from the beginning. In our view two rules can be identified:
- (a) The proposal as confirmed must be within the scope of the proposal as put out for consultation;
  - (b) Any change must fairly arise out of the submissions which have been received, or any relevant change in circumstances. The expectation is that the Council will not approve a different proposal (even one within the original scope) unless the reconsideration has been triggered by submissions which

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have been received, or is the result of some external change of circumstances which affects the original proposal.

27. Whether a decision falls within or outside the scope of a proposal is a question of degree. On the one hand, a decision can take a different approach to the Council's proposal on an issue that is "at large" during the consultation process. On the other hand, the Council cannot decide to do something which is fundamentally different in nature from the original statement of proposal. One rule of thumb is to ask whether the change could be seen as a reasonably foreseeable outcome of the consultation process.
28. Applying these principles, in our view the change from an eight court facility to a twelve court facility was not so significant as to be beyond the Council's ability to make as part of the 2006 LTCCP process. We note paragraph 4.3 of the S&P report dated 21 June 2006 refers to submissions expressing our preference for twelve courts rather than eight courts: accordingly, the decision in favour of the larger twelve court facility was within the scope of submissions. We note also that there was a substantial analysis of the cost of an eight court facility and a twelve court facility in the June 2006 S&P Committee report both in terms of capital cost and ongoing operating expenditure. The differences between the two options were not in our view significant.
29. We must also consider the differences between the scope of the proposal adopted as part of the 2006-16 LTCCP and the present proposal. You have advised that the latest cost projections for the ICSC are for capital expenditure of approximately \$46 million, as compared to \$40.434 million for construction identified in the June 2006 S&P Committee Report. For operating expenditure, the 2006-2016 LTCCP anticipated operating expenditure of \$4.463 million in the ICSC's first full year of operation, whereas the draft 2009 LTCCP identifies operating expenditure of \$5.1 million in its first full year of operation. In our view, these costs increases are not significant given the time that has elapsed since the 2006 decisions, and would not require the Council to undertake a further specific consultation process. In any event, these amended costs will be included in the draft 2009 LTCCP, and to that extent will be consulted on shortly.

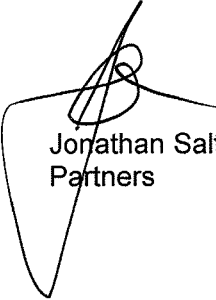
#### **Issue 6: Consultation if Council now favours the Westpac Stadium concourse**

30. We address this issue only briefly, as we understand the scenario to be only hypothetical at this stage. In our view the Council could not rely on its existing consultation if it were now to decide that it favoured an ICSC on the Westpac Stadium concourse. If the issue were merely one of location and the financial impact was identical as between the two options both of which would deliver identical levels of service, then an argument could be made that no further LGA consultation was required. However, if, as we understand, the two options are **not** literally "like for like" in terms of cost and specification, then further consultation would be appropriate before the Council could depart from its current proposal. Given that the Council has always regarded the ICSC as a significant activity and strategic asset, section 97 would apply to the decision to construct the ICSC on the Westpac Stadium concourse, in turn requiring a fresh statement of proposal in the LTCCP meeting the requirements of section 84(3).

**Next Steps**

31. Having reviewed the additional material, this opinion may now be regarded as our concluded view. Please do not hesitate to let us know if we can provide any further clarification if that would be helpful.

Yours faithfully  
SIMPSON GRIERSON



Jonathan Salter / Padraig McNamara  
Partners