

## **Appendix 3 to Telecommunications Facilities, Morphettville (GC131015R01)**

This appendix to the Telecommunications Facilities, Morphettville Council (GC131015R01) report contains legal advice regarding the appeal in the Environmental, Resource Development Court regarding 142 Morphett Road and therefore contains confidential information

### **RECOMMENDATIONS (1)**

### **DUE DATES**

#### **That Council:**

- 1. In accordance with Section 91(7) and (9) of the Local Government Act 1999 the Council orders that appendix 3 the report Telecommunications Facilities, Morphettville (GC131015R01) be reviewed and considered in confidence under Section 90(3) (h) of the Act, except when required to effect or comply with Council's resolution(s) regarding this matter, be kept confidential and not available for public inspection for a period of 12 months from the date of this meeting. This confidentiality order will be reviewed at the General Council Meeting in December 2015**

**13 Oct 2015**

#### **Environment, Resources and Development (ERD) Court consideration**

If the telecommunications facility does not proceed at Kellett Reserve, Telstra have previously advised that they will proceed with an appeal through the ERD Court for their development application at 142 Morphett Road, Glengowrie (Development Application 100/376/2014 ERD-14-318). The appeal is scheduled to commence on 30 November 2015.

Advice has been sought from Norman Waterhouse Lawyers regarding:

- a) The likelihood of the Council successfully defending its decision for refusal at this site; and
- b) The anticipated cost to Council to defend the Council's decision.

#### **Likelihood of Success**

Since the early 1990s, there have been in the order of 25 planning appeals/cases involving telecommunications facilities. Of these 25 or so cases, there appears to be only two cases (in 2004 and 2005) where a Council has been successful in defending its decision to refuse to grant Development Plan Consent to a telecommunications facility. To the best of our knowledge, there have been no cases since 2005 where a Council has been successful.

In 2007, the Supreme Court issued a judgement ([2007] SASC 216) which offered a rationale for the assessment of telecommunications facilities, which has generally been adopted by recent decisions before the ERD Court. The following extracts of the judgement in relation to visual impact and the role of alternative sites are of note:

*"The function of this part of the Development Plan is to ensure not only that the technological requirements for delivery of the service can be satisfied by a particular installation but that they can be satisfied in a way which minimises what are assumed to be adverse effects on the visual amenity of the locality. It is not a matter of balancing the facility need with the environmental effects and then deciding whether the facility should be installed."*

*The provisions of the Development Plan relating to telecommunications facilities are not cast in the form of weighing that need against any other objectives or principles of the Plan... It recognises and assumes that telecommunications facilities will have a detrimental effect on visual amenity.*

*...To the extent that a planning authority must ensure that the installation of a proposed facility will minimise the effect on the environment, the planning authority will need to consider, where alternative sites or low-impact facilities are suggested, whether that minimisation can be better achieved by installation of a facility at some other preferred site. But it will also need to consider whether that possible preferred site will meet the facility demand. If it will not, it may be discarded. There may be other reasons why a particular alternative site is inappropriate or impracticable."*

The identification of a possible alternative site for the telecommunications facility will be an integral part of the ERD Court's consideration of the appeal. If it can be demonstrated that alternative sites are not viable due to poor likelihood of tenure, reduced technical outcomes, maintenance/access restraints, etc., this is likely to be advantageous to Telstra's appeal.

As part of Council staff's assessment the telecommunications facility at 142 Morphett Road in 2014, the site at Kellett Reserve was identified as a potential alternative site where:

- a) visual impact would be minimised; and
- b) the technical requirements of Telstra would be satisfied.

Development application 100/208/2015 for a telecommunications facility at Kellett Reserve has been granted Development Plan Consent by Council's Development Assessment Panel, which demonstrates that this site sufficiently complies with the relevant provisions of the Development Plan. If the Council resolves to not grant a commercial lease to Telstra for Kellett Reserve, this site would be discarded from the potential alternative sites considered by the ERD Court. This would further diminish Council's chances of successfully asserting that other alternative sites are viable.

In relation to the site at 142 Morphett Road, Glengowrie, Norman Waterhouse Lawyers have advised Administration staff that:

*"...if the Council is to have any chance of successfully defending its decision in this case, it will need to call expert evidence from a radio frequency/electronics engineer who can provide evidence that there is a reasonably practicable alternative site where this proposed facility can be located which will still meet the facility demands of Telstra that will also result in the effect of the facility on the environment being minimised. In the absence of any such evidence being called, the Council has very little chance of successfully defending its decision in my opinion."*

### **Anticipated Cost**

It is estimated that the Council's legal costs in defending the decision before the ERD Court would be approximately \$20,000, excluding GST. This approach would involve engaging a member of the bar to represent Council, with Norman Waterhouse Lawyers acting as instructing solicitor.

Additionally, the Council must call expert evidence to support its decision. A Council (Development Officer – Planning) would give town planning evidence on the Council's behalf, and another officer of the Council would be able to assist the Court concerning alternative sites. However, as outlined above, Council's legal counsel have recommended that the Council also engage a radio frequency/electronics engineer to act as an expert witness for the Council.

It has been estimated that it would cost the Council approximately \$15,000, excluding GST, to engage a radio frequency/electronics engineer to act as an expert witness for the Council.

As such, the anticipated total cost to Council to defend its decision before the ERD Court would be as follows:

	<b>Cost</b>	<b>GST</b>
Legal counsel	20,000	2,000
Radio frequency engineer	15,000	1,500
Legal costs already incurred	7,000	700
<b>Total (\$46,200)</b>	<b>42,000</b>	<b>4,200</b>

### **Summary**

The Council would need to spend approximately \$46,200 in legal costs and expert witness fees to defend Council's decision for refusal at 142 Morphett Road, Glengowrie, before the ERD Court. If Council did not engage a radio frequency engineer, the cost would be reduced to approximately \$29,700.

Based on the outcome of similar appeals before the ERD Court in recent years, Council would appear to have little chance of successfully defending the appeal.

The ERD Court will consider whether the visual impact of the telecommunications facility at 142 Morphett Road, Glengowrie, has been sufficiently *minimised*. In considering minimising the effect on the environment, the Court will also consider whether minimisation can be better achieved by the installation of a facility at other possible sites. However, alternative sites will need to meet the facility demand and if they do not, they may be discarded from the search. If the Council does not engage its own radio frequency/electronics engineer as an expert witness, the Court is likely to accept the advice of Telstra's engineer in relation to the technical viability of alternative sites.

As such, the Council's chance of successfully defending its decision for refusal is likely to be further diminished if it does not engage a radio frequency/electronics engineer (provided of course that the engineer supports the Council's case, which is unknown at this stage).

To Administration staff's knowledge, there have been no cases before the ERD Court where a Council has provided expert evidence from a radio frequency/electronics engineer. As such, even if the Council did engage a radio frequency/electronics engineer, the likelihood of success is still unknown.