

PUBLIC EXCLUDED REPORT

TO: Chief Executive
FOR: Council Meeting – 13 December 2017
FROM: Property & Commercial Manager
DATE: 12 December 2017
SUBJECT: **SELWYN HUTS UPDATE**

1. RECOMMENDATION

“That in regards to the Upper Selwyn Huts licences that the following occurs:

- (a) That the Council appoints a Committee to engage with the Upper Selwyn Huts community to develop a plan regarding the future residential occupancy of the Upper Selwyn Huts Reserve;**
- (b) That the plan be prepared in conjunction with Environment Canterbury, Department of Conservation, Taumutu Runanga and Ngai Tahu to ensure consistency with arrangements that those authorities are obliged to undertake related to the Lake Ellesmere environment;**
- (c) That the Chief Executive is authorised to obtain from the appropriate authority an extension to the Upper Selwyn Huts waste water consent that expires in June 2020 until a time consistent with the waste water consent that exists for the Lower Selwyn Huts;**
- (d) That these decisions are communicated to the Upper Selwyn Huts community.**

2. PUBLIC EXCLUDED REASONING

This report is excluded for the following reasons provided for under Section 7 of the Local Government Official Information and Meetings Act (LGOIMA):

- (a) Maintain legal professional privilege.**

3. PURPOSE

To allow the Council to discuss the preparation of a plan for the Upper Selwyn Huts.

4. SIGNIFICANCE ASSESSMENT/COMPLIANCE STATEMENT

This report is deemed to have a low significance assessment for Council activity.

5. HISTORY/BACKGROUND

Council is well aware that the Upper Selwyn Huts community occupies a Council reserve by way of a licence. This licence arrangement expires in June 2020 which is the same time the waste water consent for the waste water treatment plant also expires. In recent times Council staff have been questioned over whether the Council is likely to extend the licence and they have not been able to confirm whether the licence will or will not be extended.

Licensees have an investment at the huts by virtue of the structure that they own and which occupies an area of approximately 202 square metres on the Upper Selwyn Huts reserves and to which they are licenced to occupy.

Questions in recent years have indicated that climate change and associated environmental impacts may make occupation by communities such as the Upper Selwyn Huts challenging long term.

In a recent workshop discussion staff indicated that some form of licence extension needed to be given beyond June 2020 as it would be unreasonable to discontinue licences in such a short timeframe. They proposed that an extension of a minimum to 2024 be allowed if an extension in the waste water consent could be obtained from Environment Canterbury until that date.

2024 was selected as this also linked to the Lower Selwyn Huts waste water consent expiry date and thus logically meant the two communities have been dealt with in a similar manner.

Each licensee's investment in their structure is on average in the region of \$100,000. Not allowing the licensee to write off that investment over an appropriate time frame could be seen as unreasonable.

Councillors indicated they wished to receive legal advice on their ability to not extend hut licences beyond June 2020. Part of the reason for this is that a number of Councillors felt that the licence expiry of June 2020 already gave that signal while other Councillors would be mindful that any investment in waste water treatment and disposal at the huts to extend the future residency would be expensive.

6. PROPOSAL

Staff have sought legal advice and that is attached to this report. The recommendation from the legal advice is that Council must proceed with caution and take into account a variety of issues which are identified in the advice.

It should be noted that the issue of licence continuity beyond 2020 has been discussed in a number of forums in recent years but it would be better if a plan was developed in conjunction with the Upper Selwyn Huts and wider Selwyn district community.

7. LEGAL IMPLICATIONS

Copy of the most recent legal advice is attached.



DOUGLAS MARSHALL

MANAGER PROPERTY & COMMERCIAL

12 December 2017

To
Douglas Marshall
Selwyn District Council
PO Box 90
Rolleston 7643

From
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Mark Odlin

By Email
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Dear Douglas

Selwyn Huts - Licences

1. We refer to our recent discussions regarding the above matter.
2. Our understanding of the background is as follows:
 - (a) The Council administers several hut settlements in the district, including the Upper Selwyn Huts (the "**Huts**"). The Huts have been in existence since at least the 1920's. There are approximately 97 dwellings.
 - (b) Rights to occupy the huts are granted by the Council by way of written Deeds of Licence (the "**Licences**"). The Licences have fixed terms and, generally speaking, provision for renewals. Occupants under the Licences own their own improvements.
 - (c) The Huts have a wastewater scheme (the "**Scheme**") which operates under a resource consent from the Canterbury Regional Council which will expire in 2020 (the "**Consent**"). The current Licences will expire on or before the expiry of the Consent.
3. You have asked for our views on the following matters:
 - (a) The feasibility of refusing to renew the Licences.
 - (b) The feasibility of renewing the Licences for a lesser term, so that the expiry of the Licences would align with an extended Consent term, or renewing conditional upon obtaining an extended Consent term.
 - (c) The feasibility of withdrawing wastewater services to the Huts.
4. We note that, in keeping with our instructions, our advice is high-level only, and our views are accordingly tentative and preliminary.

The feasibility of refusing to renew the Licences

5. Although the Council is working towards a consistent form of Licence, there are a number of different forms in place at the moment.
6. We understand that the current Licences generally contain a five year term and, in some (but possibly not all) cases, contain a right of renewal with no absolute right to a further licence. On the face of the renewal language that we have seen, it is open to Council to simply refuse to enter a new licence on the final expiry date.¹
7. Obviously though, the occupants may prove resistant, and we note the following potential legal arguments they could pursue:
 - (a) An argument based on the interpretation of the Licence documentation – most likely that the Licences were intended to be continuously renewable (potentially perpetually). This argument may be tenable, notwithstanding the lack of an express covenant to support it, if the renewal provisions were seen to be coloured by the context of a practice of continuous renewal over a significant length of time.
 - (b) Relief under the Property Law Act 2007 against a refusal to renew or enter into a new licence. While this provision applies to licences, and an application to Court could accordingly be made, it would seem difficult to rely upon in circumstances where there is neither an unequivocal and mandatory covenant from the Council nor a refusal to renew based upon a breach of the licence.
 - (c) An argument that, due to previous comments made and/or actions performed on Council's behalf, it should be prevented from changing a practice or policy. Such an argument might be based on estoppel or 'legitimate expectation'.
 - (d) There will also be, as always, the possibility of the Council's procedures and decision-making being judicially reviewed. Any decision not to renew would need to be rigorous in terms of decision-making and consultation for the purposes of the Local Government Act 2002 (the "LGA"), and that the Council be seen to have acted fairly and reasonably. We would have some concerns in this context that:
 - (i) Any decision not to renew the Licences might be characterised as a decision to change the purpose for which the land is held and disestablish the Huts. To cite the lack of an express contractual obligation to renew the Licences as the basis for a decision might be seen as the 'cart driving the horse' on the basis that the wider issue is the continued existence of an established community.
 - (ii) Any related funding decision would need to be given its own due and proper consideration (acknowledging that these decisions are interrelated).

¹ We note that at least some forms of the Licences have explicit 'holding over' provisions, setting out basic terms if the Council allows occupancy past the final expiry (i.e. terminable at will on one month's notice). Any such requirements as to notice periods would, of course, have to be complied with.

- (e) An argument that a refusal to renew amounts to a compulsory acquisition of an interest for a public work (i.e. flood protection or similar), entitling the occupants to compensation. Such an argument is a theoretical possibility, but would face significant difficulties.
8. The above arguments have varying degrees of substantive merit but at the very least they could be used, potentially collectively, to delay or wear down an intention not to renew. There is also, of course, the media pressure that will be brought to bear in circumstances of this nature. As you will be aware, similar circumstances have plagued other public bodies, often resulting in impasse.²

The feasibility of renewing the Licences for a lesser term, or conditional upon extending Consent

9. In our view, it is open to the Council to renew the Licences conditional upon obtaining an extended Consent. Any such course of action will, however, remain subject to equivalent potential issues as those raised above – albeit softened in reflection of the interim nature of such a decision.
10. However, a course of action along these lines would seem on the face of it to be more reasonable and straightforward to justify in the circumstances (and therefore more defensible) than a decision not to renew.
11. We question in passing if there has been any consideration given as yet to alternative technical solutions, if any exist (i.e. individual 'composting toilets' or some alternative collective solution). If feasible a further option might be issuing new licences subject to the licensees' employment of such systems.

Whether the Council could withdraw wastewater services to the Huts

12. As you will be aware, the LGA contains express obligations on the Council in relation to wastewater services. Specifically, section 130(2) of the LGA provides that the Council must continue to provide such services.
13. However, where it is *"no longer appropriate to maintain"* such a service it may be closed down (or transferred to a community entity) under (and subject to) the provisions of sections 131 to 135. On the face of it, it would seem that the present circumstances are such a situation.
14. Sections 131 and 134 of the LGA set out specific requirements for closure, which include:
- (a) That there be 200 or fewer persons served who are *"ordinarily resident in the district, region, or other subdivision"*. It would seem initially plausible that the present situation meets this requirement, on the basis that permanent residents are fewer than 200.
 - (b) In any event, the proposal will need to be supported by 75% or more of votes cast in a binding referendum of those served. Presumably the possibility exists that this could be satisfied on the basis that the alternative will involve the passing on of potentially prohibitive costs relating to the wastewater system.

² Or, where feasible, a decision to 'freehold' so as to remove the problem, such as occurred with the Rakaia Huts.

- (c) Consideration of likely health, environmental and private cost implications of closing the service. Presumably the argument would be that these would be satisfactorily mitigated by closure of the Huts themselves.

15. Overall, closure may be possible, contingent on obtaining buy-in from Licensees.

Recommendations

- 16. We recommend that the Council proceed with extreme caution. The renewal or non-renewal of Licences is likely to be an emotive issue for the residents and hut owners concerned. As discussed, abrupt or unforeshadowed changes in direction are potentially risky and vulnerable to challenge. Rather, we think that the Council should "lead" the Selwyn Huts community in relation to short, medium and long term objectives, expenditure and management.
- 17. Once a plan has been made and consulted on, the Council should take care to ensure that it is clearly communicated to current and future stakeholders. This communication could be achieved by a number of means, including:
 - (a) ensuring that all relevant property files are noted with a reference to the management plan;
 - (b) appropriate passages in the Long Term Plan and relevant Infrastructure Plans; and
 - (c) holding regular public meetings.
- 18. Please do not hesitate to telephone if you wish to discuss.

Yours sincerely



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