

30 August 2008

ACT Planning and Land Authority  
PO Box 365  
MITCHELL ACT 2911

By Facsimile: (02) 6207 6258

**Development Application No 200704152**

**Block 1671, Tuggeranong**

Dear Sirs,

We refer to the above matter and confirm we act for Canberrans for Power Station Relocation (CPR) Inc, an objector to the subject application.

Further to the material already submitted by our client in relation to this application, we **enclose** a legal opinion from Mr David Mossop of counsel, which goes to the lawfulness of the proposed development.

We note that this opinion is concerned with questions of law surrounding the use of the subject land and is not concerned with claims about impacts to amenity etc. As such, we anticipate no obstacles to the Authority having regard to this opinion outside the relevant notification period.

Please confirm receipt in writing at your earliest convenience.

Should you have any questions in relation to the above please do not hesitate to contact the writer on (02) 6247 6077.

Yours faithfully,

J.S. O'Connor Harris & Co.

*Per Mark Popplewell.*

25 August 2008

**RE: DEVELOPMENT PROPOSED ON BLOCK 1671  
TUGGERANONG**

**OPINION**

**SOLICITORS:**

**O'CONNOR HARRIS**

**DX 5617 CANBERRA**

**RE: DEVELOPMENT PROPOSED  
ON BLOCK 1671 TUGGERANONG**

**OPINION**

1. My instructing solicitors act for Canberrans for Power Station Relocation (CPR) Inc ("**CPR**").
2. CPR is a community group concerned with a proposal to build what are described as "data centres" on part of block 1671 Tuggeranong. That proposed site is located between Mugga Lane, the Monaro Highway, the Wanniasa Hills Nature Reserve and the suburb of Macarthur.
3. I have been briefed with:
  - a. Development application 200704152 dated 26 February 2008;
  - b. ActewAGL Preliminary Assessment for Canberra Technology City, Part Block 1671 Tuggeranong District, 26 February 2008;
  - c. Alteration of development application pursuant to s 226(7) of the *Land (Planning and Environment) Act* 1991 dated 3 May 2008;
  - d. Statement of reasons by Paul Nicholas Lees, Manager Development Assessment (North and Estates), Development Services, ACT Planning and Land Authority dated 15 July 2008;
  - e. ActewAGL Preliminary Assessment for Canberra Technology City, Part Block 1671 Tuggeranong District, 3 June 2008 ("**Preliminary Assessment**");
  - f. ActewAGL Design Response Report Canberra Technology City Part Block 1671 Tuggeranong District, 3 June 2008 ("**Design Response Report**");
  - g. Evaluation of Preliminary Assessment by the ACT Planning and Land Authority dated August 2008;

4. I am asked for my opinion on the following questions:
- a. is the component of the development in development application 20074152 that is described as “data centres” properly characterised as a “communications facility” for the purposes of the Territory Plan made under the *Land (Planning and Environment) Act 1991* (repealed)?
  - b. is the “data centres” use proposed a permissible use of land subject to the Broadacre Land Use Policies set out in the Territory Plan?
  - c. is it lawfully open to the ACT Planning and Land Authority (“ACTPLA”) to approve the proposed “data centres” on block 1671 Tuggeranong?

***Legislation applicable to development application***

5. The development application was lodged on 26 March 2008 shortly prior to the repeal of the *Land (Planning and Environment) Act 1991* (repealed) (“**Land Act**”) on 31 March 2008. Notwithstanding the repeal of the Land Act, the development application is required by s 442 of the *Planning and Development Act 2007* to be dealt with under the Land Act and the Territory Plan in force under that Act (“**Territory Plan**”).
6. On 3 June 2008 the applicant requested that its application be altered pursuant to s 226(7) of the Land Act and ACTPLA made that alteration.
7. The application, as modified, is still being considered by ACTPLA.
8. Clause 9.1 of Part A3 of the Territory Plan provides:
 

*9.1 The relevant authority shall not approve a development or a proposal for the use of land that would be inconsistent with:*

*(a) the applicable land use policy in Part B;*

...
9. The Territory Plan map indicates that the land to which the application relates (part of block 1671 Tuggeranong) is subject to the Broadacre Land Use Policies (Part B10) of the Territory Plan (“**B10 Policy**”). Relevantly, the B10 Policy sets out the land uses which are permissible in Broadacre areas. Clause 2.1 of the B10 Policy and the schedule of permissible uses which forms part of that clause are reproduced below:

## 2. CONTROLS

### 2.1 Land Use [V54]<sup>1</sup> [V81]<sup>2</sup>

Subject to the provisions of the Broadacre Land Use Policies below, land described on the Map as Broadacre may be used for one or more of the purposes listed in the schedule below.

| <b>SCHEDULE 1</b>   |  |
|---|--|
| <b>BROADACRE LAND USE</b>   |  |
| <i>Purposes for which land may be used</i>  |  |
| Agriculture   | Municipal depot <sup>*</sup>                   |
| Animal care facility  | Nature conservation area                       |
| Animal husbandry  | Outdoor recreation facility <sup>*</sup>       |
| Caravan park/camping ground <sup>*</sup>  | Parkland                                       |
| Cemetery  | Place of worship                               |
| Communications facility <sup>*</sup>  | Road <sup>*</sup>                              |
| Community activity centre   | Scientific research establishment <sup>*</sup> |
| Corrections facility <sup>*</sup>   | Special care establishment                     |
| Defence installation <sup>*</sup>   | Special care hostel                            |
| Educational establishment   | Tourist facility                               |
| Emergency services facility   | Transport depot <sup>*</sup>                   |
| Health facility   | Veterinary hospital                            |
| Land management facility  | Woodlot  |
| <b>MAJOR UTILITY INSTALLATION<sup>*</sup></b>   |  |
| <sup>*</sup> May be subject to mandatory preliminary assessment under the Land Act (see Appendix II)  |  |
| Notwithstanding the provisions of this schedule, land may be used for temporary uses, minor uses and uses ancillary to the principal use of the land, provided there is no conflict with the objectives in section 1. Subject to the National Capital Plan, land may be used for the purpose of educational, recreational, cultural, community, research, farm tourist development or other rural business which is an adjunct to the primary permitted use of the land and which does not adversely impact on the environmental quality of the locality. |  |

10. It is relevant to note that both "Communications facility" and "MAJOR UTILITY INSTALLATION" are uses which, subject to the terms of the B10 Policy, are permissible in Broadacre areas.

11. Clause 3.1 of Part A3 of the Territory Plan provides:

*"The terms used in the Plan have the meaning defined in Part D. Where a term is not defined in Part D, it has its ordinary meaning unless otherwise defined in applicable legislation."*

12. Part D contains a schedule of definitions prefaced by the following:

*The definition of land uses, water uses and many other terms used in this Plan are set out in the left hand column in Schedule 1 below. All terms are mutually exclusive, that is, there is no overlapping between definitions unless stated otherwise. Terms used within definitions and printed in italics (for example, dwelling) are defined elsewhere in the schedule. Terms printed in capitals (for example, COMMUNITY USE) are collective terms used to express groups of terms defined elsewhere in the schedule.*

*The right hand column contains some examples of the types of activities, which are covered by the accompanying definition.*

13. The terms "Communications facility" and "MAJOR UTILITY INSTALLATION" are both defined in Appendix D.

14. In relation to "Communications facility" the definition in the left hand column of the schedule is:

***Communications facility** means the use of land for the provision of facilities for postal, telecommunications and other communication purposes including facilities used for receiving and transmitting radiated signals using radio masts, towers, and antennae systems but does not include cabling or ducting used for the carrying of electromagnetic signals. [V100]<sup>13</sup>*

15. The examples of the types of activities which are covered by the definition appear in the right hand column of the schedule of definitions under the heading "Some Common Terminology". They are as follows:

*Mobile phone antenna  
Satellite or microwave dish  
Radar equipment  
Aviation navigation communication  
Space tracking facility  
Telecommunication facility, depot  
Television/radio broadcasting facility  
Australia Post exchange  
Australia Post facility, Depot  
Telephone exchange*

16. The definition of "MAJOR UTILITY INSTALLATION" is:

***MAJOR UTILITY INSTALLATION** means a distribution reservoir; a major electrical sub-station; a major gross pollutant trap; a major pump station; a major service conduit; a power generation station; a sewerage storm tank; a treatment plant; a tunnel; an urban lake, pond and/or retardation basin; or a water storage dam.*

17. As made clear in the preface to Part D quoted above, each of the terms in the definition of "MAJOR UTILITY INSTALLATION" is then defined elsewhere in the schedule. Relevant for present purposes is the definition of "power generation station" which is as follows:

***Power generation station** means equipment and associated buildings constructed for the generation of electricity utilising gas, coal or other fuel sources.*

### ***The proposed use***

18. The proposed use is described in the development application (par 3(a) above) and the amendment to the development application (par 3(c) above) as being "MAJOR UTILITY INSTALLATION AND COMMUNICATIONS FACILITY".

19. The documents accompanying the amendment to the development application describe the nature of the proposed use. They include the Design Response Report and the Preliminary Assessment including their associated reports and plans.

20. The Preliminary Assessment (paragraph 3(e) above) contains the following:

a. in section 2.5.1:

*The CTC project will provide a number of purpose built, next generation data centres, which will revolutionise the way that computer systems and data are secured and supported. The facility will provide a comprehensive long term solution for Australian and international organisations.*

*A data centre is a facility used to house computer systems and associated components, such as telecommunications and storage systems. It generally includes redundant or backup power supplies, redundant data communications connections, environmental controls (e.g., air conditioning, fire suppression), and special security devices. Communications in data centres are most often based on networks running the IP protocol suite and contain a set of routers and switches that communicate and transport traffic (data) between the servers and to the outside world.*

b. in section 2.5.2:

#### *2.5.2 Natural Gas Co-generation Facility*

*The co-generation facility component consists of three main activities:*

- 1. Construction of the Natural Gas Co-generation facility and its associated switchgear/transformer yard.*
- 2. Construction of a high pressure natural gas pipeline to provide fuel for the co-generation facility and*
- 3. Construction of over head high voltage power lines from the co-generation facility to the existing electricity 132kV distribution network.*

#### *Construction of the Natural Gas Co-generation Facility*

*The development will include 3 gas turbine electrical generators; these are made up as follows:*

*2 x 14MW gas turbines in production*

*1 x 14MW gas turbine in standby;*

*Operating output of the co-generation facility is approximately 28 MW.*

*The electricity generated will be used to supply the onsite data centres and may also feed minor quantities of surplus electricity into the 132 kV distribution network. Surplus electricity is not expected to be large and would not be suitable as an emergency source of electricity for the ACT.*

21. The facility is described as a “cogeneration” facility because it produces both electricity and chilled water for the operation of the data centres. The chilled water assists in the cooling of the buildings which house large amounts of heat-generating computer equipment.

22. The Design Response Report describes the layout of the site as follows:

*The Canberra Technology City site at Tuggeranong consists of 17.39 Ha of Broad Acre land. The proposed use is Major Utility Installation (natural gas co-generation facility) and Communications Facility (Data Centre).*

*Approximately 3.8 Ha of the site is required for the Major Utility Installation which includes a secure holding area. The remaining 13.59 Ha will accommodate computer data centres with the required road access and parking. ... Featured on site will be the following Major Utility Installation and Communications Facility components:*

- A plant facility comprising, secure holding area, turbines, generators and ancillary plant as required;*
- A high voltage switchyard comprising high voltage transformers and switchgear;*
- Central Amenities with car parking; and*
- Computer Data Centres with associated car parking.*

23. The plans filed with the amended application show that there will be 10 main buildings on the site. Two of those contain the power generation facility. The other eight buildings contain the data centres. Those eight buildings are made up of three types, described as GC1, GC2 and GC3. There are to be three GC1 buildings, three GC2 buildings and two GC3 buildings.

24. Each of these types of building is a modular data centre building designed by a company called Galileo Connect Ltd. The GC1 and GC2 buildings have the appearance of being a large rectangular warehouse with a curved roof. The GC3 building is similar except that it has a square footprint approximately double that of the other buildings.



25. The GC1 building (as shown in drawing 3378\_DA61 Revision B) has three levels:

- a. a ground floor labelled "PLANT";
- b. level 1 which is labelled "DATA HALL" and appears to have an elevated floor and a distance of 5.2 metres between the elevated floor and the floor level above;
- c. a roof cavity which contains roof plant (labelled "CHILLER") with crawl access down either side.

26. It has a footprint of 28.8 metres by 61.2 metres and is recorded in the Design Response Report as having a gross floor area of 2300m<sup>2</sup>.

27. The GC2 building (see Drawing 3378\_DA64 Revision B) has a similar layout except that:

- a. between the data hall on level 1 and the roof cavity area is another floor labelled "OFFICE – DISASTER RECOVERY" which is more like a normal office floor in that it does not have an elevated floor and is only 3.45m floor to floor;
- b. in the roof cavity area there are, in addition to chillers, small rooms for other types of plant;
- c. it is recorded in the Design Response Report as having a gross floor area of 3,987.9m<sup>2</sup>.

28. The GC3 building (see Drawing 3378\_DA67 Revision B) is the largest of the three. It is almost double the size of the other buildings having:

- a. a much larger footprint of 61.2 by 61.2 metres with a gross floor area recorded in the Design Response Report as 7140.7m<sup>2</sup>;
- b. four chiller compounds in the roof cavity (as opposed to two in GC1 and GC2);
- c. in addition to a ground floor and the roof cavity area, two levels labelled "DATA HALL"; and
- d. two data halls on each such floor.

**Correct approach to characterising uses for the purposes of zoning restrictions**

29. The approach to characterisation of uses has most often been considered in the context of planning provisions which protect existing uses. However, the approach to characterisation described in the cases relating to existing uses can, for present purposes, be taken as the same as that applicable to characterising a use for the purposes of the Territory Plan. In *Woolworths v Pallas Newco* (2004) 61 NSWLR 707 at [98] Spigelman CJ (with whom Mason P agreed) summarised the position as follows:

*98 The general approach to characterisation for planning purposes has often been stated in terms such as those adopted by Kitto J in Shire of Perth v O'Keefe [(1964) 110 CLR 529] at 535:*

*"The application of the by-law in a particular case is therefore not to be approached through a meticulous examination of the details of processes or activities, or through a precise cataloguing of individual items of goods dealt in, but by asking what, according to ordinary terminology, is the appropriate designation of the purpose being served by the use of the premises at the material date."*

*(See also Woollahra Municipal Council v Banool Developments Pty Ltd (1973) 129 CLR 138 at 145-147; Royal Agricultural Society of New South Wales v Sydney City Council (1987) 61 LGRA 305 at 310-311.) For present purposes it is unnecessary to consider whether a different approach is appropriate when determining existing uses, than that which is used when dealing with a development application.*

30. In the same case at [205]-[206] Cripps AJA said:

*205 A council when considering the characterisation of a use for which development consent is requested is, of course, concerned with what is proposed to be done on the land. In doing so, in my opinion, the various tests referred to in Royal Agricultural Society of New South Wales v Sydney City Council (1987) 61 LGRA 305 and North Sydney Municipal Council v Boyts Radio and Electrical Pty Ltd (1989) 16 NSWLR 50 provide guidance as to the task to be undertaken by the Council notwithstanding that the tests there set out were stated in the context of existing use rights. In Royal Agricultural Society after referring to the test to be applied McHugh J said with respect to existing uses:*

*"Accordingly a test has been devised which requires the purpose of the use of the land to be described only at that level of generality which is necessary and sufficient to cover individual activities, transactions or processes carried on at the relevant date. Thus the test is not so narrow that it requires characterisation of the purpose in terms of detailed activities, transactions or processes which have taken place. But it is not so general that a characterisation can embrace activities, transactions or processes which differ in kind from the use which the activities, transactions or processes as a class have made of the land."*

206 In *Boyts Kirby P (at 90E to F)* referred to the fact that what was required was a determination of the "appropriate genus which best describes the activities in question". He continued: "In determining that genus attention should be focused on the purpose for which the determination is being made. That is a town planning purpose."

### **"Communications facility"**

31. Prior to undertaking the characterisation process contemplated in *Shire of Perth v O'Keefe* and *Woolworths v Pallas Newco* it is necessary to say something more about the definition of "communications facility".

32. For convenience I will break the definition up into its component parts. Communications facility is defined to mean:

- a. the use of land for the provision of facilities for
- b. postal,
- c. telecommunications and
- d. other communication
- e. purposes
- f. including facilities used for receiving and transmitting radiated signals using radio masts, towers, and antennae systems
- g. but does not include cabling or ducting used for the carrying of electromagnetic signals.

33. The first point to note is that part (b) is clearly not relevant because the facility has nothing to do with postal communications. Secondly, part (f) (which picks up the terms of the limited definition of communications facility prior to variation 100 to the Territory Plan) is not relevant because the facility is not of that kind. Thirdly, in relation to the exclusion in (f), it is only relevant to note that because the proposal involves much more than cabling and ducting it is not relevant to the present questions.

34. I note that "the use of land for the provision of facilities for telecommunications or other communication purposes" is broader than simply "the use of land for the provision of telecommunications or other communication purposes" because of the reference to "the provision of facilities for". This suggests that the definition extends to uses which are

less directly associated with the actual provision of communications at least where it is clear that the facilities exist for the purpose of providing communication services. This is consistent with the inclusion of two forms of “depot” (Telecommunications facility, depot” and “Australia Post Facility, depot”) in the “Some Common Terminology” column (set out above).

35. The use of land for the provision of facilities for “telecommunications ... purposes” involves the use of land for provision of facilities for the sending or receipt “telegraphic or telephonic communications by line or radio transmission” (see *Macquarie Dictionary* (2<sup>nd</sup> ed, 1991) “telecommunication”) or alternatively for “communication over a distance, especially by cable, telegraph, telephone or broadcasting” (*New Shorter Oxford English Dictionary* (1993)).
36. The use of land for the provision of facilities for “other communications ... purposes” is broader in the sense that it is not limited to communications by line or radio transmission. In other words it is less tied to any particular technology for communications. However, it does not avoid the requirement that the use of the land must be for the purposes of providing facilities for communications.
37. Further, the definition is broad enough to cover facilities that form part of communications infrastructure for air navigation and more specialist technical uses. “Radar equipment” and “Aviation navigation communication” are included so that it is clear that infrastructure for this kind of communication is included. Similarly, “space tracking facility” is an anomalous technical use of land which can be defined by its communications purpose. However, the fact that a range of different examples are given with the definition is not sufficient, in my view, to indicate that any land use with a communications component will be within the scope of a “communications facility”. Rather the facility must exist for “telecommunications” or “other communications purposes”.

***Is the component of the development in development application 20074152 that is described as “data centres” properly characterised as a “communications facility” for the purposes of the Territory Plan made under the Land Act?***

38. One is then left with consider whether the proposal involves “the use of land for the provision of facilities for telecommunications or other communication

purposes". This is done by considering what, according to ordinary terminology, is the appropriate designation of the purpose being served by the use of the land.

39. In the present case, the proposal for the data centres is not specific to any particular type of underlying business.
40. The proposed use outlined in the Design Response Report and Preliminary Assessment is for a development that would provide purpose-built buildings in which to operate large scale computing facilities. The benefits of the development to users are that the buildings are large, purpose built and secure. There is nothing in the documentation to suggest that tenants in the facility will be limited to any particular type of business or government organisation. More specifically, there is nothing in the documentation which indicates that the facilities are to be limited to tenants who provide telecommunications or communications services to business, government or the public. Thus, if one has regard to the underlying business goals of the tenants of the proposed facility the development, as currently described, goes beyond what can be classified as a communications facility.
41. However, in my opinion, it is not appropriate even to embark on an inquiry as to the business goals of the tenants of the facility. That is because, in my opinion the use of the land is, in a planning sense, divorced from the business or governmental purpose of the organisations which might be tenants of the facility. What is being provided is a generic accommodation facility for large scale computing equipment. That use, having regard to its extent, and the specialised nature of the buildings and the systems which they require, is a separate and distinct type of land use.
42. The provision of specialised accommodation for computer equipment is similar, in this regard, to the provision of office accommodation for business or government tenants. When one is characterising, for planning purposes, the use of office accommodation one generally does not look at the specific identity of the tenants in order to characterise the nature of the use. Rather, the nature of the use is, in terms of its planning consequences, sufficiently generic for it to be considered as a distinct use separate from the corporate goals of any particular tenant. So too where a standard form of accommodation is provided for large scale computing facilities. The nature of the use is not determined by the particular corporate purpose for which

the tenant organisations use their computers because that does not change the physical features of the use to which the land is put.

43. The use of the property for providing such generic purpose-built computer accommodation facilities will involve some communications. Plainly the facility will be connected to the telephone network. It will also be connected to data networks and the internet and it is likely that large volumes of data will be transmitted to and from the facility by those means. However, in my view the fact that there are significant inflows and outflows of data from the facility is not a factor which would lead to the facility being characterised as a communications facility. That is because the purpose of the facility is not to facilitate communications but rather the communications exist in order to allow the facility to function where it does. The communications are simply ancillary to the use of the land for the purpose of housing large quantities of computing equipment, in the same way that a significant communications network is likely to be necessary for the operation of any large area of office space used for business purposes.

44. As a consequence, the use of the land for data centres as described in the Preliminary Assessment and Design Response Report is not properly characterised as a “communications facility” within the meaning of that term in the Territory Plan.

45. Further, the data centre use does not become permissible by reason of the fact that “MAJOR UTILITY INSTALLATION” is permitted by the B10 Policy. The power generation component of the proposed development falls within the scope of that definition because it is a “power generation station”. That is because it is equipment and associated buildings constructed for the generation of electricity utilising gas. Where a use is ancillary and subordinate to, and not independent of, another use it is generally not considered to be a separate use for planning purposes. In *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157 at 161 Glass JA (with whom Samuels and Hutley JJA agreed) said:

*It may be deduced that where part of the premises is used for a purpose which is subordinate to the purposes which inspires the use of another part, it is legitimate to disregard the former and to treat the dominant purpose as that for which the whole is being used. Doubtless the same principle would apply where the dominant and servient purposes both relate to the whole and not to separate parts. ... Where the whole of the premises is used for two or more purposes none of which subserves the others, it is, in my opinion, irrelevant to inquire which of the multiple purposes is dominant. If any one purpose operating in a way which is independent and not merely incidental to other*

*purposes is prohibited, it is immaterial that it may be overshadowed by the others whether in terms of income generated, space occupied or ratio of staff engaged. The ordinance is nonetheless being disobeyed."*

46. This is consistent with the terms of the land use table from B10 Policy set out above which, notwithstanding the restrictions imposed by the body of the table, allows uses which are "ancillary to the principal uses of the land, provided that there is no conflict with the objectives in section 1".

47. However, the data centres are not a use which is ancillary to the use of the land for a power generation station. The purpose of the power generation facility is simply to provide power to the data centre. As indicated in the section of the Preliminary Assessment quoted above, any supply of electricity from the power generation facility into the ACT grid "is not expected to be large". Both in terms of the purpose of the facility and in terms of the overall nature of the land use proposed on the site, it is the power generation facility which is ancillary to the use of land for data centres and not the other way around. As a consequence the fact that a "power generation station" and "MAJOR UTILITY INSTALLATION" are permissible uses does not mean that the use of the land for data centres is a permitted use.

48. As a consequence, in my opinion, the data centres component of the development proposed in the documentation with which I have been briefed is not a communications facility within the meaning of the Territory Plan.

***Is the "data centres" use proposed a permissible use of land subject to the Broadacre Land Use Policy set out in the Territory Plan?***

49. The use of the land for "data centres" is:

- a. not permissible by reason of being a "communications facility" as defined in the Territory Plan;
- b. not permissible by reason of being ancillary to a permitted use, namely, power generation station.

50. None of the other uses set out in the schedule to clause 2.1 of the B10 Policy would accommodate the data centres as proposed. The effect of this is that under the terms of clause 2.1 of the B10 Policy the "data centres" are not a permissible use of the land.

***Is it lawfully open to the ACTPLA to approve the proposed "data centres" on block 1671 Tuggeranong?***

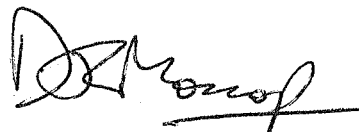
51. Section 8 of the Land Act provides:

*"The Territory, the Executive, a Minister, or a territory authority must not do any act, or approve the doing of any act, that is inconsistent with the plan."*

52. ACTPLA is either "the Territory" or "a territory authority" for the purposes of s 8: see Land Act, Dictionary, "territory authority"; *Planning and Development Act 2007* s 10, 11.

53. In the present case, the use has been described as a "communications facility" in the development application. However the description of the description of the proposal on the application form is not determinative of its approvability. Fundamentally this is because what is being approved is not the use of land but the carrying out of "development" on land as defined in s 222 of the Land Act. That includes, relevantly, the erection of buildings and other structures on the land and the carrying out of earthworks or other construction work on the land. The obligation upon ACTPLA is to determine whether the buildings and works on the land are for a purpose which is consistent with clause 2.1 of the B10 Policy. If, having regard to the plans and the description of the proposal in the documents accompanying the application, the proper characterisation of the proposed use is that the proposal is not in fact a "communications facility" then it is not open to ACTPLA to approve the proposal. That is because to do so would be to "approve a development or a proposal for the use of land that would be inconsistent with ... the applicable land use policy in Part B" contrary to clause 9.1 in Part A3 of the Plan and hence contrary to s 8 of the Land Act.

54. Because the data centres component of the proposed development is not a "communications facility", approval of the proposal would be contrary to s 8 of the Land Act and hence is a course not lawfully open to ACTPLA.



David Mossop

Blackburn Chambers

25 August 2008