

## 11. INTERIM FINDINGS BY THE ENVIRONMENT COURT ON URBAN GROWTH REFERENCES (DECISION NUMBER C 217/2001)

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The purpose of this report is to summarise for the Committee an interim decision of the Environment Court on urban growth.

The Environment Court has issued an interim decision relating to the general evidence presented by the Canterbury Regional Council, the Christchurch City Council, and developer parties relating to urban growth references on the City Plan. This evidence was presented to the Court between November 2000 and March 2001.

This decision is an interim one, because it does not make decisions on individual rezonings heard by the Court after the presentation of the general evidence. Nevertheless, it provides some very important case law on matters relating to urban growth, particularly as it concerns Christchurch.

### BACKGROUND

The Council rezoned a substantial area of land (approximately 800 ha) for residential development (especially at Aidanfield, Northwood and East Halswell) in its decisions released in May 1999. These zonings were NOT challenged by the Regional Council. Another 300 ha rezoned by the Council has been challenged by the CRC, while there are developer references on another 560 ha which the Council did not rezone. A consent order in 2000 resulted in agreement between all parties on the wording of the objectives and policies in the Proposed Plan. The general hearings were about applying the agreed objectives and policies to the 860 ha of "contested" zonings on a city wide basis.

One has to be cautious about summarising the findings in any Environment Court decision, including this case, and whether it can be regarded as a "Council victory". Expressed in simple terms, the Regional Council's position sought the most restrictive outcome; the developers the most liberal; and the City Councils position was between these two. Overall the Court's decision appears to fall between the position of the developers and the City Council, but generally rejects that taken by the Regional Council.

### THE STATUS OF THE OBJECTIVES AND POLICIES

There has been debate for some time as to whether objectives and policies in Plans determine rules (which includes zoning), or whether changes to rules and zoning can require consequential amendments to objectives and policies. The Court came to the view that the correct approach is the "top-down" one, whereby the objectives and policies provide the framework for the rules and zoning (refer para 40). Although recent case law has been somewhat inconclusive on this matter, the Court's finding in this case is a matter of considerable relief to the Council. The alternative would be that the objectives and policies in plans would be little more than "wallpaper", a position which some developer parties have strongly promoted. The Court also found that the objectives and policies, once beyond challenge, reflected the provisions of Part II of the Act and could not be further challenged on this basis. Some evidence for the developers attempted to do this (refer para 308 of the Court's decision) .

It was clear however, that the Court considered that the Proposed City plan was "not inconsistent with" the Regional Policy Statement as required by the RMA. The degree of control over the supply of land sought by the Regional Council could not be achieved within the current policy framework of the Proposed Plan or the RPS, and would be incomplete without the participation of those councils adjoining the City's boundary.

### REGULATING THE SUPPLY OF LAND

The Court found that the City Plan (and by implication the Regional Policy Statement ) does not require regulation of the supply of land. Rather, the City Plan focuses on managing the form of urban development through both infill and peripheral development, in accordance with the established policy of urban consolidation. Hence it is the form of urban growth, rather than the amount of it, which is regulated by the Proposed Plan. (refer paras 56, 70, 79, 82, 86, 88, 285, 286 and 336 of the decision). In an analysis of the Court's decision, the Council's legal adviser, Mr Fogarty QC, has commented that it would be possible to regulate the supply of land in policy terms, given the Court's concluding comments (refer para 359). However he believes this would be difficult to substantiate without rigorous justification and Section 32 analysis. It would not be advisable to regulate the supply of land through "rationing" in order to protect property values.

The Court took the view that growth forecasts and restrictions on land supply based on democratic projections alone were unreliable, and other matters such as economic trends also have to be factored in (refer para 107). Restrictions on land supply within the City's boundaries would, in the Court's view, be ineffective in the absence of an integrated growth strategy which included Waimakariri and Selwyn Districts. This implies there is a need to review some policies in the Regional Policy Statement.

### **VERSATILE SOILS**

The policy in the City Plan on versatile soils ( which reflects almost exactly the wording in the RPS) is considered by the Court to be ultra vires and ineffectual. The Court was concerned that the policy purported to require that activities be shown to be necessary to achieve the purpose of the Act, rather than the provisions of the Proposed Plan itself. This is not considered to be an appropriate means of a Council discharging its responsibilities under the Act. The Court also considers that the protection of versatile soils is not a matter of paramount importance under the Act, and is not a matter of particular significance within the boundaries of Christchurch City, in contrast with the region as a whole. The Court did not reject the concept of policies aimed at protecting versatile soils, but considers it needs to be justified on the merits in conjunction with a range of other factors. (refer paras 139, 164, 176, 337).

### **FOSSIL FUELS AND VEHICLE EMISSIONS**

The Court arrived at a fundamental legal finding, taking account of previous case law, that the sustainable management of fossil fuels is specifically excluded from the application of Section 5 (2)(c) of the Act. This is because they are derived from "minerals" which are excluded from the principle of sustainable management under the Act (refer paras 242 - 244)

In terms of the matters relating to the merits of urban containment and densities, the Court was not convinced that urban containment was necessarily effective in reducing the adverse effects of car dependent transport. Reference was made by the Court to evidence relating to (for example) European and Asian cities which have very high densities, greater proportional use of public transport, and lower per capita car usage, but which suffer from severe congestion and pollution problems associated with vehicle use (refer paras 185 and 265). The Court was critical of the CRC promoting or contrasting urban form options which were outside the Policy framework of the proposed plan, or indeed the RPS (refer para 103 ).

The Court was critical of evidence which focused specifically on fossil fuel usage and urban density without consideration of wider issues, in particular economic matters such as differences in income, tax regimes, regulatory regimes, etc between different countries and cities (refer paras 187,195, 315) .

Councils can take into account demonstrable adverse effects created by transport demand (e.g. *public costs* such as pollution and congestion). However it cannot regulate on the basis that it wishes to save on the consumption of fossil fuels, nor on the basis that people's choices about where to live involve higher *private costs* in terms of transport. (refer paras 183, 304)

The Court took a somewhat "middle of the road" position on the likely impact of technological change on fossil fuel usage and associated urban development patterns. It was considered to be inappropriate to rely on past trends and to discount the likelihood of greater fuel efficiency by vehicles in the future, particularly in light of likely initiatives flowing from the Kyoto Protocol. On the other hand, it did not agree that technological change would necessarily obviate the adverse effects of traffic growth to the extent that some witnesses claimed, or that simply providing more road capacity would solve the problem. Interestingly, the Court considered that there was an issue with the extent of urban zoning associated with the lack of road pricing mechanisms, although it did not provide any suggested solution to this problem (refer paras 231 and 342).

### **EFFECTS OF THE RESTRICTING LAND SUPPLY**

The Court repeatedly observed that restrictions on urban zonings on the edge of the City itself (unless related to specific environmental constraints) would lead to development being dispersed to adjoining district council areas, with even greater longer distance commuting (refer paras 255, 286, 292, 305 and 318). It also concluded that the evidence demonstrated that restrictions on land supply would cause inflation in land prices (refer paras 123, 124).

## THE NATURE OF PERIPHERAL DEVELOPMENT

There appears to be a strong suggestion in the body of the decision that the Court would favour comprehensively designed large-scale peripheral development which was consistent with the consolidation principle. It expressed the view that there should be greater control over the form of peripheral urban development including maximum lot sizes ( para 131 ), and a requirement for a range of densities (including provision for higher densities in parts of these areas) . While some may see the Court's decision as a "victory" for developers, there is a "sting in the tail" - the decision appears to offer support for more stringent controls over the nature of greenfield development. Whether this is definitely the case will be confirmed when the final decisions are released on specific rezonings, of which those relating to the Masham and Styx Mill Basin areas will be particularly interesting. (The committee may recall that the issue of controls over greenfields subdivision is currently the subject of work towards an options paper, and an ultimate variation to the City Plan to deal with the matter).

Could there be a greater degree of guidance and control over urban development around Christchurch? From reading the decision, this is arguably the case. However, such a strategy would need to be based on the following components:

- (a) it would need to include land in adjoining district council areas to be effective;
- (b) the policy framework would need to be more explicit;
- (c) new greenfield development (unless minor in scale) would need to require a mix of densities, and be better integrated and staged;
- (d) be consistent with the principle of urban consolidation;
- (d) be integrated with transport policies which include a component of pricing, and not simply rely on the regulation of land use and densities.

## CONCLUSIONS

This is not a decision against the regulation of urban growth, but it indicates that regulation needs to be justified and supported by a robust policy framework. It is apparent to the writer that given the cross boundary nature of issues such as transport and land supply, a review of some policies in the RPS would be a necessary starting point. There is effectively an invitation by the Court for CRC/CCC to look at the soils policies as a matter of some urgency.

Finally, there is a lesson in the decision about the perils of "vague" policies which contain numerous qualifications. There may not be a problem if a policy is consciously drafted to provide a high degree of flexibility. The difficulties arise when the policy is relied on to provide specific direction, but which in reality can easily be satisfied. By way of illustration, current issues concerning Variation 55 and outdoor advertising policies demonstrate this point.

The above comments are only a brief summary of the 180 page decision, and copies of the full decision can be made available to those who are interested to read it.

## Recommendation

**from Chair:** That the information be received.