

3. ENVIRONMENT COURT DECISION

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The purpose of this report is to advise the Committee of several recent decisions of the Environment Court.

1. Taylor's Mistake

The interim decision of the Court was reported to the Committee in July 2002. The Court confirmed the retention and scheduling of certain baches in the Conservation 1A Zoning, required the removal of others and provided for their replacement in a new zone to be created. There were many details left to be either agreed between the parties or referred back to the Court for final decision.

After extensive discussion, three matters could not be resolved and were referred back to the Court. The Court has now issued a final decision. The decisions of the Court on the three matters were;

- (a) **Deferral of zoning.** The Council and the Taylor's Mistake Association (representing the bach owners) sought deferral of the new Taylor's Mistake Bach Zone where the replacement baches are to be erected. The deferral would have been pending finalisation of legal agreements regarding occupation of the baches and the removal of the original baches from the foreshore. The Court has declined to defer the zoning. The main effect of this is to require the demolition of any of the 14 baches prior to or simultaneous with the construction of a new bach.
- (b) **Preventing permanent occupation.** While all parties had accepted the desirability of this, which was a finding of the original decision, the Council and the Association had argued that this was a matter best left for the legal agreements to be entered into between the Council and the bach owners. The council argued that there would be extreme difficulty in enforcing this provision if it became a rule because of the lack of definition of temporary and the problems collecting evidence that would support a prosecution.

The Court has not accepted this finding, pointing out that it would be equally difficult to enforce a legal agreement and that the Council has used the word temporary in regard to other activities. With all respect to the Court, once a problem has been pointed out, referring to earlier examples that contain the same problem does nothing to solve it. However, the Court is probably correct that legal agreements might not be enforceable either in this regard. The end result is to be a rule that probably cannot be enforced. This will lead to embarrassment and difficulties if the referrers or other parties put pressure on the Council to enforce it, which may well occur. There is little or nothing that can now be done about this and it will have to be managed if and when the situation arises.

Rules for remaining baches in the Conservation 1A Zone. There were a number of detailed rules proposed by the referrers for the remaining scheduled baches. These concerned fencing and curtilage, sewer, water and electricity, etc. The Court has decided to leave these matters to the Council's control as landowner.

There were a few anomalies in the Court decision so that it could not be implemented in the way the Court intended. Council has provided a memorandum to the Court pointing these out.

2. Rutherford Family Trust

This is a 60 ha block of land on the eastern flank of Moncks Spur. A map of the area is attached. The Court has made an interim decision that approximately 20 ha of the land should be given a modified Living Hills zoning. It did this on the basis that while the land has some drawbacks for this zoning, these are outweighed by the offer of the owners to vest nearly 40 ha of land in the Council as "environmental compensation". This land lies mostly above the land to be rezoned Living Hills, but in part below it in a gully. This land will connect John Britten Park on the higher slopes of Mt Pleasant with Barnett Park. It will enable preservation of some significant ecological areas and put a permanent end to any further residential encroachment

up Mt Pleasant, as all the land will be Council reserve. Environmental compensation is provided for in Policy 6.3.14 of the Proposed City Plan.

This decision reverses the decision of the Council. However, it is considered to be a very satisfactory outcome with substantial gains for recreation, ecology, stormwater management, landscape and amenity and urban consolidation.

Many details remain to be resolved. These include:

- The transfer of the environmental compensation block to the Council.
- The lodging with the Council of a concept plan, to the Council's satisfaction as to the detail, in respect of:
 - (a) Outline boundaries on the downhill side of the middle block;
 - (b) Section and roading layout and design
 - (c) Stormwater disposal;
 - (d) Sewage disposal and sewage systems;
 - (e) Waterways aspects;
 - (f) Planting and early maintenance regimes; and
 - (g) Restrictive covenants.
- Immediate vesting of a through-road formed at the landowner's sole expense from Horizon Heights to Mt Pleasant Road on deposit of the first subdivision plan.
- Setting houses back further from the cliff edge to minimise their presence from the proposed reserves.
- Footpaths linking the reserves.
- Treatment of the areas in the gullies to ensure they fulfil their functions of retaining or at least slowing down stormwater, silt and other pollutants;
- Planting and of the gullies including maintenance.
- Deferral of Living Zoning pending agreement on payment for and any necessary resource consents for a retention pond and supplementary systems.

These are either to be agreed between the parties or referred back to the Court for final decision by 30 September 2003. Discussions with the developer have commenced.

The rezoning is conditional on transferring the environmental compensation block to the Council. The Court cannot actually order the Council to accept this gift. This raises an interesting issue if the Council decided not to accept it. The Council had rejected the zoning of the block at the submission stage and opposed the reference. The Council may therefore still be in a position to thwart the Court's decision. It is not recommended that this be considered in this case. However, in any future cases that turn on environmental compensation, the Court may not have an entirely free hand to decide the case as it sees it and these matters may have to be negotiated with the Council. This point was made to the Court during the hearing of the McVicar case, it appears to have been overlooked before then.

The judgement makes some useful findings, as follows;

- The part of the Port Hills that is an outstanding natural landscape for the purposes of section 6 of the RMA is the undeveloped rural part, and excludes the Living Hills Zones.
- Land required to be set aside for drainage purposes or other utilities should not necessarily be part of the reserves contribution payable by the developers.
- Environmental compensation is over and above reserves contributions.
- Policy 2.7.2 of the City Plan means that the boundary of Living Zones on the Port Hills is to be largely fixed in its present location. Significant extensions can only be justified by worthwhile environmental compensation.

3. **CS Campbell Family Trust**

This is a small block of approximately 1.2 ha on Moncks Spur. It adjoins the Rutherford land, as shown on the attached plan. The issue was whether the land should be zoned Living Hills A or B. The difference is the minimum subdivision size, 1,500m² for LHA and 3,000m² for LHB. The land immediately downhill is LHA. The Council had originally zoned it LHA, but changed it to LHB through the submissions process. The Court has changed it back to LHA.

This is considered to be a very minor matter. The land now has potential for eight homes to be erected in total, instead of four. There are already two. The land is adjacent to other land zoned for similar or higher densities.

The Court did provide an opportunity, which has now lapsed, for the Council to apply under s293 of the RMA for a footpath to be provided across the land to link with other potential paths on the Rutherford land. Staff met with the owners to discuss this and did not proceed with it because:

- There seemed no basis in law to do it. The issue was never raised by any party in submissions or in the references. The owners indicated they would strongly oppose such an application, and staff considered there could be no hope of success in law.
- The footpath would have reduced the sub divisional potential of the land and adversely affected the privacy of the owners.

4. **Montgomery Spur**

Three landowners made submissions to Council and then references to the Environment Court seeking Living Zoning of land at Montgomery Spur. This is the prominent, largely undeveloped spur just to the east of the Rapaki Track, as shown on the attached plans. About 160 ha of land is involved. The Court declined the requested zoning, except for two small areas near the base of the Spur adjacent to existing housing, which it zoned Living Hills B. That aspect has been appealed to the High Court, the owner seeking Living Hills for the two areas.

The Court found that the Spur is an outstanding landscape, and prominently visible from many parts of the City. After a careful examination of the City Plan objectives and policies, the Court decided that the land should remain Rural (Hills).

Some interesting features of the case were;

- The Court considered that the top edge of the steeper sides and foot of Montgomery is a clear demarcation line topographically, and that is also the current zone boundary between the Living and Rural Hills Zones. That line is where the broad relatively open slopes of Montgomery Spur, suddenly steepen into a series of bluffs and cliffs further broken by coastal erosion in the recent geological past, and by quarrying in the very recent human timescale.
- The Court strongly upheld Policy 2.7.2 of the City Plan, which provides that the boundary of Living Zones on the Port Hills is to be largely fixed in its present location. The Court rejected an argument that the policy was about a notional line following the upper limit of residential development on other spurs such as Huntsbury or Cashmere so that allowing some residential development on the Montgomery land would be merely topping up the spur to the approved boundary line.
- At a late stage in the hearing the developers offered 90 ha to the Council as environmental compensation. The Court was not prepared to accept this at that stage, as it gave no opportunity for full consideration by witnesses. The Court also held that at least some of the land being proposed as environmental compensation is essentially steep, not able to be built on, and not where it will be most prominently viewed. It accepted that there are other areas which are also to be part of the environmental compensation but considered that they are inadequate as environmental compensation especially given that there is no evidence that the Christchurch City Council wanted them.
- The Court considered that the case was very different from the Rutherford case in that the area was not already partly developed, was much more visually prominent and did not offer the same value of environmental compensation.

- The Court considered cumulative effects of allowing additional housing on the Port Hills as a whole. This may be of considerable significance to the remaining Port Hills cases, notably McVicar's and Kennedy's Bush.

Staff

- Recommendation:**
1. That the Council note the final decision of the Environment Court relating to Taylor's Mistake, particularly in relation to permanent occupation of baches.
 2. That the Council staff continue to negotiate with the Rutherford Family Trust to implement the decision of the Environment Court, with the Council's position to be confirmed by the References Subcommittee before being referred back to the Court.
 3. That the action of staff in not pursuing the walkway on the Campbell Family Trust land be retrospectively confirmed.
 4. That a report be made to the City Plan References Subcommittee on the implications of the High Court appeal against the Montgomery Spur decision.

Chairman's

- Recommendation:** That the above recommendations be adopted.