

**1. PROPOSED CITY PLAN – SUBMISSION OF G A & J Y MCVICAR  
AND CHRIST’S COLLEGE CANTERBURY**

RR 10457

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Corporate Plan Output: Legal Advice	

The purpose of this advice is to assist the Committee in deciding whether to recommend to the Council to proceed to make and notify a decision on the McVicar submission or to apply to the Environment Court for an order that the McVicar submission be renotified.

**BACKGROUND**

G A & J Y McVicar and Christ’s College Canterbury (“the submitters”) own land which totals approximately 140 hectares in area in Cashmere Valley near Worsleys Road. On 28 November 1995 the submitters lodged a submission (“the McVicar submission”) to the proposed city plan. In general terms, the McVicar submission sought a change in the zoning of the land from rural to living with provision for a wetland ponding area for flood protection purposes.

The McVicar submission was detailed and contained a number of annexures. For the purposes of this report, it is not necessary to consider its contents in depth.

In April 1996, the Council publicly notified in The Press the availability of a “Summary of all decisions requested” in submissions on the proposed city plan pursuant to the First Schedule of the Resource Management Act 1991 (“the Summary). The notice advised of the availability of the Summary and copies of all submissions for public inspection during normal office hours at listed Council offices. The Summary is a 2 volume, 800 page document, which summarises the decisions that are requested by each submitter.

The decisions requested by the submitters were divided into 10 parts in the Summary. These are set out at pages 791 and 792 of the Summary. Copies of these pages are tabled. It can be seen that, depending on the particular part of the land involved, the McVicar submission seeks a change of zoning to either Living 1, Living H, Living HA or Rural H. Only one parcel of land, containing approximately 32 hectares, is sought to retain the existing Rural 2 zoning prescribed in the proposed city plan as notified in 1995.

The McVicar submission was grouped with other submissions relating to the Port Hills, Cashmere Valley and Worsley Spur areas. These submissions were heard on 12, 13, 16-20 March and 2 July 1998. The City Plan Hearings Committee reserved its decision at the conclusion of the hearing.

By letter dated 5 March 1999, Weston Ward & Lascelles wrote on behalf of some residents of the Cashmere Valley area and raised a number of concerns about the manner in which the McVicar submission had been dealt with. The letter made a number of general complaints about the hearing process, including the adequacy of the manner in which the McVicar submission was summarised. As a result of this letter, the City Plan Unit investigated the matter and discovered that the McVicar submission sought the rezoning of land contained in planning maps 53 and 60 of the proposed city plan but was summarised under planning map 53 only in the Summary. The matter was referred to the Council who resolved to defer making a decision on the McVicar submission until the decision of the Environment Court in *Re an application by Christchurch City Council*, decision C71/99, ("*Montgomery Spur*") had been issued. That decision has now been made and was followed in short time by a decision in *Re an application by Christchurch International Airport*, decision C77/99, ("*Templeton Hospital*").

The decision of the Court in *Montgomery Spur* dealt with the legal requirements that the Council must comply with when preparing a summary of decisions requested. It did so in the context of the facts of three submissions seeking to rezone land around Montgomery Spur. The findings of the Court included:

- 1 The summary must be fair and accurate and certainly not misleading.
- 2 It must be sufficient to alert the reasonable non-expert reader of the summary to the fact that they should go to the submission and examine it for themselves
- 3 Fairness and accuracy requires some sort of accurate identification of the land involved. Where rezoning is involved, the subject land must be accurately identified by, inter alia, an area bounded by named roads, by street address, legal description or map co-ordinates.

After they had been notified that the Council had deferred making a decision on the McVicar submission pending the *Montgomery Spur* decision, the McVicars and Christ's College obtained and provided to the Council opinions from Mr A Hearn QC and Mr J Milligan. In turn the Council has obtained an opinion from Mr A C Hughes-Johnson QC as to the appropriate course of action for the Council to take.

Copies of these opinions are tabled. I will summarise each opinion in turn.

## **First Opinion of A Hearn, QC**

In an opinion dated 21 May 1999, Mr Hearn considered the issue of whether the action that the Council must take is determined by the decision in *Montgomery Spur*. In his opinion, the decision of the Environment Court in *Montgomery Spur* may be erroneous in law. However, accepting that the decision represents the law as it presently stands, he is of the view that the facts that led to the decision in that case can be distinguished from those in the present case. If this view is accepted, it means that the Council is not bound by the decision in *Montgomery Spur* and can proceed to make and notify its decision on the McVicar submission.

The grounds on which Mr Hearn bases this view are that:

1. In this case, the Council's summary contained the legal description of each parcel of land that is the subject of the McVicar submission. This means that the Summary cannot be said to be inaccurate, misleading or unfair.
2. The McVicar submission is accompanied by plans that clearly show the area covered by the McVicar submission. It is plain from these plans that part of the land sought to be rezoned is contained in map 60, and not just map 53.
3. A substantial part of the land contained in map 60 is owned by the McVicar Timber Company which is aware of and supportive of the McVicar submission.
4. The letter of complaint from Weston Ward & Lascelles dated 5 March 1999 does not identify the failure to summarise the McVicar submission under map 60 in the Summary as a matter of concern to the residents. There is no evidence of any person having land within map 60 who claims to have been prejudiced by the Summary.

As a final point, he says that in terms of fairness, a balance must be struck between fairness to residents who are potential objectors and fairness to developers who have spent time, effort and money in presenting a full and comprehensive case in support of their submissions.

## **Opinion of J Milligan**

The opinion of Mr Milligan for the submitters dated 10 June 1999 raises strong arguments as to why the decisions in *Montgomery Spur* and *Templeton Hospital* may be erroneous in law. However, Mr Milligan does not distinguish the *Montgomery Spur* decision to the same lengths as Mr Hearn. His reasons for not following the *Montgomery Spur* approach in this case can be summarised as follows:

1. In his view, it is implausible that any person concerned enough to examine the Summary, and therefore view the Summary under planning map 60, would not also have considered the Summary under map 53. Any examination of the summary under map 53 would inexorably lead to the summary of the McVicar submission at issue and then to the McVicar submission itself. An examination of the full submission clearly shows that the land affected is contained in both maps 53 and 60.
2. Should the Council decide to apply for an enforcement order in respect of this submission, it will then be incumbent upon it to review all of its summaries against the tests set down in *Montgomery Spur*. Where these tests are failed, then similar applications to the Court will need to be made.

The second matter is separately addressed in the public excluded section of this agenda.

### **Opinion of A C Hughes-Johnson, QC**

In an opinion dated 16 June 1999, Mr Hughes-Johnson for the Council provided an opinion on what he considered to be the appropriate course of action for the Council to take. This opinion was able to be provided following consideration of the matters raised and summarised above in the opinions of Mr Hearn and Mr Milligan.

Mr Hughes-Johnson identified the critical question as being whether, by reading the Summary, a person with an interest in the land contained on planning map 60 would have had his or her attention drawn to the McVicar submission.

In considering this question, and also by way of response to several matters raised by Mr Hearn, he says:

- 1 Although the McVicar Timber Company owns a substantial part of the land on map 60, there are a number of other landowners in the vicinity of the land the subject of the McVicar submission who have not made submissions or further submissions to the proposed plan.
- 2 Although the residents represented by Weston Ward & Lascelles have not raised a concern about the issue of map referencing, once the Council becomes aware of a non-compliance with a statutory duty it cannot simply ignore the matter. The Council must act in an even-handed way and consider exercising its discretion in favour of remedying the non-compliance unless there are good reasons not to do this, such as the certainty that persons are not prejudiced or otherwise adversely affected.

Mr Hughes-Johnson then concludes that the failure to summarise the McVicar submission under both planning maps 53 and 60 is a breach of the Council's duty to summarise under clause 7 of the First Schedule in terms of the *Montgomery Spur* decision. He does not accept that the *Montgomery Spur* decision can be distinguished from the present case. In his opinion, the Council should apply to the Environment Court for an enforcement order to renotify the McVicar submission, similar to the earlier application in the *Montgomery Spur* case. His reasons in support of this approach include:

1. Any person who examined planning map 60 would not have been alerted to the McVicar submission because this was summarised under planning map 53 only.
2. There are a number of persons owning land that is contained in planning map 60 who may be potentially affected by the McVicar submission who have not filed a further submission.
3. Aside from those persons who own or occupy land contained in map 60, there may be other members of the public who may have examined the Summary under map 60 and not been alerted to the McVicar submission. It cannot be assumed that those persons would not have taken steps had they learned of the rezoning sought in the McVicar submission.

### **Second Opinion of A Hearn, QC**

In his second opinion dated 1 July 1999, Mr Hearn further advances his clients' position. In reply to the views expressed in Mr Hughes-Johnson's opinion, he says:

1. No complaint has been made by any person that he or she was prejudiced by reference to one planning map instead of two. No person has come forward and said, "I looked at planning map 60A and concluded that there was nothing which affected my land and acted accordingly". No complaint was voiced in this regard until the matter was reported by Council staff.

2. If the Council proceeds to make and notify its decision, then the Cracroft Resident's Association (who made a submission on this part of the plan) have a right to file a reference against this decision. The original submission of the Resident's Association was very general. It is reasonable to assume that the residents on whose behalf Weston Ward & Lascelles have raised concerns, are residents of the Cracroft area. It follows that they are reasonably likely to be able to persuade the Residents Association that the filing of a reference would be a proper and appropriate course of action to take, should this be necessary to retain the existing rural zoning. Accordingly, it may be wrong for the Council to approach the matter on the basis that the residents who are now voicing their concerns have no other remedy available to them.
3. There appear to be a number of other submissions involving 2 planning maps which were summarised under 1 only. Decisions have already been made on those submissions. However, if the Council is unable to distinguish the *Montgomery Spur* case from the McVicar submission, it may be only fair that it take steps to renotify and rehear all other submissions that were not properly summarised.

The last matter is separately addressed in the public excluded section of this agenda.

#### **RECOMMENDATION**

The Committee's role is to provide a recommendation to the Council as to which of the conflicting legal opinions should be followed.

Although arguments can be raised that the decisions in *Montgomery Spur* and *Templeton Hospital* may be erroneous in law, they nevertheless represent the law as it currently stands (although the latter has been appealed to the High Court). Both decisions are based on the principle that a summary must be fair and accurate. It must be sufficient to alert a reasonable person reading it that they should go and examine the original submission.

In my opinion, the facts of this case are not so different to those in *Montgomery Spur*. In both cases the Council summarised a submission against one map and not two. In both cases the failure was identified prior to the Council's decision on the submission, thereby providing an opportunity to cure the defect. In my view the summary of the McVicar submission cannot be said to be fair and accurate. Any person examining the summary under map 60 would not have been alerted to the McVicar submission. The question of whether any person can be said to be prejudiced by this failure may be best left to the Court to decide.

If the Committee agrees with this view then a draft resolution could be:

1. That the Council apply to the Environment Court for an enforcement order seeking re-notification of the submission of GA & JY McVicar and Christ's College Canterbury (s1138) including an order directing the form in which any re-notification should take place.
2. That the Council apply for directions as to service as to the parties who should be served with the application.
3. That the Legal Services Manager be authorised to take such steps as he considers necessary in the Council's interests in relation to this application.

If the Committee disagrees with this view then a draft resolution could be:

That the recommendation of the City Plan Hearings Committee on the submissions of GA & JY McVicar and Christ's College Canterbury (s1138), the Cracroft Residents Association (s3030 and s3036), and Professor C Kissling (s3032) be referred to the Council for consideration.

It was **resolved** that the discussion on this report be held public excluded.

Councillor Manning left the meeting for the purposes of the discussion on this matter and did not vote on the recommendation.

- Recommendation:**
1. That the Council apply to the Environment Court for an enforcement order seeking re-notification of the submission of GA & JY McVicar and Christ's College Canterbury (s1138) including an order directing the form in which any re-notification should take place.
  2. That the Council apply for directions as to service as to the parties who should be served with the application.
  3. That the Legal Services Manager be authorised to take such steps as he considers necessary in the Council's interests in relation to this application.