

1. **SECTION 293 OF THE RMA 1991 – ENVIRONMENT COURT ORDER – RMA 515/99 KENNEDYS BUSH DEVELOPMENTS LTD V CCC.**

<b>Officer responsible</b> Environmental Services Manager	<b>Author</b> Angelene Holton (Committee Secretary), DDI 941-8437 Councillor Sue Wells (Chairman Regulatory and Consents Committee)
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The purpose of this report is for the Council to consider recommendations arising from Committee discussions held on the Kennedys Bush Development Ltd (KBD Ltd) proposal to vest 194 ha of land in the Council as environmental compensation for the rezoning of an adjoining 42 ha of land owned by the developer.

**PROPOSAL**

KBD Ltd owns 236 ha of land situated at the end of Kennedys Bush Road. Details of the proposal, submissions, and identification of the issues associated with the proposal are provided in the attached report by Sean Elvines (Consultant Planner).

The proposal has been publicly notified by the Environment Court under section 293 of the Resource Management Act 1991. Section 293 provides the Court with the ability to direct changes to a policy statement or plan where an appeal or inquiry has been sought. In this case the section 293 Order originated from a legal challenge to the scope of the original submission by KDB Ltd.

The proposal seeks the rezoning of 42 ha of land from Rural Hills to a Living Hills A type zone. The remaining 194 ha of land on the upper slopes is offered to the Council as environmental compensation with a proposal for rezoning this land from Rural Hills to a Conservation 1 zone (Natural, Ecological and Heritage Parks).

**COMMITTEE CONSULTATIONS**

Details of the proposal were discussed at some length by the Regulatory and Consents Committee over two meetings on Friday 9 May 2003 and Tuesday 20 May 2003. All Councillors were invited to attend the 20 May 2003 meeting to provide all elected members with an opportunity to discuss in detail important issues generated by the proposal.

The KBD Ltd proposal was also considered by the Parks, Gardens and Waterways Committee on 7 May 2003, as reported on page 68 of the Council agenda. The Parks Gardens and Waterways Committee considered the suitability and long term recreational value of the 194 ha land if it was vested in the Council as a reserve. That committee supported this aspect of the proposal.

**COMMITTEE CONSIDERATIONS**

Councillors raised a number of issues at the 20 May 2003 meeting which were considered and addressed by planning staff as follows;

**Urban Growth and Development**

A central issue raised by the committee was whether or not the KBD Ltd proposal met the objectives and policies of the Proposed City Plan in relation to urban consolidation, the extent of appropriate peripheral urban growth and overall city identity.

Sean Elvines (Consultant Planner) advised that the proposed development tenuously linked existing urban development in a relatively small area, with the remainder “ballooning” away from existing urban development. Even with amendment to the 42 ha subdivision proposal as it stands and the offer of environmental compensation, the proposed subdivision would not achieve or implement either the Urban consolidation or Peripheral Urban Growth objectives or policies as outlined in the Proposed City Plan.

Mr Elvines also noted that this was one of the most difficult issues that needed to be addressed by the Council in considering the proposal. Councillors needed to determine a “threshold of acceptance” when examining the subdivision issues and to balance this decision against the environmental compensation aspects of the proposal.

## **Landscape and Natural Values**

Andrew Craig (Landscape Architect) addressed the proposal in terms of Landscape and Natural Values issues. He considered that some amendment was needed to the subdivision proposal by KBD Ltd as it currently stood. In his view this may be achieved to some extent by restricting development to the 160 m contour line to mitigate against adverse visual effects that structures would have on this significant landform. It was further suggested that the zoning pattern be amended to maintain and ensure a consistent landscape character with adjacent land.

Mr Craig also noted that there would be some impact on a number of prominent landforms and the natural environment as the proposed development would be dispersing out into open, rural unbuilt farm land. Again these issues needed to be considered by the Council and balanced against the offer of environmental compensation. The "outstanding natural landscape" of the Port Hills was given consideration.

The Committee noted that there was a need for further consideration of the proposed 42 ha subdivision in respect of zoning issues and design control features.

## **Water Drainage/Supply/Sewerage**

Mr Eric Van Toor (Planning Team Leader - City Water and Waste) provided the committee with an outline plan for water supply to the proposed subdivision and stormwater drainage. It was noted that these issues needed to be considered in further detail at the resource consent stage. It was further agreed that any rezoning of the proposed subdivision land should be dependent on the appropriate resource consents being first obtained by the developers. This could be achieved through deferred rezoning.

## **Transport Issues**

Paul Roberts (Transport Planner - Networks) spoke on the issue of the impact of the proposed development on the safe and effective functioning of the roading network. It was considered that the proposal without the environmental compensation aspect would have only a minor effect on amenity, and would achieve the Transport objectives and policies in the Proposed City Plan.

There was concern that public transport would be difficult, and that this was not consistent with energy policies.

## **Recreational Opportunities/Public Access**

Kelvin McMillan (Parks and Waterways Planner) reported to the Committee on the significant future recreational and public access opportunities that would be provided by the Council's acquisition of the 194 ha of land offered by the developer.

Liz Briggs (Open Space and Water Policy Leader) also outlined the overall strategy for the Port Hills. The Council had two methods for acquiring land on the Port Hills, either by direct purchase or by negotiation, such as this, with private landowners. The current proposal by KBD Ltd offered a good opportunity to acquire a significant piece of land on the Port Hills at no cost to the Council. Recent Environment Court decisions had provided a strong lead on the urban boundary significance of the landscape value offered by the Port Hills.

## **Development - Cost to Council**

It was not proposed that the land would be developed further, other than fencing of scrub areas to provide for regeneration of native bush and separation of areas suitable for stock grazing. The estimated capital costs of fencing was in the order of \$50,000.

The Committees were advised that there would be minimal increased costs to do with services. There would be savings in the area of pest control. Overall, the acquisition was of no material cost unless the Council chose to further develop the land.

## **Precedent**

Liz Briggs addressed the concerns of the Committee in relation to the precedent that acquisition of the land may create for further developments of this kind. It was noted that some additional requests may be made, but it was considered that the proposal was sufficiently different to stand alone.

## Environmental Compensation

A report from Bob Nixon (Consultant Planner) attached to the agenda was considered by the Committee in relation to the use of Environmental Compensation. In particular, 4.4, page 15 (attached) noted that *“Environmental compensation is **one** tool which offers significant potential benefit to developers, residents and the Council in particular cases. I expect the majority of developments which succeed should still be able to do so in its absence. However it is a policy tool which although “new” through the Proposed plan, is too valuable in terms of its potential benefits to be set aside. It also needs to be openly expressed in the plan as a policy option, to provide the necessary transparency for the decision making process.”*

The Committee noted that while there were significant benefits associated with the environmental compensation aspect of this development, there were also questions as to whether or not this proposal would have met the objectives and policies of the Proposed City Plan in its absence.

### PROCESS - CHAIRMAN'S COMMENTS

It is rare for this Council to be faced with a question of this magnitude under section 293. Section 293 is a provision of the Resource Management Act which is not commonly used in proposals of this magnitude. The extent of the Court's powers under section 293 is currently an issue before the High Court on a separate matter to which the Council is a party. Section 293 puts us out of our normal comfort zone, for a couple of reasons.

Firstly, the Council is not the decision maker, nor is it the hearing authority. The Environment Court is both. In a reference (appeal) situation, that is perfectly normal. What is different here is that the developer has put forward a proposal which the Environment Court has asked the parties to a reference, including the Council, to consider and advise on its position. As a result, we have to make a submission which has not been tested through the 'normal' City Plan hearings process. The Council's first framing of an opinion on the matter is made through a process which does not involve hearing from the public. When the question is as large as this one, it can make an elected member a little tense.

We're so used to the Council's planning decisions being shaped by receiving both information and feedback throughout the submissions process that there is a real mindset about the level and type of enquiry we need to make to assure ourselves that our decision is robust. When the Court uses section 293, we are much more dependent on the advice of our officers, and reliant upon our own judgement. Because the Court is hearing submissions and we are not, there can be concern that we are missing something in our assessment of environmental compensation that might have tipped the scales either way. The Court will naturally have benefit of submissions, but it does beg a question about the implications of section 293 for us as decision makers on the receiving end of it.

For that reason, the recommendations that are coming to this Council meeting have been tested more strenuously than I am sure many people thought they would be. This is exactly the kind of planning decision that is fraught with potential downsides as well as with potential upsides and it is frankly frightening doing it without the benefit of the scrutiny of a public hearings process to assist us frame our opinion. We can only hope, as elected members, that the advice of our professional staff and the six hours of detailed analysis put in by both the Parks and Recreation and Regulatory and Consents Committees will stack up in the community's view in the long-term.

This recommendation gives the green light to our staff to take a starting position back to the Court. It is not a rapturously enthusiastic 'at all costs' acceptance of the Court's idea - rather it is a very cautious acceptance that there is possibly merit in this notion and that it should be assessed carefully to ensure that the Committees are correct in ascertaining that the obvious clashes with our Plan are outweighed by an equally obvious public benefit, which is the vesting of roughly 194 hectares of private farmland into permanently protected Conservation land. In plain English - we think this idea has good bits and bad bits and that the bad bits are outweighed by the good - but only just, and only with the conditions we're putting forward.

At the Regulatory and Consents reconvened meeting there was some residual concern about the size of lots around the edge of the proposed additional subdivision, and whether they could be changed from LHB to LHA if other different amenity conditions were imposed. We parked that discussion because it was felt that the level of detail was such that it was important to clarify before the Council returns to Court, but not critical in making a material determination. For that reason we are suggesting that the small portion of the question relating to that zoning be referred to an already scheduled meeting of the City Plan References Subcommittee which would be held in public. (As it is a standing subcommittee of Regulatory and Consents and meets regularly, it was felt convening a further ad-hoc subcommittee would not be of any great benefit.)

I would like to thank those members of both committees who participated so well in the almost six hours of discussion which have been had so far, and also the staff who worked so hard to answer a large number of questions in between meetings. Bringing these recommendations to Council has proved to be very testing. I think it is fair to say we are closer to consensus than not, but that a number of elected members still have reservations about this proposal. There is nothing wrong with that. This issue is so very finely balanced that it may well offer something of a useful benchmark for the Court as to what Council can comfortably handle by way of suggestions made under section 293.

- Recommendation:**
1. That, recognising this matter is finely balanced, the Council support the proposal put forward by Kennedys Bush Developments **conditional** upon KBD amending their proposal in accordance with the Council officer suggestions relating to landscape (zoning), water supply and stormwater provision.
  2. That the Council's support be on the basis that:
    - (a) Any residential zoning be deferred until stormwater issues are resolved to the satisfaction of the Team Leader - Water Environment and a report has been subsequently submitted to the Regulatory and Consents Committee for information.
    - (b) Any building line within the subdivision be limited to the 160m contour.
    - (c) That the future consideration of the LHB Zoning following the periphery of the proposed subdivision zone and/or design controls be delegated to the City Plan References Subcommittee.