

19. BANKS PENINSULA DISTRICT PLAN LANDSCAPE APPEALS

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PURPOSE OF REPORT

1. The purpose of this report is to seek the Council's direction on the conduct of an appeal in the High Court.

EXECUTIVE SUMMARY

2. Pacific Investment Trust has appealed to the High Court against a decision of the Environment Court relating to the Banks Peninsula District Plan. The appeal is against the minimum allotment size of 10 hectares imposed by the Environment Court in the Rural Amenity Overlay area in the Rural zones of the District Plan. The appeal asserts that the Environment Court had no jurisdiction to alter the previous limit of 4 hectares, because no party specifically requested that.
3. Although it is a very simple appeal the consequences are potentially very serious. If the appeal is allowed the matter would be referred back to the Environment Court, which may decide to reopen the entire enquiry into Banks Peninsula Landscape issues, which could cost the Council in excess of \$100,000. There would also be major costs to all other parties. However, the Council's legal advisers consider that the appeal by Pacific Investment Trust is more likely than not to be allowed.
4. Environment Canterbury have entered an appearance and engaged a leading barrister who apparently considers that there is a very good case to oppose the appeal. However, ECan will not take part unless this Council also appears to oppose the appeal.
5. Defending the appeal would be a pragmatic step which, if successful, would settle the matter quickly for a modest cost. If unsuccessful, the cost to the Council would still be modest, and the Council would still be in a position to argue the matter through the Environment Court. Although not recommended, a further appeal to the Court of Appeal on the preliminary legal issue is possible. Although the time for this has passed, the Council's lawyers advise that leave could still be sought to appeal provided there had been no delay in getting the matter considered by the Council at the first opportunity.

FINANCIAL IMPLICATIONS

6. Should the Council decide to oppose the appeal by Pacific Investment Trust when it is heard in the High Court, the direct expense to the Council would be in the order of \$5-10,000, some of which would be recoverable from the appellant. Costs would be likely to be awarded against the Council if it lost. These would probably be less than \$10,000 and would be shared with ECan.
7. The costs to the Council if the matter is referred back to the Environment Court could vary from about \$5,000 to over \$100,000 depending on what the Environment Court decides to do.

Do the Recommendations of this Report Align with 2006-16 LTCCP budgets?

8. The costs are able to be absorbed into existing City Plan budgets.

LEGAL CONSIDERATIONS

9. Although High Court appeals on district plan matters are relatively unusual, the legal issues are all able to be dealt with within the standard procedures of the Resource Management Act.

Have you considered the legal implications of the issue under consideration?

10. As above.

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

11. This process aligns with the City Plan Activity Management Plan.

Do the recommendations of this report support a level of service or project in the 2006-16 LTCCP?

12. Resolution of this matter would promote the District Plans activity by assisting to complete the Banks Peninsula District Plan.

ALIGNMENT WITH STRATEGIES

13. Not applicable.

Do the recommendations align with the Council's strategies?

14. Not applicable.

CONSULTATION FULFILMENT

15. Not required.

STAFF RECOMMENDATION

It is recommended that the Council join with Environment Canterbury to defend the decision of the Environment Court in the High Court.

BACKGROUND (THE ISSUES)

16. The issue of landscape protection in the Banks Peninsula District Plan has been ongoing for many years. The Environment Court conducted a major hearing in February 2008 and then issued interim and final decisions settling the package of provisions to be included in the District Plan for the Rural zones. This is an integrated package with several sub zones or overlays, and differing requirements such as minimum lot sizes and different activity status in the various sub zones.
17. The District Plan Appeals Subcommittee was previously advised of an appeal by Pacific Investment Trust to the High Court against the decision of the Environment Court on the Banks Peninsula Landscape appeals. The appeal is against the imposition of a 10 hectare minimum subdivision limit in the Rural Amenity Landscape, in lieu of the 4 hectares originally proposed. Subdivision of lots less than 10 hectares would be non-complying activities. The appeal asserts that the Environment Court lacked the scope to make this change, no party having specifically requested it. The Environment Court thought there was sufficient scope in a more generally worded appeal, which sought a new set of rural zones without going into the details of what was proposed. The legal issue is that this may not have been specific enough to alert potential parties that the 4 hectares rule might be under challenge.
18. The Subcommittee was advised that the appeal may have been lodged out of time and resolved to pursue this as a preliminary issue. The High Court has now considered this and granted leave to the appellant to continue with the case. Although an appeal to the Court of Appeal on this preliminary point is available, and in the opinion of the Council's solicitors would have a good chance of success, this would be an unprecedented move for the Council on a planning appeal. The Subcommittee previously resolved to take a neutral stance on the jurisdiction matter if the appellant succeeded in getting leave to continue the appeal. The change since that time is the active participation of Environment Canterbury and the views of its barrister.
19. An alternative is to defend the decision of the Environment Court at the substantive High Court hearing. Buddle Findlay consider that the case for the Council would not be particularly strong, but there is an arguable case. They assess the chance of success as 33 per cent. By contrast, Environment Canterbury, who are also involved, have engaged a leading barrister who considers there is a strong case for defending the Environment Court's decision. However, ECan is reluctant to pursue the case by itself and has indicated it is likely to withdraw if the Council is not in support.
20. Another alternative would be for the Council to elect not to contest the matter in the High Court. If ECan then withdraws, the High Court would be faced with a live appeal with only one side being argued. In these circumstances the High Court is likely to appoint an "amicus curiae" (friend of the Court) to argue the case in opposition to the appeal.
21. The consequences of losing this case in the High Court is that the entire landscape issue may have to be revisited by the Environment Court. If the appeal succeeds in the High Court, the case will be sent back to the Environment Court to reconsider. It may not just be a matter of substituting 4 hectares for 10 in one rule. The 10 hectares rule was an integral part of the Environment Court's package of amendments. Without it the Court may have decided the other provisions differently, for example, by enlarging some of the more restrictive landscape overlays. The costs of the Environment Court rehearing the whole matter would be very large, in excess of \$100,000.
22. It is possible that the Council could suggest to the Environment Court that it invoke a simplified process under section 293 of the Resource Management Act (RMA). Instead of revisiting the entire landscape issue the Court itself could publicly notify its preferred 10 hectares rule, receive submissions on it and conduct a further hearing limited to that issue.

23. Defending the appeal in the High Court would be a pragmatic step which if successful would settle the matter quickly for a modest cost, noting that the prospects for success are not high but this would be the most cost-effective solution if successful. If unsuccessful, the cost to the Council would still be modest, and the Council would still be in a position to suggest to the Environment Court that it use its powers under section 293 to simplify the rehearing process.
24. The District Plan Appeals Subcommittee has met informally to discuss the matter. Its delegation in regard to High Court matters is limited to conducting the case in accordance with staff advice. As the Subcommittee members were reluctant to act in accordance with the staff recommendation to defend the appeal, the matter is referred to the full Council.

THE OBJECTIVES

25. The ultimate objective is to settle on a course of action in the High Court which will settle the Banks Peninsula District Plan in an economical fashion consistent with good environmental outcomes.

THE OPTIONS

26.
 - (a) Take a neutral stand in the High Court on the matter, accept the outcome in the High Court and if it is referred back to the Environment Court, then suggest that Court deal with the matter using its powers under section 293 of the RMA.
 - (b) Join with Environment Canterbury to defend the decision of the Environment Court in the High Court.
 - (c) Do nothing. Accept whatever outcome results.

THE PREFERRED OPTION

27. The preferred option is (b).