

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV-2011-485-2438
[2012] NZHC 644**

UNDER The Judicature Amendment Act 1972 and
Part 30 of the High Court Rules

IN THE MATTER OF An application for judicial review

BETWEEN CRESWICK VALLEY RESIDENTS
ASSOCIATION INC
Applicant

AND WELLINGTON CITY COUNCIL
First Respondent

AND TERRACE HEIGHTS HOLDINGS LTD
Second Respondent

Hearing: 27-28 February 2012

Counsel: FMR Cooke QC and M S Smith for Applicant
S F Quinn and K M Anderson for First Respondent
J A Gregory for Second Respondent

Judgment: 4 April 2012

In accordance with r 11.5 I direct that the delivery time of this judgment is 3pm on
the 4th day of April 2012.

RESERVED JUDGMENT OF MACKENZIE J

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Introduction

[1] In this proceeding, the applicant seeks judicial review of decisions made by the first respondent (the Council) concerning the zoning and development of a site owned by the second respondent, near to the homes of members of the Association. The land is presently zoned Outer Residential as to part, and Open Space B as to the remainder. In September 2010 the Council approved a District Plan Change (PC73) which, if it becomes operative following one outstanding appeal to the Environment Court, will rezone the whole site Business 2. In December 2010 the Council granted the second respondent resource consent to carry out earthworks and vegetation removal on the site. The second respondent subsequently applied, in April 2011, for a resource consent to build a Mitre 10 Megastore. The residents became aware of that development proposal in June 2011. It asked the Council to withdraw the proposed zoning change in PC73 but the Council declined to do so.

[2] The applicant challenges three decisions of the Council:

- (a) The decision to rezone the land as Business 2 under PC73;
- (b) The granting of the earthworks consent (on a non notified basis) to the second respondent; and

- (c) The decision not to withdraw the rezoning under cl 8D of Schedule 1 of the Resource Management Act 1991 (the RMA).

The Site

[3] The land concerned is at 55-85 Curtis Street in the Creswick Valley between Northland and Karori. It is about 1.1 hectares in area and roughly triangular in shape. It is bounded by Old Karori Road to the west, Curtis Street to the east and Whitehead Road to the north. The surrounding area to the south, east and west is generally zoned Residential. To the north, across Whitehead Road, is Ian Galloway Park, a public park on what was previously a Council landfill. The land was separated from Ian Galloway Park when Whitehead Road was formed to provide access from Curtis Street to Karori Road. At that time, the whole site was owned by the Council. The southern end of the site had been used as a Council depot from the 1930s. That part has a zoning of Outer Residential, though it has not, at least since the 1930s, been used as residential. By the early 1990s it was in an untidy and unkempt condition. The northern part of the site, along with the rest of the former landfill which is now Ian Galloway Park, is zoned Open Space B.

[4] In 1996 the Council had the site cleared. It held public meetings in January 1997 and April 1998 to discuss the future of the land. Potential uses were discussed but it appears that no consensus as to the most appropriate uses emerged. The Council accordingly decided to sell the land. In October 1998, Council officers reported to the Council on the proposed sale. The report noted that tenders had been called asking for potential purchasers to confirm their intended use so an assessment by Council could be made as to the optimum development. Bids from two tenderers were considered in the report. The report recommended that the Council either approve the sale on the basis of one or other of those bids, or direct officers to reject all bids and retender. It also recommended that the Council note two matters:

2. Note that the approved tenderer is to purchase the site, and make the appropriate representations to Council to ensure that the proposed use will meet with provisions of the District Plan, and any other Council requirements.
3. Note that Council is not undertaking to guarantee the issuance of Resource Consent to the approved purchaser.

[5] The report also referred to consultation over the use of the site. The report said:

The properties listed have been declared surplus by the previous occupying Unit. All other Units have been given the opportunity to consider whether any of the properties are required. There have been a number of meetings with local residents over the future use of the site. As it was not possible to achieve a consensus from local residents as to use, it was decided to call for tenders to purchase the site, with a condition of tender being that the proposed use be revealed with the price. The tenders have since been reviewed with Council's policy unit.

[6] The land was sold to a tenderer whose proposed use was light commercial bulk retail, for a Foodstuffs supermarket. The proposal to develop a supermarket caused concern to some local residents. On 27 April 1999, Mr P S Barker wrote on behalf of several residents of Creswick Terrace to the Council raising concerns. He said:

We therefore request that we be informed and consulted on regulatory permissions that may be sought for the activities proposed for the site. In particular, we refer to zoning changes, notification procedures for non-conforming authorisations, and/or resource consents that may be sought from the Wellington City Council.

[7] The Council responded to that letter by letter dated 10 May 1999. In it the Council said:

While I am not able to anticipate likely future use of the site, I am confident that you will have reasonable opportunity to comment on any development.

I understand that the site has been sold with a zoning of part residential/part open space B. In such a case, if the owner wishes to proceed with a retail development there are 3 options:

- Apply for a resource consent under the current zoning
- Request the Council to initiate a variation to the District Plan – unlikely to be agreed given the focus on getting the plan operative
- Wait until the District Plan is operative and request that the Council initiate a plan change or make a private plan change.

Whichever course is followed, public notification is required, giving an opportunity for any concerns to be raised in submissions. In addition, any persons deemed to be affected would be notified directly.

[8] Subsequent to the hearing of this proceeding, the Association became aware of some other correspondence between a local resident and the Council concerning the supermarket proposal. This was put before me by a consent memorandum from counsel filed on 9 March 2012. In an undated letter, a homeowner in Creswick Terrace wrote expressing concern at the proposal for a supermarket. The letter said:

Would you please:

1. Note my concerns about the effects that this development will have on my residential environment
2. Provide me with information as to my rights and the processes I should follow in making a submission on this development
3. Advise me of the process that the land owner is required to follow vis-à-vis the Council.

[9] The Council replied by letter dated 1 May 1999. It noted that no resource consent application had been received and that the Council was unable to accept the letter as a formal submission under s 96 of the Act. The letter went on to say:

I note your concerns and your letter will be placed on the file for the property so that the people responsible for processing any subsequent resource consent application will be aware of your concerns. Once an application has been received these people will be able to undertake a full assessment of the proposal. I regret I am unable to be more specific about the method of processing until an application has been received and all the of the [sic] aspects of non-compliance with the District Plan rules have been identified.

[10] As matters transpired, the supermarket proposal did not proceed. In 2007, the land was sold to the second respondent, subject to an encumbrance preventing the development of a supermarket on this site.

The District Plan and the Site

[11] I outline the relevant planning history of the site. This description is largely based on the evidence of the Council's senior policy adviser, Ms Newbald. She was not directly involved in the relevant plan changes, and her evidence is largely based on the documentary record. All officers involved in the plan change process have left the Council.

[12] The Council's District Plan under the RMA became operative in 2000. Since then, the Council has undertaken a number of Plan changes, under a "rolling review" under which changes to the Plan are reviewed by issue or by chapter. There have been a number of such reviews. In 2007 the Council prepared and consulted on a Centres Policy to provide a framework to guide the development and management of Wellington's City Centres. This work identified some issues which led to the review of the Suburban Centres chapters of the District Plan. Monitoring of all existing areas zoned Suburban Centres was undertaken and there was high level consultation with a number of interest groups. In May 2008 the Council issued a discussion paper on Wellington's growth needs which led to work on reviewing the Plan's provisions for Residential Areas. These two strands of work led to Council to review together the Residential and Suburban Centres chapters. Council decided to undertake full reviews of the relevant chapters in the District Plan together.

[13] Draft provisions for consultation preliminary to proposed Plan Changes were the subject of a report by officers to the Council's Strategy and Policy Committee (SPC) in November 2008. The report sought approval to consult with the public on the reviews of the Residential Area and Suburban Centre chapters of the District Plan, which became PC72 and PC73 respectively. The executive summary described the key changes proposed. Most of the key changes affected the rules relating to the Residential zone and the Suburban Centre zone. The only proposed rezonings of individual properties in the Residential chapter were described as "minor rezonings". In the Suburban Centre chapter the only key change involving the rezoning of individual properties was described in the executive summary in these terms:

Rezoning of a number of parcels of land from Residential to Suburban Centres and vice versa (this includes the rezoning of 12 areas throughout the city to Neighbourhood Centre) to better reflect existing use and to reinforce the centre's function.

[14] The relevant chapter in the report described the Suburban Centre proposed rezoning in these terms:

5.3.8 Suburban Centres – Rezoning

There are numerous examples throughout the City of appropriate commercial services, industrial workshops and retail activities on land zoned for residential purposes. In order to better reflect the current land uses and to

retain flexibility in the activities that can occur on site into the future, some of these activities have been rezoned from Residential to Suburban Centres.

It is also proposed to rezone a number of properties from Suburban Centre to Residential to reflect the residential nature of the property and its relationship with its surroundings.

Criteria that were used to justify the rezoning included:

- Commercial need – is there an identified need for more commercial space and would the zone change add to the vitality and viability of the existing commercial area?
- Reflects existing use – is the area a larger site (or group of smaller sites) that reflects its existing use?
- Urban design – would re-zoning to Suburban Centres zone provide opportunity to create better on-street linkages and connections, particularly in regard to primary or secondary frontages?
- Completeness – is the zoning incompatible with the surrounding commercial area or part of a wider commercial block?
- Bulk and location – is it appropriate to re-zone to allow for more height and bulk, or would re-zoning actually constrain development opportunities?
- Change Areas – would re-zoning support proposals for Areas of Change?
- Surrounding context – would the site naturally blend into Residential Areas or is it surrounded primarily by commercial areas?

Some examples of where rezoning is proposed include the creation of new Neighbourhood Centres, including Onepu Road in Lyall Bay, the Standen Street shops in Karori, and a number of retail properties on Constable Street in Newtown. Other examples of existing Suburban Centres where rezoning is proposed include Aro Valley, Brooklyn and Berhampore. (Refer to Appendix 9 for summary of proposed rezonings).

It is noted that the majority of these neighbourhood centres are well established and were zoned for commercial purposes under the previous 1980s District Plan Scheme.

[15] The report sought approval to consult on the proposals in these terms:

The recommendations seek approval to consult on the proposals for the review of the Residential and Suburban Centres chapters over the period from December 2008 to March 2009. It is intended to send out an information leaflet to all households in the City, and to have available a plain English summary guide, as well as copies of the draft plan changes themselves. The feedback will be reported back to Committee in March 2009, with a revised plan change to be notified in mid-2009.

[16] The recommendations were approved by the SPC on 20 November 2008, with the consultation period extended to 1 April 2009.

[17] In December 2008 the Council publicised the proposals by sending a letter to all Wellington residents and ratepayers advising of the Council's intention to review the provisions and of the availability of the draft provisions and a summary guide. An attached pamphlet advised that "a summary guide of the draft plan changes is available which explains the proposed changes in more detail" and advised persons who wished to get more information and have a say to "check out the summary guide" and draft plan changes at [the Wellington City website]". Council also advertised the review on 4 December 2008. The advertisement referred to the Summary Guide, and said:

It you live in a residential area (which you probably do) or shop in a suburban centre (which you also probably do) – you might want to be involved in planning the city's developmental future.

...

We're reviewing the planning rules for land zoned as residential areas and suburban centres in the District Plan – the city's town planning rulebook. These rules cover the sort of activities that can take place and how people can build or modify their properties in these areas.

...

City Planning Manager Luke Troy is keen to hear what Wellingtonians think before carrying out a formal consultation process under the Resource Management Act.

...

The District Plan has been in place for 10 years now and this is part of a rolling review of the entire plan. We're looking at everything – what's working, what's not and how different areas of the city will grow with the predicted population growth of the next 10 years.

...

Rezoning some parcels of land from residential to commercial and vice-versa to better reflect the existing use of those sites.

[18] At this stage, the proposed zoning changes did not include a rezoning of the Curtis Street land.

[19] Prime Property Group (PPG) which owns Terrace Heights Holdings Limited, the registered proprietor of the Curtis Street land, had instructed a planning consultant, Mr Leary of Spencer Holmes Ltd, in 2008, to look at development options for the land. This work included a proposal to develop a commercial storage facility on the site. An application for storage units was lodged with the Council in March 2008. Mr Leary consulted with Transpower NZ, the owner of electricity transmission lines crossing the site. The constraints on the use of the land imposed by the nature of the site and by the transmission lines led Mr Leary to the view that the site would be more appropriately zoned Suburban Centre. He discussed with a Council officer, Mr McKay, the possibility of PPG initiating a private plan change proposal. Mr McKay advised him that the Council was starting to do preliminary work on the Suburban Centres review, and Mr McKay did not think that it was a good idea for a private rezoning to take place alongside a Council Plan Change. Mr Leary said that Mr McKay suggested that the proposal to rezone the Curtis Street land could be brought within the Council's review process.

[20] When Mr Leary obtained a copy of the consultation document after it was publicly released later in 2008, he noted that the Curtis Street land was not included in the proposed rezoning. He wrote to the Council on 27 November 2008 requesting that the Council consider rezoning the Curtis Street land as Suburban Centre, and expressing disappointment that the Council had not included the rezoning in the Draft Plan provisions released for consultation. The Council's reply noted that feedback on the draft provisions was being sought and said:

We would welcome a submission from you regarding this site and confirm that we are happy to consider this as part of the review and before we formally notify the plan change.

[21] By letter dated 1 April 2009, Mr Leary gave feedback for PPG on the Suburban Centres review. That included a submission that the Curtis Street land be rezoned.

[22] Council officers prepared a summary of feedback on the consultation and reported to the SPC in a report on 14 May 2009. The report discussed proposed rezonings in these terms:

5.1.4 Rezoning

Proposals consulted on:

There are numerous examples throughout the City of commercial, retail and industrial activities on land currently zoned for residential purposes. In order to better reflect current land uses and to retain flexibility in the activities that can occur on these sites in the future, some of these clusters of non-residential activity sites are proposed to be rezoned from Residential to Suburban Centres. It is noted that a number of these areas are well established and were previously zoned for commercial purposes under the 1980's District Plan Scheme.

In addition, some areas of land are proposed to be rezoned from Residential to Suburban Centres on the edges of both Johnsonville and Karori. This is to allow for additional land to be made available for commercial activities.

It is also proposed to rezone a number of properties from Suburban Centre to Residential to reflect the residential use of the property and its relationship with its surroundings.

Feedback received:

The proposed rezoning generated 45 responses. Approximately 42% of respondents supported the various rezoned areas, while appropriately 18% of respondents opposed the proposals. Another 40% of respondents had no opinion – largely because respondents had no direct interest in the land being considered for rezoning.

The proposed rezonings also generated a number of phone calls to Council officers, most of which were supportive of the proposed rezoning affecting their particular property. However, it is noted that many of these people did not make submissions on the draft plan change.

Those respondents that supported the proposed rezonings were of the view that the rezoning would better recognise the use of their property and also provide greater flexibility for any redevelopment of their property in the future.

The main concerns raised by those respondents opposing the proposed rezonings included perceived impacts on the value of their property and concerns that their property is not suitable for rezoning.

In addition, the Council also received requests from the following property owners to rezone individual parcels of land:

- Karori Baptist Church, 161-163 Karori Road; seeking rezoning of land from Outer Residential to Suburban Centres
- 673 Hutt Road, Kaiwharawhara; seeking rezoning of land from Rural to Suburban Centres
- 61-85 Curtis Street, Karori; seeking rezoning of land from Open Space and Outer Residential to Suburban Centres

- 29 Evans Bay Parade, Greta Point; should retain Suburban Centres zoning, rather than be rezoned to Open Space B.

Way forward:

Further consultation will be undertaken with those landowners who have raised concerns about the proposed rezoning to try and resolve their issues. Those proposed rezonings that are supported will continue to be pursued. The suggested additional rezonings will be considered against the rezoning criteria and where appropriate will be included in the proposed plan change. [emphasis added]

[23] At its meeting on 19 May 2009 the SPC considered the report and noted that the proposed plan changes for the Residential and Suburban Centre chapters of the District Plan would be reported back to the Committee in August 2009 for approval to publicly notify the changes.

[24] On 19 June 2009 Council officers met with representatives of PPG to discuss that company's feedback on the Draft Plan changes. Ms Newbald's evidence as to the outcome of that meeting is:

105 As a consequence of the meeting Council Officers decided in principle to include 55-85 Curtis Street in the Proposed Plan change with a Business Area Zoning, not a Suburban Centre zoning as requested. (Note that the review proposed to delete Suburban Centres Area and replace it with three new Areas – Centres, Business 1 and Business 2). The proposal was still to be assessed against section 32 of the RMA, but if those tests were met, it could be included in the proposed plan change.

[25] Ms Newbald further says:

107 Under section 32 of the (RMA), any proposed plan change must be accompanied by an evaluation that assesses the extent to which each objective is the most appropriate way to achieve the purpose of the RMA and whether the proposed policies, rules and other methods are the most appropriate way in which to achieve the objectives in terms of their efficiency and effectiveness. A section 32 evaluation must take into account:

- the benefits and costs of the policies, rules or other methods
- the risk of acting or not acting if there is uncertain or insufficient information

Undertaking a section 32 evaluation assists in determining why changes to existing plan provisions may be needed and formalises a

process for working out how best to deal with resource management issues.

- 108 The extent of a section 32 analysis will vary depending on the issue being considered and the extent and breadth of the proposed plan change. A section 32 analysis is a high level assessment of how the objectives will achieve the purpose of the RMA and how provisions will meet the objectives. It must be undertaken in sufficient detail to enable consideration of relevant factors. The section 32 report produced as part of the plan change documents is a summary of the evaluation that has taken place and must be available for public inspection at the time a plan change is publicly notified.
109. The section 32 Report produced contained two paragraphs on the rezoning of the Curtis Street site and stated:

Finally there is an area of largely vacant land that is located on the suburban boundary of Karori and Wilton, near the intersection of Curtis Street and Chaytor Street which should be considered for rezoning. This land, known as 55-86 Curtis Street adjoining the Karori Garden Centre and is approximately 1.09ha in size. The land is currently partially zoned Outer Residential and partially Open Space (at the northern end of the site). The land was formally used as a cleanfill and Council works depot and is traversed by a high voltage transmission line running north to south. The open space zoning at the northern part of the land is remnant land left over from the development of Whitehead Road which linked Old Karori Road and Curtis Street which has subsequently been built. The remainder of the site (55-85 Curtis Street) is now in private ownership.

Given the presence of these power lines, it is not considered appropriate to develop the site for residential purposes. In addition, as a general rule Council does not normally zone privately zoned land for open space purposes and it is considered that the old historic partial zoning of this site for open space purposes is also inappropriate. In this regard, this leaves a Business Area zoning as the most appropriate use for the site. It is considered that a Business 2 Area zoning will allow for the best future use of the site.

[26] The s 32 report to which Ms Newbald refers dealt with Suburban Centre rezoning of individual parcels in Appendix 2. It said:

Rezoning

The following tables show a number of areas around the city where it is proposed to rezone land to better reflect land uses of the area.

It is proposed to rezone a number of properties from Residential to Centres to recognise their (in some instances long-standing) current use and to protect this use.

It is also proposed to rezone a number of properties from the former Suburban Centres zone to Residential to reflect the residential nature of the property and its relationship with its surroundings. Where an area retains the same commercial boundaries, the zone name of the area will change from Suburban Centre to Centre.

In addition, it is proposed to rezone some properties currently zoned Suburban Centres to either Business 1 Area or Business 2 Area to better reflect the types of activities that are undertaken on site and provide more tailor-made provisions to protect their use. (Note that not all proposed rezonings have an accompanying photo included in the table).

Criteria

Criteria that were used to determine whether a site should be rezoned from Residential to Centres included:

- Commercial need – is there an identified need for more commercial space and would the zone change add to the vitality and viability of the existing commercial area?
- Commercial use – is the area a larger site (or group of smaller sites) that reflects its existing use for commercial activities?
- Urban design – would re-zoning to Suburban Centres zone provide opportunity to create better on-street linkages and connections, particularly in regard to primary or secondary frontages?
- Completeness – is the zoning incompatible with the surrounding commercial area or part of a wider commercial block?
- Bulk and location – is it appropriate to re-zone to allow for more height and bulk?
- Change Area – would re-zoning support proposals for Areas of Change in the future?

Criteria that were used to determine whether a site should be rezoned from Suburban Centres to Residential included:

- Reflects existing residential use – is the area already developed for residential, and if so, is this unlikely to change in the long term?
- Bulk and location – would re-zoning to Residential Area zoning constrain development opportunities?
- Surrounding context – would the site naturally would [sic] blend into Residential Areas?

[27] Council officers reported to the SPC in September 2009 seeking approval to publicly notify changes to the District Plan resulting from the reviews of the Residential Area and Suburban Centre chapters, the planning maps and the relevant

urban design guides. That report was based on the s 32 report. The executive summary in the report addressed the rezoning proposals in the proposed Plan changes in these terms:

In addition, a number of parcels of land are proposed to be rezoned from Residential to Centres or Residential to Business Areas and vice versa. This reflects the existing uses on these parcels and the desire to reinforce the function of these areas into the future as individual activities come and go.

[28] The full report elaborated on the Suburban Centre review. It noted:

5.2.1 Introduction

It is proposed to replace the current single zone structure (Suburban Centres), with two new zones (Centres and Business Areas) to reflect the diversity of these areas and the different management objectives.

...

5.2.6 Rezonings

There are numerous examples throughout the City of commercial services, industrial workshops and retail activities on land zoned for residential purposes. It is proposed to rezone a number of these properties from Residential to Centres to recognise this often long-standing use and to retain flexibility in the activities that can occur on site in the future.

It is also proposed to rezone a number of properties from the former Suburban Centres zone to Residential to reflect the residential nature of the property and its relationship with its surroundings.

In addition, it is proposed to rezone some properties currently zoned Suburban Centres to either Business 1 Area or Business 2 Area to better reflect the types of activities that are undertaken on site both now and in the future.

These proposed rezonings are summarised in Appendix 3.

[29] Appendix 3 described the Curtis Street land, in the section headed "Suburban Centre Karori", in these terms:

Location and Proposed Rezoning	Consideration
Rezone 55-85 Curtis Street from Outer Residential and Open Space to Business 2 Area	The site is inappropriate for residential and open space purposes. The proposed zoning will allow for a more constructive use of the site for business-type activities.

[30] The report to the SPC also included individual zoning maps showing each site proposed to be rezoned. The proposals were approved by the SPC for public notification.

[31] The proposed PC73 was publicly notified, along with the proposed PC72, by advertisement in the Dominion Post on Tuesday, 29 September 2009. The statutory notice under cl 5 of Schedule 1 to the RMA said:

Proposed District Plan Changes 72 (Residential Area) and 73 (Centres and Business Areas)

Wellington City Council has reviewed the planning rules that affect land zoned Residential and Suburban Centre in the District Plan. These are the rules that determine where and how development can take place. The Residential zone includes most of the city's residential suburbs. The Suburban Centre zone includes shopping centres as well as commercial areas where industrial activities take place. As most people live, shop or work in these areas, it is likely the proposed District Plan Changes will be of interest to you.

...

Proposed District Plan Change 73 is a full review of the Suburban Centre chapters of the District Plan. Key changes proposed include:

- Splitting the current Suburban Centre zone into two new zones, Centres and Business Areas, to recognise their differing roles, and better manage the activities that locate in these areas.
- Increased policy guidance regarding urban design and the management of retail activities.
- The introduction of a new design guide for Centres and Business Areas to help improve the quality of new development.
- Rezoning of some parcels of land to better reflect existing uses.
- Amendments to other policies, rules, definitions and planning maps to improve effectiveness.

[32] Ms Newbald's evidence on the extent of the detail included in the public notice is:

- 182 The purpose of the public notice is to advise that Council is undertaking a change to the Operative District Plan, where it can be inspected and how people may make submissions. It simply cannot contain a list of all the proposed changes as to do so would require such an extensive public notice that it would not be possible, or practical, to include it in the newspaper.
- 183 In Plan Changes of the size undertaken it is difficult for Council to determine the extent to which every change being proposed will affect an individual/group/community. The RMA provides for notification to all parties who may be potentially affected. In this instance Council notified all WCC residents that it was undertaking a 'full review' of the Residential and Suburban Centres Chapters and that it could affect all property in, or next to, those areas. It is accepted that plan changes can be vast documents for individuals and the community to understand and the Council tries to provide guidance by producing plain English summary guides. However, they are by their nature a summary and will not contain all the proposed changes.

[33] The public notice, with a leaflet headed "Important Notice for all Residents and Ratepayers" was sent to every ratepayer in Wellington. The leaflet said:

Why is the Council doing this?

It is part of the Council's 10-year rolling review of the District Plan – the city's planning rulebook. The review has looked at whether the policies and rules are working, what issues have emerged since they were first drafted in the early 1990s, and the role different areas in the city will play in meeting population and economic growth over the next 10 years.

As a result of the review, the Council has prepared District Plan Change 72 (Residential Area) and District Plan Change 73 (Centres and Business Areas).

The Council has carried out extensive community consultation over the past three years on the key issues affecting the residential and commercial areas of the city. This included specific consultation on draft proposals from December 2008 to April 2009. The feedback received from the community has helped shape the proposed Plan Changes.

Do I have to take any action?

No. This leaflet is for your information only. However if you want to make a formal submission and make your views known, or if you want more information, feel free to contact the Council (details below).

Where can I get more information and have a say?

We have prepared a summary guide to explain the proposed District Plan Changes in more detail. Check out the summary guide and the proposed plan changes at www.Wellington.govt.nz.

Copies of the summary guide are also available from city libraries – or phone 499 4444 and we will send you one.

If you want to make a submission on either of the proposed plan changes, a copy of the submission form can be found at www.Wellington.govt.nz.

Post your submission(s) to City Planning, Wellington City Council, PO Box 2199, Wellington 6011; or deliver it to ground-floor reception, Council offices, 101 Wakefield Street; or email www.Wellington.govt.nz.

Submissions on proposed District Plan Changes 72 and 73 close at 5pm Friday 27 November 2009.

If you need any further information, call the City Planning Helpline on 499 4444 or email district.plan@wcc.govt.nz.

Wellington City Council has reviewed the planning rules that affect land zoned Residential and Suburban Centre in the District Plan. These are the rules that determine where and how development can take place. The Residential zone includes most of the city's residential suburbs. The Suburban Centre zone includes town centres and local shops as well as traditional work areas where activities such as manufacturing occur.

As most people live, shop or work in these areas, it is likely the proposed District Plan Changes will be of interest to you.

This brochure outlines the key changes we're proposing. You can comment on the proposed Plan Changes through a formal public consultation process under the Resource Management Act 1991.

What are some of the key changes?

We are proposing to replace the existing single Suburban Centres zone with two new zones; Centres and Business Areas – to better reflect the existing role and function of our centres and business areas. Most activities will be permitted, but there will be some controls on particular types of retail activity outside of the city's centres.

A new building design guide for development in both Centres and Business Areas will be introduced to improve the quality of development, particularly in existing Centres where local character and identity is important.

We are proposing to change zoning of some parcels of land to better reflect existing uses.

In the city's Residential zones, we propose new rules including:

- New 'areas of change' around the Johnsonville and Kilbirnie town centres, identifying where medium-density residential development will be encouraged.
- New provisions to promote quality housing development throughout the city.
- The creation of a 'residential coastal edge' which recognises the valuable contribution that the coastline and adjoining settlements make to the city's unique character.
- Amendments to the inner residential pre-1930s demolition rules to make them more consistent and effective.

[34] The summary guide referred to in that leaflet set out some further detail. It contained, under the table of contents, the following disclaimer:

Disclaimer: This is a summary guide only and does not contain the details of all changes proposed to the District Plan. Copies of the proposed Plan Changes are available on request (see page 15).

[35] In the section "Issues and proposed Changes" the summary guide said: "This section gives an overview of the main issues, and outlines the key changes proposed". Under the heading "Changes to Zone Boundaries" it said:

Issues

There are numerous examples throughout Wellington of commercial services, industrial workshops and retail activities on land zoned for residential purposes. Some of these activities, particularly those on the edge of centres, are proposed to be commercially rezoned to better reflect the current land uses and to encourage their retention.

Likewise, there are some examples of residential properties that have a commercial zoning. It is proposed to rezone these properties to residential to reflect their residential nature and relationship with the surroundings.

[36] Alongside that, under the heading "Changes we Propose", the summary guide set out a number of properties, identified by description, of properties to be rezoned from Residential Area to Centres and from Suburban Centre to Residential Area. Those properties did not include the Curtis Street land. The note continued:

In addition, it is proposed to rezone some properties around the Karori town centre from residential to centres to enable future expansion of the town centre.

Further detail of the proposed rezoning, including maps, are available on the Council's website or by contacting the City Planning team at Wellington City Council on 499 4444.

[37] The draft Plan change was also given other publicity by the Council through news media and other means. Ms Newbald's evidence summarises the steps taken on public notice and provision of documents in these terms:

- 141 The Council put a public notice of Plan Changes 72 and 73 in the Dominion Post and sent that public notice to every ratepayer in Wellington.
- 142 The full plan change documents were available at public libraries and on the Council website. In addition to the statutory documents required to be produced Council produced a leaflet explaining the process and extent of the changes proposed; a Summary Guide that explained the key changes; and maps of individual rezoning. These were available at Council libraries and on the Council website.
- 143 The Council also highlighted the Plan Changes by running an article in the 'Our Wellington Page' during the period in which submissions on the proposed plan changes could be made.

[38] Submissions on the proposed Plan changes closed on 27 November 2009, a period in excess of the minimum 20 working days required by the Act. Spencer Holmes made a submission on behalf of PPG which (among other things) supported rezoning of the Curtis Street land. Ms Newbald summarises the submission on this aspect:

- 148 Paragraphs 54-59 of the submission give Prime Property Groups reasons for the submission as: the site was formerly a landfill and is traversed by high voltage transmission lines, making it inherently unsuitable for residential and open space; a zoning of suburban centre zoning would be preferable but Business 2 would suffice; the site is below surrounding residential buildings and will not have an adverse effect on residential amenity; Business 2 will allow reasonable use of the land as well as providing services and employment opportunities to the wider community.

[39] No submissions were received opposing the rezoning of the Curtis Street land.

[40] In accordance with cl 7 of Schedule 1 of the RMA a summary of submissions was prepared and publicly notified by the Council on 2 February 2010. The PPG

submission was summarised in the summary of submissions on page 30 of that document in the following terms:

Submitter Number: 85

Submitter Prime Property Group (PPG)
Details: Ian Leary
C/- Spencer Holmes Limited
Level 6, 8 Willis Street
PO Box 588
WELLINGTON 6140

Wish to be Heard: Yes

Submission Summary: Generally supports those provisions of the plan change which support market-led outcomes and a wide range of retail activity in the city. The submitter requests changes to the plan change, specifically with regard to properties at Curtis Street, Hutt Road and Rongotai South.

Decision(s) requested:

1. That the proposed rezoning of land at 55-85 Curtis Street from Outer Residential and Open Space to Business 2 Area be adopted.
2. Change first word of Policy 33.2.9.1, regarding transmission lines, from 'restrict' to 'control'.
3. That the land of 673 Hutt Road to be rezoned from Rural to Business 2 Area.
4. Amend Policy 33.2.3.2 to include Rongotai South as a Business Precinct.
5. Increase the maximum permitted building height for parts of the area at Rongotai South from 12m to 21m.

[41] There were a total of 18 further submissions on PC73 supporting or opposing approximately 150 original submissions. None of those further submissions was directly relevant to the PPG submission on the Curtis Street site.

[42] The Council held hearings on the proposed Plan Changes 72 and 73 over several weeks from April to June 2010 before the Hearing Committee. PPG appeared at those hearings in support of its submission. The Council's decision took the form of approval of a report on the public hearings before the Hearing Committee. That report dealt with the rezoning of the Curtis Street site in these terms:

171 The decision stated:

Submitter 85 (Prime Property Group) supported the proposed rezoning of land at 55-85 Curtis St, Karori from Outer Residential and Open Space (at the northern end of the site) to Business 2 Area. This site is an area of largely vacant land that is located in the suburban boundary of Karori and Wilton, near the intersection of Curtis Street and Chaytor Street. The land adjoins the Karori Garden Centre and is approximately 1.09ha in size. Officers advised the Hearings Committee that the land was formally used as a cleanfill and Council works depot. The open space zoning at the northern part of the land is remnant land left over from the development of Whitehead Road which linked Old Karori Road and Curtis Street which had subsequently been formed.

At the Hearing, the submitters Planner Ian Leary, further supported the proposed zoning of this site as a Business 2 Area.

The Hearing Committee agreed with the Officers Report that the site is unsuitable for residential purposes and that privately zoned land should not generally be zoned for open space purposes. The Committee consider that a Business 2 Area zoning will allow for the best future use of the site and therefore recommend that this zoning be accepted.

[43] The Council decision accordingly confirmed the rezoning of the Curtis Street land. The decision on the two Plan changes PC72 and PC73 was publicly notified on 29 September 2010. The public notice, under cl 10 of the First Schedule to the Act, did not detail the changes. It repeated the earlier brief descriptions of Plan changes. It said that the key changes proposed in PC73 include: "Rezoning of some parcels of land to better reflect existing uses."

[44] Following the Council's decision approving the Plan Change, PPG lodged an appeal against certain aspects of the decision. One of the changes sought by PPG in that appeal is to reverse the change made in PC73 to subdivide the Suburban Centre zone into separate zones. The relief sought is described in the notice of appeal in these terms:

- 6b. Delete changes to District Plan maps 1 to 31 introduced under the Plan Change. The Appellant seeks that all Centres, Business 1 and Business 2 Areas be zoned Suburban Centres.

[45] That appeal has not yet been dealt with. In consequence, PC73 is not yet operative.

The earthworks consent

[46] In November 2010, PPG, through Spencer Holmes, lodged a resource consent application for approval to carry out earthworks and clear vegetation on the site. The application was received by the Council on 5 November 2010. It had been the subject of a pre-application meeting, requested by Mr Leary, with the Council on 22 October 2010. The proposal was to carry out earthworks to form an earthworks platform by constructing a level platform, and then loading that platform with a further three metres of material to sit on the platform for about six months. The application said:

During that time, other consents will be sought from Council in relation to the use of the site. If those consents are successfully obtained, then the 3 metres of material used to load the building platform, will be distributed over the site.

If the consents are not successfully obtained, then the material will be deposited at an approved landfill or cleanfill and the earthworks platform used for purposes permitted by the District Plan.

[47] The area of land to be filled is approximately 3,400 square metres. The volume of the earthworks proposed to be placed on the site, including the fill solely for loading, is 19,000 cubic metres. Of that 7,200 cubic metres would be permanently placed and compacted to a level suitable for the construction of a shed or industrial type building. Approximately 4,000 to 5,000 cubic metres of material recently tipped on the site is to be used as part of that volume.

[48] The application was considered on a non-notified basis. I address the evidence relating to the processing of the application later. The consent was granted on 13 December 2010.

The Mitre 10 Mega proposal

[49] To complete the background factual narrative, I record that on 14 April 2011 PPG lodged a resource consent application to allow the development of a Mitre 10 Megastore on the site. A number of nearby residents were notified. There was opposition. In August 2011, Spencer Holmes advised the Council that the applicant wished to defer the hearing, and would advise the Council before recommencing the consent process. That application remains deferred.

[50] The notification led to some local opposition to the proposal. It also brought awareness by residents of the zoning change. That led to an unsuccessful approach to the Council requesting it to revisit the zoning decision. I address that later. These proceedings were issued in November 2011.

The applicant's challenge

[51] The essence of the applicant's submission is that the Council has acted unlawfully in the processes by which it rezoned the land and gave the earthworks consent. The applicant submits:

- (a) The proposal to rezone the site as part of a District Plan change required proper consultation in accordance with the relevant provisions in the RMA. The consultation material released by the Council not only failed to meet the requirements but was misleading.
- (b) The rezoning was outside the scope of the land rezoning contemplated by the District Plan within which the land was included, and the rezoning did not have proper regard to the rezoning principles that the Council had decided to apply or the relevant principles of the RMA.
- (c) The Council was required to give notice to affected parties of the rezoning and the earthwork consent application but failed to do so, in breach of a promise made to residents in 1999.

- (d) The application for resource consents for the earthworks and vegetation clearance should not have been separated from the inherently interrelated application for consent to the Mitre 10 Mega store development.
- (e) The Council decision not to withdraw the rezoning under cl 8D of Schedule 1 of the RMA was unlawful in that it was based on incorrect advice given to the Council that the residents' criticisms of the consultation and notification procedures were legally irrelevant and could not be used as a reason to withdraw the site from PC73 under cl 8D.
- (f) The Council's decisions to rezone the site, to grant the earthworks consent, and not to withdraw the site from PC73 under cl 8D, are unlawful as a result of procedural impropriety whereby the developer has been favoured and the residents excluded, notwithstanding a requirement that RMA procedures operate in a fair and open manner.

Discussion

(a) The rezoning decision: Consultation

[52] When undertaking a District Plan change, the Council may undertake consultation, in accordance with cl 3, Schedule 1 of the RMA. If it does engage in consultation, the Council must undertake that consultation in accordance with s 82 of the Local Government Act 2002 (the LGA).

[53] Here, the Council did consult on the draft changes proposed in PC73. It advertised the proposed change in December 2008, and specified a consultation period between December 2008 and April 2009. Those steps clearly fall within the ambit of cl 3(2) of Schedule 1 of the RMA. The Council was therefore required by cl 3(4) to comply with s 82 of the LGA in carrying out that consultation.

[54] Mr Cooke submits that the consultation material was misleading in stating that the rezoning of land was "to better reflect existing uses". He submits that that description could not reasonably apply to this site. However, when the December 2008 consultation documents were issued, this site was not included. The description of the rezoning as being "to better reflect existing uses" was not, at least so far as this site is concerned, misleading at that point. The proposal that this site be rezoned as part of PC73 originated in the discussion between Mr Leary of Spencer Holmes and Mr McKay of the Council. That was at an early stage of the review, before any consultation had been undertaken. That discussion did not lead to the inclusion of the rezoning in the draft PC73 when the consultation material was issued in December 2008.

[55] The proposal that the rezoning of this site be included in PC73 was again raised by PPG, through Mr Leary, in PPG's feedback on the consultation material in April 2009. The Council decided, on consideration of that submission, to amend the draft PC73 to propose the rezoning of the site. The applicant's submission is that PPG's rezoning proposal in its feedback should not have been accepted by the Council, because it involved a change which was beyond the scope of the draft PC73. I deal with that submission later, in dealing with the applicant's "Out of Scope" argument. At this stage, in considering only the question of consultation, I hold that the receipt of feedback from PPG in response to the consultation documents was a proper working of the consultation process.

[56] For these reasons, I find that, so far as the initial consultation phase is concerned, that is, from December 2008 to April 2009, the applicant has not made out any breach by the Council of its obligations under s 82 of the LGA.

[57] I consider that the starting point for the examination of the applicant's claim that the Council's information was misleading must be the documentation which was issued after the proposed rezoning of this site had been included. That is the documentation issued when the statutory process under the RMA commenced, on the public notification of the draft plan change PC73 in September 2009.

[58] At that stage, what the statutory scheme required, under clauses 5 to 10 of Schedule 1 of the RMA, was public notification, and a prescribed process for the receipt and consideration of submissions.

[59] The Council's statutory obligations as to notice of PC73 are contained in cl 5 of Schedule 1 of the RMA. As relevant, that clause provides:

- (1) A local authority that has prepared a proposed policy statement or plan shall publicly notify it.
- (1A) A territorial authority shall, not earlier than 60 working days before public notification or later than 10 working days after public notification of its plan, either—
 - (a) Send a copy of the public notice, and such further information as the territorial authority thinks fit relating to the proposed plan, to every ratepayer for the area of the territorial authority where that person, in the territorial authority's opinion, is likely to be directly affected by the proposed plan; or
 - (b) Include the public notice, and such further information as the territorial authority thinks fit relating to the proposed plan, in any publication or circular which is issued or sent to all residential properties and Post Office box addresses located in the affected area—

and shall send a copy of the public notice to any other person who, in the territorial authority's opinion, is directly affected by the plan.

...

- (2) Public notice under subclause (1) shall state—
 - (a) Where the proposed policy statement or plan may be inspected; and
 - (b) That any person may make a submission on the proposed policy statement or plan; and
 - (c) The process for public participation in the consideration of the proposed policy statement or plan; and
 - (d) The closing date for submissions; and
 - (e) The address for service of the local authority.

[60] I have described, at [31] to [37], the steps which the Council took to publicly notify the proposed changes.

[61] For the Council, Mr Quinn submits that all the information required by cl 5(2) of the First Schedule was included in the public notice. He submits that the

information required is mechanical, rather than substantive, and there is no requirement in cl 5 to describe the Plan changes or the specifics of what it addresses. He submits that in the context of a full review of all Residential and Suburban Centres chapters in Wellington it would not be practical to identify all the relevant changes in a public notice. He submits that the RMA Plan change process envisages that those who might consider they have an interest in the chapter changes should study them and become involved in the public participation process if they wish to do so.

[62] The Council has adduced in evidence an affidavit from Mr Putt, a planner and resource management consultant. Mr Putt notes that the public notice required by cl 5 was supported by a summary guide document and a direct mail out to all residents and ratepayers informing them that this major review of District Plan provisions was underway through the public notification of the PC73. In his experience, the public notice contained a level of information appropriate for the breadth of the review and directed recipients to where they could find more details of the proposed terms and conditions. He notes also the public notice of the summary of submissions in February 2010. He expresses the opinion that the Council took all steps in the process that are required by Schedule 1 and that the level of detail provided was what he would expect of a Plan change of this size and nature.

[63] I consider that, from a purely mechanical perspective, the requirements of cl 5 were met. However, I consider that it is necessary, in determining whether the Council has met its wider administrative law obligations in relation to the promulgation of PC73, to go further than merely considering whether those mechanical requirements of cl 5 have been met. There are two respects in which the exercise of an administrative discretion is required of the Council under cl 5(1A)(a). It must decide what ratepayers are likely to be directly affected by the proposed Plan. It must also determine what, if any, further information should be sent with the public notice to those ratepayers. Both of those aspects require further consideration here.

[64] As to the information to be sent, the Council has, commendably, prepared material which helpfully summarised the changes proposed in PC73. It sought to

describe the main effects of the changes. Such a helpful approach to the provision of additional information is to be commended. The Council's discretion as to what further information it supplies is very broad. But it must be exercised in accordance with the law. I consider that there was an obligation on the Council, having decided to supply that additional information, to ensure that the information was not materially misleading. It would not be appropriate to apply an overly critical assessment to whether this additional information was misleading. To do so might discourage Councils from doing more than the bare statutory minimum. However, adopting a benevolent approach, I have, for the reasons which follow, reached the conclusion that the material was materially misleading, so far as the disclosure of the proposed zoning change for the Curtis Street site was concerned.

[65] The only reason given, in the explanatory material, for the rezoning of land in PC73, was that there were to be some changes of zoning "to better reflect existing uses". Mr Leary in his affidavit expresses the opinion that the rezoning of the Curtis Street site was consistent with that description, as the rezoning would better reflect the site's existing and historical use. Ms Gregory for the second respondent submitted to like effect. Mr Leary says that the site has, to his knowledge, never been used for residential activity. It is private land, and therefore has little open space value. Its recent historical use has been as a works depot and clean fill.

[66] I do not accept the submission that the words used accurately describe the rezoning of the present site. The matters to which Mr Leary refers might support the proposition that the existing zoning of the land was inappropriate and that a Business 2 zoning might better reflect possible future uses. It is not appropriate for me to express any view on that issue. It is however impossible to say that the existing use of the land is appropriately reflected by a Business 2 zoning. The rezoning of this land was not motivated by the need to reflect the existing use of the land. The failure to identify the rezoning of this land as being motivated by different considerations was, in my view, materially misleading. I return later, at [79] and following, to the broader issue of the reasons for the rezoning.

[67] The September 2009 report to the SPC did not draw attention to the rezoning. I have set out at [28] cl 5.2.6 of that report. That indicated two proposals for

rezoning residential land. One was to “better reflect current land uses and to retain flexibility...on these sites in the future”. The second was to rezone some land on the edges of Johnsonville and Karori to make additional land available for commercial activities. Neither of those is an accurate description of the proposed rezoning of the part of the site zoned residential. The report did not refer to any proposed rezoning of Open Space zoned land to Suburban Centres

[68] No reader of the information material would have been alerted by the existing use of the land to the possibility that this site was to be rezoned Business 2. The misleading effect of that statement as to the reason for the rezonings in PC73 was not ameliorated by the way in which the rezoning of this site was referred to in the Plan change documentation itself. Appendix 3 (referred to at [29] above) gives a summary of rezonings in Suburban Centres. The land at 55 to 85 Curtis Street cannot properly be described as being within a Suburban Centre. In Appendix 3, and in the s 32 report, it is described as part of the Karori Suburban Centre. This land is barely within the suburb of Karori, let alone within the Karori Suburban Centre. That reference to the Karori Suburban Centre is limited to the main commercial area in Karori. That is confirmed by the description in Appendix 3 of Marsden, which is within the suburb of Karori, as a different Suburban Centre from Karori.

[69] As I have noted at [63], the exercise of a discretion is also required under cl 5(1A)(a) in deciding the ratepayers who are likely to be directly affected by the proposed plan. As I have noted at [33], a copy of the public notice was sent to every ratepayer in Wellington. The covering leaflet said that the review involved the planning rules affecting land zoned Residential and Suburban Centre. It said: “as most people live, shop or work in these areas, it is likely the proposed District Plan changes will be of interest to you.” That suggests that the Council has decided that all ratepayers are likely to be directly affected by the proposed Plan, because of the changes to the planning rules.

[70] That is not the only possible direct effect on ratepayers. It is possible that, as the applicant alleges here, one or more ratepayers may also be directly affected by the proposed Plan in some specific way, by a provision other than the planning rules of general application across the zone. That raises the question whether the general

provision of a copy of a notice, on the generic basis of the effect of the planning rules on all ratepayers, will be sufficient compliance with cl 5(1A), or whether the Council must also identify that specific potential effect, and draw that to the attention of the ratepayers affected.

[71] In this case, that question is linked to the applicant's challenge which I have summarised at [51](c). I need to consider whether specific notice of the proposed rezoning of the Curtis Street site to neighbours was required by either or both of:

- (a) The application of administrative law principles to the exercise of the Council's discretion to determine who is likely to be directly affected in terms of cl 5(1A)(a); or
- (b) Some additional administrative law obligation resting on the Council in this case, by reason of the correspondence in 1999, described at [6] to [9] above.

[72] In this case, the answer to (a) is directly related to the misleading nature of the information supplied. As I have found, there was nothing in the explanatory material which drew the proposed change of zoning of this site to the attention of ratepayers likely to be directly affected by that change. I consider that the obligation on the Council to give notice of the proposed plan change to every ratepayer likely to be directly affected includes an obligation to identify the relevant part of the proposed plan. The Council did that, so far as the planning rules were concerned. In doing so, it discharged its duty under cl 5(1A)(a) so far as that likely effect was concerned. That did not exhaust that duty. The duty remained for the likely effect of other changes. It is not necessary for me to consider whether, for those sites rezoned by PC73 to better reflect the existing use of the land, some different form of notice to neighbouring ratepayers might have been required. That may well have been unnecessary, having regard to the existing use of those sites, and the clear indication that some such sites were to be rezoned. For the Curtis Street site, that cannot be so. I consider that the Council was required by cl 5(1A), to consider whether any ratepayers were likely to be directly affected by the rezoning, and to send to any such ratepayers information sufficient to draw that proposed change to their attention.

[73] Mr Quinn submits that in the context of a full review of all Residential and Suburban Centres chapters it would not be practical to identify all the relevant changes in a public notice. There is force in that submission. But that serves to emphasise the importance of the obligation on the Council to identify the ratepayers likely to be affected by a specific change, and to notify them of that change. The scale and complexity of the proposed plan change does not alter the Council's responsibility in that regard.

[74] For these reasons, I hold that, to the extent that the Council should, in respect of any ratepayers, have formed the opinion that those ratepayers were likely to be directly affected by this rezoning, the giving of notice to those ratepayers, in their capacity as ratepayers generally, as likely to be affected by the change of planning rules, was not a sufficient compliance with the obligation to give notice to the ratepayers likely to be directly affected by the proposed rezoning of the Curtis Street site.

[75] It is for the Council to determine which ratepayers, in its opinion, are likely to be directly affected by the rezoning. In this case, that involves the issue raised at [71](b). It is clear from the sequence of events that no specific consideration was given by the Council to the question of whether any ratepayers were likely to be directly affected by the change of zoning. It is therefore not possible to examine what the Council's opinion on whether neighbouring ratepayers were likely to be directly affected by the rezoning might have been. It is not for this Court to decide what decision the Council should have reached on whether any particular neighbouring ratepayer was likely to be affected by the rezoning, if it had considered that question. This Court can, however, examine what might have been relevant to that question.

[76] Counsel for the applicant submits that the exchange of correspondence in 1999 required consultation with the community in relation to the rezoning because of a legitimate expectation of the residents arising from the promises contained in the letter at [7]. Counsel submits that procedural legitimate expectations will arise from promises that a public authority will act in a certain way and where a group of

people is uniquely and specially affected by a decision because of their long standing interest in the subject matter of it.¹

[77] I do not consider that the correspondence in 1999 created a legitimate expectation giving rise to an administrative law obligation on the Council to consult with residents over the rezoning. I consider that the correspondence is properly to be read as advising the residents of the likely course to be followed under the planning law then in force. I do not consider that it would impose on the Council an additional obligation to consult residents, in circumstances where planning law did not, at the time of any consideration of the zoning or use of the land, require consultation.

[78] I do however consider that the correspondence is relevant to the consideration which the Council should have given to the question of whether the neighbouring ratepayers were directly affected by the rezoning. Current planning law includes cl 5 of Schedule 1 of the RMA, and the correspondence is relevant to the Council's obligations under that clause. The site had generated considerable interest from neighbouring landowners in 1999. The Council ought to have anticipated a similar level of interest, and taken that interest into account in deciding whether neighbouring ratepayers were directly affected by the proposed rezoning of the Curtis Street site in PC73. The fact that the rezoning was proposed as part of a wider review does not alter that obligation.

(b) The rezoning: Scope and approach

[79] The ground of challenge summarised at [51](b) addresses the decision of the Council to include the rezoning of the land in PC73 when it was publicly notified in November 2008, following the initial consultation phase. Counsel for the applicant refers to the relevant statutory provisions which limit what can be received by way of submission, and what can be amended during a Plan change process. Only submissions "on" the change are provided for in the statutory scheme. Clauses 6, 7

¹ *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [142]; *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 132 and 135.

and 8 of Schedule 1 of the RMA all refer to submissions “on” the proposed Plan. Counsel for the applicant cites authorities which refer to the limiting effect of that requirement on what can properly be included within a submission.² Counsel submits that a submission seeking an inclusion of the Curtis Street site in the rezoning, cannot properly be regarded as a submission “on” the scope of the proposed Plan change.

[80] I accept Mr Quinn’s submission that the answer to that is that PPG’s request to include the rezoning of the site in the proposed Plan change was made not in a cl 6 submission but in its feedback to the Council in the initial consultation phase. At that stage, as counsel submits, the process for making submissions on the proposed Plan change had not commenced. Clause 6 of Schedule 1 of the RMA was not engaged. PPG’s ability to request the Council to include the rezoning in the proposed Plan change was not limited by cl 6 of Schedule 1. Nor was the Council required by cl 7 to give public notice of its decision on PPG’s feedback requesting the rezoning of the site. Counsel’s acceptance of PPG’s request meant that the rezoning of the site was included in the proposed Plan change at the time it was publicly notified under cl 5. I have already addressed the issue of the Council’s obligation under that provision so far as notification of the proposed rezoning is concerned.

[81] The applicant’s next submission is that, in deciding to include the proposed rezoning of the site as part of PC73, and in its subsequent decision in September 2010 to adopt the Plan change, and so to rezone the land, the Council has failed to apply the proper approach. In particular, it asserts that the Council has made two inter-related errors:

- (a) The criteria approved to assess the rezoning which were included in PC73 were not applied to this site, and this site did not meet those criteria; and

² *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch, AP34/02, 14 March 2003; *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC).

- (b) The rezoning did not satisfy the requirements of the RMA, in particularly s 32.

[82] The criteria used to identify sites to be rezoned in the proposed PC73 were identified in the report to the SPC in November 2008 and approved by the SPC on 20 November 2008. They were set out in paragraph 5.3.8 set out above at [14]. At that stage, the rezoning of the Curtis Street site was not proposed, so the question whether that rezoning would have met those criteria did not arise. The report to the SPC on the feedback on the consultation in May 2009 discussed proposed rezoning in paragraph 5.1.4, set out at [22]. As noted in the passage which I have emphasised at the end of that quotation, the rezoning of this site was to be considered against the rezoning criteria and if appropriate included in the proposed Plan change. There is no evidence that the rezoning of this site was ever considered against those criteria, or indeed against any other criteria. The next report to the SPC, in September 2009, the s 32 report, which formed the basis of the SPC's approval for PC73 to proceed to the public notification stage, described the proposed rezoning. The criteria were stated, in a slightly modified form, in the s 32 report as set out at [26]. None of those criteria were used to assess the proposed rezoning of this site. They clearly could not have been considered appropriate, at least for that part of the site zoned Open Space, as none of the stated criteria addressed a rezoning from Open Space to some other zoning. Further, the decision on the rezoning of the Curtis Street site, set out at [42], addressed quite different considerations from those set out in the criteria.

[83] There is nothing in the documents to indicate that there had been a departure from the way forward advised to the SPC in May 2009, that the rezoning would be considered against the rezoning criteria. Nor is there anything in the documents to draw to the attention of the SPC the fact that this rezoning had not been considered against the criteria. As I have said at [67], the attention of the SPC was not drawn to the proposed rezoning of this site.

[84] Mr Quinn submits that, while criteria were used by the Council in identifying land for rezoning, this does not limit the Council's legal ability to include land for rezoning. He submits that the legal requirement applicable was to undertake a s 32

analysis to determine the most appropriate zoning. He submits that that must be the paramount consideration and such an assessment was undertaken in this case.

[85] Counsel for the applicant submits, in relation to s 32, that in the absence of consideration of the proposed rezoning of the site against criteria that had been developed for considering other sites under PC73, there needed to be a proper consideration of the issues as they would normally arise under the RMA for the proposed rezoning of a particular piece of land. Counsel submits that there has been no adequate consideration of such principles and accordingly, a failure to meet the requirements of the RMA, in particular s 32.

[86] I do not consider that it is necessary, or appropriate, in this case, to undertake an analysis of what is required by s 32. Section 32A of the RMA imposes limits on the extent to which a failure to comply with s 32 may be relied upon as a grounds for challenge to the Council's decision. I do not think that it is necessary to venture into that territory here. The reason for that is that I do not consider that it is necessary for the applicant to invoke a failure to comply with s 32. The short point is that the Council in May 2009 had approved work which included the assessment of the proposed rezoning against stated criteria. This rezoning was assessed against different criteria.

[87] There was evidence, and submissions, directed to the issue of whether or not a Business 2 zoning is a more appropriate zoning for this site than the present Open Space B and Outer Residential zoning. I do not consider it appropriate to venture into a discussion of that evidence, or those submissions. The merits of the proposed rezoning are not an appropriate subject for this challenge by way of judicial review. It is sufficient to observe that it is no answer to the proposition that the criteria adopted for considering rezoning proposals within PC73 have not been applied to say that, if appropriate criteria had been adopted, the rezoning would have met those criteria.

(c) The 1999 Correspondence

[88] I have, in dealing with the first ground of challenge, addressed the effect of the correspondence between residents and Council, relied on in support of the ground of challenge in [51](c).

(d) The earthworks consent

[89] The applicant also challenges the Council's decision to grant the earthworks consent to the developer. The ground of challenge is briefly summarised in [51](d). As amplified in submissions, this challenge is based on three inter-related grounds:

- (a) Under s 91 of the RMA, the earthworks consent should not have been separated out and dealt with separately from the resource consent for the construction of the Mitre 10 Mega store;
- (b) The Council should have notified the directly affected residents of the earthworks consent application. In particular:
 - (i) The District Plan rules did not preclude public notification of the application so as to require that the application not be publicly notified, by virtue of s 95A(3) of the RMA; or
 - (ii) The Council should have decided that special circumstances exist in relation to the application, under s 95A(4).
- (c) The earthworks consent should be set aside because it has been materially influenced by the rezoning decision and that, if that decision is set aside, a foundation for the earthworks consent decision has been materially altered. That is to say, the Council has proceeded on the assumption that there has been a valid rezoning and, if there has not, it has taken into account an irrelevant consideration.

[90] Ms Williams, the resource consents planner in the Council who dealt with the application, says in her affidavit that she accepted the application as being complete in the knowledge that it essentially formed stage 1 of a future potential development within the site. She understood the purpose of the earthworks was to improve the stability of the land through the formation of a compacted earthworks platform which could be used for a number of different purposes including accommodating a future building. She noted that the application did not seek consent for structure or buildings. She considered that the proposed earthworks were not reliant on a future resource consent being successfully obtained. She noted from the application that no building had been specifically designed for the site at the point of application for the earthworks consent.

[91] Following further discussions within the Council and with the applicant, Ms Williams was satisfied that she had enough information to undertake a complete assessment of the actual and potential environmental effects of the proposal. When dealing with the effects, she considered that PC73 was relevant for the proposal as it rezoned the site from Outer Residential and Open Space B to Suburban Centre – Business 2. That demonstrated the future direction that development within the site might take. She noted that a consequence of the rezoning was that an eventual change in the site's vegetation cover could be anticipated. That provided the wider context in which the application was considered but Ms Williams said that the operative District Plan provisions were afforded significant weight and PC73 was afforded limited weight due to appeals against PC73.

[92] Ms Williams considered whether the resource consent application should be notified. She noted that relevant rules provide that such applications do not need to be publicly notified or served on affected persons. She noted that the 2009 amendments to the RMA (which inserted s 95A) applied, and said:

Whilst it is noted that the provisions do not specifically reference the word "preclude", as stated within the 2009 amendments to the Act, the intent is such and accordingly the rules are consistently applied in this manner, unless special circumstances apply or the applicant requests notification. I applied them in this manner when processing the earthworks resource consent.

[93] Ms Williams noted that the Council must consider whether there are any special circumstances that warrant public notification under s 95A(4) of the RMA. She was cognisant of the fact the proposal related to a discretionary (restricted) activity. She considered the earthworks to be of a generic preparatory nature that could facilitate a number of conceivable development opportunities. She considered the scale of the earthworks to be generally consistent with a site of such size and considered that the effects could be managed appropriately. The scale of vegetation removal was greater than that provided for within the District Plan as a permitted activity in the Open Space B area but would be permitted under PC73. She considered that the values associated with the indigenous vegetation to be removed from the site would not be so significant as to determine that special circumstances exist requiring the application to be notified. She considered the impact on the wider ecological values of the area did not constitute special circumstances.

[94] Ms William noted that the site has a high profile but said that public interest in a development or site does not automatically give rise to special circumstances. She was not at the time aware of the 1999 correspondence as to public input in relation to future development of the site. She said that had she known about that correspondence she would not have considered it to be a special circumstance.

[95] Ms Williams said in her affidavit, as I have noted, that, in her consideration of the application, the operative District Plan was afforded significant weight and PC73 was afforded limited weight. I accept her evidence. However, I consider that, in deciding whether the two applications should have been separated, and whether the earthworks consent should have been publicly notified, the zoning of the site was an important consideration. Ms Williams acknowledged that PC73 was relevant because it rezoned the site and demonstrated the future direction that development within the site might take. It is one thing to consider an application for consent to construct a building platform, of a generic preparatory nature that could facilitate a number of conceivable development opportunities, where the uses to which the platform could be put are consistent with the zoning of the site. It is quite another to permit the development of such a building platform where the ultimate use of the site for the conceivable development opportunities is problematic because of the zoning. Consent for an activity involving the construction of a building appropriate to the

proposed building platform, in a Residential or Open Space zone, must be at best problematic. The likelihood that the building platform could realistically be used for a purpose for which it was suitable must have been a relevant consideration in deciding whether the two applications should be separated, and whether the earthworks application needed to be notified.

[96] I consider that it is not possible to examine the issues of whether the earthworks consent application should have been dealt with ahead of an application for the development of the site, and whether the application should have been publicly notified, in isolation from the zoning of the site. The validity of the rezoning in PC73 is of such importance as to affect the validity of the decision making process for the earthworks consent. In deciding whether the earthworks consent application should have been dealt with separately from a future application for development on the site, and whether it should have been notified, the zoning of the site was an important consideration, and the rezoning in PC73 was taken into account in the decisions made in the course of processing the earthworks consent application.

[97] Where a decision, subsequently held to be invalid, has been taken into account in making some other decision, the validity of that other decision will be affected.³ In this case, the decisions as to the rezoning and in relation to the earthworks consent are inter-related to a degree where the invalidity of the rezoning decision must vitiate the earthworks consent.

[98] That conclusion makes it unnecessary to deal specifically with the three matters raised on this ground of challenge.

(e) *Non-withdrawal under cl 8D*

[99] When local residents became aware of the proposal for the site, by notification of the Mitre 10 Mega store proposal, some local opposition to the

³ *Rowling v Takaro Properties Ltd* [1975] 2 NZLR 62 at 66-67; *Survey Nelson Ltd v Director of Maritime New Zealand* HC Wellington CIV-2011-485-391, 24 March 2011 at [41].

planned development arose. There were approaches to the Council requesting it to review the rezoning decision in PC73.

[100] Clause 8D of Schedule 1 of the RMA provides:

- (1) Where a local authority has initiated the preparation of a policy statement or plan, the local authority may withdraw its proposal to prepare, change, or vary the policy statement or plan at any time—
 - (a) if an appeal has not been made to the Environment Court under clause 14, or the appeal has been withdrawn, before the policy statement or plan is approved by the local authority; or
 - (b) if an appeal has been made to the Environment Court, before the Environment Court hearing commences.
- (2) The local authority shall give public notice of any withdrawal under subclause (1), including the reasons for the withdrawal.

[101] A proposal that the rezoning should be withdrawn was put to the Council, but rejected by it. The applicant submits that the Council's decision not to exercise its power to withdraw the rezoning was unlawful, because the Council was advised that the residents' criticisms of the notification and consultation procedures were irrelevant to both the initial compliance with the procedural requirements, and any decisions under cl 8D.

[102] The Council takes issue with whether this issue is properly raised on the pleadings. It submits that if the applicant sought to challenge the cl 8D decision, it should have been specifically referred to in the relief sought.

[103] I do not propose to address this ground of challenge in detail. My decision on other grounds of challenge renders this ground largely academic. In the circumstances, it is best that I do not address a question upon which any views that I might express would necessarily be obiter.

(f) Procedural impropriety

[104] In its final ground of challenge, summarised at [51](f), the applicant says that all of the relevant decisions of the Council should be set aside because of procedural

impropriety that has infected the decision making process as a whole. Counsel submits that this procedural impropriety ground of challenge has a similarity with an allegation of bias, but there is a different focus. Counsel submits that the allegation is that the processes followed by the Council here did not involve a proper application of the procedures prescribed in Schedule 1 of the RMA because a procedural preference has been accorded to the developer, and the residents excluded in important parts of the decision making process.

[105] Again, I do not propose to address this ground. My decisions on the earlier grounds of challenge make that unnecessary. I have addressed, in dealing with those grounds of challenge, whether the procedures and processes adopted by the Council have accorded with applicable administrative law principles. I have not, in considering those grounds of challenge, found it necessary to consider whether there may have been any conscious or unconscious motivation for or against any of the parties, on the part of anyone in the Council. It is appropriate that I should record that my reasoning does not imply any such findings. Beyond that, I do not consider it appropriate to address this cause of action.

Conclusions and outcome

[106] I now need to draw together the conclusions which I have reached, and apply them so as to determine the outcome.

[107] I have held, at [72], that the Council was required to consider whether any ratepayers were likely to be directly affected by the rezoning of the Curtis Street site, and to send to any such ratepayers information sufficient to draw that proposed change to their attention. I have held, at [73], that no specific consideration was given by the Council to the question of whether any ratepayers were likely to be directly affected by the change of zoning. I have held, at [74], that the giving of notice to any such ratepayers, in their capacity as ratepayers generally, was not a sufficient compliance with the obligation to give notice to the ratepayers likely to be directly affected by the proposed rezoning of the site. I have also held that the information supplied to all ratepayers did not meet the Council's obligations to ratepayers likely to be directly affected by the proposed rezoning. I have held, at

[78], that the Council ought to have anticipated a level of interest from neighbouring landowners and taken that interest into account in deciding whether neighbouring ratepayers were directly affected by the proposed rezoning of the site.

[108] Those findings lead me to the conclusion that the Council has not fully complied with its obligations under clause 5(1A) of Schedule 1 of the RMA in respect of the rezoning decision.

[109] I have further held, at [86], that the rezoning was not assessed against the criteria fixed by the Council in May 2009 for rezoning. I find that this failure by the Council to follow the criteria means that the Council has failed to have regard to relevant considerations, and has had regard to irrelevant considerations, in reaching its decision to rezone the site.

[110] Those failures are material, and go to the validity of the rezoning decision. I consider that they must lead to the consequence that the rezoning decision must be set aside.

[111] The rezoning decision forms part of the wider changes in PC73. The reasons which have led me to the conclusion that the rezoning decision should be set aside do not apply to other aspects of PC73. In these circumstances, I consider that the appropriate remedy is to set aside the decision of the Council, made on 20 November 2008 by adopting the report dated 29 November 2008, to include the rezoning of the site in PC73. The setting aside of that decision necessarily requires that the Council's decision to rezone the site, made by adopting the report of the hearing committee as set out at [42] and publicly notified on 29 September 2010, must also be set aside. The order setting aside those decisions is limited to that part of PC73 alone, and does not otherwise affect the decisions of the Council on other aspects of PC73.

[112] I have held, at [97], that the rezoning decision and the earthworks consent are inter-related to a degree where the latter must stand or fall with the former. There must be an order setting aside the earthworks consent.

[113] To give effect to these conclusions, there will be orders setting aside:

- (a) The Council's decision to include the rezoning of 55-85 Curtis Street in PC73; and
- (b) The Council's decision to rezone the site at 55-85 Curtis Street; and
- (c) The Council's decision to grant the earthworks consent.

[114] Costs are reserved. The parties may submit memoranda.

"A D MacKenzie J"

Solicitors: Adderley Head, Christchurch for Applicant
DLA Phillips Fox, Wellington for First Respondent
Chapman Tripp, Wellington, for Second Respondent