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## WELLINGTON CITY COUNCIL SUBMISSION TO THE LOCAL GOVERNMENT AND ENVIRONMENT SELECT COMMITTEE

APPROVED BY THE COUNCIL ON 16 AUGUST 2015

### EXECUTIVE SUMMARY

As trustee, the Council is the guardian of the Wellington Town Belt as well as its day-to-day custodian and manager. These important roles are made more difficult by a legislative status quo that is complex and sometimes contentious. Following extensive consultation and a prolonged public conversation, the Council wishes to honour its roles by promoting local legislation — the Wellington Town Belt Bill — that will more effectively protect the Town Belt and allow it to grow in the future should suitable land become available. The Bill will also make the basis upon which the Town Belt is governed and managed more transparent, thus enabling the public to hold the Council accountable.

This cannot be achieved without legislation. The Bill before the Local Government and Environment Select Committee has undergone years of careful development and negotiation with stakeholders. The public and important stakeholders have expressed support for it. The Council respectfully requests that the Committee recommend the Bill to Parliament for enactment.

### BACKGROUND

#### **What is the Wellington Town Belt?**

The land known as the Wellington Town Belt is a significant area of open space that provides a scenic backdrop to the inner city and offers recreational opportunities to residents and visitors. Today it comprises nearly 400 hectares stretching in a horseshoe shape from Mt Victoria/Matairangi in the north — east, to Te Ahumairangi Hill (formerly Tinakori Hill) between Wadestown and Thorndon.

The Town Belt had its genesis in the 1839 instruction given by the Secretary of the New Zealand Company, John Ward, to set aside a belt of land "not to be built upon" around the then town of Wellington. Part of the New Zealand Company's intention was to provide green and open spaces to improve the health and wellbeing of citizens. After the New Zealand Company's land passed to the Crown, the Governor of New Zealand gazetted the belt of land as reserve in 1841. In 1865 the land was transferred from the Crown to the Superintendent of the Province of Wellington (known as the 'Crown Grant').

#### **What is the current governance and management framework?**

Wellington City Council became trustee of the Town Belt in 1873, when, acting pursuant to the Wellington City Reserves Act 1871, the Superintendent transferred a large portion of the Crown Grant upon trust to "The Mayor, Councillors and Citizens of Wellington". This transfer was effected by the Superintendent executing a deed, now known as the 'Town Belt Deed'. The Deed stated that the transferred land was:

... to be for ever hereafter used and appropriated as a public Recreation ground for the inhabitants of the City of Wellington in such manner as in and by rules and regulations to be from time to time made in that behalf by the [Council] shall be prescribed and directed ...

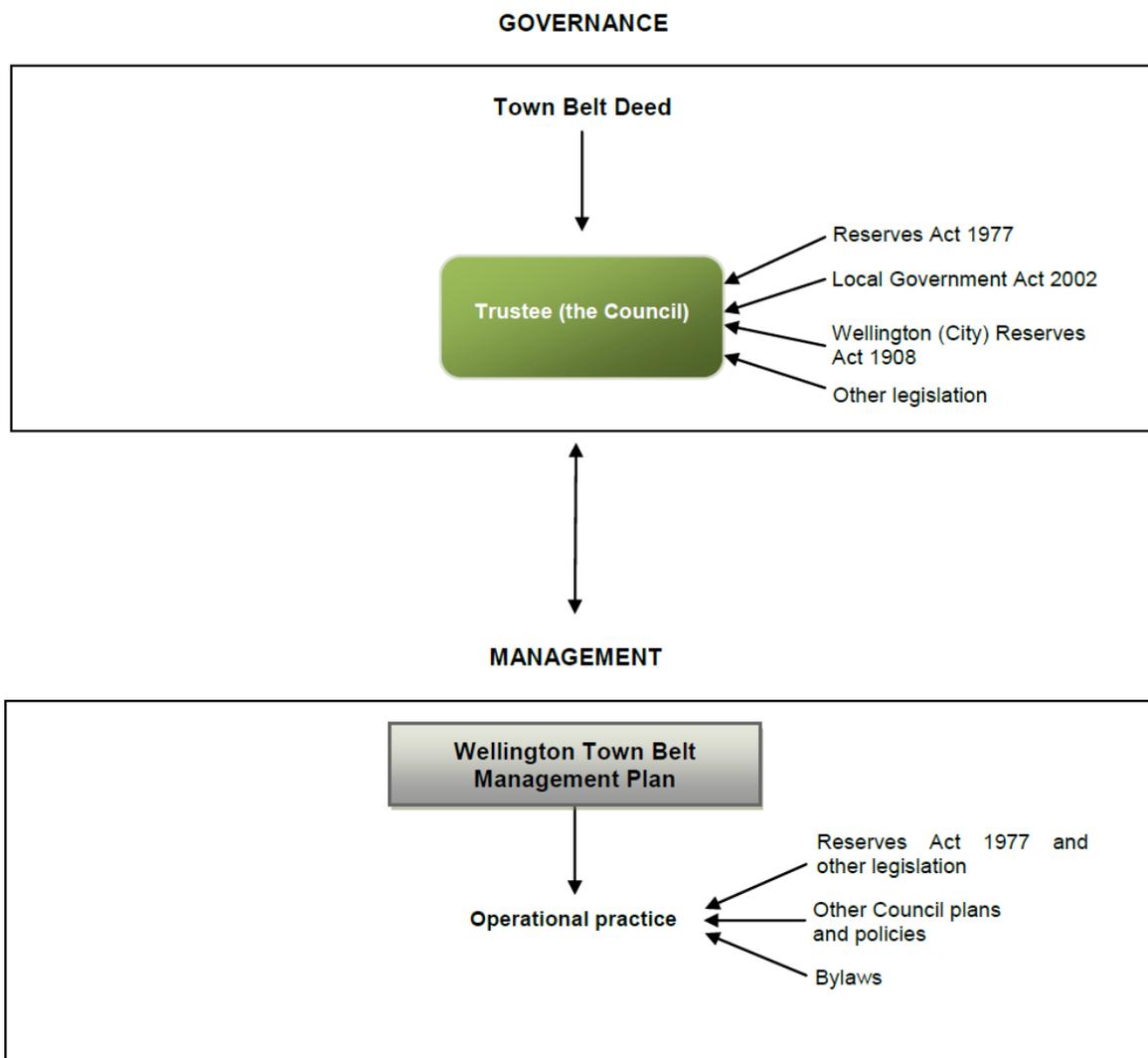
It is the land that the Council continues to hold on trust pursuant to the Deed that is regarded as 'Town Belt' in a formal legal sense.

The Deed also empowered the Council to lease parts of the Town Belt in order to raise revenue for the purposes set out in the Wellington City Reserves Act 1871 and the Wellington City Reserves Act 1872. These purposes were to fund the "ornamentation and utilisation of the Town Belt"; the Board of Governors of the Botanic Gardens; and the construction and maintenance of various roads. This power is now effectively historic as other methods of raising revenue are available and more appropriate.

As well as being held on trust by the Council, the Town Belt is also a recreation reserve under the Reserves Act 1977 (**RA**). While the Council's day-to-day powers are probably most commonly sourced from the RA, section 5(2) of that legislation provides that its application must be read subject to the Deed.

The Council's primary duty is to execute the trust created by the Deed in accordance with its terms and the general law. In other words, the Council's powers must be exercised in a manner that is consistent with the object of using the Town Belt as a public recreation ground for the inhabitants of Wellington.

The current governance and management framework can be represented diagrammatically as follows:



The Council's general management powers under this framework include:

- Under the Deed, the Council may manage the Town Belt "in such manner as in and by such rules and regulations to be from time to time made in that behalf by the [Council] shall be prescribed and directed".
- In practice however, the Council manages the Town Belt by exercising its powers as the administering body for the Town Belt as a recreation reserve under the RA:
  - Under section 41(11) of the RA, the Council must, in the exercise of its functions, comply with its current management plan (presently the Wellington Town Belt Management Plan 2013).
  - The Council may lease parts of the Town Belt in accordance with section 54 of the RA.
  - The Council may grant rights of way and other easements over the Town Belt in accordance with section 48 of the RA.
  - The Council may grant licences to use parts of the Town Belt pursuant to section 54 of the RA.

## WHY IS THERE A NEED FOR LEGISLATIVE CHANGE?

The Council's obligations and powers as trustee of the Town Belt come from a range of sources, including the Deed, the RA and a number of older statutes. The relationship between these sources can be complex and hard to understand — in some cases leading to controversy and dispute. The Bill will simplify and make much more transparent the basis upon which the Council holds and manages the Town Belt.

The Bill will also enable land to be added to the Town Belt as well as implement a number of technical boundary adjustments so that the status of land within and adjacent to the Town Belt matches the facts on the ground. This adjustment is required because, in some places, existing formed roads and other infrastructure do not match the underlying surveyed boundaries.

In summary, the primary purposes of the Bill are to:

- Resolve the existing legal complexities;
- Improve and modernise the governance arrangements for the Town Belt;
- In conjunction with the Wellington Town Belt Management Plan, provide the public and the Council with a single and easily understood reference point for how the Town Belt will be protected and managed in the future; and
- Enable land to be added to the Town Belt.

Under the Bill, the trust created by the Deed will be preserved by legislation and the Council will continue to manage the Town Belt in accordance with a management plan that it adopts periodically following public consultation.

## WHAT PROCESS HAS BEEN FOLLOWED?

In early 2010, a high level analysis of the legislative and policy framework for the Town Belt took place. This work resulted in a four stage project:

- *Stage one — guiding principles:* Public consultation on a set of proposed guiding principles took place in mid-2011, with a final set of principles being adopted by the Council on 16 December 2011. These principles reflect what the community values about the Town Belt.
- *Stage two — drafting instructions:* The Council accepted advice that there was a need for legislative change and on 27 June 2013 it adopted drafting instructions outlining why legislation was desirable and what it should seek to achieve. These instructions formed the basis for preparing a local bill to rationalise, clarify and consolidate the governance of the Town Belt.
- *Stage three — preparing a first draft of the Wellington Town Belt Bill:* A draft of the Bill was prepared by lawyers and, on 2 April 2014, was approved by the Council for consultation. Consultation took place between 8 April and 19 May 2014. This included:
  - Media releases and advertising in print media via the Council's "Our Wellington" page in the *Dominion Post*.

- Use of the Council's website and Facebook pages.
- Direct distribution to key stakeholders. This included clubs with leased facilities on the Town Belt; community groups working on the Town Belt; iwi; and individuals and organisations who had submitted on either the guiding principles or the most recent management plan.
- A joint public meeting was held on 6 May 2014 with the group called 'Friends of the Wellington Town Belt' at the St John's in the City conference centre.
- Making information available at the Council's libraries and service centres.
- *Stage four — preparing a final draft of the Wellington Town Belt Bill:* Taking into account the submissions received (see below), Council officers and lawyers worked together with Councillors, certain stakeholders, the Parliamentary Counsel Office, Land Information New Zealand and the Office of the Clerk of the House of Representatives to prepare a final draft of the Bill. This was adopted by the Council on 30 September 2014. The Council approved minor amendments to the Bill on 25 February 2015 following a further review by the Office of the Clerk and Parliamentary Counsel Office.

## OUTCOMES OF CONSULTATION ON THE DRAFT BILL

Fifty written submissions on the draft Bill were received. Twenty submitters also made oral submissions to the Council's Environment Committee on 27 May 2014.

The key issues raised by the submissions can be grouped into the following three main themes:

**Application of the Public Works Act 1981:** The Council's policy position reflected in the first draft of the Bill was that it accepted the Bill should not exclude the Public Works Act 1981 (**PWA**) entirely; but it did not want the Bill to enable the Council to "do deals" or be a willing party to the compulsory acquisition of Town Belt land (which is consistent with current practice on the basis that the Deed seemingly prevents the Council from agreeing to acquisition under section 17 of the PWA).

A wide range of views were expressed during consultation, including on one hand that the Town Belt should not be subject to the PWA; and on the other that the Council's policy position might disadvantage it and result in worse outcomes overall for the Town Belt when faced with the prospect of compulsory acquisition.

In the light of the submissions and advice received, the clause dealing with the PWA was amended so that it will not allow the Council to agree to acquisition under section 17 of the PWA, but it may enable the Council to achieve a better outcome when faced with an intention to compulsorily acquire Town Belt land. Clause 23 of the Bill endeavours to achieve this by providing that:

- The acquisition by agreement provisions of the PWA do not apply.
- The public may object to a proposed acquisition under the PWA in the normal way.
- Where a proposed acquisition has reached the stage at which it can be completed by the issuance of a proclamation, the Minister and the Council must endeavour to agree compensation. If compensation cannot be agreed, it will be assessed "on the basis of the reasonable cost of equivalent reinstatement of land of similar or

better value for use as part of a public recreation ground for the inhabitants of the city of Wellington than the land taken or acquired".

- Where only a strata title to the subsoil of the Town Belt is to be acquired (for example a tunnel), compensation will be assessed under the PWA in the normal way.

The Council notes that The Minister for Land Information Hon Louise Upston (the **Minister**) has raised concerns about the relationship between the Bill and the Public Works Act 1981 (**PWA**) — in particular with respect to clauses 6 and 23. In summary, the Minister's concerns are that, in her view, the Bill.

:

- Does not recognise the PWA as enabling the Crown and local authorities to carry out works for public purposes.
- May make parts of the compulsory acquisition process impracticable.
- Extends legal standing to object to the taking of the land to all inhabitants of Wellington.
- Seeks to amend the established compensation provisions of part 5 of the PWA by changing the timing, amount and assessment of compensation.

The Council requests that the Select Committee recommend changes to clauses 6 and 23, on the understanding that such changes would result in greater certainty around timing and less risk associated with the taking of Wellington Town Belt land, while giving the Council the opportunity to advocate for the best possible compensation — including land to add to the Wellington Town Belt. The amended versions of clauses 6 and 23 that the Council support are as follows:

## **6 Meaning of Wellington Town Belt**

*In this Act, unless the context otherwise requires, Wellington Town Belt—*

...

(b) *does not include—*

- (i) *land referred to in section 25(1);*
- (ii) *land referred to in section 27; and*
- (iii) *land taken or declared to be road under the Public Works Act 1981*

## **23 Application of the Public Works Act 1981**

- (1) *The Council has no ability to agree under section 17 of the Public Works Act 1981 to the acquisition of any part of the Wellington Town Belt.*
- (2) *Sections 40 to 42 of the Public Works Act 1981 do not apply to the addition of land to the Wellington Town Belt under section 21.*
- (3) *Nothing in this Act or the Town Belt Deed obliges the Council to object under s 23(3) of the Public Works Act 1981 to the taking of any part of the Wellington Town Belt.*
- (4) *Whenever steps may be taken under section 26 of the Public Works Act 1981 following a notice of intention to take part of the Wellington Town Belt, the Council and the Minister or local authority (as the case may be) must make all reasonable endeavours to agree the compensation that will be made to the Council, which may include a grant of land.*
- (5) *If the compensation that will be made to the Council is not agreed within 6 months from any part of the Wellington Town Belt being taken under the Public Works Act 1981, the obligation under paragraph (4) expires and the following provisions apply:*

- (a) *the Council may make a claim for compensation under the Public Works Act 1981:*
- (b) *the Council may request that compensation for the land taken be assessed on the basis of the reasonable cost of equivalent reinstatement in some other place under section 65 of the Public Works Act 1981, in which case the Minister or local authority (as the case may be) shall assess compensation on that basis unless section 65 does not apply or the Minister or local authority considers that assessment on that basis would not constitute full compensation for the land taken:*
- (c) *in all other respects the provisions of the Public Works Act 1981 will apply, including the ability to grant land as compensation.*

**Commercial activity:** Several submitters expressed concern that the provisions in the draft Bill around 'for profit' activity were too open ended and might enable commercial activities and even forms of recreation that were contrary to open space values.

A number of changes were made in response to these submissions, including the addition of a new clause 18. All business activities will require authorisation, which the Council will only be able to give if:

- The activity is temporary and any effect on the Town Belt is no more than minor; or
- The activity is consistent with the use of the Town Belt as a public recreation ground and the effect on the Town Belt of any structure or facility required to be built or extended for the activity is no more than minor.

In effect, the Bill will allow the Council to authorise activities such as pro shops and professional coaching associated with recreational clubs; cafes within existing buildings; coffee carts; and guided tours. It will not allow activities and developments such as gondolas; golf driving ranges; and new buildings for cafes or shops.

**Removing the Town Belt from the application of the RA:** Several submitters expressed concern over the proposed removal of the Town Belt from the jurisdiction of the RA (i.e. ending the Town Belt's status as a recreation reserve). Their concerns were centred on a perception that the Bill might offer a reduced level of protection, as well as the (again, perceived) wider range of powers the Council would have if some powers were not retained by the Minister of Conservation.

The Council commissioned Paul Radich QC to review the implications of removing the Town Belt from the RA by way of the Bill. His conclusions were:

- The protections that are provided by the Bill for the Town Belt improve materially upon those that are available under the RA because they are more comprehensive and are focused directly upon protecting the features of the Town Belt.
- There is nothing, in terms of avenues for participating in or challenging management decisions by the Council about the Town Belt, in the RA that would be lost through having the provisions of the Bill cover the use and management of the Town Belt. Each of the relevant avenues for participation or challenge in the RA is available in the Bill and the similar or equivalent avenues in the Bill are better designed and better suited for participation and challenge having regard to the particular features of the Town Belt to which they are directed.

- Furthermore, there is some uncertainty as to whether the RA applies to the Town Belt at all and as to whether the Deed provides an unrestricted power to lease Town Belt land. These uncertainties, however slight, have the potential to produce significant adverse consequences. They are removed through the provisions of the Bill.

The Council remains of the view that the continued application of the RA would simply create uncertainty and room for legal argument without materially adding to the protection of the Town Belt or the Council's ability to effectively manage the land. The longevity of the Bill would also be put at risk by any future reform of the RA.

## EFFECT OF THE BILL

The Council prepared the Explanatory Note which explains the Bill and includes a clause-by-clause analysis. More detail in relation to some of the clauses is set out below:

- **Preamble:** This describes some of the history of the Town Belt. The Whakatauki was provided by Port Nicholson Block Settlement Trust (PNBST). The way in which this history is described has been carefully mediated by the Council as between different stakeholders such as PNBST and the Friends of the Wellington Town Belt.
- **Clause 4 — Principles:** These principles reflect the guiding principles adopted by the Council following public consultation as stage one of the overall process of reform.
- **Clause 6 — Meaning of the Wellington Town Belt:** Together with Schedule 2, this defines, by reference to specific parcels, the land that will be subject to the Bill as part of the "Wellington Town Belt". It also allows suitable land to be added in the future by resolution of the Council (clause 21). Schedule 2 was compiled with the assistance of a surveyor and has been certified on behalf of the Registrar-General of Land.
- **Clause 8 — Legal status:** Several stakeholders wanted the Deed to be preserved as the founding document for the Town Belt (rather than replacing it with a wholly statutory trust). Clause 8 achieves this, but also simplifies the legal position by eliminating the need for any reference to the historic document itself (although we note that the document is included in the Bill through Schedule 1).
- **Clause 9 — Public access:** This carries over an important element of the RA regime by guaranteeing public access. It also provides that business activities (as defined in clause 5) may not be undertaken on the Town Belt unless authorised pursuant to the Bill.
- **Clauses 10 and 11 — Management plan:** The Bill puts in place a management plan regime broadly equivalent to that required by the RA. In exercising its powers with respect to the Town Belt, the Council "must comply" with the management plan it has adopted following a process of public consultation. The management plan will also define the boundaries of the Chest Hospital and Wellington Zoo so that they may, if appropriate, be reduced in size in the future.
- **Clauses 12 and 13 — Powers:** While the starting point is the modern approach of "full capacity", the Council's powers are limited by the principles in clause 4; the trust in clause 8; the requirement to comply with a management plan in clause 10; and the specific restrictions in clause 13. Importantly, the Council cannot sell the Town Belt or grant permanent rights over it except as provided for by the Bill itself. As discussed

above, the Bill will also limit the Council's ability to permit commercial activities on the Town Belt. Aside from within the Wellington Zoo and Chest Hospital areas, the Bill would prohibit the Council from authorising business activity unless it was either (a) temporary and of minor impact; or (b) consistent with the use of the Town Belt as a public recreation ground and did not require any new structure of more than minor effect.

- Clause 20 — Public services:** Clause 20 recognises that, as Wellington grows and changes, there are likely to be good reasons for using some Town Belt land for infrastructure such as reservoirs, pipes or cables. The Bill therefore empowers the Council to grant rights over the Town Belt for "public services" as defined in clause 5.

The end result of the Bill will be a refined and improved governance and management framework that can be represented diagrammatically as follows:

