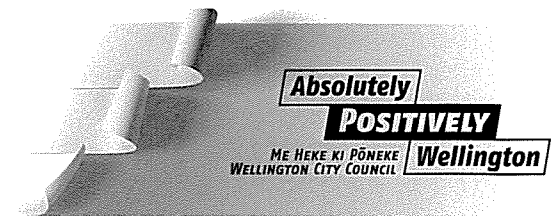


# STRATEGY AND POLICY COMMITTEE

3 MAY 2012



---

REPORT 5  
(1215/52/1M)

## HIGH COURT DECISION: 55 - 85 CURTIS STREET, KARORI

---

1. RESOLUTIONS PASSED BY STRATEGY AND  
POLICY COMMITTEE ON THURSDAY 3 MAY 2012
  
2. COPY OF PAPER AGREED TO BE RELEASED BY  
THE STRATEGY AND POLICY COMMITTEE  
MEETING DATED 3 MAY 2012

**NOTE:** The deleted text in the report is withheld under Section 7(2)(g) of the Local Government Official Information and Meetings Act 1987 - to main legal professional privilege (see resolution 11 of the resolutions of the meeting).

*COPY OF PAPER AGREED TO BE RELEASED BY THE STRATEGY AND POLICY COMMITTEE MEETING DATED 3 MAY 2012. THE DELETED TEXT IN THE REPORT IS WITHHELD UNDER SECTION 7(2)(G) OF THE LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987 - TO MAIN LEGAL PROFESSIONAL PRIVILEGE (SEE RESOLUTION 11 OF THE RESOLUTIONS OF THE MEETING).*

---

**REPORT 5  
(1215/52/1M)**

**HIGH COURT DECISION: 55 - 85 CURTIS STREET, KARORI**

Resolutions

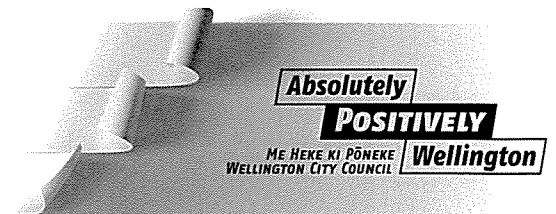
*THAT the Strategy and Policy Committee:*

1. *Receive the information.*
2. *Note the High Court's findings, and that the Council's decision to rezone 55-85 Curtis Street as Business 2 has consequently been set aside.*
3. *Note that the landowner has advised that it intends to lodge an appeal to the Court of Appeal. As a consequence of this action, Council will be required to be a party to the appeal.*
4. *Note that some of the findings of the High Court have implications for all current and future District Plan and the manner in which Council deals with them.*
5. *Agree that in response to the significant process issues from the High Court decision and Creswick Valley Residents' concerns, the Council agree in principle to initiate a new plan change to rezone 55-85 Curtis Street, Karori, from Outer Residential and Public Open Space B to Business 2.*
6. *Instruct officers to prepare a report for an August Strategy and Policy Committee meeting on a new plan change to rezone 55-85 Curtis Street, Karori, including advice on the timing of public notification in accordance with the First Schedule of the RMA.*
7. *Agree to accept the finding that the supplementary material prepared by Council was misleading.*
8. *Agree not to appeal the decision.*
9. *Instruct officers to incorporate the lessons learned from the High Court decision into the officer report back as requested by the Strategy and Policy Committee on 8 September 2011.*

Note: These resolutions have been confirmed by the Chair as an accurate record of the decisions made but will not form part of the formal record until the minutes of the meeting are prepared and confirmed at a future Strategy and Policy Committee meeting.

10. *Instruct officers to:*
  - a. *Approach the Ministry for the Environment (MfE) requesting consideration be given to redrafting clause 5(1A) of the First Schedule of the Resource Management Act (RMA) to clarify its requirements given the High Court decision on 55-85 Curtis Street, Karori (Option 3a)*
  - b. *Approach Local Government New Zealand (LGNZ) seeking support for any request to the Ministry for the Environment for clarity on clause 5(1A) of the First Schedule of the RMA (Option 3b)*
  - c. *Advise the Creswick Valley Residents Association and Terrace Heights Holdings of the Committee's decisions and initiate preliminary discussions on the new plan change process with the aim of developing a collaborative approach to that process.*
11. *Agree to release the decisions of the Strategy and Policy Committee at the conclusion of the meeting, and to release a copy of this report, subject to withholding the specific parts of the report that are necessary to retain legal professional privilege.*

Note: These resolutions have been confirmed by the Chair as an accurate record of the decisions made but will not form part of the formal record until the minutes of the meeting are prepared and confirmed at a future Strategy and Policy Committee meeting.



---

**REPORT 5**  
(1215/52/1M)

---

**HIGH COURT DECISION: 55 - 85 CURTIS STREET, KARORI**

---

**PUBLIC EXCLUDED**

**Grounds:** Section 48(1)(a) – that public conduct of the whole or the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist under Section 7

**Reason:** Section 7(2)(g) – maintain legal professional privilege

---

**1. Purpose of report**

The purpose of this report is to provide advice to the Strategy and Policy Committee on the recent High Court decision on the rezoning of 55 - 85 Curtis Street proposed by Plan Change 73 “Suburban Centre Review”, and the granting of an earthworks consent for the site. The High Court decision has implications for how the Council and other territorial authorities conduct plan changes, and for planning processes for the Curtis Street site.

**2. Executive summary**

In November 2011, the Creswick Valley Residents Association (CVRA) sought a judicial review of -

- The Council’s decision to rezone the land as Business 2 under Plan Change 73 (PC73),
- The granting of the earthworks consent (on a non-notified basis) to the landowner, THH, and
- The decision not to withdraw the rezoning under clause 8D of the First Schedule of the Resource Management Act (RMA).

The High Court decision of 4 April 2012 found against the Council for three main reasons -

1. The supplementary material the Council prepared was “materially misleading”

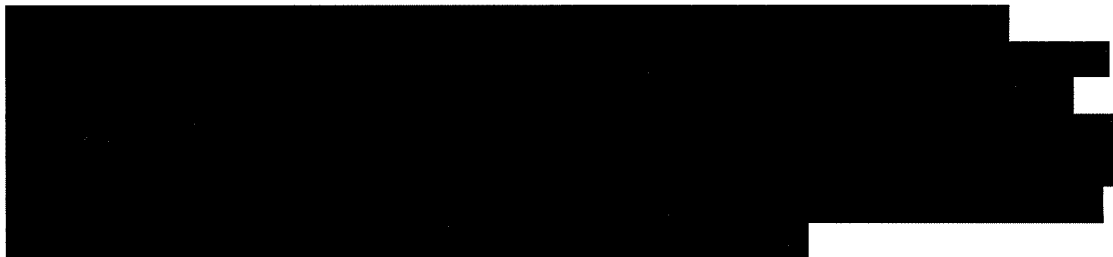
***COPY OF PAPER AGREED TO BE RELEASED BY THE STRATEGY AND POLICY COMMITTEE MEETING DATED 3 MAY 2012. THE DELETED TEXT IN THE REPORT IS WITHHELD UNDER SECTION 7(2)(G) OF THE LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987 - TO MAIN LEGAL PROFESSIONAL PRIVILEGE (SEE RESOLUTION 11 OF THE RESOLUTIONS OF THE MEETING).***

2. The rezoning of Curtis Street did not meet the criteria the Council had set for the rezonings in PC73
3. The Council did not identify who might be directly affected by the proposed Curtis Street rezoning and the relevant parts of the plan change that affected them, and did not then send those persons separate notice of that.

As a result of the High Court decision, the zoning of the Curtis Street site has been returned to those in the Operative District Plan, a mix of Outer Residential and Open Space B. The earthworks consent has been set aside, so a fresh application will need to be made. The landuse consent application for the Mitre 10 has not yet been heard, and the landowner can still elect to proceed with it. Both applications would need to be considered against the Operative District Plan zoning. Any change to the zoning will require a new plan change. This can be initiated by the Council or by the landowner.

The Court's decision highlights the important responsibility Council has to notify directly affected parties of district plan changes. Plan change processes and complex plan changes, can be difficult for the wider public to understand and engage in. These findings place greater responsibility on councils to ensure that directly affected parties are aware of a plan change and the particular parts of the plan change that affect them, are identified and that information is notified in a personalised manner.

The period for appealing the decision to the Court of Appeal closes on 7 May 2012. An appeal can be lodged by the Council, by THH, or by both the Council and THH. Terrace Heights Holdings has advised Council that it intends to appeal the decision. If the decision of the Committee is not to appeal, Council will still be required to participate in the appeal as Council will be a party to it.



In response to the High Court decision, Council has two key options:

Option 1: The Council does not appeal the decision AND initiates a new plan change, or

Option 2: The Council lodges an appeal on the key policy issues AND initiates a new plan change.

In addition to these options, the Council can approach the Ministry for the Environment and seek a change to the law to clarify the issues raised by the High Court decision (Option 3a) and seek support from Local Government New Zealand for both an appeal and/or its approach to the Ministry for the Environment (Option 3b).

[REDACTED] Should the Committee decide not to appeal (Option 1), the Council will need to develop new processes for notifying plan changes to best give effect to the High Court decision.

Initiating a new plan change to rezone 55-85 Curtis Street, Karori, from Outer Residential and Public Open Space B to Business 2 is considered a matter of priority following the High Court decision. Officers would also recommend that the issues of risk and uncertainty be brought to the attention of the Ministry for the Environment (Option 3a) and Local Government New Zealand (Option 3b).

### **3. Recommendations**

Officers recommend that the Strategy and Policy Committee:

1. *Receive the information*
2. *Note the High Court's findings, and that the Council's decision to rezone 55-85 Curtis Street as Business 2 has consequently been set aside.*
3. *Note that the landowner has advised that it intends to lodge an appeal to the Court of Appeal. As a consequence of this action, Council will be required to be a party to the appeal.*
4. *Note that some of the findings of the High Court have significant implications for all current and future District Plan changes and will introduce complexity and uncertainty in the plan change processes.*
5. *Agree that in response to the significant process issues from the High Court decision and Creswick Valley Residents' concerns, the Council agree in principle to initiate a new plan change to rezone 55-85 Curtis Street, Karori, from Outer Residential and Public Open Space B to Business 2 (Option 2).*
6. *Instruct officers to prepare, without delay, the necessary reports to the Strategy and Policy Committee to rezone 55-85 Curtis Street, Karori so that a new plan change can be publicly notified in accordance with the First Schedule of the RMA.*

7. *Agree to accept the finding that the supplementary material prepared by Council was misleading, while reserving the Council's ability (if necessary) to pursue an appeal.*
8. *Agree:*  
*EITHER*
  - a. *Not appeal the decision,**OR*
  - b. *To appeal the decision of the High Court to obtain certainty and to reduce the risk in the District Plan notification process.*
9. *Instruct officers to incorporate the lessons learned from the High Court decision into the officer report back as requested by the Strategy and Policy Committee on 8 September 2011.*
10. *Instruct officers to:*
  - a. *Approach the Ministry for the Environment (MfE) requesting consideration be given to redrafting clause 5(1A) of the First Schedule of the Resource Management Act (RMA) to clarify its requirements given the High Court decision on 55-85 Curtis Street, Karori (Option 3a), and*
  - b. *Approach Local Government New Zealand (LGNZ) seeking support for any appeal and request to the Ministry for the Environment for clarity on clause 5(1A) of the First Schedule of the RMA (Option 3b).*
11. *Agree that if the Resource Management Act 1991 is clarified (Option 3a), any Council appeal on the Curtis Street decision will be withdrawn.*
12. *Agree to release the decisions of the Strategy and Policy Committee at the conclusion of the meeting, and to release a copy of this report, subject to withholding the specific parts of the report that are necessary to retain legal professional privilege.*

#### **4. Background**

In September 2010, Council approved as part of District Plan Change 73 "Suburban Centres Review" (PC73) the proposed rezoning of 55 – 85 Curtis Street from a mix of Outer Residential and Open Space B to Business 2.

In December 2010, the Council granted the landowner, THH, resource consent to carry out earthworks and vegetation removal on the site. Terrace Heights Holdings subsequently applied, in April 2011, for resource consent to build a Mitre 10 Megastore.

The Creswick Valley Residents Association (CVRA) was formed to oppose the Council's decision, in particular the rezoning and proposed development of the Curtis Street site.

On 8 September 2011, the Strategy and Policy Committee considered officer advice on the Standing Order agenda item: "the revocation of part of Plan Change 73 covering the rezoning of 55-85 Curtis Street from the Operative zoning of Outer Residential and Open Space B, to Business 2." The Committee resolved to, "instruct officers to report back to the Strategy and Policy Committee on potential improvements on consultation on draft plan changes."

In November 2011, the CVRA sought a judicial review of -

- The Council's decision to rezone the land as Business 2 under PC73,
- The granting of the earthworks consent (on a non-notified basis) to the landowner THH, and
- The decision not to withdraw the rezoning under clause 8D of the First Schedule of the RMA.

In December 2011, the High Court put a stay on giving effect to the earthworks consent. The Court's substantive decision was issued on 4 April 2012.

## **5. Discussion**

### **5.1 The High Court Decision**

The key findings in the decision are as follows -

- The summary material prepared by the Council is helpful and commendable, however having decided to provide this additional information it must not be materially misleading. The information provided regarding this site was materially misleading.
- The Court expressed no view on the merits of the appropriate zoning, however the criteria adopted for the rezoning proposals were not applied to this site. The only reason given for the rezoning of sites by PC73 was that the changes were 'to better reflect existing uses'. That reason was not applicable to the Curtis Street site.
- Nothing in the notification material drew the proposed change of zoning of this site to the attention of particular ratepayers likely to be directly affected by the change, and the relevant parts of the plan change affecting them. Sending them the same notice sent to all ratepayers is not enough. The duty goes further and, for this site, required the Council to identify those directly affected by the rezoning.
- The Council correspondence in 1999 was alleged to have established a legitimate expectation of consultation with residents; however the Court found that this did not impose any additional obligations.



- The validity of the PC73 zoning was material to the earthworks decision, and accordingly the Court's finding on the plan change process affects the validity of that consent.

Only the rezoning of the Curtis St site is set aside. All other aspects of PC73 are unaffected by the decision.

## **5.2 Legal Processes Following the Decision**

The period for appealing the decision to the Court of Appeal closes on 7 May 2012. An appeal can be lodged by the Council, by THH, or by both the Council and THH.

## **5.3 Implications of the High Court Decision**

In summary, the Court found against the Council for three main reasons:

1. The supplementary material the Council prepared was “materially misleading”
2. The rezoning of Curtis Street did not meet the criteria the Council had set for the rezonings in PC73
3. The Council did not identify who might be directly affected by the proposed Curtis Street rezoning and the relevant part of the plan change that affected them, and did not then send those persons separate notice of that.

Overall, the decision puts greater emphasis on the need to ensure that the community are aware of and understand the effects of plan changes.

### **5.3.1 Implications of the Decision for the Curtis Street Site**

The zoning of the Curtis Street site has been returned to those in the Operative District Plan, a mix of Outer Residential and Open Space B.

The implications of this (unless the decision is over-turned in its totality on appeal) are as follows:

- *There are now a different range of permitted activities on the site:* For the land zoned residential, all vegetation can be cleared as a permitted activity. There is the capacity for 14 houses over the 7 residentially-zoned

lots, and for each lot, earthworks are permitted over 250m<sup>2</sup>, and to a depth of 2.5m. However new houses would be subject to a resource consent process due to the proximity to high voltage transmission lines, and the potential contamination of the site. In the Open Space B area, all exotic vegetation can be cleared as of right, and 100m<sup>2</sup> of indigenous vegetation can be cleared over a 5 year period.

- *The Mitre 10 proposal*; The landuse consent application for the Mitre 10 has not yet been heard, and the landowner can still elect to proceed with it. The earthworks consent has been set aside, so a fresh application will need to be made. The applications will be considered against the Operative District Plan zoning. [REDACTED]

Any change to the zoning will require a new plan change. This could be initiated either by the Council or by the landowner as a private plan change.

### **5.3.2 Implications for Current Plan Changes and Future Plan Change Processes**

Whilst the decision explicitly limits its influence to the Curtis Street rezoning, the principles of the decision apply to other plan changes, both current and future.

The first finding is that where a council decides to provide more than the minimum information required by the RMA for the notification of plan changes, the additional material must not mislead the public. This is accepted and checks and balances must be incorporated into Council processes to ensure that accurate and informative information is provided.

For large and complex plan changes and particularly plan review processes, it is proposed that attention is given to the balance between providing clear and simple summary material for the public, and the need to accurately reflect the changes that result from the plan change. Such information would be usefully supplemented by education to assist the public. Some initial options the Council could consider to improve the public's understanding of plan change processes, and the communication of the effects of plan changes are shown in **Appendix 1**.

The second finding relates to the scope of a plan change, and whether, having established criteria to guide a plan review process, a council has then confined its ability to include other changes that do not meet the criteria that may arise through consultation on a draft plan change or (presumably) through the formal

submissions process. This has introduced an additional element into the plan change process.

The third finding relates to the interpretation of clause 5(1A) of the First Schedule RMA, which prescribes how councils are to give notice of a plan change. The notification of plan changes is a critical step in the plan change process. Under clause 5(1) the council must first give public notice of the proposed plan or plan change. The content of the public notice is prescribed. Clause 5(1A) goes on to require that the public notice is sent to persons likely to be directly affected by the plan change. Council has two clear options to do this; through delivery of the public notice with the rates notice, or through delivery of the public notice to all residential and PO Box addresses. In addition there is a safety net provision to ensure that the public notice is sent to persons who are directly affected but are excluded from the notification option selected by the Council, for example they are not ratepayers and so missed the rates notice notification.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

#### **5.4 Landowner Response to Court Decision**

THH have advised the Council that it intends to appeal. If the decision of the Committee is not to appeal, Council will still be required to participate in the appeal as the Council will need to be a party to it.

#### **5.5 Options for Council**

##### OPTION 1: Council Does Not Appeal AND Initiates a New Plan Change

Under this option, the Council would not appeal the decision. The Council would need to review and change its notification processes to best comply with the High Court decision, [REDACTED]

[REDACTED]

In response to the significant process issues from the High Court decision and Creswick Valley Residents concerns, it is recommended that Council agree in principle to initiate a plan change to rezone 55-85 Curtis Street, Karori, from Outer Residential and Open Space B to Business 2. An actual decision to

initiate a plan change could not be made until the Committee considers a report on the available options and adopts the section 32 report in accordance with First Schedule of the RMA. Officers would be in the position to report to the committee in August 2012.

A commitment to notify a plan change would enable the residents to participate in the planning processes for the site, and would also recognise the interests of THH, which is seeking planning certainty for the site. It allows the Council to clearly demonstrate its acknowledgement of the residents concerns, the High Court's decision on the supplementary information, and ensure a 'robust' new plan change process is undertaken.

The timing of notification needs to be considered in light of the Strategy and Planning Committee decision (16 February 2012) to prioritise the resolution of existing District Plan appeals before notifying any significant new plan changes. The target for this is December 2012. Officers will bring back further advice on how the new plan change for Curtis Street will be drafted, in light of PC73 not yet being operative.

OPTION 2: Council Initiates an Appeal on the Key Policy Issues AND Initiates a New Plan Change

[REDACTED]

[REDACTED]

Under this option a plan change would be notified, as in Option 1.

OPTION 3a: Seek a Law Change

The Council could approach the Ministry for the Environment, and pursue a change to the RMA to remove the issues raised by the High Court decision. In seeking such an amendment the Council would make it clear that the amendment sought is only to resolve the uncertainty created by the High Court decision. This option could be pursued in parallel or independently of Option 1 or Option 2.

If successful, it would result in clarification of the notification requirements in clause 5(1A) of the First Schedule of the RMA. Any Council appeal on these matters could then be withdrawn.

While this is the least costly option, the Ministry for the Environment cannot provide any assurance that the issues of concern to Council would be addressed in the short to medium term. Officials have however invited the Council to provide further information on the impact of the judgement for consideration for inclusion in the next stage of the Government's proposed programme of amendments to the RMA. This programme does not currently have a nominated timeframe.

#### OPTION 3b: Seek Support from Local Government New Zealand

The Council could approach Local Government New Zealand to support an appeal to the Court of Appeal and request to the Ministry for the Environment, on the basis that the High Court decision raises significant issues for all territorial authorities across New Zealand.

#### **5.6 Consultation and Engagement**

The issues covered in this paper are largely legal and therefore consultation and engagement are not required. However some suggested ways of improving plan changes processes are appended to this report.

#### **5.7 Financial considerations**

The financial implications for the different options proposed in this report have been identified. Any significant costs are likely to fall into the 2012 – June 213 financial year.

#### **5.8 Climate change impacts and considerations**

There are no climate change impacts or considerations.

#### **5.9 Long-term plan considerations**

Should the Council decide not to appeal the parts of the decision relating to future plan change processes, there may be considerations for both the timing and costs associated with the District Plan programme, as outlined in the Long-Term Plan.

## **6. Conclusion**

The High Court decision on Curtis Street found against the Council for three main reasons. As the proposed rezoning has been set aside, along with the earthwork consent, new planning processes will need to undertaken for the site.



[REDACTED] the Committee will need to assess its options on appealing the decision. Given the nature of the issues involved, officers are recommending that these be brought to the attention of the Ministry for the Environment (Option 3a) and Local Government New Zealand (Option 3b).

As requested on 8 September 2011, officers will be reporting back to the Strategy and Policy Committee on ways of improving plan change processes, and this will include the lessons learned from the High Court decision.

Contact Officer: Julia Forsyth, Programme Manager, District Plan

## SUPPORTING INFORMATION

### **1) Strategic fit / Strategic outcome**

*The District Plan supports a wide range of strategic outcomes, particularly those in the Urban Development area.*

### **2) LTCCP/Annual Plan reference and long term financial impact**

*Relates to the ongoing administration of the District Plan, Project C553 – District Plan.*

### **3) Treaty of Waitangi considerations**

*All District Plan work is required to take into account the principles of the Treaty of Waitangi (refer to section 8 of the Resource Management Act).*

### **4) Decision-making**

*This is not a significant decision.*

### **5) Consultation**

*There has been significant consultation and input into the suburban centres and residential reviews, and as part of Plan Changes 72 and 73.*

### **6) Legal implications**

*Council's lawyers have been consulted during the development of this report.*

### **7) Consistency with existing policy**

*Council's process for the notification of plan changes is determined by the requirements of the Resource Management Act.*



## **Appendix 1: Possible Tools for Improving Plan Change Processes**

Some ways Council may consider improving Plan Change Processes include:

- Running seminars along the lines of the “law for lunch” model to assist members of the public and residents groups in understanding their rights, responsibilities and opportunities in participating in RMA processes.
- Developing and circulating a new District Plan user guide based on the “Guide to the District Plan” (2003), to assist members of the public in understanding and navigating the District Plan.
- Alerting neighbouring property owners and residents to proposed rezonings (or other geographically targeted proposals) through the use of on-site signage.
- Mail outs of specific maps and information to parties directly affected by rezoning proposals and other geographically targeted proposals (e.g. heritage areas).
- Briefings to Ward Councillors on geographically discrete planning proposals to assist their understanding of the issues and engagement with their communities.
- Potentially separating site specific rezonings (and equivalent changes) from large “omnibus” plan changes to ensure that they don’t “get lost” in the overall volume of changes.
- Ensuring that public notices and summary documents contain sufficient information to alert members of the public about how they may be potentially affected.
- Maximising the potential of electronic media, including the Council website and potentially mobile phone applications (“apps”) to communicate with the public about planning matters.