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**REPORT 4**  
*(1215/52/IM)*

## **OWHIRO BAY SECTIONS**

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### **1. Purpose of Report**

To report back on progress on the disposal of two sections at Owhiro Bay declared surplus in 2005. A recent Environment Court decision ruled that the sections be zoned Open Space B rather than outer residential as proposed by the Council. The paper will reassess the previous decision to declare the land surplus and whether it is needed for any Council purpose.

### **2. Executive Summary**

The Council declared two sections at Owhiro Bay Quarry surplus in 2005. Subsequent public consultation on the decision showed overwhelming support for their retention. In 2006 the Council reaffirmed its decision to dispose of the sections. The Council agreed that prior to sale the land should be rezoned from Rural to Outer Residential. In 2007 commissioners approved this proposed plan change which was subsequently appealed to the Environment Court. A court hearing took place between 1 and 3 March 2010. The decision released on 15 April 2010 upheld the appellant's view that the sections should be rezoned to Open Space B.

The court's decision is that open space zoning is most appropriate for the site given its association with the adjacent gateway area and that housing is inappropriate because of risk from coastal hazards, and the effects of residential development on the adjacent Open Space B land. The Council will not be appealing the decision.

The Council now needs to consider whether to proceed with the sale of these sections given the court ruling and the consequential impact on Council's ability to achieve its original objectives for these sites. The Council have two options:

1. Proceed with the sale to an adjoining land owner or someone prepared to take the risk and lodge a resource consent for a dwelling
2. Revoke the decision to sell

### **3. Recommendations**

Officers recommend that the Strategy and Policy Committee:

1. *Receives the information.*
2. *Recommends that Council agree:*
  - a. *To revoke the decision to sell 178 and 180 Owhiro Bay Road (WN21C/11 and WN479/226), made by Council on 27<sup>th</sup> September 2005<sup>1</sup>.*
  - b. *Commence classification of the land under section 16 of the Reserves Act 1977.*
  - c. *Delegate to the Chief Executive to negotiate payment of a portion of the appellant's costs up to a maximum of \$5000.*

### **4. Background**

In 2000 Council purchased the Owhiro Bay Quarry from Milburn New Zealand Limited to stop quarrying on the South Coast, restore open space values and improve public access around the coast. Two sections at the end of Owhiro Bay Parade (178 and 180 Owhiro Bay Parade) were part of the Quarry purchase. (Appendix 1)

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<sup>1</sup> Note that in this situation the Council can revoke the decision to declare the sections surplus as the Section 40 obligations of the Public Works Act have been met and no offer back is required.



On 27 September 2005 the Council declared the two sections surplus on the basis that their possible disposal was identified in the South Coast Management Plan (SCMP). Councillors were not aware that the sale of these sections was not in the draft South Coast Management Plan which was consulted on, but did appear in the final South Coast Management Plan. Councillors agreed to reconsider the decision to sell following public consultation.

Consultation took place in early 2006, with 500 submissions received. 95% of these stated that they did not want Council to sell the sections. Results of the consultation were presented to SPC on 15 June 2006. Councillors did not change their previous resolution and resolved instead to direct the sections be sold subject to pre conditions being met, with changing the zoning from rural to outer residential one of those conditions. The others were that the two sections have a boundary alteration to create two more viable lots, a bush covenant and a height restriction be imposed.

District Plan Change 54 to rezone the two sections from Rural to Outer Residential was publicly notified on 1 March 2007. A hearing was held on 13 August 2007 and a decision approving the proposed rezoning was released on 18 October 2007.

Two appeals were lodged against this decision from Southern Environmental Association (Wellington) Incorporated and Action for Environment Incorporated. At the direction of the Environment Court, formal court mediation was held on 2 October 2008. Two options for resolution of the appeal were tabled by the appellants and subsequently put before Regulatory Committee on 19 November 2008. These were:

1. Rezone 178 Owhiro Bay Parade as Outer Residential subject to Covenant A and appropriate building design/siting restrictions to be agreed. Rezone 180 Owhiro Bay Parade Open Space B.
2. Adjust the boundary of 178 Owhiro Bay Parade by approximately 3 metres with the enlarged section to be zoned Outer Residential with appropriate design/siting restrictions to be agreed. The remaining covenanted areas (i.e. A & B) would be zoned Open Space B and incorporated into the adjacent reserve land (see appendix 2)

The appellants were essentially proposing one section could be rezoned outer residential with appropriate protective measures. Officers did not recommend a course of action and the Committee did not accept either of the options above. The case proceeded to a full court hearing in March 2010.

The court's decision was received on 15 April 2010 and agreed with the appellant's view that the sections should be rezoned to Open Space B. In particular the decision identified the following:

- Para 56 – The sections have a greater association with land to the west and the escarpment to the north, which are Open Space B
- Para 62 – houses on the 2 sections would have an adverse effect on the Open Space B area and the visitors
- Para 64 – the site may be critical to accommodate future parking and amenities
- Para 87 – a significant risk from coastal hazards remains
- Para 108 – even if housing was appropriate, the conditions need to be certain and transparent.
- Para 115 – Open Space B is the most appropriate fit for the site. That conclusion would not change even if more certainty was provided on the potential development

### **Court costs**

The Environment Court reserved any decision on costs. Southern Environment Association have advised they do not intend to seek costs from the Environment Court. This appears to be based on the fact that they obtained funding from the Environmental Legal Assistance Fund.

They are seeking a \$3-4,000 contribution towards the costs of Michael Jacobsen's evidence. This appears to be because they did not obtain funding for this evidence.

## **5. Discussion**

The driver to sell the two sections was that the sites were deemed to be surplus, that is they were not required under the Public Works Act. In declaring the land surplus the Council then sought to maximise the return it could achieve by rezoning the site for residential development. These sites were valued as residential lots in 2004 as having a value of \$820,000 and in 2006 at \$1m.

The Council now has two options:

Option 1: continue the divestment process

Option 2: revoke the decision to sell<sup>2</sup>

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<sup>2</sup> Note that in this situation the Council can revoke the decision to declare the sections surplus as the Section 40 obligations of the Public Works Act have been met and no offer back is required.

### **5.1 Option 1: Continue the divestment process**

The land could be sold to the owner at 176 Owhiro Bay Parade or to someone who is prepared to take the risk of acquiring it and then going through a private plan change and/or lodging a resource consent for a dwelling.

#### Advantages

- Consistent with the Council's original decision to declare the land surplus

#### Disadvantages

- Seen to be inconsistent with the Environment Court decision that noted the sections have a greater association with land to the west and the escarpment to the north, that houses on the 2 sections would have an adverse effect on the Open Space B area and that the site may be critical to accommodate future parking and amenities.
- Diminished value of selling land at open space value<sup>3</sup> and whether there would be any interest given the restrictions on development
- The potential for continued litigation if the Council proceeds to dispose of the properties with Open Space B zoning

### **5.2 Option 2: Revoke the decision to sell**

The land would be retained by the Council and classified as reserve under section 16 of the Reserves Act 1977.

#### Advantages

- The recent Environment Court decision that the sections have a close fit with the open space land to the west and may be required for future car parking. The 2006 SPC paper identified that the area would fit up to 12 parking spaces. If the land is retained it will be landscaped in the short term whilst the need for future parking is assessed.
- Overwhelming public support for retention of the land as reserve. Even though the submissions on the land were received 4 years ago interest in the protection of the coast has increased with support for the marine reserve and opposition to developments such as the Marine Education Centre.

#### Disadvantages

- Inconsistent with the Council's original decision to declare the land surplus.

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<sup>3</sup> Valuation of the land with Open Space B zoning is \$125,000

### **5.3 Court Costs**

Southern Environment Association (SEA) have asked the Council to consider paying for one of their expert witnesses Michael Jacobson who provided evidence relating to coastal hazards and climate change effects. The reasons given are:

- The comprehensive and balanced evidence
- The evidence enabled coastal hazard issues to be put before the court that may not have occurred otherwise (The Council's own evidence was provided by way of rebuttal)
- The Council will benefit from the production of this expert evidence and analysis

SEA have confirmed that they do not intend to apply to the court to recover costs so this payment would be seen as a one off ex gratia payment given the above circumstances.

The evidence from Mr Jacobson and the rebuttal from Dr Croad raised some issues around coastal hazards and their management specific to this area and in particular long term access around the coast and the integrity of the carpark area. It is correct that if SEA had not raised the issue in their evidence it is unlikely that the Council would have commissioned Dr Croad who carried out a thorough analysis of the coastal hazards and climate change effects.

### **5.4 Consultation and Engagement**

Consultation in 2006 strongly supported the retention of these sections as part of the Owhiro Bay Reserve. The subsequent appeal to the Environment Court was made by two parties, Southern Environment Association (SEA) and Action for the Environment.

### **5.5 Financial Considerations**

Any income from disposal of these sections would go into the consolidated fund.

### **5.6 Climate Change Impacts and Considerations**

The Court ruling identifies significant coastal hazards and future sea level rises as one of the reasons for not rezoning the sections as outer residential.

### **5.8 Long-Term Council Community Plan Considerations**

No implications. Any upgrading of the land to be retained would be funded from within existing budgets.

## **6. Conclusion**

The Council needs to reconsider its decision to declare the sections at 178 and 180 Owhiro Bay Parade surplus in light of the Environment Court decision to rezone the sections from Rural to Open Space B. Officers recommend that the Council rescind their decision to declare the land surplus and retain the sections to be managed as part of the adjacent Owhiro Bay reserve entrance.

Contact Officer: *Mike Oates, Manager Open Space and Recreation Planning.*



## Supporting Information

**1) Strategic Fit / Strategic Outcome**

*The land will be managed as part of the Owhiro Bay entrance consistent with the policies in the South Coast management Plan (2002)*

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

*Income from the sale was not budgeted for in the LTCCP. Management of the area will come from within existing budgets.*

**3) Treaty of Waitangi considerations**

*No implications.*

**4) Decision-Making**

*This is not a significant decision. The report sets out two options given the Environment Court decision.*

**5) Consultation**

**a) General Consultation**

*No specific consultation has taken place.*

**b) Consultation with Maori**

*No specific consultation has taken place.*

**6) Legal Implications**

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

**7) Consistency with existing policy**

*There are no significant policy issues*