BEFORE COMMISSIONERS APPOINTED BY WELLINGTON CITY COUNCIL

WELLINGTON CITY COUNCIL PROPOSED DISTRICT PLAN

IN THE MATTER of Hearing Stream 7 – Open Space

AND

IN THE MATTER of a submission by Panorama Properties Limited in relation to 1 Upland Road and surrounds

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SYNOPSIS OF SUBMISSIONS FOR PANORAMA PROPERTy LIMITED

15 MARCH 2024

Counsel acting: Ian Gordon
Stout Street Chambers
Level 6, Huddart Parker Building
1 Post Office Square
PO Box 117
Wellington 6011
T: 04 472 9026
ian.gordon@stoutstreet.co.nz

MAY IT PLEASE THE COMMISSIONERS:

Introduction

1. These submissions are made on behalf of Panorama Property Ltd (**Panorama**) in relation to its leasehold interests of land and buildings at 1 Upland Road, Kelburn at the interface with the open space of the Botanic Gardens.

2. The operative zoning for the site is Outer Residential but the Proposed District Plan (**PDP**) proposes that this be changed to Open Space Zone (**OSZ**) notwithstanding that the site is occupied by buildings and car-parking and is subject to a long-term lease for limited but private commercial purposes with 20 years to run.

3. Panorama opposes inclusion of the site in the OSZ and seeks alternative zoning as supported by Mr Lewandowski's expert evidence and acknowledged by Mr Sirl for the Council.

4. But for reservations over a legal matter, the reporting officer, Mr Sirl now accepts that the appropriate zone should not be OSZ[1] and that the more appropriate alternative is Neighbourhood Centre Zone.

5. The legal matter at issue was addressed in written advice from Mr Whittington for the Council on 15 March 2024.

History and Status of Site

6. The history of the site is set out in the evidence of Mr Martin Shelton including that the buildings on the site have been used for commercial purposes for 120 years pursuant to various lease arrangements entered into by the Council for the benefit of the ratepayers of the city.

7. The legal status of the land is determined by the relationship between several statutory instruments. In chronological order, those are:

   (a) The Wellington Botanic Garden Vesting Act 1891 (**WBGV Act**);

   (b) The Reserves and Other Lands Disposal Act 1964 (**ROLD Act**);

[1] Sirl Rebuttal statement dated 13/3/2024 paragraphs 23 - 28.

(c) The Reserves Act 1977 (**Reserves Act**);

(d) The Gazette notice published in 1995 designating the land as a "local purpose reserve (public gardens)" (***Gazette* notice**), and

(e) The Resource Management Act 1991 (**the RMA**).

8. The ROLD Act was passed in 1964 to address specific land issues, including the Council's 1904 lease of part of the Botanic Garden land to the Kelburn and Karori Tramway Company Ltd for commercial purposes as tearooms and the then 60-year history (now almost 120 years) of the site being used for commercial purposes.

9. The ROLD Act lists the site and makes specific provision for the use of the site other than for the Wellington Botanic Gardens. In fact, the ROLD Act identified 4,645m^2 of land as a 'special' area of the Botanic Gardens[2] and empowered Council to lease it on "*such terms and conditions as the [Council] sees fit*". That situation subsists.

10. Despite that history the site was identified and gazetted as local purpose reserve in 1995 under the Reserves Act 1977. This may have occurred mistakenly, but it remains the status quo.

Discussion

11. First, the Council's power to lease found in s14 of the ROLD Act is broad: "… *as the [Council] sees fit*". That power is not constrained by the WBGV Act because s14 expressly overrides that Act.

12. This breadth of Council's power to lease under the ROLD Act was confirmed by the High Cout in a 1980 case stated from the Planning Tribunal when the Terawhiti Licensing Trust was seeking to establish a bar in the Skyline premises.[3] Chief Justice Davison confirmed that Council's specific powers under the ROLD Act cannot be in contention. Those powers could not be clearer.

13. Secondly, A remaining question was whether the later Gazette Notice conferring reserve status on the site in 1995 and the Reserves Act 1977

[2] Lot 1 on DP 55960, being the land comprised and described in Certificate of Title WN25B/56.
[3] Terawhiti Licensing Trust v Wellington City Council M250/80 September 1980

impact on the Council's powers under s14 ROLD Act in a way that would warrant consideration of appropriate zoning provisions under s 32 RMA.

14. On this issue, Mr Whittington agrees that the Council's power to lease in s14 ROLD Act is not affected by Reserves Act.[4]

15. The Reserves Act does not repeal the ROLD Act. Rather, the Reserves Act merely confers on Council an additional discretion to lease land in certain circumstances without constraining any other rights conferred on the Council by the ROLD Act.

16. As Mr Whittington observes, s 61 Reserves Act authorises the Council to "do such things as it may from time to time consider necessary or desirable for the proper and beneficial management, administration, and control of the reserve and for the use of the reserve for the purpose specified in its classification". The Council may lease the land either under the Public Bodies Leases Act 1969 or for the following purposes: community building, playcentre, kindergarten, plunket room (or other like purposes), or farming, grazing, cultivation, cropping, (or other like purposes).

17. S 5(2) Reserves Act provides that the Act's application to any reserve shall be read subject to any [other] Act (whether passed before or after the commencement of [the Reserves] Act)", as observed by the High Court in *Terawhiti Licensing Trust*.

18. In other words, the Reserves Act is permissive rather than mandatory or exclusionary and does not dilute Council's powers specific to this identified site under the ROLD Act.

19. Thirdly, even if Council has an obligation under the Reserves Act 1977 to continue to manage the land as a local purpose reserve (public gardens), that does not constrain its options for zoning in this iteration of the Plan. It is not bound to zone the land in its District Plan for open space purposes when those purposes would be at odds with the commercial activities provided for in the existing lease.

[4] Whittington legal advice 15 March 2024

Section 32

20. Zoning must be in accordance with a comprehensive evaluation process under s32 RMA. That process was recently described by the Court in *Royal Forest and Bird v Whakatane DC* as:[1]

> The necessary evaluation of a proposed rule under s32 of the Act involves an examination, to a level of detail that corresponds to the scale and significance of any anticipated effects, of whether the rule is the most appropriate way to achieve the objectives of the Plan by:
>
> (a) identifying other reasonably practicable options for achieving those objectives;
>
> (b) assessing the efficiency and effectiveness of the rule in *achieving* those objectives, including:
>
> i) identifying, assessing and, if practicable, quantifying the benefits and costs of all the effects that are anticipated to be provided or reduced from the implementation of the rule; and
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> ii) assessing the risk of acting or not acting if there is uncertain or insufficient information; and
>
> (c) summarising the reasons for deciding on that rule.

21. A s32 assessment should have addressed most if not all the above criteria listed by the Court in *Royal Forest and Bird v Whakatane DC*. As submitted and accepted, that process has not happened here. The Council's Planner concedes that.

22. Aside of Mr Lewandowski's work, there is no assessment of zoning options that might advance the objectives of the Plan or the purpose of the Act. In fact, there is no site-specific assessment whatsoever. The site does not even rate a s32 mention and, despite the meeting and correspondence with Council's Mr Chi in 2022, here is no s 32AA assessment offered up.

[1] *Royal* Forest *and Bird Society of NZ Inc v Whakatane DC [2017] NZEnvC 051 at [43].*

23. Nor is there any evidence that the Council has been unable to meet its reserve management or other obligations under the Reserves Act 1977 while the site has been zoned Outer Residential for the last 25 years. The reality is that Council is able to manage its Reserves Act obligations for the site regardless of its zoning. The Neighbourhood Centre Zone recommended by the Planners would not change that.

24. To now suggest that rezoning to OSZ is somehow necessary to align with reserve obligations would be a fiction.

25. As Judge Kirkpatrick observed in 2014, s 32 is the 'engine room' of the RMA[5]. But where the engine does not even kick into life on available options to inform what is most appropriate, there is a vacuum which cannot be backfilled.

26. Finally, on s 32 the Court in Royal Forest and Bird[6] adopted the time-honoured approach of the Court in Wakatipu Environmental Soc v QLDC:

> that where the purpose of the Act and the objectives of the Plan can be met by a less restrictive regime then that regime should be adopted.[7]

27. The recommended Neighbourhood Centre Zone is a less restrictive zone that enables the purposes of the lease and the RMA and the objectives of the Plan to be met. The Planners agreement is evidence of that.

28. Panorama submits that the only course reasonably open to the Panel is to accept the recommendation of the Planners and zone the site Neighbourhood Centre Zone.

IM Gordon
Counsel for the Submitter
15 March 2024

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[5] Conference Paper: section 32 RMA – A Brief Introduction, Judge DA Kirkpatrick 11 Augst 2014
[6] Footnote #1
[7] C 153/2004 at [56]