

[2015] ELHNZ 204
Environment Court, Wellington

Creswick Valley Residents' Association Inc v Wellington City Council

ENV-2014-WLG-12

ENV-2014-WLG-15

ENV-2014-WLG-16

ENV-2015-WLG-3

Decision: 28 August 2015

Judge Thompson, Commissioner Leijnen, Commissioner Mills

HEADNOTE

District plan change — Resource consent — Earthworks — Contamination

This was the Court's decision regarding: the appeal against the grant by Wellington City Council ("the council") of resource consents to Prime Properties Group Ltd ("PPG"); and the appeal against Proposed Plan Change 77 to the Wellington City District Plan ("PC77"). The matter related to a 1.091 ha area of land at 55-98 Curtis St, Wellington ("the site"), parts of which had been a city rubbish dump and infill area. In 2012, the High Court found in favour of Creswick Valley Residents' Assn Inc ("the Residents"), holding that the council had not sufficiently identified the relevant provisions of Proposed Plan Change 73 when notifying it and accordingly set aside the council's decision to rezone the site from Outer Residential Area/Open Space B zones to Business 2.

The Court first considered the resource consent appeal from the council decision to grant land use consent to PPG to clear vegetation and undertake earthworks on a contaminated area. The proposal was to create, on the north of the site, a sloping platform and fill it with a cap of clay over the cleanfill in order to inhibit the leaching of contaminants that might be in the fill. The Court stated it was clear that some form of built development was the ultimate goal of PPG. PPG now asserted that any adverse effects of the proposal would be less than minor. However, the Residents were primarily concerned about what might be the end use of the site, and opposed any zoning which might allow large scale commercial or retail development and raised issues as to effects on traffic and residential amenity.

The Court considered the relevant planning instruments, including the National Policy Statement on Electricity Transmission and the NES for Contaminated Soil, in addition to the district plan. Under the plan Policy 29.2.1.1, earthworks and structures were to be coordinated with further land development and subdivision; however, there was no such coordination in the present case. However, the Court was satisfied that this dilemma was offset by: the fact that the effects would be minimal; the zoning would be simultaneously settled in the PC77 appeal; the large sloping platform would not predetermine or limit future use; and any future development would be either within the bounds of the zoning applicable to the site or would require resource consent. The Court agreed with council decision to grant resource consents, with the reservation that conditions set out in the council's decision should be amended as specified. The proposed earthworks and vegetation clearance would be a step towards the use of the site that would, subject to the management of potential adverse effects through the zone provisions or the resource consent process, enable the purpose expressed in s 5(2) of the RMA to be better achieved.

The Court then considered the plan change appeals. The council wanted to rezone the land as Curtis Street Business Area with the intention of enabling a broad range of activities including residential, business, commercial and industrial activities, subject to area-specific environmental controls which would limit establishment of large scale retail developments, building heights and impacts on roads, plus restrictions on sensitive activities to avoid reverse sensitivity issues arising. Retention and planting of vegetation for landscape and ecological reasons were also encouraged. After considering the relevant statutory provisions, in ss 74, 75 and 32 of the RMA, and evaluating regional and district planning documents, the Court concluded that there was an expectation contained in the objectives and policies of the plan of some commercial activity within residential areas, subject to the area remaining residential overall. On balance, taking into account the characteristics of the site, its neighbourhood, the

constraint of residential development imposed by the transmission corridor running thorough the site, the demand of business land and the ecological site context, where mixed use was expected, the Court considered that the proposed zone would promote a more efficient and effective management regime than merely to rely on the current open space and residential zones. PC77 was site-specific and its objectives and policies addressed the natural and physical environment, and the Court concluded that the objectives and policies were the most appropriate for the site in terms of s 32 of the RMA. Further, the Court concluded that the efficiency and effectiveness of the rules in PC77, which set the activity status rules and assessment criteria, would provide efficient and effective methods to implement the objectives and policies, in the context of the operative district plan provisions.

The Court concluded that a tool something like a concept plan should form part of the plan change in the form of a rule. In addition, the Court considered that the provisions for subdivision should encourage comprehensive development; but did not do so as they were currently set out. The Court confirmed that non-complying status for earthworks on the west of the site was appropriate.

Accordingly: the appeal against the grant of consents was allowed only to the extent that the conditions imposed on the consents were to be altered as specified in the present decision; and the appeals against PC 77 were allowed, but only to the extent that amendments should be made to the provisions as set out and specified in the decision. The council was directed to submit the redrafted provisions for both the resource consents and the plan change to the Court for approval, and to that extent the decision was an interim one. Costs were reserved.

J W Maassen and N Jessen for Prime Property Group Ltd — applicant and appellant

W D Newman and P S Barker for Creswick Valley Residents' Association Inc

M P C Gibson — appellant and s274 party

S Y Bennett , R A Bryant , P A Henderson and F F Knight — s274 parties

K M Anderson and E H Wiessing for the Wellington City Council

Party Names

Creswick Valley Residents' Association Inc (*Appellants*), Prime Property Group Ltd (*Appellants*), M P C Gibson (*Appellants*), Wellington City Council (*Respondent*)

Judgment

Decisions on Appeals: Background (Part 1) Resource Consents (Part 2) Proposed Plan Change 77 (Part 3)

The Appeal against the grant of resource consents is allowed to a limited extent -see para [2-54]

The Appeals against Proposed Plan Change 77 are allowed to a limited extent — see para [3-131]

Costs are reserved

Judge C J Thompson, Commissioner A C E Leijnen, Commissioner J R Mills

Part 1: Background — All Appeals

Background — both proceedings

[1-1] The area concerned in these appeals is somewhat complex to describe. It is a site of some 1.0913ha, known as 55 — 85 Curtis Street, Wellington and is in the floor of a valley, the west side of which rises steeply towards Paisley Terrace and to the main entry road (Chaytor Street) to the suburb of Karori. To the east it rises, also steeply, to the residential area on and around Curtis Street and Creswick Terrace in Northland. Towards the north, there are extensive sports grounds and facilities known as Ian Galloway Park, which have been developed on the surface of what were once very large City rubbish dump and landfill areas. A little distance to the south, and on the southern side of lower Chaytor Street, is Anderson Park (also once a dump and landfill and also now resurfaced) and, beyond that again,

running into the head of the valley, is the nature sanctuary now known as *Zealandia*, containing within it the (two) Karori Dams and Reservoir.

- [1-2] The Kaiwharawhara Stream rises in the *Zealandia* area, and once ran through the floor of the whole of the valley. It is now piped in a purpose-made tunnel below Anderson Park and Chaytor Street before emerging briefly in the valley floor to the south of the site, and is again then tunnelled beneath Curtis Street along the east side of Ian Galloway Park, disgoring to the north of that park and flowing through Otari-Wilton's Bush, then Trelissick Park, and then down Ngaio Gorge to the harbour at Kaiwharawhara.
- [1-3] The site contains a mixture of vegetation of both planted and regenerating indigenous species and also planted and self-sown exotics, including weeds such as gorse, cherry, and blackberry. There are also areas of mown and rank grass on the northern end of the site, fronting Whitehead Road and, along and above the line of Old Karori Road (now a walkway only), and below Chaytor Street, the vegetation is a mixture of indigenous and exotic species.
- [1-4] The Central Park to Wilton A 110kV electricity transmission line runs north-south across the site, although there are no pylons standing on it. At least part of the site is also noted as a *potentially contaminated* site on the Wellington Regional Council's *Selected Land Use Register* (SLUR). This is a consequence of the former use of the northern part of the site (zoned *Open Space B*) as part of the old Wilton Tip, and the southern part (zoned *Outer Residential*) as a Council drainage and storage depot. The northern part has also had up to c10m of fill placed on it — presumably as part of the construction of Whitehead Road.
- [1-5] The site is roughly triangular in shape. It is bounded on its three sides by legal road — Old Karori Road to the west, Whitehead Road to the north and Curtis Street to the east. To its south is a Kindercare pre-school/childcare centre, established c2011, on a site formerly occupied by a garden centre, and a small residential enclave of 11 or so houses in the narrowing space between Curtis Street to the east, and Chaytor Street to the west and south.
- [1-6] While it may be a matter of incidental interest rather than of direct relevance to the immediate decision-making, the site has a recent history of resource consent applications which have not proceeded to a conclusion. In 2010 the Council granted a consent for pre-loading earthworks. That was not pursued. In 2011, the Council received an application for the establishment of a Mitre10 store, but in August 2011 that was placed *on hold* at the request of the Applicant and has not been revived. Following the lodging of this present application with the Council, an application for earthworks and a multi-unit residential development was lodged, but was subsequently suspended awaiting further information. That application was specific to the land zoned *Outer Residential Area*, and, formally at least, it remains *on hold* pending the provision of the required further information.
- [1-7] Also of interest is that in 2012 the High Court heard an application for Judicial Review brought by the Creswick Valley Residents Association against the Council in respect of the proposed rezoning of the site to *Business 2* under the city-wide provisions of Plan Change 73, and the granting of an earthworks consent: - see [Creswick Valley Residents Association Inc v Wellington CC \[2012\] NZHC 644](#), [\[2013\] NZRMA 503](#). The High Court found in favour of the Association, holding that the Council had not sufficiently identified the relevant provisions of the proposed plan change in making notification of it. The rezoning decision was set aside. That has led, in part, to the present proposed Plan Change 77.
- [1-8] In the course of preparing the appeals for hearing, the Court requested the parties to confirm the issues they would, or would not, put forward in support of their respective positions. We note, in its memorandum dated 29 January 2015, that the Association, and the parties aligned with it, confirmed that:

“ ... ecology, landscape and urban design are not expert issues in dispute. The parties also consider that noise, transport, geotechnical matters, contamination and heritage are not expert issues in dispute in these proceedings and do not require expert testimony.”

[1-9] There was however evidence called by those parties about, eg geotechnical issues - in the form of the evidence from Dr Peter Davenport: - and there was evidence from residents about visual aesthetics — which might be thought to come under the broad heading of landscape. Noise and contamination were also mentioned in the course of non-expert evidence. In those senses the position at hearing was not entirely consistent with what had been foreshadowed to the Court and other parties. In the course of reviewing the evidence we have attempted to consider all topics raised without confining the opposing parties to the strict letter of what had been set out in the January memorandum, and in the end those additional issues raised have not materially affected our view.

Part 2: The Resource Consent Appeal

Introduction

[2-1] In a decision dated 3 December 2013, made by an Independent Hearing Commissioner acting under delegated authority, the Wellington City Council granted land use resource consents to Prime Properties Group Ltd (PPG) to clear vegetation on a site, and to undertake earthworks on a contaminated site.

[2-2] Two appeals were lodged against that decision; one by Kindercare Learning Centres Ltd which operates the childcare centre; and one by the Creswick Valley Residents' Association Inc (CVRA), an organisation which, as the name suggests, is mostly comprised of residents of the suburban area near the site.

[2-3] Discussions between the parties have resulted in a resolution between the Council and Kindercare Learning Centres Ltd. That appellant is now prepared to agree to the grant of the resource consents, subject to specified amendments to the conditions attaching to them. Kindercare did not participate in the hearing. The Council's closing submissions incorporated the agreed amendments and we discuss those conditions, including remaining areas of agreement, later in this decision.

[2-4] The CVRA, and the s274 parties aligned with it, remain opposed to the grant of the consents.

The present proposal

[2-5] The earthworks now proposed will be the placement of c34,000m³ of cleanfill to create, in the northern part of the existing valley, a single gently sloping platform of some 8040m² (643m² of which will be on unformed legal roads — parts of Curtis Street and Old Karori Road — requiring land-owner consent from the Council), the surface of which will be some 7 — 8m higher than the lowest point of the present valley floor. The fill surface will slope at about 3% (ie 3m in 100m) downwards from north to south and from east to west. There is to be a cap of clay over the cleanfill to inhibit water soakage into the underlying fill material, and so inhibit leaching of contaminants that may be in that fill.

[2-6] Presently, there is no firm proposal for the future development of the site, although part of the purpose of depositing the cleanfill is the pre-loading compaction of the part of the site that was once part of the Wilton (or Bradford) tip, but it is perfectly obvious that some form of built development is the ultimate goal.

[2-7] The absence of a definite proposed end-use may create an issue in dealing with Policy 29.2.1.1 of the District Plan, and possibly s 91 of the RMA. We shall return to those provisions at para [2-39]ff.

[2-8] On the same theme as the absence of a definite end use for the site, there is no information about the source of the fill to be used in the proposal. This may have had a consequence in considering Policy 29.2.1.11 of the District Plan, which provides:

“Ensure the transport of earth or construction fill material, to and from a site, is undertaken in a way that is safe and minimises adverse effects on surrounding amenity and the roading network.”

However, the traffic engineers engaged by the parties have agreed (assuming that the resource consent is granted at all) on conditions which would mitigate concerns about traffic effects on the roading system and on amenity in the surrounding area. The conditions would limit truck deliveries to 6 per hour with operating times from 9.30am to 2.30pm — those times being particularly aimed at safety and convenience during the childcare centre's drop-off and pickup peaks. We see no reason to disagree with that view, and the consent conditions should be set accordingly.

[2-9] The vegetation clearance would, broadly, involve the clearance of most of the site (much of which would be *filled* in any event). The exception will be in designated vegetation protection areas around the periphery, particular on the western boundary, so as to maintain and enhance protection of habitats on the western escarpment. It is fair to say, we think, that it is neither the clearance nor the earthworks issue that really arouses the opposition to the project. Rather, it is the spectre of what the end use of the land might be. Certainly, taken alone, the vegetation clearance is a relatively insignificant issue and one that could readily and satisfactorily be managed by suitable consent conditions.

[2-10] Although we are giving a separate decision on Plan Change 77, there is still an issue as to whether, and if so to what extent, a consideration of Plan Change 77 should be a factor in determining the resource consent appeals. Obviously PC 77 has reached an advanced stage in its evolution, and reflects a change in Council thinking about the appropriate zoning for the site. That said, we agree with Ms Anderson's submission that there is no conflict between the operative Plan, PC 77 and the sought resource consents — indeed, as one might expect, they are quite consistent.

The applicant's position

[2-11] In summary, PPG asserts that any adverse effects of the proposed activities will be less than minor in the longer term. It acknowledges that the earthworks will involve some disruption and inconvenience during the placement period but, even with those, it believes that the proposed conditions will be sufficient to mitigate effects to an acceptable, short-term, level. The end product of the earthworks and the vegetation clearance will, it asserts, result in a number of benefits: - the creation of a usable space for ... *a range of activities*; ecological improvement from the removal of pest and weed species, and the planting of indigenous species; a reduction in potential exposure to contaminants; geotechnical improvements; and the efficient use of fill material.

[2-12] PPG accepts that achieving the finished product of filling the site may be a somewhat long-term operation. It may take some time to locate a suitable source of fill and, once sourced, the transport and placement of it will need to be done to a schedule designed to minimise traffic impact on the neighbourhood. After completion of fill placement the compaction effect would have to be monitored over a period of at least 6 to 12 months before any buildings or roading could be constructed on it. All up, there could be a delay of 5 — 6 years before any building could be occupied. Such a delay is, it says, too long for any commercial arrangement with a would-be occupier to be entered into now: - hence the absence of a firm end-use proposal.

The opposing parties' positions

[2-13] We have already identified what we understand to be the CVRA's central concern — the end use of the site. Its positions on the more peripheral issues are not easy to briefly summarise, but some themes emerge. There is concern

that the filling of the site will ... *alter the form and functioning of the landscape*. This, it is said, will adversely affect the amenity that the open space of the valley presently provides. There is concern too that the scale of the earthworks will, potentially at least, encourage the ultimate use of the site for a large scale single-use development, in contrast to, say, smaller formed residential developments. There is concern that if the Kaiwharawhara Stream tunnel is blocked by, say, earthquake damage, that will lead to more rapid flooding of the remainder of the valley (ie that part which will not be filled and which contains the childcare centre and some of the houses) because the filled portion of the valley will not be available to hold the impounded water.

- [2-14] The Association (and those aligned with it) were specific in saying that they do not oppose development of the site and ... *[do] not wish to see the site remain derelict ...* (a descriptor which is certainly telling of the way it appears today). But they wish any development to accord with their perception of the values and potential the land may have which, in their view, means a residential zoning, with mixed use of appropriate (ie limited) bulk and scale perhaps possible under discretionary terms. It is fair to say that the theme underlying the opposition to the resource consents (and the Plan Change) is the concern that the end result will be a commercial (ie retail) development of a scale which the CVRA and those parties regard as jarring to their literal and figurative views of the area. We think it is probably fair to say that if the proposed earthworks and vegetation clearance resource consents were part of a comprehensive residential development proposal, there would be no opposition.

The Council's position

- [2-15] The Council is content with the decision made, and supports it.

Zoning and Activity Status

- [2-16] The site is presently zoned partly *Open Space B* (the northern c40%) and partly *Outer Residential* (the balance). It is to be noted that the whole site (ie including the part zoned *Open Space B*) is in private ownership. That is an issue we comment on further in dealing with the proposed Plan Change, but the issue of ownership is not relevant here — we do not, for instance, agree with the submission that the Council has placed inappropriate weight on the private ownership of the land. There is no basis that we can see to support that assertion.
- [2-17] The parties agree that vegetation removal on *Open Space B* land is a *Discretionary Restricted* activity (Rule 17.2.4), as is Earthworks on the whole site (Rule 30.2.1). There is some difference about the applicability of Rule 32.2.1 — the use of potentially contaminated land, but for status purposes the *National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health* (NES for Contaminated Soil) does, it is agreed, make the earthworks a *Discretionary (Unrestricted)* activity. On a bundled basis then the proposal is to be considered as a *Discretionary* activity. We shall return to that National Environmental Standard, which brings s 9(1) of the Act into play, at paras [2-36].

Permitted baseline

- [2-18] The planning witnesses agree that the quantum of fill proposed for the site makes any comparison with the *permitted* types and extent of similar activities meaningless, and that a *permitted baseline* assessment should not be used. We agree with that view.
- [2-19] Vegetation clearance, insofar as it is in dispute at all, is slightly more complex. The District Plan permits unlimited vegetation clearance from *Outer Residential* land, and clearance of up to 100m² every 5 calendar years from *Open Space B* land. That said, no party put reliance on the issue either way, and we can find no assistance in it when considering the practical issues raised by the evidence. Accordingly, we *disregard* those permitted activities in terms of s 104(2).
- [2-20] That means that the proposal is to be considered under s 104(1) and Part 2 of the RMA. Section 104(1) lists the matters to be considered as:

- “(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to-
- (a) any actual and potential effects on the environment of allowing the activity; and
 - (b) any relevant provisions of—
 - (i) a national environmental standard;
 - (ii) other regulations;
 - (iii) a national policy statement;
 - (iv) a New Zealand coastal policy statement;
 - (v) a regional policy statement or proposed regional policy statement;
 - (vi) a plan or proposed plan; and
 - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.”

Potential adverse effects - earthworks

[2-21] Prominent among the bases of opposition to the earthworks consent is the proposition that, by partly filling the gully area to the north of the Kindercare building and the 11 or so houses in the enclave at the Curtis Street/Chaytor Street intersection triangle, there will be an increased risk of flooding at least the lowest of those buildings, particularly should the Kaiwharawhara Stream tunnel below Curtis Street become blocked, and there is a coincidental heavy rainfall.

[2-22] This possibility is described in the evidence of Dr Peter Davenport, a consulting engineer engaged by the CVRA. It is agreed by all of the engineers called that the Council records show that the Kaiwharawhara Stream tunnel below Curtis Street was constructed in stages c50 — 70 years ago, and has an exposed rock roof. It is c1.2 km in length and is computed as having a flow capacity of $7.8\text{m}^3/\text{second}$. It is Dr Davenport's view that in the event of the expected large earthquake in Wellington (ie a magnitude of MMI 10 or thereabouts) there would be sufficient shaking damage to the tunnel to block it, perhaps in more than one location. Dr Davenport reports that a shaking of that magnitude on the Wellington Fault is thought to have a return period of 500 to 1000 years. We should note that the MMI scale is not the same as the perhaps better known Richter Scale — it measures the felt intensity on a scale from 1 to 12. For comparative purposes, Dr Davenport advises that the February 2011 Christchurch event was rated at MMI 9.

[2-23] Dr Davenport calculates the catchment of the stream, as it would affect the tunnel entrance, as being 310ha. He adopts a Runoff Coefficient of 0.25 as appropriate for flow rate calculations. That gives an outflow water volume of $51,900\text{m}^3$ for a storm event with a return period of 2 years and a 1 hour rain depth of 18mm, up to a volume of $127,000\text{m}^3$ for a storm event with a return period of 100 years and a 1 hour rain depth of 45.7mm.

[2-24] He goes on to say [in his EIC]:

“3.36 I have not calculated the depth of ponding that this volume would cause as this would require further data to be obtained. It is quite feasible, however, that it would only be a matter of hours before access from Curtis Street to houses situated on the western side of the natural stream upstream from the tunnel inlet would be cut off.

3.37 The volumes may be compared, however, to the owner's proposal to fill this low area with about 34,000 cubic metres of soil and raise the level of the land by about 6 metres. Clearly if this fill was put in, the potential ponding area would be moved upstream onto land belonging to others and occupied by houses or the childcare centre.

- 3.38 It would not require an unusual storm event to cause this inundation. A recent rainstorm in this area on 2015-03-07 saw 9.4 mm depth of rain fall in one hour, as measured at nearby Kelburn (data obtained from Metservice). This was about a one year return period storm for this area. The volume of water falling on the catchment was about 29,000 cubic metres.
- 3.39 The total rain depth for March 2015 was 85 mm, with a historical average for March as 114 mm. Historical average monthly rainfall varied from a low of 49 mm for February to a high of 184 mm for August. The average yearly total is 1250 mm giving a monthly average of 104 mm. From this it can be concluded that March 2015 was not a high rainfall month.”

[2-25] In the course of his oral evidence, Dr Davenport also posited the scenario of a storm rainfall of c90 minutes' duration and of 1:100 year intensity. That duration would, he considered, be long enough for rain from the furthest parts of the catchment to flow to the tunnel and begin, even without seismic damage to the tunnel, to exceed its capacity, thus leading to the possibility of overflow back into the lower valley, with consequent flooding. Dr Davenport acknowledged this possibility was one he had considered only on the *back of an envelope* basis and that he does not have the detailed information necessary to reach a satisfactory conclusion. There was some criticism of this evidence on the basis that it had not been put to, let alone discussed with, the other engineering witnesses. However, as will be apparent, consideration of the evidence has not disadvantaged other parties.

[2-26] Again, the possibility of extreme events cannot be discounted. But we take some comfort from the clear evidence that, in the five to seven decades of the tunnel's existence thus far, through the earthquakes and storms that have assailed the city over those years, there is no recorded instance of the tunnel failing to safely carry all of the water put through it. No flood event, no matter how localised and transitory, has ever been attributed to its failure to do so. We take some comfort too in Dr Davenport's acknowledgement that even if his 90 minute extreme storm event came to pass, there would be at least hours to arrange evacuation of the valley to ensure safety.

[2-27] Mr Robert Jack is a chartered engineer with particular experience in drainage and water supply issues, and was called by the Council. His evidence is that the tunnel can cope with both the short and long period 1% AEP events without there being any flooding of existing dwellings. It therefore meets the hydraulic requirements of both the New Zealand Building Code and the Wellington City Council Code of Practice for Land Development (2012). Importantly, he says, the 1450m³ of excess water resulting from such a short period event will be contained within the banks of the stream upstream of the tunnel entrance, immediately to the south of the Kindercare building. His illustration of this event shows that neither the Kindercare building nor the houses would be inundated, although the vehicular access from the houses to Curtis Street will be.

[2-28] Accepting that a tunnel collapse is *plausible*, Mr Jack's evidence puts the consequences into the context of a city-wide event. In the event of a 7.5MMI or greater earthquake, he points out that City-wide and significant infrastructure damage is inevitable, and that stormwater network failures will compromise areas that are already at higher levels of risk than the Curtis Street area. Even assuming that the Curtis Street area is given priority, because the road is classified as a secondary link road, Mr Jack says that it would be at least two weeks before a tunnel blockage would be cleared. The end result will be that if the earthworks are completed, the dwellings will:

“ ... begin to be inundated with ponding from the base flow within around 3 days. If the earthworks are not progressed, inundation will begin within 9 days. Under either earthworks scenario, the dwellings are unlikely to be able to be saved from inundation due to the time it would take service crews to respond, locate and repair the blockage in a post-earthquake environment.”

- [2-29] Mr Jonathan Devine, a consulting engineer with particular experience in seismic design and stormwater systems was called by PPG. He disagrees with Dr Davenport, about the likelihood of the collapse of the tunnel. In terms of risk, he says ... *nor in my view would the risks to existing buildings and valley residents be perceptibly increased by the proposed filling.* This is because, he says, in terms of the entire valley area which would be filled with water, in the event of a complete tunnel blockage, the fill area would occupy only 5% of the total volume and so ... *will have little consequence on the existing situation, as the volume will fill some three and a half days prior.*
- [2-30] While we accept that the *doomsday* scenario of the coincidence of a catastrophic earthquake and a catastrophic rainfall event could happen, it has to be said that we heard no suggestion, no matter how faint, that any governmental or professional organisation has suggested, let alone provided for, that it is a realistic scenario on which to base resource use or management planning. Indeed the opposite is the case — Mr Devine was very clear that such a coincidence of events is expressly not taken account of in systems design simply because it is, mathematically, so improbable. In the case of, for instance, a rain event with a 1:100 AEP, and an earthquake with a 1:500 AEP, the coincidental event probability is simply a multiplication of the two — ie 1:50,000.
- [2-31] We do not wish to be thought dismissive of the welfare of the people immediately involved, but it must be said that if Wellington City is faced with such a combination of events, everyone, including those people, will very likely have more immediate issues of major concern. The likelihood of the necessary equipment and personnel being available to locate the blockage(s), excavate (probably) some 1000s of cubic metres of overburden to clear it, and reopen the tunnel within any relevant timeframe is so remote that the potential few days difference between inundation onsets (ie with or without the valley being filled as proposed) will simply make no practical difference.
- [2-32] The possibility of severe seismic events is a reality of living in a place like Wellington, and severe weather events are a possibility anywhere. It is not possible to eliminate all risk, and the RMA does not, it must be emphasised, rest on a no risk philosophy, or have the elimination of all risk as its purpose. Ultimately, all RMA decision-making rests on the Act's purpose — contained in s 5 — and we shall return to that.

Potential positive effects - earthworks

- [2-33] A positive effect of the proposal will arise from the placing of fill across the site. We note the view of Mr Kevin Tearney, (who has science, geology and contaminated land expertise and was a witness for the Council), that:

“In effect, the proposal includes capping of contaminated and potentially contaminated land with several meters [sic] of fill which is an accepted practice to manage/reduce risks to human health and the environment.”

To the extent that the previous activities on the site have left it with some degree of contamination, the fill placement will substantially diminish, if not completely halt, the results of that escaping into the environment and the clay capping, as already mentioned, will largely stop the penetration of surface water into the contaminated material and leaching into natural waterways.

Potential effects of vegetation clearance

- [2-34] We can begin by noting that no one suggests that the vegetation on the part of the site to be filled is notable or otherwise justifying preservation (Ecologist's Joint Witness Statement para [6-7]). That said, there is some vegetation in the buffer areas of the Old Karori Road escarpment which, while not of itself of high ecological value, is worthy of protection because of its function in providing wind shelter and micro-climate humidity and stillness to the seepage wetlands and bush remnants which provide a home to glow worms along the walkway formed by part of Old Karori Road. It seems to be agreed that the proposed conditions will retain sufficient of this buffer vegetation to fill that

function. There is also one particular Karaka tree just below that western escarpment which is acknowledged to be valuable in providing shade and buffering, and there are conditions proposed to prevent harm to it.

National planning documents

[2-35] The *National Policy Statement on Electricity Transmission* (NPSET) is relevant, obviously because of the presence of the Central Park — Wilton A transmission lines. We deal with this in more detail in the Plan Change decision. Transpower did not seek to be heard on either of the two appeals and the transmission lines have no direct bearing on the issues of earthworks or vegetation clearance, so that in the absence of a defined end use development, we need presently do no more than to note that decision-makers about a particular end use will be subject to the direction that ... *to the extent reasonably possible manage activities to avoid reverse sensitivity effects on the electricity transmission network and to ensure that operation, maintenance, upgrading, and development of the electricity transmission network is not compromised.*

[2-36] As the site is contaminated in part, and potentially contaminated elsewhere, the NES for Contaminated Soil is also relevant. This document works alongside existing provisions in the District Plan and a resource consent as a *discretionary* activity would be required under the NES as well as Rule 32.2 of the Plan. There was no dispute about this, and we see no reason to have to take it further.

Regional planning documents

[2-37] The Wellington Regional Policy Statement is operative (as from April 2013). There was no evidence or submission to contradict the Council's submission that the proposal is consistent with the RPS, and we see no reason to think that it might be. There is no need to take that issue further.

[2-38] There is no consent required under the provisions of the Wellington Regional Plan.

District planning documents

[2-39] We referred earlier to Policy 29.2.1.1. of the District Plan, which provides:

“Ensure that the design and assessment of earthworks and associated structures is coordinated with future land development and subdivision.”

As noted, there is no definite proposed end-use, and that absence may also have echoes in s 91(1) RMA. That provides:

“Deferral pending application for additional consents

- (1) A consent authority may determine not to proceed with the notification or hearing of an application for a resource consent if it considers on reasonable grounds that—
 - (a) other resource consents under this Act will also be required in respect of the proposal to which the application relates; and
 - (b) it is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any 1 or more of those other resource consents be made before proceeding further.”

As regards s 91, there was no separate application to have either the Council or the Court ... *not ... proceed with the notification or hearing* ... The applications have been heard and the decisions must be made, taking account of Policy 29.2.1.1.

[2-40] On the face of it, the Policy cannot be complied with. There cannot be coordination of the earthworks with unknown ... *future land development* We do not though see that as preventing a decision in this instance. The dilemma that might otherwise exist is offset to a considerable degree by four issues. First, the effects of the earthworks and the vegetation clearance on the surrounding environment will be minimal and, if anything, are likely to be beneficial. Secondly, we are simultaneously able to settle the terms of the zoning which will guide development through our consideration of PC 77. Thirdly, we agree with Ms Anderson's submission (and the joint view of the planning witnesses) that the large single sloping platform which will be the result will not predetermine or limit a future use. Fourthly, we know that any future development of the site will either be within the bounds of the zoning that applies to the land, or will require a resource consent, meaning that the effects of that development can be examined and decided upon in the course of considering whether it should be granted.

Part 2 RMA

[2-41] No issues arising under s 8 relating to the Treaty of Waitangi, or matters of particular significance to Maori under s 6(e), were brought to our attention. Nor was it suggested that there were other s 6 matters of national importance to be recognised and provided for.

[2-42] In terms of matters to which *particular regard* should be had, we take the following s 7 matters as being relevant:

- “(aa) the ethic of stewardship:
- (b) the efficient use and development of natural and physical resources:
- (c) the maintenance and enhancement of amenity values:
- (d) intrinsic values of ecosystems:
- (f) maintenance and enhancement of the quality of the environment:
- (g) any finite characteristics of natural and physical resources:”

Section 7(c) and (f) - amenity values and the quality of the environment

[2-43] As is often the case, these issues, to which particular regard is to be had, overlap and can be considered together.

[2-44] The term *amenity values* is defined in the RMA as:

“those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes”

As will be apparent from the comment already quoted from the CVRA's submissions (para [2-14]) the valley in its present state is hardly outstanding in its pleasantness or aesthetic coherence. North of the childcare centre it is mostly covered with rank or partly mown grass, and a tangle of unkempt vegetation, along with a collection of shipping containers. Only along its edges and on the northernmost portion is there anything visually appealing. That is recognised, and what the CVRA and its supporters express concern about is that the sense of a *valley* might be lost through the proposed filling, and that some kind of commercial development, such as Large Format Retail (LFR), will intrude even further into what is presently a residential area. Such intrusion might, the members fear, be by way of visual incompatibility, noise, and traffic.

[2-45] We accept of course that if the ultimate development of the site, or part of it, is commercial, then there will be change. But change is not, of itself, an adverse effect that counts against the granting of a resource consent. What we have here, considered overall, is a low-to-medium density suburban residential area bisected by Curtis Street — a relatively busy

street connecting the city's largest suburb, Karori, with its northern neighbours of Northland, Wilton, Wadestown, and those further north still. That such an area, serviced by such a road, should be a candidate for consideration for commercial development of some kind is very far from a unique prospect. There are innumerable instances of such commercial development in suburbs, with adverse effects being managed to acceptable levels by appropriate conditions. In any case, as we have said, that outcome will depend on the zoning or any resource consent application made in the future. We acknowledge as CVRA has, that non-residential activities are contemplated under the existing residential zone as a *Discretionary* activity.

- [2-46] The proposed conditions will require that the highest point of the filled surface along the eastern edge at cross section 160.00 (as shown on Plan S12-059-20 Rev A) is at least 4m below the level of the adjacent footpath in Curtis Street. This relativity is to be maintained as the fill is generally merged towards the base of the site (south). Cross section 160.00 aligns just south of the opposing property boundary between number 64 and 66 Curtis Street and runs across the site in an east-west direction to just south of the Karaka Tree on the western edge. It is well south of the Whitehead Road/Curtis Street corner. North of the 160.00 cross section, the ground level will merge with the existing ground level (an area of approximately 1762m²) at the far northern end of the site fronting Curtis Street and Whitehead Road. Coupled with vegetation being required along the street edge, that vertical separation should mean that for at least the southern, and already lower, portion of the site, there remains a sense of *valley*, with the childcare centre at the valley bottom.
- [2-47] The operative District Plan and proposed PC 77 provisions for building development would limit building height scale and site coverage. Development beyond those parameters would require a resource consent.

Traffic issues

- [2-48] Traffic issues — by way of increased flows with potential convenience and safety ramifications, along with amenity issues such as noise, can be considered under a number of s 7 heads. We accept that the present intersections of Curtis Street with streets such as Creswick Terrace, Randwick Road and Whitehead Road, have difficult visibility on some angles, and that increased traffic moving through the area could compound present issues. If, as seems likely, the public access to any commercial development would be taken off Whitehead Road, its intersection with Curtis Street would almost certainly require redesign, eg perhaps by way of a roundabout, and visibility could almost certainly be improved at the other corners also. We do not see any insuperable issues under this head and the district plan provisions provide for such analysis.

Efficient use and development of resources — s 7(b)

- [2-49] This may be a convenient heading under which to observe that the site is far from pristine, and nor is it contributing much to the neighbourhood except as perhaps adding a sense of *openness* along the lower valley. That is not to say that development, per se, is a better option. But a well considered comprehensive development of the site with height, bulk, colour and so on given their proper places, may well contribute a useful outcome. In that sense, the site could be considered a candidate for a more efficient use and development than it has at present. In any case, the rehabilitated site achieved through the proposed earthworks would enable development where the current state of the site has been unfavourable for that.

Intrinsic values of ecosystems — s 7(d)

- [2-50] Both ecologists agreed that the surrounding environment contains higher botanical and ecosystem values than those present on site, including regionally significant seepage wetlands supporting bryophyte assemblages recognised as “Uncommon” in the Wellington region, and forest habitats which support nationally threatened birds. On the evidence we heard, we are satisfied that the proposed conditions for vegetation preservation should suffice to provide continued shelter and shade for the colonies of glow worms along the Old Karori Road escarpment to continue.

[2-51] The success of *Zealandia* in rebuilding populations of native birds in and around the City has been a matter for celebration for some years now. One of the purposes, so we were told, of conditions encouraging the planting of native tree and bush species as part of the vegetation preservation conditions was to improve, even if only slightly, the size and make up of *stepping stones* which make up the ecological corridor of native vegetation for avifauna moving out of *Zealandia* towards Otari Wilton's Bush, and to the north generally. That would be, we agree, a worthwhile bonus.

Section 104(1)(c) — other relevant matters

[2-52] No *other relevant matters* in the sense used in this section were brought to our attention.

The Commissioners' decision — s 290A

[2-53] Section 290A requires the Court to have regard to the decision under appeal. That does not, as has been discussed in a number of the Court's decisions, indicate that the decision is presumed to be correct and that an appellant has an evidential burden in attempting to overturn it. But it does mean that the Court must genuinely consider the result, and the reasoning, of the first instance decision and, implicitly at least, explain why it has come to a different outcome, if indeed that is the case.

Result

[2-54] For the reasons we have outlined, we agree with the first instance decision. The proposed earthworks and vegetation clearance will, in our view, be a step towards a use of this site that will, subject to the management of potential adverse effects through the zone provisions, or the resource consent process, enable the purpose expressed in s 5(2) of the RMA, to be better achieved. The appeal against the grant of the resource consents by the CVRA is allowed, but only to the extent that the conditions to be imposed on the consents — as set out in Appendix 3 to the Council's closing submission — are to be subject to the following addition/alterations:

- a. Condition 9, and in particular the 9th bullet point, which addresses complaint response procedures, shall refer to the information required to be incorporated on a sign on the site under Condition 33 bullet point 2. Appendix 1 shall be deleted.
- b. Bullet point 1 of Condition 33 shall be deleted. We are satisfied that with bullet point 3 in place the local residents will be satisfactorily provided with necessary contact details and the communication and complaints procedures set out in the Construction Management Plan to provide the appropriate conduit for complaints and their resolution.
- c. There was an issue between the Council and PPG about stormwater issues — to the extent of providing access to the drainage portal on the site — leading to the Kaiwharawhara Stream tunnel. This seems a logical and reasonable requirement relating to the earthworks, and Condition 53A as presented with the Council's closing submissions should be incorporated.

Part 3: The Plan Change Appeals

Introduction — Proposed Plan Change 77

[3-1] The context for Plan Change 77 (PC 77) is found in two earlier plan changes promulgated by the Council as part of its rolling review of the District Plan (Plan Change 72 - Residential Review and Plan Change 73 - Suburban Centre Review).¹ The subject site was not included in Plan Change 73 at first notification but was added as a result of a submission from PPG. However, the site was later dropped from that plan change as a result of legal proceedings finding that due process had not been followed (see para [1-7]). However, Plan Change 73 in particular sets the context for PC 77² and is now operative. Plan Change 73 introduced a comprehensive set of new provisions relating to Business Areas of the City.³

- [3-2] Thus the Council had already turned its mind to the future of the subject land in the context of its rolling review and considered at that time that a *Business 2* zone might be the appropriate fit. This is reflected in some of the supporting analysis we saw in evidence, particularly the economic evidence prepared by Mr Heath and Ms Moncrieff, the Council's Planner. While we can see that the *Business 2* zone formed the basis for the proposed zone, as Ms Moncrieff puts it; ... *with the advancement of the Council's position regarding residential use on the site, the mixed use nature of the zone more closely resembles the Plans Business 1 Area introduced as part of Plan Change 73.*⁴ The proposed zone is however a bespoke zone with refinements made to it to capture the special characteristics of this site.
- [3-3] In a decision made on 14 January 2014, following and adopting a report dated 10 December 2013 made by independent Hearing Commissioners appointed for the purpose by the Council, the Council approved PC 77 to its District Plan. Three appeals were lodged against that decision, one by PPG, one by CVRA, and the third by Mr Michael Gibson.
- [3-4] PC 77 is designed to rezone only the land at 55-85 Curtis Street, Karori: - ie the same site as that involved in the resource consent appeals. We have already described the site, and its environs and current zoning in the first part of this decision dealing with the PPG earthworks resource consent application.
- [3-5] PC 77 is independent of the earthworks and vegetation clearance resource consents under appeal: - and as the decision dates already mentioned indicate, it was processed quite independently of the resource consents.

The Council's position

- [3-6] The Council proposes to rezone the land *Curtis Street Business Area* (CSBA). Its intention is that the Plan Change would provide dedicated objectives, policies and rules to enable a broad range of activities including residential, business, commercial and industrial activities to be established there, subject to area-specific environmental controls including:
- [a] Controls on the establishment of supermarkets and integrated retail developments for the purpose of managing impacts on existing centres.
 - [b] Building floor space and height controls to manage visual and landscape impacts.
 - [c] Retail and commercial floor space controls to reduce the impact on the surrounding road network.
 - [d] Controls on the establishment of sensitive activities, such as schools and residential dwellings to avoid reverse sensitivity conflicts with the electricity transmission lines which cross the land.
 - [e] Various provisions encouraging retention and planting of vegetation for landscape and ecological reasons.
- [3-7] The rationale for a zone change as described by Ms Moncrieff⁵ was:
- [f] The split zoning of Outer Residential and Open Space B was not well suited to the site's characteristics and potential future use.
 - [g] In 20 years of residential zoning no such use had been made of the site.
 - [h] The land owner had alerted the Council to their desire to use the land for a different use and a plan change was considered the most appropriate way to facilitate that use.

PPG's position on PC 77

- [3-8] In general terms, PPG supports PC 77 as proposed, but on four issues it seeks what it regards as more appropriate provisions. The issues, broadly described are, first, what PPG describes as a cascade of provisions aimed at assessing and controlling distributional impacts arising from the development of the site. It submits that those provisions should be removed from the Council's draft. Secondly, it disputes the appropriateness of a *non-complying* activity status for earthworks on the western side of the site. It submits that within the defined 5m strip, the activity should be *restricted*

discretionary. Thirdly, it disputes the appropriateness of controls on the removal of plantings along the Curtis Street frontage. Fourthly, it submits that the assessment criterion concerning the location of building bulk below the level of Curtis Street should be removed. In those respects, it has issues with the Council about Policy 35.2.1.5; Rules 36.3(d) (e) and (g); Rule 36.5(d); Assessment Criteria 36.7(b) and (i); Activity Standard 36.6(f)(ii), and some Definitions.

[3-9] To clarify a point made in PPG's case about *distributional* impacts (or effects) we should say that we understand that term to mean ... *effects attributable to changing patterns of support, and changing levels of supply, of retail floor space ... They are the collateral social and economic effects of trade competition on amenity, efficiency and community enablement.* — see [Kiwi Property Holdings Ltd v Christchurch DC \[2012\] NZEnvC 92](#). We can say immediately that we heard no evidence that came close to establishing the likelihood of such effects on existing retail centres arising from this plan change, particularly given the gross floor area restrictions it contains, and we put the issue aside. We do however discuss some retail-related issues at paras [3-69] to [3-85] and [3-100].

[3-10] As we understand the evidence and submissions, and expressed in a very summarised form, what lies behind the Council/PPG position is that;

- The *Open Space B* zoning is now redundant, with the land having, in any event, little attraction as an active, or passive, recreation or ecological area;
- The possibility of residential use of some kind has long been a possibility, for at least some of the area, but has never been pursued — indicating either or both of a lack of demand or a general view that the site is unattractive for the purpose;
- There is an unfilled need for additional commercial/retail space in Karori/Northland/Wilton;
- Because of its proximity to each of those suburbs, and the possibility of creating a relatively large and flat open space on it, the site may well be attractive, and appropriate, for commercial/retail use.

The opposing parties' positions on PC 77

[3-11] The CVRA/Gibson/s274 parties' position, on the other hand, arises from a spectrum of views ranging between

- That the *valley* should be left as it is;
- That it should be replanted with indigenous species and allowed to develop as a further ecological area, supplementing *Zealandia* and Otari-Wilton's Bush;
- That if the area is to be developed, the development should be residential with, at most, only incidental business amongst it: - in that sense, their view of *mixed use* differed significantly from the way the Council and PPG would use that term;
- That traffic safety and workability on the roads around the area militate against any use which would generate significant vehicular traffic.

We shall attempt to set out and discuss each of the positions in a little more detail.

CVRA's position

[3-12] CVRA's position is that it regards the existing zonings of *Open Space B* and *Outer Residential* as appropriate to the site, and asserts that a spot zoning for business activities and structures of ... *a scale and intensity many times greater than would be anticipated in a residential setting* ... cannot be appropriate. It says that a case for rezoning the land has not been clearly demonstrated, nor has the present zoning been shown to prevent the use and development of the land. CVRA argues that a commercial development on the site could *dwarf* nearby centres, including Karori, and that the potential effects on the viability of those centres have not been fully assessed, and that development of that scope is inconsistent with the *Centres* policy in the District Plan. It emphasises that the amenity of the area is the primary concern of its membership.

Mr Gibson's position

[3-13] Mr Gibson expresses the view that PC 77 amounts to a private plan change being progressed at the expense of the City's ratepayers, and is based on the erroneous advice that the site is not suitable for residential purposes. It is intended, he believes, to give the landowner *carte blanche* to do as it wishes with the site, including unspecified industrialisation. He too argues that there is no ... *justification sufficient to meet the requirements of the [RMA]* ... for the rezoning, and that retail activity sufficient to meet any reasonable need is available under the present zoning. In his closing submission, Mr Gibson attempted to make a point about the absence of *Special Housing Areas* in this part of the City. He puts a proposition that the absence demonstrates ... *not only that there is a significant need for housing in Wellington but also that none of the seventeen existing or planned Special Housing areas in Wellington could be said to satisfy the need for housing in the area of Northland/Karori*. We have to say now that we do not see that connection at all. The Court's interest in *Special Housing Areas* was directed to the possibility that, if there were to be such near the site, it/they might add to the demand for commercial/retail space which, the evidence demonstrates, is in short supply in the nearby suburban centres. We recall no evidence suggesting that there is a particular need for residential land in the area and, even if there is, the proposed zoning in PC 77 could accommodate at least some of that need.

The s274 parties' positions

[3-14] Ms Frances Knight is a fellow of the Chartered Institute of Logistics and Transport, and raised traffic safety issues as a part of her concerns. We have mentioned elsewhere the acknowledged limitations of some of the intersections with Curtis Street. It is the case also that Curtis Street, as presently formed, is quite narrow and if cars are parked, even only on one side of it, there are places where crossing north and south bound traffic has to slow or stop to allow safe passage. Ms Knight also emphasised the issue of *amenity* in the widest sense of the mix of public and private space, and the intrusion of elements such as traffic, and noise - with the *amphitheatre* effect the locale is said to give to it. We set out our conclusions on traffic, noise and amenity issues generally later in this Part of the decisions.

[3-15] Mr Peter Henderson laid some emphasis on the feared affects of development of the site upon biodiversity protection and regeneration, and ecology generally.

[3-16] Ms Sheena Bennett was frank in saying that she would prefer the valley to remain just as it is, with the native vegetation being encouraged to regenerate to be compatible with *Zealandia* and the Otari reserve area. Accepting though that some development is probably inevitable, she would wish to see it being ... *appropriate to the residential nature of the surrounding area preserving the steep escarpment and narrow valley which we all treasure*. While accepting that PC 77 might ... *read well* ... she fears that the planning process is such that the end result will be activities that conflict with its expressed objectives.

[3-17] Mr Rodney Bryant supported Ms Knight's views about traffic issues. He is a member of the Karori Sanctuary Trust and so has been involved in the *Zealandia* project — and also in Kaiwharawhara Stream catchment projects. He is concerned about possible adverse effects on the stream's water quality, and is somewhat critical of the Council's position, suggesting that it is moving ahead with the Plan Change without really knowing the facts or exploring the options. He also disputes the views about *leakage* of shopping spend from Karori. We have already mentioned where we consider traffic issues. We discuss biodiversity and ecology issues later in the Part of the decision.

Statutory considerations

[3-18] The matters to be considered when preparing a plan or plan change are set out in sections 74 and 75 of the RMA. These include requirements, relevant here, to give effect to any national policy statement and regional policy statement; not to be inconsistent with a regional plan, and not to have regard to trade competition. Further, and importantly, the Council has obligations under s 32 of the RMA, and the issues raised by that section are crucial to the determination of these appeals.

[3-19] It is agreed that the version of s 32 applicable to the Plan Change is that in force prior to the RMA Amendment Act 2013. It provided:

“32 Consideration of alternatives, benefits, and costs

- (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by— ...
 - (c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) of Schedule 1); or
 - (d) the person who made the request, for plan changes that have been requested and the request accepted under clause 25(2)(b) of Schedule 1.
- (2) A further evaluation must also be made by—
 - (a) a local authority before making a decision under clause 10 or clause 29(4) of Schedule 1; and ...
- (3) An evaluation must examine—
 - (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
 - (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
- (3A) This subsection applies to a rule that imposes a greater prohibition or restriction on an activity to which a national environmental standard applies than any prohibition or restriction in the standard. The evaluation of such a rule must examine whether the prohibition or restriction it imposes is justified in the circumstances of the region or district.
- (4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—
 - (a) the benefits and costs of policies, rules, or other methods; and
 - (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.
- (5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.
- (6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified or the regulation is made.”

Evaluation of the objectives and the policies

[3-20] So, s 32(3) first requires an evaluation of ... *the extent to which each objective is the most appropriate way to achieve the purpose of the Act*. The Concise Oxford defines *evaluate* as ... *form an idea of the amount, number or value of ...*. So an evaluation is not necessarily a process of ranking possible alternative objectives into an order of 1, 2, 3 etc. Nor does s 32(3) say that the objective must be the most appropriate way to achieve the purpose of the Act. The key word here might well be *appropriate* — again, turning to the Concise Oxford — that means ... *suitable; proper*.

[3-21] Putting that together, what para (a) of the subsection requires is the forming of a view as to whether a given objective might be said to be a suitable means of achieving the purpose of the Act and how it compares with other possible

suitable contenders. That is not a simply mathematical exercise — it requires a value judgement based on the whole context.

[3-22] Secondly, in para (b), the subsection requires an evaluation, based on their efficiency and effectiveness, of whether policies, rules or methods are the most suitable means of achieving the objective(s) in question. Here though there is no qualifier in the terms of ... *the extent to which* So it could be at least arguable that para (b) calls for a definite ranking of the possible policies, rules or methods. Even if that is so, what is required is a value judgement based on the context as a whole.

[3-23] Before referring to the District Plan provisions, it may be helpful to confirm that in the decision of Eldamos Investments Limited v Gisborne DC (W047/05), the Court proposed measures for evaluating objectives, policies, rules and other methods against the provisions of s 32. Measures proposed were:

- (a) An objective in a District Plan is to be evaluated by the extent to which:
 - (i) It is the most appropriate way to achieve the purpose of the Act - s 32(3)(a); and
 - (ii) It assists the territorial authority to carry out its functions in order to achieve the purpose of the Act - s 72; and
 - (iii) It is in accordance with the provisions of Part 2 - s 74(1).
- (b) A policy rule or other method in a District Plan is to be evaluated by whether:
 - (i) It is the most appropriate way to achieve the objectives of the Plan - s 32(3)(b); and
 - (ii) It assists the territorial authority to carry out its functions in order to achieve the purpose of the Act - s 72; and
 - (iii) (If a rule) it achieves the objectives and policies of the Plan - s 76(1)(b).

It is to be noted that the term *most appropriate* does not necessarily mean the most *superior* in an absolute sense. Rather it means the *most appropriate* of the ways presented to the decision-maker, with the decision being made as a value judgement, and having regard to comparative costs and benefits, and measured against the purpose of the Act or the objectives: - see eg *Rational Transport Society Inc v NZ Transport Agency* (High Court Wellington CIV-2011-485-2259, 15 December 2011).

[3-24] We shall return to these issues at para [3-94]ff.

Evaluation against National documents

[3-25] The *National Policy Statement on Electricity Transmission* (NPSET) is most relevant at its Section 8, Policies 10 and 11. There is a direction to decision-makers to ... *the extent reasonably possible manage activities to avoid reverse sensitivity effects on the electricity transmission network and to ensure that operation, maintenance, upgrading, and development of the electricity transmission network is not compromised*. Ms Moncrieff confirmed the Council had reached agreement with Transpower on the identification of an appropriate buffer corridor for PC 77 which, in the decisions version, controls sensitive activities by way of definition and a yard setback to address Policy 11. Although this mechanism was generally agreed, there appeared a suggestion that, given the existence of residential development happily coexisting elsewhere beneath the transmission lines, there was greater scope for residential development on this site. However, we had no evidence on the matter so we have to accept the position as it was presented to us by Ms Moncrieff and accept that the plan change appropriately addresses the NPSET.

[3-26] As the site is contaminated in part, and potentially contaminated elsewhere, the NES Contaminated Soil is also relevant. This document works alongside existing provisions in the District Plan and a resource consent as a discretionary activity would be required under the NES as well as Rule 32.2 of the Plan. The position was agreed and we need take this matter no further.

[3-27] Ms Moncrieff also referred us to the proposed *National Policy Statement for Indigenous Biodiversity* but, as we know, this Government initiative is on hold and therefore not able to be considered relevant to this plan change. In any case we were referred to regional documents which address this issue and we understand this not to be in dispute.

Evaluation against Regional documents

[3-28] There is in place an operative Wellington Regional Policy Statement (RPS) (2013). There was no suggestion that the District Plan did not give effect to it. Relevant policies concern freshwater management, including sustainable management; minimising the contamination from earthworks, and supporting healthy functioning ecosystems. Of course these matters are also covered by the *National Policy Statement — Freshwater Management* and we heard no evidence on this document.

[3-29] However there was no suggestion that the District Plan did not implement the RPS in these matters so we are confident we can rely on the District Plan for consideration of the Plan Change.

[3-30] The joint witness statement addressing ecology confirmed that while the Kaiwharawhara Stream is of regional significance and has high ecological values, the vegetation on the land is largely dominated by weeds and introduced species of low ecological value. As we have noted, it is the buffer function of edge vegetation to the west that has some functional significance in managing possible adverse ecological effects.

[3-31] Another matter of regional significance is the requirement that ... *risks and consequences to people, their businesses, property and infrastructure from natural hazards and climate change are reduced*. That objective is enforced through a policy in the RPS of avoidance of inappropriate subdivision and development in areas at high risk from natural hazards.⁶ This matter has been carried through to the District Plan and was raised as being relevant to the development of the subject land. We have discussed the possible significant hazard that was raised about this site — earthquake-caused inundation, in Part 2 of this decision, and return to it at paras [3-55] to [3-56]. Suffice it to say the RPS seeks *avoidance* of inappropriate development in *areas at high risk* from natural hazards.

[3-32] There are Regional Plans in place including the *Regional Freshwater Plan* (1999) and *Regional Plan for Discharges to Land* (1999). Ms Moncrieff confirmed that she had examined these plans which are currently under review (a draft combined plan has been notified for consultation purposes) and found no inconsistencies with them. Further, the Wellington Regional Council was a s274 party to these appeals and has confirmed by memorandum to the Court (30 January 2015) general support for the plan change.⁷ We heard no evidence to the contrary.

Evaluation against the District Plan

[3-33] While we have considered the higher order planning documents mentioned, we accept that the District Plan is the most relevant document. What is required now is that the provisions of PC 77 should not directly or inferentially create an consistency with the higher documents.

[3-34] With the inclusion of PC 73 into the District Plan, the more relevant chapters - to a greater or lesser extent depending on the issues - include:

- [a] Chapter 4 Residential Areas
- [b] Chapter 6 Centres
- [c] Chapter 16 Open Space
- [d] Chapter 29 Earthworks
- [e] Chapter 31 Contaminated Land
- [f] Chapter 33 Business Area
- [g] Chapter 34 Business Area Rules

[3-35] Of these, the chapters concerning *Open Space*, *Residential*, *Centres* and *Business* are most relevant to the overall direction of PC 77. The others concern relative detail, primarily contained in rules.

Residential - and Transmission lines

[3-36] The Central Park - Wilton A 110kV National Grid Transmission line traverses the land with the site located about mid-span between Tower 11 (which is about 157m from the northern boundary and opposite No. 5 Seaforth Terrace) and Tower 12 (which is about 153m from the southern boundary and in the property at No.32 Curtis Street).

[3-37] This characteristic has been clearly at the forefront of consideration of the suitability of the site for residential development - as we heard from Ms Moncrieff and Mr Ian Leary, consultant planner for PPG. Mr Warburton, consultant planner for CVRA, had spent some time in his career with Transpower and suggested that currently a more liberal approach to development in the vicinity of the high voltage alignment than once was the case may be possible. We understand that in fact a more liberal approach is set out in PC 77, with a significant reduction in the protected corridor width. However, beyond what has been agreed with Transpower, who are satisfied with the resultant form of the plan change, there was no evidence indicating that we might consider still greater tolerance. We must take the view that there is an impediment to certain development in the valley as a result of the existence of this nationally important infrastructure corridor.

[3-38] The operative *Outer Residential* zone provisions which apply to the site rely on Objective 4.2.13 which seeks to ... *manage activities to avoid reverse sensitivity effects on the electricity transmission network and to ensure that operation, maintenance, upgrading and development of the electricity transmission network is not compromised*. Policies which follow restrict location of buildings and structures near these transmission lines and seek to reduce risks associated with them. This is carried through to the following standard:

“5.6.2.12. Any buildings (including additions), and structures over 2 metres in height, shall be located further than 32 metres from high voltage transmission lines (as measured from the centreline at ground level).”

Emphasis added

[3-39] Through the plan change submission process Transpower sought to protect this corridor in two ways: by clarification of the definition of *Sensitive Activities*, and an exclusion of this type of activity from the area within 12m either side of the centreline of the transmission line (i.e. a 24m corridor compared to the operative 64m, essentially through the middle of the length of the site). This effective release of land for development purposes must then affect the efficient and sustainable use of this land. We note from its submission that Transpower gave consideration to the vertical clearances and appropriate land use. The following passages from the submission are relevant:

“3.5 The site has large vertical clearance distances from the conductors of the transmission line. Further, given the location and layout of the site (and its history), it is unlikely that business activities could locate away from the 12m corridor proposed (either side of the centreline). On this basis Transpower can, in this instance, accept non-sensitive activities being located underneath the conductors. The preference from Transpower's perspective is that these activities should not involve large numbers of people being located under conductors for any significant period of time. It may be possible to layout the development of the site accordingly; e.g.; provide the carparking, loading spaces or storage areas under the transmission lines.

3.6 Many retail activities can be considered to be sensitive activities [in] relation to electricity transmission lines. As stated above Transpower does not support activities that include the congregation of large numbers of people under the Transmission Lines from establishing on greenfield sites. On this basis the definitions of *retailing activities* in the proposed Plan Change can be used to encourage only those less sensitive activities from establishing directly beneath the transmission lines ...⁸”

[3-40] The definition of *sensitive activities* settled upon by the parties is:

“*Sensitive activities and uses*: means those activities and uses which are:

- schools, kindergarten or child care centres
- homes for the elderly, hospitals, residential care facilities, premises with high density, low mobility uses
- facilities critical to emergency response and utility lifelines
- transport corridors to emergency services
- residential activities (applies only in Central Area, Centres and Business Areas)
- For the purposes of the National Grid Transmission Line that traverses the Curtis Street Business Area such activities are those activities listed in bullet points 1, 2 above.

Sensitive activities and uses will require additional buffer zones from activities involving the use, storage, handling or disposal of hazardous substances.”

[3-41] We note that the settled position regarding the definition and corridor is consistent with the Council's objective (4.2.13 National Grid) which seeks to avoid reverse sensitivity effects from transmission lines, and to manage risk. Specifically Policy 4.2.13.3 is clear in its directive, which the Plan Change provisions implement:

“4.2.13.3 Reduce the potential risks associated with high voltage transmission lines by encouraging the location of these away from urban areas and by restricting the location of residential development near such lines.”

Containment and intensification

[3-42] The residential objectives and policies of the District Plan seek to enhance the City's natural containment, accessibility and residential amenity, by promoting efficient use and development of resources. This is achieved through the encouragement of consolidation of the established urban area. This includes achieving development of a character and scale that is appropriate for the neighbourhood in which it is to be located.⁹

Character, sense of place, urban form, sustainable design and range of activities

[3-43] There is an objective to recognise and enhance characteristics that contribute to distinctive physical character and sense of place.¹⁰ Policies include residential intensification within the *Inner* and *Outer Residential* areas, provided that it does not detract from the character and amenity of the neighbourhood in which it is located. This includes minimising hard surfaces by encouraging development that increases opportunities for permeable open space areas and encouraging the retention of mature, visually prominent trees and bush.¹¹

- [3-44] There is a requirement to ensure residential development has access to reasonable levels of amenity, and this means that adverse effects on residential amenity values are to be managed by siting, scale and intensity that is compatible with surrounding development patterns. Multi-unit and infill development receive particular attention in this respect. Rules and design guidelines have been included to assist with meeting many of these objectives and policies.¹²
- [3-45] A sustainable built form is promoted through low impact design and the efficient use of energy and other resources.¹³ We note that PC 77 contains similar objectives for buildings and structures, and specifically encourages the use of permeable surfaces to enhance visual amenity and to attenuate stormwater runoff in terms of both quantity and quality.¹⁴
- [3-46] Particularly relevant to this plan change is Objective 4.2.7: to ... *facilitate a range of activities within Residential Areas provided that adverse effects are suitably avoided, remedied or mitigated, and amenity values are maintained or enhanced*. CVRA seek to rely on this objective and its related policies (and rules) as providing a suitable vehicle (ie other than a plan change) for mixed-use development to establish on the site.¹⁵ We note Ms Moncrieff's response that the provision is for more of a mixed-activity scenario and that such activities are provided for only by fully *Discretionary* activity status. She set out (paras 115 and 116 EIC) a number of shortcomings with the residential provisions in providing for mixed use. We summarise these as:
- [a] *Discretionary* activity status does not overtly encourage such uses.
 - [b] The establishment of non-residential activity will require a strong resource consent application in order to successfully meet the objectives and policies of the Residential Area.
 - [c] Such an application is likely to be notified which represents a risk unattractive to some landowners.
 - [d] Any development significantly outside the scale of a residential development would likely struggle to gain approval.
 - [e] If consented, the non-residential use would be constrained by the terms of its consent and thus any change would require a further consent.
 - [f] Business zoning enables a range of activities as permitted activities providing greater flexibility.
 - [g] The certainty offered by a plan change is more likely to result in the site being used for the desired purpose.
 - [h] If the site were developed on an ad hoc basis using the non-residential activity rule this could result in an undermining of the Council's Centres Policy 2008 which, in her words, is a relevant consideration under the policies.

- [3-47] We note that Policies 4.2.7.3 to 4.2.7.5 address provision for non- residential activities in residential areas, provided the character and amenity standards are maintained and adverse effects are avoided, remedied or mitigated. There are specific objectives in PC 77 — see 35.2.3 and 35.2.4 - which seek:

“To recognise the residential character, landscape and ecological values of the Creswick Valley.

To protect the amenity of adjacent residential areas from activity and development in the Curtis Street Business Area.”

- [3-48] Protection is achieved through managing the character of development with height, landscape, light, noise, traffic and signage controls. In addition, within the CSBA a high quality neighbourhood-scale urban environment is sought and internal effects are addressed to provide for the coexistence of the broad mix of activities anticipated (Objective

35.2.6). Thus the setting or context of the site within the residential valley is addressed, consistent with the *Outer Residential* zone objectives, but addressing the specific characteristics of this land.

[3-49] Further, the bespoke nature of PC 77 provisions requires that buildings be accommodated as *Restricted Discretionary* activities where assessment in terms of design and appearance is required. The provision is:

“36.3 (i) The construction, addition and alteration of buildings and structures Discretion: In assessing applications under this rule Council's discretion will be restricted to design, external appearance and siting, the location and type of buildings or structures, site layout, provision of parking and access including pedestrian movement, site landscaping, and the extent to which any residential development meets the Residential Design Guide.

For clarification, non-residential buildings will not be assessed against the Residential Design Guide.

Conditions:

- This rule does not apply to:
 - Buildings and structures located in the Building Setback (Western Escarpment Buffer)
 - Residential buildings located within 12m of the centreline of the Transmission Wires
- A landscaping plan must be submitted with the resource consent application. *Emphasis added*

[3-50] CVRA accepts the notion of a mix of residential and non-residential activities, but at what they would regard as a scale appropriate to the present zoning. We conclude that the context of the land within the valley (which is to be maintained in PC 77 through control on earthworks as well as the application of buffer planting) and the objectives, policies and rules we have touched on above will result in *residential sympathetic* development. In addition, we note that while PC 77 directs that consideration be given to the Residential Design Guideline, it does not require development to be assessed against that guideline. We accept that there are practical reasons why residential design guidelines would not be appropriate to a mixed-use development, but consider that they would be useful as a measure of compatibility. The PC 77 provisions most appropriately provide for mixed use on a scale appropriate for development in the area because they are specific to the character of this land, including the neighbourhood in which it is located, and thus provide greater certainty of environmental outcome.

[3-51] Specifically, we also note that retail activities should not compromise the role and function of *Centres*. We will come to the Centres chapter of the District Plan shortly, but this directive supports Ms Moncrieff's concern regarding ad hoc development which might impact adversely on the integrity of *Centres*. As a general concept we acknowledge that sustainable management would encourage a plan change which provides certainty, as against ad hoc development which would not necessarily employ a comprehensive approach to the development of an area.

[3-52] Relevant objectives and policies for Residential areas of the city also include the maintenance and enhancement of natural features (including landscapes and ecosystems) that contribute to Wellington's natural environment.¹⁶ Specifically, the regional significance of the Kaiwharawhara Stream and the presence of the seepage wetlands and glow worms on the Old Karori Road escarpment are relevant. The ecological experts agreed that the latter features can be classified as *ecologically significant* because of their rarity and support of regionally uncommon native bryophyte communities. These features are not within the site itself, but development and activities on it have the potential to adversely affect them. Relevant residential policies encourage retention of existing vegetation - especially established trees and native vegetation - and also encourage the retention and restoration of indigenous ecosystems and habitats.

[3-53] While these matters are particularly relevant here, we were told there are limited rules which would protect the areas of *ecological significance* under the present zoning of the site. The *Outer Residential* zone permits vegetation removal without the need for consent. The *Open Space B* zone provides some control by limiting the damage and removal of indigenous vegetation to a defined quantum of 100m² in any 5 year period. There is a mixture of indigenous, weed and introduced species present on the land which, while not important in its own right, forms a valuable buffer role in protecting the seepage wetlands and glow worms present on the Old Karori Road escarpment.¹⁷ PC 77 establishes a regime (through building setbacks and rules) for the retention of a buffer and the retention of an identified Karaka tree which is located in the presently *Outer Residential* zoned part of the area. The PC 77 provisions are most appropriate for development of the site in terms of ecological issues because they address these existing features specifically and are likely to ensure a positive environmental outcome, both in terms of retention and future enhancement, given the location of the subject land.

[3-54] Finally, the last more relevant set of objective and policies concerning *Residential* areas addresses natural and technological hazards/risks and seeks to avoid or mitigate the adverse effects of natural and technological hazards on people, property and the environment. The subject site is not within an identified fault line. However, the issue canvassed by Policy 4.2.10.3 was a matter of concern to CVRA:

“4.2.10.3 Ensure that buildings and structures in Residential Areas do not exacerbate natural hazards, particularly flood events, or cause adverse impacts on natural coastal processes.”

Under the current District Plan regime this land is not identified as being in a flood risk area. The existing zoning is essentially neutral in this respect. We heard much evidence, in the context of the earthworks resource consent, which addressed a potential earthquake and the risk of flooding. It is in the context of a resource consent that these matters would likely be addressed. PC 77 sets a maximum height for cut and fill and other constraints around earthworks, beyond which a resource consent will be required. Flooding has, in the context of this hearing at least, been examined and it has been confirmed by experts that the provisions of the plan change will not exacerbate likely risk.

[3-55] We note that Ms Moncrieff (unopposed by Mr Leary), suggested bringing a generic hazards based objective/policy (eg Objective 4.2.10 for residential areas) suite into PC 77 (a possibility included in the Council's closing submission). However, this was not included in the original Plan Change, nor has it been requested as an insertion in a formal submission so we have doubts about it being within the scope of the appeals. We do not think this is significant because such matters can be and are controlled through other regulation at the building consent stage. We understand that *Residential* zone provisions apply where such hazards have been pre-identified, and this site does not at present fall into that category. In any event, there is nothing to prevent the Council reassessing this situation through a plan change process should it so desire.

[3-56] Consistent with other development focused zones, the *Residential* objectives and policies address efficient and convenient access for people and goods with a focus on the use of public transport and alternate modes to that of the private motor car. The road network is to be managed so as to avoid, remedy or mitigate the adverse effects of road traffic within *Residential Areas*. There is also a requirement for appropriate parking, loading and site access and for the road system to be managed in accordance with a defined road hierarchy. PC 77 incorporates a similar suite of objective and policies (Objective 35.2.5). While both the plan change or the operative District Plan provisions are appropriate to the site because they are generic, with the amendment we suggest later to encourage comprehensive management of access to this land we consider that PC 77 will provide a more appropriate management of the road network. This is especially important given the topographical relationship of the land to the adjoining streets and in particular the physical characteristics of Curtis Street in this location.

[3-57] Again, we acknowledge the concerns expressed by Ms Knight previously referred to. These objectives and policies, in combination with those addressing comprehensive development of the site, are on point. While there is scope for the Council to address shortcomings in the street network, development also can provide the catalyst for improvements to take place. We do have concerns with the detail of the rules around a comprehensive approach to development of this land to ensure these traffic matters are appropriately managed. We will address the detail of this in our discussion on the efficiency and effectiveness of the proposed rules later in our decision.

Open Space

[3-58] The existing *Open Space B* zone applies to the northern, and higher, end of the site which has been filled and, at least at its uppermost point, is close to level with Whitehead Road and the north end of Curtis Street. This is the widest part of the site and the most visible. It contains an area of 4397m².¹⁸ We understand that the existing fill includes cleanfill and landfill materials such as miscellaneous builder's rubble. Settlement is likely to occur under loading or earthquake shaking.¹⁹ While there is no confirmed risk to human health from contaminated material the site is considered potentially contaminated, and will be treated as such for development purposes.²⁰

[3-59] The *Open Space B (Natural Environment)* is described in the District Plan as follows:

“Open Space B land is valued for its natural character and informal open spaces. It involves areas that are used for types of recreation that, in the broadest sense, do not involve buildings or structures. The intention is to keep such areas in an unbuilt or natural state. This type of open space encompasses both formal and informal open space elements. It includes walkways, scenic areas and open grassed areas where buildings are inappropriate. Its characteristics are minimal structures, largely undeveloped areas and open expanses of land. Most Open Space B areas are vegetated and often have ecological values or may buffer Conservation Sites.”

[3-60] Thus, given that this land is open and vacant and there are some physical constraints to building on it it would fit, in a very general sense, the description of land zoned *Open Space B*.

[3-61] As we have discussed, ecologically the site's value is low. It is mown at its apex where Whitehead Road and Curtis Street intersect, but the remainder of the area is vegetated. In terms of passive recreational pursuits, the mown section would be of limited use. Some of the remainder — the western escarpment area - has some ecological and scenic value (containing mixed indigenous and exotic species) and provides a vegetated buffer to the northern section of the seepage wetlands and glow worms on the Old Karori Road escarpment.

[3-62] Ian Galloway Park is a major open space area to the north across Whitehead Road. It is also zoned *Open Space B* but incorporates dedicated active sports facilities - playing fields, gymnasias and the like - as well as passive open space. This filled area effectively dams the valley and the Kaiwharawhara Stream runs in the tunnel beneath and beside it, to re-emerge into the Otari-Wilton's Bush area. Thus there is an expansive area of open space zoned land immediately to the north of the subject land.

[3-63] CVRA and the s274 parties supporting it drew our attention to the Council's *Outer Green Belt Management Plan 2004* (OGBMP) which has a rather complicated purpose; set out in its section 1.2.1. It serves in part, or at least in some parts of the City, as a Reserve Management Plan promulgated under the [Reserves Act 1977](#). However, we are uncertain of its relationship to this specific site as it is not a reserve under that Act, but is privately owned land. Thus, outside of its [Reserves Act](#) purpose the OGBMP does not have a statutory purpose. It includes the following statement:

“This Plan is not intended to control the use of private land within the concept area, but will be used as a reference document and an advocacy tool. More formal policy in respect of private land in this area may be developed separately, following the appropriate [Resource Management Act 1991](#) process, including appropriate consultation.”

- [3-64] The document contains a section dealing with Sector 4 and the Otari-Wilton's Bush, including a reference to ecological linkages, streams and regeneration of bush (5.4.2.3). This refers in broad terms to the Kaiwharawhara catchment and the importance the northern green belt area plays in improving water quality after the stream has passed through the old landfill area in Ian Galloway Park. It contains a map of the Sector 4 in its Current Form and the same mapped area as a Future Initiative.²¹ Similar maps occur at pages 142-143 in reference to Sector 6 Wrights Hill/Sanctuary with an objective to ... *develop the sector as a major component of the Outer Green Belt ecological corridor, the major ecological hub for the southern part of the city and the natural headwaters of Kaiwharawhara Stream*. The future initiatives map in each case indicate swathes of land the Council would appear to seek to control (by comparison with land marked WCC Open Space between the before and after plans) and this includes the subject land. The Council suggested the identification of the subject land was an error, but on reading these maps in context they seem to indicate far-reaching ambitions which are not replicated in any statutory document. We find this document of very limited assistance, other than in confirming the ecological corridor which exists along the general alignment of the Old Karori Road escarpment and which, for the most part, falls outside the site.
- [3-65] On the basis of this document and its general contribution to an ecological corridor, CRVA and others saw no justification for the zone to change on this portion of land and indeed there was some suggestion that perhaps it should be extended over the whole of the subject land.
- [3-66] Mr Leary referred us to the Council's most recent open space planning document *Our Capital Spaces - An Open Space and Recreation Framework for Wellington* 2013-23. He described it as defining the Council's priority areas for open space purposes. He noted that the document does not make any direct reference to, or indicate any intention of the Council to purchase this land.²² We note too that the land was in Council ownership until 1999.
- [3-67] With that note, it may be convenient to mention here that the whole site (ie including the part zoned *Open Space B*) is in private ownership. If only for the sake of clarity, we should say that we are not influenced by the argument that privately owned land should not be zoned as any kind of Open Space. In some circumstances ownership of the land in question may be a relevant consideration as, for instance, in the Court's decision of *Capital Coast Health v Wellington CC* (W101/1998) where the Court said:
- “164. Having regard to the Open Space policies and assessment criteria in the proposed plan which place emphasis on public enjoyment of the site's recreation potential, together with the clear intent of the zone to avoid structures and maximise open space, we accept Mr Thomas' conclusion that a private landowner would not be able to make reasonable use of Open Space zoned land. Therefore, Open Space B zoning is inappropriate for private land such as this which is perfectly capable of other uses.
165. We agree with Mr Thomas too that it is not the role of private landowners to provide for general open space and the recreational needs of the community. There is a considerable body of case law to support that view.”

We do not understand it to be, as CVRA argued it was, any part of the Council's, or for that matter PPG's, case that the justification for changing the *Open Space B* zoning is because that land is privately owned. It was purchased in the knowledge that it was so zoned when acquired by PPG. The question simply will be whether we are satisfied that the *CSBA* zoning is more appropriate than the existing zonings.

[3-68] Having given consideration to this part of the site and its context we note that PC 77 pays special attention to the specific ecological features of this area. On balance, we conclude that, given its potential for other uses, the abundance of nearby public open space, and the practicalities of giving effect to even an operative *Residential* zone due to the filled character of the land (which takes no account of the zone boundary) PC 77 appropriately protects the natural features which this part of the site contributes to this neighbourhood, and thus the Objectives and Policies of PC 77 are most appropriate for that reason.

Centres

[3-69] The planning journey for this land, as it is described by Mr Leary, has ... *largely been predicated around the fact that the site provides an opportunity for the development of commercial activity of some kind on the site.*²³ We have already discussed its identification through PC 73 as part of the Council's rolling review process. The context for consideration for commercial activities engages what Ms Moncrieff refers to as the *Wellington Centres Policy 2008* (a non-statutory document) but which we understand to be expressed at least in part in the *Centres* Chapter of the District Plan. The first objective in that Chapter is:

“6.2.1 To provide a hierarchy of accessible and appropriately serviced Centres throughout the City that are capable of providing goods, services and facilities to meet the day to day needs of local communities, residents and businesses, and of accommodating anticipated population growth and associated development whilst maintaining Wellington's compact urban form.”

[3-70] Karori Town Centre has a position in the *Centre* hierarchy, *Centres* being described generically as:

“Service one or more suburbs and generally have very good access by public transport and the roading network. They are anchored by a main traditional main street with high levels of pedestrian activity and contain at least one supermarket and a range of other convenience-based retail goods. Town Centres contain some civic and government services and have medium scale employment office, community, recreational and entertainment activities. Residential uses, generally above ground floor, can be found in Town Centres. Both off-street and on-street parking is generally available.”

[3-71] Relevant also is the description of *Neighbourhood Centres*, which are described as:

“Service the surrounding residential neighbourhood and offer small-scale convenience-based retail for day-to-day needs. Neighbourhood Centres tend to have easy pedestrian access for locals and have some community services and small scale offices. There is good accessibility to public transport and parking is generally on-street only.”

[3-72] Policies which follow from this objective encourage outward expansion of existing centres (under appropriate conditions) when they are required to accommodate growth, and intensification of activities and buildings in and

around centres is encouraged. A wide range of appropriate activities is encouraged, to facilitate vibrant and viable centres both economically and to meet the social needs of the community. Integrated retail activities exceeding 20,000m² GFA are to be managed, both in terms of location and scale to ensure cumulative effects such as impacts on other centre viability, transport, and infrastructure efficiencies are addressed. We pause to note that the 20,000m² figure is a general provision. As noted at [3-99], PC 77 has a separate provision for *integrated retail* of 2,500m². Further objectives and policies deal with built development, urban form and include a policy specific to residential development within all centres, the relevant of which part is:

“6.2.3.6 Enable residential development in all Centres, where it:

- utilises upper floors of buildings; and
- maintains an active ground-floor on any primary street frontages, (except for in Neighbourhood Centres other than the area zoned Neighbourhood Centre between 68-82 Aro Street); and
- provides a secure and pleasant environment for the occupiers;”

[3-73] The reason for traversing the *Centres* chapter of the District Plan is that the move to mixed-use type zoning essentially relies on economic analysis undertaken for the Council. The Karori catchment's retail supply centres were identified as Karori Town Centre, Marsden Village, Northland Village and Standen Court, with Karori Town Centre being the largest of them. We note that in respect of the hierarchy identified in Chapter 6 of the District Plan, only Karori has *Town Centre* status, the others are identified as *Neighbourhood Centres*. Karori Town Centre is the only centre in the catchment with supermarkets (two - which collectively amount to approximately 2,200m² GFA - small by modern day standards). As a whole, it consists of 26 stores and has a footprint of around 5600m² GFA.

[3-74] The economic analysis also looked at commercial floor space for other than retail purposes in this catchment and considered employment growth related to predicted population growth. It took into account the proportion of employment/general commercial requirements based on the location of Karori in the wider market, including its proximity to the CBD.

[3-75] Having established the likely demand for floor space, both from the basis of current retail leakage and commercial floor space growth demand, the analysis translated this into a demand for land for the period 2018- 2033.

[3-76] The summary of the analysis provided in evidence from Mr Heath, for the Council, identified a need for land to accommodate new business activity (based on both the retail and other commercial scenarios) of between 4-5ha. Mr Heath's view is that if this land is not provided to the market, then future business decisions may not appropriately provide for the local community. We took this to mean that further leakage would occur; there would be less investment in existing centres, and the benefits of the local provision of services, which range across a number of factors as identified in the Centres objectives and policies, would suffer.²⁴

[3-77] Mr Heath indicated that it was some time ago (2004) that evidence identified that the Karori Market can sustain more convenience activity and GFA than is currently supplied. Thus he identified an opportunity for this land to address some of that supply. He considered that activities appropriate for this site, given market demand, would be ... *a higher density finer grain activity composition which is likely to result in heightened economic benefit and land efficiency for Council*. That is, in his opinion, more employment and economic activity generated on the site and a ... *better outcome for both the community and Council from an economic perspective*. His view is that the higher the level of activity generated on the site, the higher the likely community economic and social wellbeing afforded the localised community.²⁵

[3-78] Specifically, Mr Heath recommended that the more efficient outcome would be:

“... to minimise the potential for a single large scale operation to absorb the entire site (such as a supermarket or home improvement and building supply store), and enable a greater propensity for multiple tenancies to be developed. This could include a mix of small scale light industrial activity, commercial service/office activity, and retail activities. The activities are likely to be localised in their focus, i.e. predominately service the localised market, and not regional industries which by virtue of their scale are typically larger.”²⁶”

[3-79] With this evidence in mind, we note that the introduction to PC 77 includes the statement that it is intended to provide for increased commercial activity in the western suburbs, while at the same time reinforcing the District Plan's intentions of facilitating efficient use of land and compact urban development on a city-wide scale. This is reflected in Objective 35.2.1 of the plan change. The concern expressed by CVRA is that the Plan Change promotes retail activities outside existing centres and public transport networks, and that is inconsistent with the Centres policy. Further, it argues that Policy 6.2.1.2 encourages growth to be addressed through outward expansion of an existing centre.²⁷

[3-80] However in answering questions from Mr Newman (for CVRA) Ms Moncrieff made the following comment:

“I think the Centres Policy is, also talks about opportunities for, that can come from windfall sites, so it could be not just sites associated round the edge of centres but other sites as well.”²⁸”

[3-81] We were not provided with a copy of the *Centres Policy*. But it is not a statutory document and we would expect this issue to be reflected in the District Plan. We were not directed to such a provision in the Plan, nor could we find any mention of *windfall sites* in Chapter 6. We noted recognition in the *Centres* commentary of the difficulty of accommodating new large retail activities, but the economic recommendation behind PC 77 is not based on one of these, nor is the site of a size to be identified as an integrated retail centre as set out in Chapter 6.

[3-82] We had no evidence of land availability around the existing Karori centre, other than the very obvious point that it was clearly developed for residential purposes. We conclude that the proposed zoning will constitute out of centre development designed to address future growth.

[3-83] On the face of it, this would not be aligned with the *Centres* policy, but we do not understand the *Centres* policy to be a moratorium on out of centre commercial development. Rather, it deals with *Centres* and the proposal enabled by PC 77 is not we understand, for a *Centre* as set out in Chapter 6.

[3-84] The mix of activities that might eventuate is not prescribed by PC 77. In other words, it could be developed for entirely commercial purposes comprising a mixture of retail and office. We will discuss the rules later.

[3-85] The Objectives of PC 77 - to facilitate a range of activities to assist the social and economic needs of Wellington's western suburbs and the wider City, and the promotion of a high quality neighbourhood urban environment - would not exclude the possibility of it becoming a new *Neighbourhood Centre* as these are set out in Chapter 6. Mr Heath acknowledged this in answer to questions from Mr Newman.²⁹ However, that this might result in a negative outcome from development in accordance with the plan change was not established in evidence. Rather, PC 77 includes threshold controls on floor space and the nature of the commercial activities which allow the Council to consider impacts on community, transport, social infrastructure and the like, supporting the *Centres* policy.

Business Areas

[3-86] We turn to consider the Plan Change in terms of Chapter 33 of the District Plan which addresses *Business Areas*. We note that the introduction section to Chapter 33 covers much of the same ground as Chapter 6, but the following extracts are, we think, relevant:

“A notable trend in the period from 1995-2009 has been the move of residential and retail activities into areas previously dominated by commercial and industrial uses. This has provided a greater mix in some areas, but a downside is that over time it will make it difficult for small to medium-sized industrial activities and businesses to find land and premises within the city boundaries. A tightening of supply for industrial land and significant increases in land residential and retail values and rental rates is tightening supply for industrial and business land and is beginning to push these (industrial and business) uses to outlying areas.”

And

“The Business Area chapter of the District Plan recognises these changing circumstances and aims to provide a balanced approach to the management of activities and their effects. The philosophy of enabling and providing flexibility has been retained, together with tailor-made provisions intended to foster the diversity of Business Areas.”

[3-87] The principal objective for *Business Areas* is to accommodate a wide range of business and industrial activities to meet the social and economic needs of the City. This is achieved by the application of two zones (*Business 1 and 2*) to identified areas. We were told that the proposed CSBA is reflective of a *Business 1* zone, but designed to fit the characteristics of this site. The *Business 1* areas provide for mixed use where people can live and work, but with fewer day-to-day conveniences for residents than may be available in *Centres*.³⁰

[3-88] Policy 33.2.1.2 is particularly relevant and we set it out in full here:

“33.2.1.2 Enable the outward expansion of existing, or the creation of new areas for business and industrial activities, where they:

- are compatible with adjoining landuses; and
- do not undermine existing investment in infrastructure (including water, stormwater, sanitary sewer, roads and footpaths); and
- are accessible from the roading network without generating more than minor adverse effects on the roading network and
- the hierarchy of roads (Maps 33 and 34) from potential trip patterns, travel demand or car use; and
- are designed to cater primarily for industrial and business activities. *Emphasis added*”

[3-89] We note the following (extract) commentary provided with this policy:

“Ideally new business and industrial activities should locate within established Business Areas. This is a sustainable use of City's existing built environment, infrastructure and transport resources, and builds on the District Plan's overarching goal of maintaining a sustainable compact urban form.

However, given the shortage of such land within the City, Council does recognise that new activities may need to locate on the fringe of already established areas or in entirely new locations. When Council is considering applications for new or expanded Business Areas, factors such as compatibility with adjoining land uses, accessibility to the road hierarchy and transport links, and whether the proposals are designed to cater primarily for industrial and business activities will be taken into account. In considering any activity the positive effects will also be taken into account, including the extent to which it will enhance the vitality of the surrounding environment and the adjacent Centre.”

[3-90] The caveat in the policy quoted above - that new locations should be designed to cater primarily for industrial and business activities - could create some conflict when residential activities are placed in the possible mix, as is the case with PC 77.

[3-91] Ms Moncrieff set out the following rationale for a Business zone for the site:

“Key factors supporting a business zoning were the site's characteristics, its constraints (particularly the transmission lines and site contamination), demonstrated need for more business land, history of use and landowners' expectations around developing the site. As well, the site's location in an existing urban area and close to two Principal Roads in the Plan's Road Hierarchy, Map 33, were relevant considerations.”

[3-92] The inclusion of residential activity came through the Court-assisted mediation process and was promoted by PPG as a result of Transpower's amended stance - as set out earlier. All parties support residential development, although we note the introductory statement to PC 77 made no mention of its provision. Mr Leary indicated that while residential activity would be relegated to the edges of the site - to avoid the transmission line corridor - and that the site in its current form (i.e. without the earthworks consent or similar) would not be well suited to such development, the site is well located for development of sustainable residential activity. He cited the walking distance to the CBD; the bus route along Curtis Street; the proximity to Karori town centre, and schools and recreation facilities in the local area. He also noted the ease of connection to local infrastructure services.³¹

[3-93] Given the constraint of the transmission corridor, we anticipate that if this activity is included in the mix of activities developed on the site, it is unlikely to be the primary use, although, as Mr Leary's Attachment D indicates, that is a potential outcome. We conclude that the Business objectives and policies anticipate a plan change of this nature and that, given the site characteristics, the bespoke nature of PC 77 is not at odds with the overall Business direction set out in the District Plan.

Conclusions - do the objectives of the plan change meet the purpose of the Act?

[3-94] The evidence has confirmed for us that, taking into consideration relevant objectives and policies contained in the key chapters of the District Plan - *Residential*, *Open Space*, *Centres* and *Business Area* - there is an expectation of some commercial activity within residential areas, subject to the area remaining residential overall, and there is an expectation of some further commercial activity outside of Centres, subject to the hierarchy of existing Centre focus and purpose being maintained.

- [3-95] On balance, looking at the characteristics of this site; its neighbourhood; the constraint of residential development imposed by the transmission corridor; demand for business land, and the ecological site context, a plan change specific to the site, and where mixed use is expected, promotes a more efficient and effective management regime than relying on the *Outer Residential* zone and the *Open Space* zone to deliver something that neither of them separately are designed to do.
- [3-96] The design of the Plan Change is specific to the site and its objectives and policies specifically address the natural and physical environment and ecological protection of the adjoining area to the west, as well as low impact design to address water making its way to the Kaiwharawhara stream. We have concluded that the objectives and policies of PC 77 are the most appropriate for the site, in terms of s 32. We will look at the efficiency and effectiveness of rules next.

Efficiency and effectiveness of rules

- [3-97] The first method for addressing matters concerning urban design and residential compatibility issues is to consider the activity status for activities within the zone. These include the requirements for new buildings (construction, addition to and alteration of buildings and structures) to be considered as *Restricted Discretionary* activities. This status leads to assessment of their design, external appearance and siting, location, building type, the layout of the site and provision for pedestrian and vehicle movement and parking. It requires a landscape plan to form part of the enquiry. There are detailed assessment criteria set out at clause 36.7 which define what is expected, including such things as employing modulated building facades and roofs (including the use of green roof designs) to break building bulk into smaller forms in recognition of the finer grain of the residential area. Other criteria address the richness of architectural detail in recognition of the variety and human scale of residential development in the area, and the avoidance of large expanses of single, eye-catching colour such as that used for branding. Other controls include the engagement of buildings with the street through design and the use of windows.
- [3-98] The activity status rules set constraints on the floor area of activities to address matters concerning traffic generation, circulation, safety, car parking, servicing and pedestrian access and safety.
- [3-99] In addition, certain floor area thresholds are set (integrated retail activities and supermarkets) to allow for the potential impacts on the vitality and economic viability of existing centres to be addressed. These rules support objective 35.2.1, and policies 35.2.1.1, 35.2.1.4 and 35.2.1.6. PPG would have these two policies deleted.
- [3-100] We remind ourselves of the economic evidence which we have referred to earlier and which underpins the rationale for the rezoning of this land. We also note Chapter 6 of the District Plan concerning *Centres*, the objectives and policies of which support this check in terms of retail development establishing in an out of centre location. The evidence identified a need for a higher-density and finer grain composition of business activity, as being better able to address the future economic needs of the community. This would also fit with the urban design/residential compatibility objectives inherent in the plan change.
- [3-101] Thus we find that these activity status rules, and their related assessment criteria, will provide efficient and effective methods for implementing the objectives and policies of the plan change, and the context of that plan change in the operative district plan provisions.
- [3-102] However, we also note the provisions for the management of earthworks and vegetation which include a *Curtis Street Frontage Control (Vegetated Bank)* set out in Appendix 1 of the plan change. This frontage control works alongside the assessment criteria to achieve a vegetated *parkway*. However, in respect of the Vegetated Bank there is a tension in the aspirations of the assessment criteria relating to site layout and buildings (36.7 (b) and (c)). By way of example, this tension arises from the need for site development to generally be set below the level of Curtis Street (with the exception of the north-east corner of the site) and to maintain a well vegetated bank between the street and the site.

The assessment criteria require development to achieve an *inter-relationship* with Curtis Street (and Whitehead Road) while achieving an appropriate placement of building bulk and protection of street vegetation. They also require buildings to orientate their frontages and entrances to Curtis Street including main windows (and a high proportion of windows are to be so located to ensure internal activities are visible from Curtis Street).

- [3-103] Taking these criteria in the context of the objectives and policies of the plan change, we find this particular assessment approach for the Curtis Street edge of the plan change land somewhat confused. We prefer that the special frontage control be given effect and that building effects are to be generally internalised to the site, given its relationship to the existing houses in this part of Curtis Street. This would better meet objective 35.2.3.1 and the vegetation policy 35.2.3.5, as well as objective 35.2.4 and its related policies.
- [3-104] We support the landscaped edge being enhanced. This means that the interaction implied by the placement of windows and entrances by certain other assessment imperatives are not critical. Development should be accessed generally from the south, and the Whitehead Road edges of the site, which would better address the topography and relationship between Curtis Street and the fact that buildings are required to be generally below street level along the frontage control area.
- [3-105] We accept that buildings might enjoy windows to the street, and that there is benefit in this in the provision of passive surveillance for pedestrians using it. However one cannot *have it both ways* and we sensed the struggle the expert witnesses had in reconciling having a real landscaped edge and providing open access to Curtis Street. We have settled on the landscaped outcome as a preference, as it would seem to better respect the integrity of the wider landscape and residential setting, and manage the effects of buildings on the adjacent residential area in Curtis Street. The assessment criteria as they are currently written in that respect will need to be redrafted.
- [3-106] The second method for addressing urban design and residential compatibility matters is the *Activity Standards* (see 36.6). These include a control on the maximum finished ground level, which conveniently relates to the resource consent we have addressed earlier so we can understand the likely environmental outcome.
- [3-107] For completeness we also confirm that the *restricted discretionary* provision (36.3(g)) which is designed to manage the removal of trees with a height of 4m or more, is an effective method to address the character and effectiveness of the Curtis Street frontage vegetated bank. In a similar vein the provision which PPG seek to insert to allow for the removal of the Karaka Tree in the Western Escarpment Buffer is appropriate in the circumstances as a pragmatic approach to management of this tree and mitigation planting. The *restricted discretionary* status is appropriate in our view because the matters requiring assessment are known and clearly set out in PPG's draft of rule 36.3(j) Appendix 2 (to the Council's Closing submission). However, the suggestion that earthworks, buildings and structures might be appropriate within the Western Escarpment Buffer is not favoured as this would undermine the objectives and policies concerning the ecological values at this edge of the site, and is not supported by the evidence.
- [3-108] The building height in the surrounding residential area is set at a 6m or 8m maximum above ground level (depending on the type of development). The CSBA adopts 8m above existing ground level, or 109m amsl (whichever is higher), to take account of earthworks which may have taken place on the site since June 2015. PPG does not support the amsl control.
- [3-109] Earthworks are subject to an activity standard rule as a *permitted* activity (36.6(e)) and beyond this require *Restricted Discretionary* activity consent. The rule provides for lifting the ground level further than, for instance, the outcome of the resource consent addressed in Part 2 of this decision. We accept the Council's preference for a 1.5 maximum height on cut or fill and slope management of 34 degrees. These rules support objective 35.2.3 and, specifically, policy 35.2.3.6 and address the specific characteristics of the land in this zone. Since there is a provision for earthworks as a *permitted* activity, and the potential for lifting the ground level for a building platform arises, for the activity standards

to be effective and meet the relevant objectives and policies the amsl control needs to be retained. We note that much of the CSBA sits well below the surrounding residential land and thus the combination height control at the 8m limit above existing ground level as well as being referenced to earthworks would allow for compatible development.

[3-110] There are also amenity constraints on noise, signage, lighting, dust, screening, retaining walls and the like, to contain effects to the zoned area as well as addressing amenity within it. For instance, the requirement for at least 5% of car parking areas not contained within a building, and which are greater than 700m² in surface area or contain more than 35 car parking spaces, must be landscaped or planted with trees. These rules sit in the context of the wider assessment which we have noted are required of *Restricted Discretionary* development. The acceptable noise emission to areas beyond the zone is set at the *Outer Residential* standard, and therefore consistent with the context of the site.

[3-111] As we have indicated, the approach underpinning PC 77 is one of a comprehensive development of all of the land that makes up the plan change area. We note that PC 77 includes subdivision of this land as a *permitted* activity, subject to the standard set out in Clause 36.6(k). This does not, in our view, address the timing of subdivision to allow for consideration of comprehensive development. In fact it places requirements on subdivision which might compromise comprehensive development. The clause provides:

“(k). Subdivision

- i. Every building or structure adjoining a new boundary must comply fully with the standards for building and structures specified in Section 36.6(a) or otherwise be lawfully established.
- ii. Every allotment must have services in compliance with City Bylaws, or, if applicable, the Council's Code of Practice for Land Development.
- iii. Every allotment must have practical, physical and legal access to a formed legal road.
- iv. Every allotment must have drive on vehicle access and parking constructed in accordance with the standards in Section 36.6(1).
- v. All earthworks needed to complete the subdivision are undertaken.
- vi. For any subdivision incorporating new roads, all services must be reticulated underground.”

[3-112] While the land is vacant there is thus a relatively unencumbered opportunity to subdivide, and when this occurs every allotment must have practical, physical and legal access to a formed road. Where these standards are not met the subdivision moves to a *Restricted Discretionary* activity and to assessment criteria at clause 36.7. These criteria address the transmission lines and Council Subdivision Design Guidelines, and the creation of allotments on which development compliant with development standards could be undertaken. If these criteria are not met, the subdivision consent becomes fully *Discretionary*.

[3-113] As far as we can see there is nothing which controls subdivision to ensure a comprehensive development approach for the entire PC 77 land, as directed by Objective 35.2.7 and Policy 35.2.2.1.

[3-114] We explored with Mr Leary the option for the existing titles - currently held under common ownership - to be independently sold off. Mr Leary confirmed that the titles could be *uncoupled*. On this basis we find that the relevant *permitted* activity rules of PC 77 do not implement subdivision which assists the development of the area in a comprehensive and coordinated manner, and as such they cannot be said to promote co-ordinated, comprehensive development of the CSBA (Objective 35.2.7).

[3-115] We note that PC 77, as originally notified, contained a *Concept Plan* activity - under Clause 36.2 Controlled Activities - which we set out below:

“(c) Concept plans

Control: In assessing concept plans under Rule 36.2(c) Council's control will be limited to the layout of buildings, car parking areas, vehicle access ways and servicing areas and any landscaping areas proposed. Concept plans will also be assessed at a broad level for their ability to provide for development which complies with activities standards in Section 36.6.

Notification / service: Concept plans assessed as Controlled Activities under Rule 36.2(c) will not be publicly notified or limited notified.”

The explanation and detail for this provision was:

“Purpose of concept plan

Council encourages the development and approval of a concept plan for the Curtis Street Business Area in order to promote comprehensive development of the area. The benefit of an approved concept plan is that it will provide a spatial framework for assessing applications for subdivision or individual buildings.

The following key points are made about concept plans sought under Rule 36.2(c):

- Application for approval of a concept plan is voluntary.
- They are expected to show the intended pattern of development at a broad level only, with building footprints, vehicle parking, servicing and site access elements required to be shown indicatively
- The assessment of concept plans will not be linked to any associated resource consent requirements (they will be assessed in isolation) except that building footprints must not exceed 500m² gross floor area and compliance with the vehicle parking, servicing and site access standards must be achievable within the indicative layout shown. Where compliance with these standards, specified in Section 36.6(a), cannot be demonstrated, concept plans will be assessed as Restricted Discretionary Activities under Rule 36.3(a).
- Approval of a concept plan does not waive other resource consent requirements specified in Section 36 for the Curtis Street Business Area but subdivision and buildings which are consistent with a pre-approved concept plan will be viewed favourably by Council.

Concept plan information requirements

Concept plans submitted under Rule 36.2(c) are required to show the indicative footprints and layout of buildings, car parking areas, vehicle access ways and servicing areas across the whole Curtis Street Business Area. A plan of a scale 1:500 or greater must be submitted along with a design statement describing the rationale for the overall layout of these elements. For the purposes of clarification, drawings of individual buildings will not be required.

Assessment Criteria

Assessment criteria are set out in Section 36.7 to provide guidance in the assessment of resource consent applications for the Curtis Street Business Area. However, it is specifically noted that the assessment criteria are not intended to limit Council's discretion when assessing restricted discretionary, discretionary or non-complying activities. In the case of restricted discretionary activities the scope of Council's discretion is specified in the rules, and the discretion is expressed in deliberately broad terms (e.g. *landscaping; urban design*).”

- [3-116] By the time PC 77 reached us, the Council and PPG had formed the conclusion that this provision was not required, seeing it as adding an unnecessary layer of consenting to an already complex plan change.
- [3-117] We agree with that general proposition - as that provision had been promulgated. We note it was in the form of a voluntary regime and offered little certainty to any prospective developer, or indeed to anyone else. However, consistent with the objectives and policies of the plan change, the provision demonstrates that there was a clear concern that a comprehensive framework to address the indicative footprints and layout of buildings, car parking areas, vehicle access ways and servicing areas across the whole CSBA is required. Understandably, this remains an issue of concern for CVRA and the parties aligned with it.
- [3-118] We add to that the complexity of vehicle access due to topographical constraints with Curtis Street in particular, and the potentially positive and practical implications of limiting access to this road, which would mean that not every lot or development unit, as such, should enjoy direct physical access to Curtis Street.
- [3-119] Apart from the issues raised by Ms Knight, we were not provided with traffic evidence, as this was not a matter CVRA wished to pursue in evidence. However, we note the obvious benefit from a comprehensive approach to development of the land, which would concentrate access points in a planned and safe manner, and eliminate the proliferation of awkward solutions such as those that have been adopted for individual residential development nearby. We note also Objective 35.2.5 and its related policies, which address the management and safety of the surrounding street network.

Conclusions

- [3-120] We have concluded that a tool something akin to a concept plan should form a part of the plan change, in the form of a rule. We see Appendix 1 to PC 77 as, essentially, the beginnings of a concept plan, in that it records rules pertaining to building setbacks and vegetation management. We can envisage this plan being developed to include nominated site access constraints and direction for access points. Should the parties consider it useful, it may also include some broadly-focused building platform areas. We anticipate that this Appendix would form an *Activity Standard* under clause 36.6.
- [3-121] In addition, we consider that the provisions for subdivision need to encourage comprehensive development and as they are set out, they do not do this, and it is difficult to see how this can be framed as a standard for a *permitted* activity status for subdivision. Thus we conclude that there should be no *permitted* status for subdivision. The remaining provisions (ie *restricted discretionary* and *discretionary*) are appropriate with an addition to the matters which the Council limits its discretion to in the case of *restricted discretionary* subdivisions. This will require an amendment to 36.3(f) and 36.7(g) to include the extent which the subdivision promotes or at least does not discourage the development of this land to be undertaken in a comprehensive way in accordance with the zone objectives. As a consequence the standard at 36.6(k) will need to be deleted, as will clause 36.1(j).
- [3-122] However, we have concluded that the rules will appropriately address urban design, residential compatibility, intensity, and character objectives and policies for the zone.

Conclusions on PGG's issues

- [3-123] At Paragraph [3-10] we summarised what we understood to be PGG's issues with PC 77. First, was the *cascade* of provisions designed to control distributional effects. We have discussed that topic and do not believe there is now anything in PC 77 which can be called a *cascade* or which would unnecessarily control, or even influence, development on the site having regard to its location and surroundings.
- [3-124] Second, was the concern about *non-complying* status for earthworks on the western side of the site. Given the terms of the resource consent for development work now being confirmed and the very shallow depth of that piece of land, we see no issue for the future with a *non-complying* status. That is, we think, on considering it under s 32, quite appropriate.
- [3-125] Third, was its concern about controls on the removal of plantings on the Curtis Street frontage. We have discussed this also and see nothing in those controls which is unreasonable or outside what could be expected to provide for amenity for the surrounding land.
- [3-126] Fourth, was the issue of building bulk below the Curtis Street level. We have discussed this also and for the reasons discussed we are satisfied with the provisions.

Our conclusions related to other appellants' issues

- [3-127] We have considered the matters raised by the CVRA and the parties aligned with them. We accept the sincerity of their views, and their stance of wishing to retain, to the best degree possible, the residential and other amenity of the area they are concerned about. For the reasons we have attempted to set out we consider that, to a large and acceptable degree, the site can be developed in the manner envisaged in PC 77 so as to provide for the wellbeing of the community as a whole, without having significant adverse effects on the amenity of the Creswick valley and its surrounds.

Evaluation of the objectives and policies — s 32

- [3-128] For the reasons we have attempted to outline, applying the evaluation process set out in paras [3-18]ff, we have come to the view that the objectives and policies in the Plan Change are the most appropriate to achieve the purpose of the Act.

Evaluation of the rules and methods — s 32

- [3-129] With the amendments we have discussed and set out in our conclusions, we have reached the decision that the suite of activity status rules, assessment criteria and activity standards work together and are appropriate to efficiently and effectively meet and implement the objectives and policies for the CSBA. In terms of s 32 and *Eldamos*, having regard to their efficiency and effectiveness, the rules and other methods are the most appropriate of those presented or considered to achieve the objectives and policies of the Plan, and to assist the territorial authority to carry out its functions.

Section 290A — the Council's decision

- [3-130] We have noted the position of, and the attention to be given to, the first-instance decision in dealing with the resource consent appeals. Again, we have considered the decision and, in the light of the evidence we have heard, come to different conclusions on some issues, but they essentially are matters of detail rather than substance. On the whole, we agree with the first-instance decision, and for the same reasons as are set out in it.

Outcome

- [3-131] The end result of the views we have come to is that the appeals are allowed, but only to the extent that amendments should be made to the Plan Change provisions to provide the changes we have set out. We have already commented on some of the provisions that were in issue, in paras [3-105], [3-107], [3-109] and [3-120]ff and amendments should be made to address those.

[3-132] Otherwise, the Plan Change as presented to the Court in Attachment 2 to the closing submissions for the Respondent (24 June 2015) with the Council's preferred drafting, should be used as the base document, subject to the following amendments:

- [a] Assessment criteria relating to development at the Curtis Street edge shall require planting and shall limit access from this edge to the part of the frontage which is closest to Whitehead Road. We accept this will need some detailed consideration to refine these criteria and that this will need to integrate with the amendment we require to Appendix 1 of the Plan Change set out below.
- [b] Appendix 1 shall be amended to define access and egress points to the site such that direct vehicle access is precluded at least for the portion of the Curtis Street frontage affected by the vegetated bank/ Curtis Street Frontage Control.
- [c] The addition of buildings and structures within the Building Setback (Western Escarpment Buffer) — refer Appendix 1 - shall be a *non-complying* activity.
- [d] The removal of subdivision as a *permitted* activity and the addition of assessment criteria for subdivision as a *restricted discretionary* activity to include the requirement for subdivision to be assessed as to the extent it will encourage comprehensive development of the CSBA.
- [d] The deletion of clause 35.2.11 as it goes beyond the scope of the plan change as notified.

[3-133] The redrafted provisions for both the resource consents and the Plan Change should be presented to the Court for approval, and we ask that, if possible, that be done by Friday 25 September 2015. To that extent, this present decision should be regarded as an interim decision.

Costs

[3-134] It is the usual practice of the Court to not award costs on Plan appeals, and our inclination is that the practice should be followed in this instance also, both for the Plan appeals and the appeal against the resource consents. As a matter of formality however the issue of costs is reserved and we will set a timetable for any applications and responses when the final decision is released.

All Citations

[2015] NZEnvC 149, [2015] ELHNZ 204, 2015 WL 5188706

Footnotes

- 1 Moncrieff EIC pages 6 & 7 [27-35]
- 2 Transcript Mr Foster page 368
- 3 Wellington City District Plan Chapters 33 and 34
- 4 Moncrieff EIC page 44 [214]
- 5 Moncrieff EIC [45]
- 6 Wellington Regional Policy Statement Objective 19 and Policy 29
- 7 Moncrieff EIC page 47 [233-234].
- 8 Moncrieff EIC Attachment 12 Transpower New Zealand Ltd Submission on PC 77 11 March 2013
- 9 WDP Objectives and Policies 4.2.1 and 4.2.1.1, 4.2.1.5
- 10 WDP Objective 4.2.2
- 11 WDP Objectives and Policies 4.2.3 and 4.2.3.1, 4.2.3.6, 4.2.3.7

- 12 WDP Objectives and Policies 4.2.4 and 4.2.4.1, 4.2.4.2
- 13 WDP Objectives and Policies 4.2.5 and 4.2.5.1, 4.2.5.2
- 14 PC 77 Policies 35.2.3.8, 35.2.3.9 and Objective 35.2.9
- 15 CVRA submission page 8 [22] and Transcript questions from Mr Newman of Ms Moncrieff starts page 105
- 16 WDP Objectives and Policies 4.2.8 and 4.2.8.1, 4.2.8.3, 4.2.8.4.
- 17 Joint witness Statement Ecology page4 {6-9}
- 18 Leary Rebuttal (RC) attached plan reference S12-0592-22/A
- 19 Leary EIC (RC) Attachment G Abuild Geotechnical Assessment April 2013 page 75 [5]
- 20 Leary EIC (RC) page12 [113-119]
- 21 Outer Green Belt Management Plan 2004 pages 112-115 and CRVA closing submission page 9
- 22 Leary EIC (PC) page 16 [124]
- 23 Leary EIC page 21 [173]
- 24 Heath EIC page 28 [81]
- 25 Heath EIC page 27 [77] and page 28 [82]
- 26 Heath EIC page29 [83]
- 27 CVRA closing submission page 9 [30-31]
- 28 Transcript page 91
- 29 Transcript page 199
- 30 WDP under Policy 33.2.1.1
- 31 Leary EIC (PC) page 19 [150-159]