BUDDLE FINDLAY

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Tēnā koe Guy

Silverstream Spur - legal implications of potential historical acts or omissions by Council

1. Thank you for seeking our advice on issues relating to land acquired in late 1989 / early 1990 by Upper Hutt City Council (**Council**), within an area known as the Silverstream Spur (the **Spur**).

2. As you know, while some of the past decisions and actions of the Council in relation to the land are clearly documented, due to the passage of time some of the historical detail may have been lost.

3. You have asked whether, on the facts currently available, anything done (or omitted to be done) by the Council in the past might continue to have legal consequences, today, for the status of the land and the Council's powers in relation to it.

4. In particular, you have asked what legal consequences, if any, might flow from:

   (a) Council acts or omissions relating to the Spur during the past planning processes for which it was responsible under the Resource Management Act 1991 (**RMA**) or predecessor legislation. In particular:

      (i) A notice was published on 10 March 1992 recording the Council's intention to *"correct"* the status of the Spur, through a review of the Hutt County District Scheme (**District Scheme**), to be *"Rural B"* with a 'designation' as *"R7 (Scenic Reserve)"*. This apparent intention did not flow through to the finalised District Scheme or, subsequently, to the current operative District Plan (**District Plan**), under which the land was zoned *"Rural B"* (and since then *"Rural Hill"* and now *"General Rural"*, reflecting the more recent terminology) and *"Residential Conservation"*, without any reserve status indicated.

      (ii) In late 2001, the Council passed a resolution recording that *"in the light of Council's original rationale for purchasing the Spur, a Variation to the District Plan be undertaken to rezone the land as "Open Space" and that it be managed as a reserve, with public access as of right"*. Again, this variation appears not to have proceeded, and the rezoning is not reflected in the current District Plan.

(b) Past views expressed by the Council regarding the possible future use of the Spur, including as a recreation or scenic reserve. For example, during a planning process led by Heretaunga Pinehaven District Community Council between 1976 and 1984, after which the Spur was zoned *"Rural Town Belt"*, a predecessor entity of the Council opposed the Spur being zoned for residential development because of the adverse amenity and other effects such development would have had, and because of the Spur's potential as a reserve. Further, a Council memorandum prior to its purchase of the Spur recorded that:

> *"part of the land may have a potential for development as residential sections although a change of zoning would be required before any such development could proceed. The bulk of the land is best suited for passive recreation purposes which would complement [other existing reserves and the Silverstream Railway Society facility]"*.

(c) The Council having purchased the Spur using funds that may have been earmarked for the creation of reserves. In particular, the Council Memorandum recommending the purchase of the Spur notes that *"the purchase could be funded from Council's Reserve Fund account"*.

5. Below we set out a summary of our advice. We then analyse in turn, by category, the potential legal implications.

Summary of advice

6. It appears from the documentary record that there is some basis for a belief that the Council intended the Spur to be held as public open space (and possibly as a legal reserve).

7. Equally, there are indications that the Council understood that the Spur could support a number of different activities (or a mix of them).

8. Given the gaps in the history, it is difficult at this distance from the relevant events to conclude with certainty what the Council's intentions have been at various points in time, whether certain outcomes are deliberate; if not, whether they were the result of errors or omissions; and if so, the nature and legal effect of those omissions. However, even read together these documents do not, in our view, evidence a clear and unambiguous commitment on the part of the Council to rezone the land or manage it as open space.

9. Notwithstanding the gaps in the record, in our view it is clear that the various points at which the Council may (or may not) have erred – such as in failing to give effect to a resolution or otherwise following through on an intended policy – were many years ago and in most cases, particularly in the planning sphere, have been superseded by subsequent public processes. In particular, the correct zoning of the Spur is directly at issue in Council's current Plan Change 49 – Open Spaces (**PC49**). As such, even if the Council did err, we have not identified any legal consequences that might flow from those errors today, in terms of the status of the Spur today or the Council's powers in relation to it.

10. Although we have concluded that there is no legal entitlement or particular consequence that arises from the various statements made by the Council in the past regarding the Spur, evidence of a past intention for the Spur to be held as public open space (or a reserve) could well be relevant to the decision-makers on PC49, as could the indications that the Council understood that the Spur could support some development or a mix of uses. In our view PC49 is the appropriate forum for the most appropriate zoning of the Spur to be determined.

The facts

11. The Council was formed through the local authority reorganisations in the late 1980s, with responsibility for Upper Hutt and the former 'ridings' of Rimutaka and Heretaunga-Pinehaven.

12. In 1987, the Council began discussions with the Land Corporation (**Landcorp**), as it was then known, about the purchase of the Spur (Part Sections 81 and 82, Hutt District; Certificates of Title 107/207 and 348/185) by the Council. Landcorp responded that the land was for sale and noted that the Silverstream Railway Incorporated had a lease over part of the Spur.

13. On 17 September 1987, the Council confirmed that the Policy and Resources Committee had indicated an interest in the purchase, subject to valuation. Landcorp received a valuation of $80,000 in October 1987. The valuation noted that the Spur was zoned *"Rural – Town Belt"*, stating that *"the purpose of this zone is to secure the protection of the hills which form the green backdrop to the adjoining urban areas. The predominant uses are parks, reserves, walkways etc and forestry and plantation development"*.

14. In April 1989, the Council commissioned its own valuation of the Spur, which valued it at $36,000. The valuation noted the zoning as Rural Town Belt. In July 1989, Landcorp received an updated valuation of $70,000, which said *"the land is however, in spite of its condition and town planning restraints, strategically well located for reserve purposes"*.

15. On 20 November 1989, a report was put to the Policy and Planning Committee, recommending that the Spur (described as Sections 81 and 82), be purchased by the Council for $59,000. The Report noted the zoning as *"Rural Townbelt"*, stating that:

> *part of the land may have potential for development as residential sections although a change in zoning would be require before such a development could proceed. The bulk of the land is best suited to passive reserves uses.*

16. The memo also stated that the *"purchase could be funded from Council's Reserve Fund"*. The Council's accounts for the year ended 31 March 1990 suggest that: (1) the Council recorded its expenditure on reserves separately, but did not use separate trust funds for that purpose (the trust funds held by the Council are listed in Note 4 to the accounts); and (2) the Spur was purchased as an item of expenditure in the Housing and Property budget (page 10), rather than the Parks and Reserves budget. Although the Silverstream Railway Society Incorporated's (**Railway**) representative, Mr Durry, has suggested that there was a separate Reserves Fund, and although

there is some reference to specific reserves expenditure in the Local Government Amendment Act 1978 (which is discussed below), the evidence suggests that the land was acquired from the Council's general budget rather than from separate funds held on trust for any purpose.

17. It appears the Council purchased the Spur in 1989. At this time, it was zoned Rural Town Belt. On 19 March 1990, a new title to the Spur was issued to the Council. The land was then subdivided, with some of the land being transferred to the Railway and the title to the remainder being reissued as Part Section 1 SO 34755.

18. At this time, the Upper Hutt District was governed by the District Scheme, developed under the Town and Country Planning Act 1977 (**TCPA**). On 1 October 1991, when the RMA came into force, the District Scheme was deemed a district plan and the ongoing reviews of the District Scheme that had been notified before that date (including one known as **Review No. 4**) were deemed to be proposed plan changes (under section 373 of the RMA).

19. Review No. 4 appears to have occurred at some point in 1992. We have reviewed correspondence in February and March 1992 relating to submissions on and requested alterations to the proposed Plan:

    (a) On 21 February 1992, a local resident objected to the re-zoning of land adjacent to their own from *"Town Belt"* to *"Residential Conservation"*. The land referred to appears to be the Spur (or part of it), although the correspondence is not clear. On 25 February 1992, the City Planner responded stating that the zoning *"of the land to the north of your subdivision" "is incorrect and will be altered"*.

    (b) On 26 February 1992, the City Planner wrote to the Mayor, Chief Executive and City Solicitor, noting three errors found in the zoning maps. These included that the *"ex: Hutt County Green Belt area bounded yellow on the attached map should be designated (R7) Scenic Reserve and not Residential Conservation"*. The land referred to appears to be the Spur, although again this is not entirely clear.

    (c) On 3 March 1992, the Council distributed a Summary of Request for Alterations to the Upper Hutt City Council Proposed District Scheme (Review No. 4), in accordance with its obligations under Regulation 27 of the Town and Country Planning Regulations 1978. The Summary set out the changes sought by the Council to the Scheme. These included *"Correct Map 2 as follows: Change zoning on northern side of Kiln Street from Residential Conservation to Rural B (restricted) and record its designation as R7 (Scenic Reserve)"*.

20. On 10 March 1992, the same Summary of Request for Alterations was published in the Upper Hutt Leader, recording the Council's intention to *"correct"* the status of the land to be *"Rural B"* with a designation as *"R7 (Scenic Reserve)"*.

21. The finalised District Scheme and, subsequently, the current District Plan, show that the Spur has two distinct parts: one is zoned *"Rural B"* (now *"General Rural"*) and the other is zoned *"Residential*

Conservation", without any reserve status indicated. It is not clear (owing to the uncertainty about the identity of the land referred to in the communications set out above) whether this was intentional or in error.

22. There is then a gap in the record until 1994. At some point around 1994, the Council applied for a resource consent application to undertake commercial forestry on the Spur (then legally registered as Section 1, SO 34755). In a report from the City Planner to the Council, dated 8 March 1994, the land is described as being zoned half as Rural B (Restricted) and half as Residential Conservation. There is no suggestion in the City Planner's report that the wrong zoning had been applied. The report notes that there were five submissions on the application, including one from the Railway. The Railway raised concerns about the impact of forestry operations on erosion, but was ultimately *"neutral in regard to the development"*. The report from the City Planner, and a report to the Judicial Committee of the Council, dated 18 March 1994, recommended that the consent be granted.

23. There is then a further gap in the record until late 2001. On 5 December 2001, the Policy Committee of Council resolved that the forestry operation be discontinued. The Policy Committee considered several options for the Spur, including selling the Spur or changing its status via a District Plan Variation *"to ensure that all the land was zoned as "open space" or alternatively "residential conservation" with a designation of reserve"*. The Committee ultimately resolved that *"in the light of the Council's original rationale for purchasing the Spur, a Variation to the District Plan be undertaken to rezone the land as "Open Space" and that it be managed as a reserve, with public access as of right"*. Again, it is not clear what happened after this point. It does, however, seem clear that the proposed variation to the District Plan was not made.

24. In 2004 the then District Plan was replaced by a new District Plan, which remains in force. The District Plan retains similar zoning for the Spur: that is, General Rural and Residential Conservation.

25. On 24 February 2016, the Council resolved to enter into a memorandum of understanding (**MOU**) with Guildford Timber Company (**GTC**). The purpose of the MOU was to enable a land swap between GTC and the Council, with GTC acquiring the Spur. The Spur would provide access to GTC to other land owned by GTC, for housing development. A report accompanying the MOU, dated 24 February 2016, records that the Council had not consulted on the MOU, but that feedback on the Urban Growth Strategy indicated that some of the community *"have concerns about the impact of development on the proposed land"*. The Report also notes that the swap *"provides access to a key development required to provide for housing growth in the city over the next 30 years"*. The Council and GTC signed the MOU on 4 March 2016. Negotiations then continued until 2021, when the Council sent a letter to GTC formally bringing the MOU to an end.

26. In 2018, the Council adopted the Open Space Strategy, which set out the overarching strategy for Upper Hutt. The Council then undertook a review of the provisions of the District Plan relating to

Open Space and consulted with members of the community. This culminated in PC49, which proposes to change the management of open spaces under the District Plan. In particular, PC49 proposes to divide the current "Open Space" zone into three new zones, being:

(a) Natural Open Space;

(b) Open Space; and

(c) Sport and Active Recreation.

27. The Spur is not included in any of these zones under the Proposed Open Space and Recreation Zoning. Several parties, including the Railway, Royal New Zealand Forest and Bird Society Incorporated and Save Our Hills (Upper Hutt) Incorporated, submitted on PC49 requesting that the Spur be included in the proposed "Natural Open Space" zone.

The issues

Introduction

28. There are three points at which an error might be said to have been made by the Council. All are over 20 years ago. The evidence for a mistake is, in each case, inferential.

(a) The first possible mistake is at the point that the land was purchased. Arguably, the possibility that it was purchased from the Reserve Fund might support a view that the Council should have declared the land to be a reserve (under section 14 of the Reserves Act 1977) and/or zoned it accordingly under planning legislation at that stage. However, there is no evidence of such a declaration, and little other evidence about any proposed zoning of the land (or its 'designation' as a reserve or open space) at that time. Any planning error was then overtaken by the 1992 District Scheme process.

(b) The second possible mistake is in 1992, when there was a clear intention to rezone at least some of the Spur (and perhaps the whole of the Spur) and apply a reserve 'designation'. The Spur was at least in part rezoned, which may have been the intention at the time. The re-zoning was then carried through into the 2004 District Plan.

(c) The third possible mistake is in 2001, when the Policy Committee resolved to vary what was at that time the proposed District Plan to rezone it as "Open Space" and manage it as a reserve. It seems clear that such rezoning did not occur separately or as part of the overall plan review process culminating in the 2004 District Plan. However, issues regarding the appropriate zoning of the Spur were then overtaken by the current PC49 process.

Implications of terms of purchase

29. We do not think that there is any actionable consequence arising from the purchase of this land in 1989/90. To explain:

(a) It is not clear what cause of action would be said to lie. Presumably, any claim would be brought either as a judicial review, or (as in *Royal Forest & Bird Protection Society v Nelson City Council* [1984] NZLR 480) on the basis of an alleged trust.

(b) As to a judicial review:

(i) A claim in judicial review is not time-barred. Judicial review is outside the scope of the Limitation Act 2010.

(ii) There is no reviewable error (eg, an error of law, a failure to take into account a relevant consideration, or taking account of an irrelevant consideration) established on the facts. It seems unlikely that there is any additional evidence available at this late stage that would establish that such an error occurred.

(iii) Although the claim would not be time-barred, the lapse of time means that the zoning of the land has been considered a number of times since the purchase. Even if a reviewable error could be shown, we think it is unlikely that a court would order relief cutting across those processes.

(iv) There is also a strong argument that judicial review is not available, in the light of the provisions of the RMA discussed below.

(c) As to a claim in equity:

(i) The only basis for a claim in equity appears to be the use of the 'Reserve Fund'. As discussed above, it is not clear what terms applied to that fund, and it may well be that the purchase was within the scope of the fund.

(ii) Mr Durry, on behalf of the Railway, has carried out extensive and helpful research into the history of the Spur. He has suggested that section 288 of the Local Government Amendment Act 1978 specified how reserve contributions collected by the Council would be used, although he says that he does not have a complete copy of the Council's reserve fund policy from the time. Even assuming (as seems likely) the fund referred to in the Council's documents is the fund described in ss 284 to 292 of the 1978 Act, we observe that (1) the Act does not require that the fund, or any land purchased with it, are held on trust; and (2) the fund may be used in a number of ways, one of which is to purchase land that will be used to create a reserve within the meaning of the Reserves Act (see ss 288(2)(a) and 288(3)(a) for the creation of reserves, and ss 288(3)(b) – (g) for other purposes).

(iii) Nor is it clear how equity would be engaged here. A trust requires certainty of intention, subject matter, and object. In our view, as in *Royal Forest & Bird*, there is no clear evidence of an intention to hold the relevant land on a trust. The only contemporaneous documents refer to the land being purchased from the Reserve Fund but, as above, the nature of that fund is unclear. Nor is it clear that a purchase

from the Reserve Fund would be intended to be held in trust: that is not required by the Act, clearly evident from the surrounding documents, or a necessary part of placing land within the Reserves Act.

(iv) The passage of time is also relevant to a claim in trust. Although a claim in equity is not time-barred, the doctrine of laches (that is, the equitable doctrine that delay will militate against equitable remedies being ordered) probably applies here, and would make any equitable remedy less likely at this late stage. If the land was in trust, the trust would remain: but, for the reasons set out above, we think that is unlikely

30. We note that it may be, that if the land was purchased from money set aside for reserves, the proceeds of any subsequent sale of the land should be paid back into a fund for reserve land (assuming that such a fund still exists). That question is outside the scope of this opinion, but we can advise on it if that would assist.

Potential RMA-related implications of the Council proposing to change the zoning

31. The next issues are the implication of the Council notifying its intention to *"correct"* the planning status of the land in 1992 (to include its designation as *"R7 – Scenic Reserve"*), and of the Council resolving to change the zoning in 2001, and neither change then coming to pass.

32. A change to the zoning of the Spur requires a change to the District Plan. The RMA sets out a specific process to do this, including notification of the change, the opportunity for public submissions, hearings, and public notification of the decision. As such, notification of the Council's intention to change the plan, or a resolution to that effect, are not sufficient to initiate a plan change.

33. The current situation is somewhat complicated by gaps in the historical record (which, in our experience, are not unusual for planning processes undertaken around the transition from the TCPA to the RMA, or even for 'first generation' plans developed under the RMA). Given the uncertainty, it is difficult to identify any actionable mistake.

34. It is possible that the outcome of the Review No. 4 process in relation to the Silverstream Spur was deliberate, and no error was made. For example:

(a) the Council may have decided against declaring the land to be a scenic reserve, and accordingly not proceeded with the proposed 'correction' in the Review No. 4 process; or

(b) the zoning 'correction' may have fallen to be determined by the decision-makers on Review No. 4, who decided, for some other reason, not to give effect to it (in favour of retaining the *"Rural B (Restricted)"* and *"Residential Conservation"* zoning, with no reserve 'designation' noted).

35. That is consistent with the fact that, as explained above, the Council's officers did not mention any planning error at or around the relevant times.

36. Another possibility is that the Council's intended correction was somehow overlooked in the Review No. 4 process, resulting in the outcome confirming the zoning of the land that was proposed when Review No. 4 was originally notified, with no reserve 'designation' being noted. This omission could then have been perpetuated through the subsequent planning processes under the RMA, as reflected in the current status of the Silverstream Spur in the District Plan.

37. It is equally possible that the Council may have deliberately not followed through with the 2001 resolution to rezone the land.

38. If no error was made in the planning process, there would of course be no planning / RMA implications for the Council or community today. In any application under either the RMA or in judicial review, it would be for the plaintiff or applicant to show that an error had occurred.

39. Even if an error was made, section 83 of the RMA conclusively presumes the current District Plan to have been prepared lawfully, in a procedural sense: *"A (…) plan that is held out by a local authority as being operative shall be deemed to have been prepared and approved in accordance with Schedule 1 [of the RMA] and shall not be challenged except by an application for an enforcement order under section 316(3)"*.

40. As section 83 indicates, it is possible to apply (under section 316(3)) to the Environment Court for an enforcement order challenging a plan on the basis that proper process has not been followed. Section 314(1)(f) allows the Court to grant various relief in such a case, including a dispensation from the need to comply with any requirement not met, or to direct compliance.

41. In this case, for argument's sake, a procedural error within the ambit of section 83 (and so unable to be challenged other than through section 316) could have arisen if the Council decision-maker overlooked the proposed 'correction' in the Review No. 4 process and thereby failed to *"give a decision on the provisions [of a proposed plan] and matters raised in submissions"* (in terms of clause 10 of Schedule 1).

42. However, members of the public and other non-council entities can only make such a challenge within three months of the relevant plan becoming operative. In this case, any procedural error would likely have been made many years before that, either during the Review No. 4 process in the early 1990s or the plan processes in the early 2000s (eg the proposed variation to the draft plan apparently contemplated in 2001 or the other processes culminating in the 2004 District Plan).

43. There is no such time bar on the Council applying for an enforcement order under section 316(3), if it forms the view that some procedural error was made. In our view, however, it would be difficult for the Council to justify the costs associated with making such an application, given that there is no clear evidence of such an error, the zoning of the Silverstream Spur (including the reserve 'designation') is already at issue in PC49, and if the Council wishes to create a scenic reserve it can do so through other processes (as discussed below).

44. The Environment Court may also refuse to entertain an application for an enforcement order because there are likely to be a number of people (both within and outside Upper Hutt) with an interest in the status of the Silverstream Spur, and enforcement proceedings are not well suited to notifying a large number of people and factoring in their views. Instead, Schedule 1 processes (such as PC49) are the usual way of allowing the public to participate in decisions about the zoning and status of land (including council-owned land).

45. As well as procedural flaws, the Environment Court can also correct substantive mistakes in plans, under section 292 of the RMA. However, that power has been held to apply only to obvious or inadvertent errors, where these can be corrected in a straightforward way by the Court without the need to involve other parties. In this case, if an error could be proven, in our view the Court would be unlikely to exercise its powers under section 292, again because:

    (a) it would be difficult for the Court to conduct a process in which all people who might have an interest in the status of the Silverstream Spur have an opportunity to take part (because the Court prefers to determine matters brought before it by parties, and does not typically seek input from other potentially interested people by, for example, giving public notice and inviting people to join a legal process); and

    (b) there is already an RMA process in train where the status of that land is in issue.

46. Section 293 likewise allows the Court to order a council to change a plan, but only *"after hearing an appeal against, or an inquiry into, the provisions of any proposed (…) plan"*, and in this case there is no such appeal that could give a pretext for the Court to exercise its powers under section 293 (because any appeals relating to the proposed District Plan in the early 2000s, for example, are long since determined, and any new appeal relating to that instrument would be well out of time).

47. As such, even if an error could be proven to have been made in historical planning processes, there is no obvious process or power under the RMA for revisiting or correcting such an error. Rather, in our view current planning processes, such as PC49, or future processes will provide a more appropriate avenue for the zoning and associated status of the Silverstream Spur to be determined.

Implications of past positions taken or views expressed by the Council

Council's ability to make and change decisions and policies

48. You have provided us with a number of documents showing that the Council and its predecessors recognised, at various times, the potential for some of the Spur to be used as a reserve or for other *"passive recreation purposes"*, and even advocated for the land to be used in that way. The documents also evidence some other Council views, including that some of the land may have potential for residential development.

49. Since the Council acquired the Spur, the land has not been declared to be a scenic or other type of reserve, and the land has not otherwise been set aside for recreation purposes.

50. As discussed further below, the legal process of creating a reserve relevantly involves a council making a resolution to declare land vested in it to be a reserve, that resolution being notified to the public, the public having an opportunity to make objections, and the Minister of Conservation then considering the resolution and any objections and deciding whether or not to publish the resolution in the *Gazette*. We have not seen any evidence of the Council having followed that process; although the resolution made in December 2001 (that the land be *"managed as a reserve, with public access as of right"*) indicates that the Council may have contemplated formally creating a reserve at that time, there is no evidence of a resolution to *"declare"* a reserve, let alone any evidence of objections being made, any process involving the Minister, or any relevant *Gazette* notice.

51. One possible interpretation of the records is that the Council simply considered making the land a reserve at various points in time, but then did not decide to follow through with that process.

52. Another possibility is that the Council did in fact make a formal decision to create a reserve, but then took no further steps to complete the legal process for doing so.

53. In either case, in general terms we do not consider that those scenarios bind the Council to any particular outcome today, or have any other implications for the way the land can be used. That is because the Local Government Act 2002 (like its predecessor legislation) provides the Council with the full rights, powers and privileges required to perform its role.[1] A council's role is a broad one[2] and, as such, the Council has wide powers to make decisions and act on behalf of the community, including in respect of land, and in particular to promote the social, economic and environmental well-being of the community.

54. The Council's powers include to make policy and decisions, which incorporate powers to **change** policy and make **different** decisions;[3] the law reflects the principle that policy can and does evolve over time,[4] and *"a decision-maker's liberty to make changes is 'inherent' in Westminster parliamentary government"*.[5] As a general proposition, then, we consider that assertions made historically by the Council or its predecessors do not bind the Council today, and even if decisions were taken in the past they can be revisited by this Council. Even if past resolutions did require the Council now to declare the Spur a reserve, that outcome would not be assured given that the power to create a reserve ultimately rests with the Minister.

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[1] Local Government Act 2002, section 12.
[2] Local Government Act 2002, sections 10 and 11.
[3] See for example *Gallagher v Attorney-General HC Wellington* CP402/88, 28 July 1988 at 21, and *Mackenzie District Council v Electricity Corp of New Zealand* [1992] 3 NZLR 41 (CA) at 47.
[4] *PP and G Basra Ltd v Rangitoto College Board of Trustees* [2010] NZAR 372 (HC) at [62]
[5] Administrative Law – A to Z of New Zealand Law, Chapter 2.25.6 – Doctrine of Legitimate Expectation citing *Hughes v Department of Health and Social Services* [1985] AC 776 (HL) at 788. See also *New Zealand Assoc for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [140]; and *Lalli v Attorney-General* [2009] NZAR 720 (HC) at [20].

Judicial review

General points

55. As discussed above, if it could be shown that an error had been committed by the Council, that might be reviewable. If the Council had, for example, overlooked its decision to 'designate' the Spur as reserve land, or failed to take into account the fact that the Spur was purchased using funds set aside for the purchase of the reserve, those would arguably be reviewable errors.

56. However, we doubt that there is any real likelihood of a judicial review succeeding in the present case. This is for essentially two reasons. First, as explained above, the relevant actions took place a long time ago. This makes it difficult to demonstrate conclusively that an error has occurred. It also means that the Court would be reluctant to intervene given the period for which the relevant decisions have stood. Secondly, the status of the Spur is currently being considered as part of PC49. Any decision about its future, at least in planning terms, is best made through that process, rather than through a judicial review. In the circumstances we think it is unlikely that the Court would order relief, even if the elements of a successful review were made out.

Judicial review founded in a legitimate expectation

57. A 'legitimate expectation' can arise where a public body such as the Council commits to act in a certain way, either through a statement, promise or settled practice.[6] In such a case, a council may be obligated to fulfil its commitment, unless there is a satisfactory reason not to do so.[7] This reflects the need to balance the desire for public bodies to act fairly and reasonably, while also allowing appropriate shifts in government policy.[8]

58. Again, we consider a judicial review based on an asserted legitimate expectation to be highly unlikely to succeed, including because of the passage of time and the fact that zoning of the land is at issue in PC49.

59. Further, based on the information we have reviewed, the Council is unlikely to have created a legitimate expectation – ie that the Silverstream Spur would have been rezoned or declared a reserve – that is capable of being reasonably relied upon by any person today. To explain:

    (a) Although there are various indications of the Council's intention to manage the land as open space, a number of other historical documents indicate that the Council saw the land has having potential for other uses, including residential development. These include the 1989 memo to the Policy and Planning Committee immediately prior to the purchase of the land, which referred to the "*potential for development as residential sections*", and subsequent documents. Read together, these documents do not, in our view, evidence a clear and

[6] *Comptroller of Customs v Terminals (NZ) Limited* [2012] NZCA 598, [2014] 2 NZLR 137 at [125].
[7] *NZ Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 525 cited in *Comptroller of Customs v Terminals (NZ) Limited* [2012] NZCA 598, [2014] 2 NZLR 137 at [122].
[8] *New Zealand Assoc for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [140].

unambiguous commitment on the part of the Council to rezone the land or manage it as open space.

(b) The legal processes to rezone land (under the RMA) or declare a reserve (under the Reserves Act 1977) are contestable, in that people can object or otherwise put forward their views for consideration.

(c) While the Council has the power to initiate those processes, it does not have the power to create a reserve; the Minister of Conservation is the decision-maker under the Reserves Act 1977, for example, and Council decisions as to zoning are appealable and are often revisited by the Environment Court. In our view these factors make it less reasonable for any person to have relied on any intention expressed by the Council to achieve those outcomes.

(d) We are unaware of any assertion by any person or entity that they have relied, to their detriment, on any commitment by the Council to zone the land. Put another way, it is not clear to us what harm (if any) has arisen from any failure by the Council to follow through on any such commitment.

(e) Considerable time has passed since the Council recorded its intention to *"correct"* the status of the land (on 10 March 1992) and resolved to rezone it as *"Open Space"* (in December 2001). Numerous public planning processes have taken place since those dates, without those outcomes eventuating. Even if the Council had made commitments that could have reasonably been relied upon at the relevant times (which we doubt, for the reasons set out above), the reasonableness of relying on the commitment would have significantly lessened with time.

Conclusion

60. We trust that this advice assists, and would be happy to discuss it with you.

Ngā mihi

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