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Report to the Policy, Finance and Strategy Committee
from Greg Schollum, Chief Financial Officer

Shelly Bay

1. Purpose

To advise the Committee of the current position of the Wellington Regional Council (WRC) in relation to land at Shelly Bay as a result of the recent determination of the Local Government Commission.

2. Background

- a) In November 1994, NZ Defence (Defence) advised the Department of Survey and Land Information (DOSLI) that it was about to declare the land it occupied at Shelly Bay, surplus to its requirements.
- b) DOSLI and Defence acknowledged the requirements of an agreement dated 2 December 1983, which required that the reclaimed portion of the Shelly Bay site was to be offered back to the Wellington Harbour Board, or its successor, at a consideration of 10 cents.
- c) DOSLI and Defence considered WRC to be the successor to the Wellington Harbour Board.
- d) The 1983 agreement also required Defence to grant land to the Wellington City Council (WCC) to legalise the existing road. WCC was to transfer the legal paper road to Defence in exchange.
- e) After consulting CentrePort, WRC resolved that, as the land was limited in size and due to its elongated and narrow shape, it had no practical use to WRC in its own right. As the WRC had no practical use for the land, it resolved that the land should be used for the benefit of the Region, with

particular emphasis placed on preservation of access by the public to the foreshore. While it was an option to dispose of the land, this was to be a secondary issue relative to preservation in public ownership of the land considered to have a public good benefit.

- f) In liaising with Defence, it emerged that WCC did not appear to be being cooperative in the exchange of land and legalisation of the existing road. It soon became clear that until the road issue was completed, Defence would not be able to dispose of its land, nor would WRC be able to achieve anything with the land which was to be transferred to it.
- g) It was agreed that every endeavour would be made to facilitate an agreement between Defence and WCC to unlock the land.
- h) Following a series of negotiations, a three party agreement was proposed between Defence, WCC and WRC. The agreement appeared to provide each party with benefits and a way forward. That proposal was adopted by WRC at its meeting in July 2000. Defence also adopted the proposal in July 2000.
- i) On 3 November 2000 the WCC Transport and Infrastructure Committee resolved to support the proposal subject to WCC officers negotiating further compensation for any imbalance in the worth of the land to be exchanged. All attempts by WRC and Defence at further negotiation with WCC were subsequently rejected.
- j) In December 2000, WCC advised it held a legal opinion from Phillips Fox disputing WRC as successor to the Wellington Harbour Board. The opinion considered WCC to be the legitimate successor.
- k) In February 2001, Oakley Moran provided its opinion countering the WCC position, considering WRC the correct successor, but acknowledging some merit to the WCC claim.
- l) In April 2001 the WRC General Manager met with the WCC Chief Executive Officer in an attempt to avoid a public confrontation between the two Councils, and to propose a deal which would satisfy the WCC needs.
- m) In June 2001, the WCC response was, to make an application to the Local Government Commission for a ruling on the matter of which Council is the rightful successor to the Wellington Harbour Board in respect of the land at Shelly Bay.

3. The Local Government Decision

Dated 22 May 2002, the Local Government Commission, Grant Kirby (Chairman), Linda Constable and Kerry Marshall (Members), determined that the right did vest in the Wellington City Council in accordance with clause

4. **The Response from Council's Legal Advisors**

The determination of the Local Government Commission (LGC) has been referred to Oakley Moran for comment. The opinion of Oakley Moran is attached as **Attachment 2**.

Oakley Moran conclude that:

- The LGC was wrong in concluding the Wellington Harbour Board's rights under the 1983 Agreement were "*property adjacent to the harbour*".
- The clear intention of the Reorganisation Order was that land owned by the Wellington Harbour Board adjacent to the harbour should vest in the territorial authority in whose district the land was situated and that all other land should vest in the WRC.
- There is no reason to distinguish between Wellington Harbour Board's rights to have land re-transferred to it and land actually owned by Wellington Harbour Board, for the purposes of determining in which local authority the land should vest.
- Because the Wellington Harbour Board's rights under the 1983 Agreement relate to one parcel of land, and that parcel of land is adjacent to the harbour, if it is desirable to preserve consistency with the Reorganisation Order such land should vest in the WCC.
- It is unlikely the High Court would quash the LGC's determination because the LGC could have determined WCC should succeed to the land, even though the LGC did so for the wrong reasons.

5. **Options Available to WRC**

The WRC has the options of accepting the determination, and thereby taking no further action, or not accepting the determination and seeking a judicial review. While there is no right of appeal to the Local Government Commission, WRC does retain the ability to seek a judicial review by the High Court under the Judicature Act. Grounds for a judicial review could be that Local Government Commission:

- failed to take into account relevant considerations;
- took into account irrelevant considerations;
- made an error in law relevant to its determination; or
- made a decision which was not one reasonably open to it.

Only error of law and failing to take into account relevant factors are arguable in this instance.

Any appeal to the High Court is subsequently capable of being taken to the Court of Appeal.

It is the declared position of WCC that any successful appeal of WRC at the High Court would be taken to the Court of Appeal.

6. **Conclusions**

The Council's intention throughout this long drawn out saga has been to get a good result for the Regional Community by acting in the public interest. That was the rationale for the Council wishing to establish a foreshore reserve at Shelly Bay.

The Council resolutions were clearly aimed at ensuring that all land on the seaward side of the formed road was to remain in public ownership so as to protect the continued ability of the public to access the foreshore.

With this in mind it had been proposed that all seaward side land would be vested in WCC as reserve, some as road reserve and some as foreshore reserve. It had also been arranged to exchange WRC land on Matiu Island with Shelly Bay foreshore land which would have usually passed to the Department of Conservation (DOC) as foreshore reserve on subdivision. This exchange with DOC would have ensured that the slipway would have remained free of Reserve land issues and would have therefore been able to be used commercially if that was viable and important to the Region.

It was also proposed to vest, at no consideration, significant areas of the landward side land in WCC to ensure that its desired minimum road reserve width of 18 - 20 metres was achieved. The current road width is only 12 metres.

The Council must now decide whether it would be in the public interest to pursue the matter any further.

While there may be an ability to succeed at the High Court on a matter of law, this will only cause the matter to be referred back to the Local Government Commission. The Local Government Commission has clearly determined that the appropriate successor to the Wellington Harbour Board for this land is WCC. If the matter is referred back to the Local Government Commission by the High Court, it is likely the determination that the WCC should be the successor to the land will remain unaltered, the only variation being the legal route chosen to justify that end. Success at law will not necessarily therefore translate into success in altering the determination. It is therefore considered inadvisable to pursue any form of judicial review.

That being so, the only remaining option is to accept the decision of the Local Government Commission in the hope that WCC will implement Council's plans for the foreshore reserve and in all other respects will find a solution at Shelly Bay which is in the public interest.

7. **Other Matters**

The WCC in its submission to the Commission stated “If the Commission determines the matter in favour of the WCC, WCC would be prepared to abide by a condition that it meet WRC’s reasonable costs as set out in paragraph 17.4 of the WRC submission.”

This offer was made on the acceptance that for the period December 1994 to December 2000, WCC had been encouraging WRC to act as the successor to the land and had thereby caused the expense to be incurred by WRC.

In the event, and despite the WCC offer, the Commission did not consider it appropriate to include such a condition in its determination. Rather, the Commission invited the WCC to make its offer directly to WRC “if it so wishes”.

Discussions are currently in train to clarify the current WCC position on this matter. WRC officers certainly believe that, under the circumstances the costs the Council has incurred should be refunded in full.

8. **Communication**

It is expected that the Council’s decision on this matter will be well reported by the media.

9. **Recommendations**

That the Committee recommend to Council that it:

- (1) Receive the report and note its contents.*
- (2) Accept the determination of the Local Government Commission, that the Wellington City Council is the successor of the Wellington Harbour Board in respect of the land at Shelly Bay.*
- (3) Determine that the Council take no action to seek a judicial review of the determination of the Local Government Commission.*
- (4) Agree that Wellington City Council should be requested to refund in full the reasonable expenses incurred by the Wellington Regional Council in endeavouring to reach a resolution of the Shelly Bay issues, for the period December 1994 to December 2000.*

A handwritten signature in black ink, appearing to be 'P. O'Brien', written on a light pink background.

PETER O'BRIEN
O'Brien Property Consultancy Ltd

GREG SCHOLLUM
Chief Financial Officer

**Attachment 1: Determination by the Local Government Commission –
May 2002**

Attachment 2: Letter from Oakley Moran dated 17 June 2002