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**For**  
Cameron Wood

**From**  
Rachel Dunningham

**By**  
Email: cameron.wood@selwyn.govt.nz

**Date**  
7 June 2011

Dear Cameron

**Inclusion of Indicative Roads on Outlined Development Plan**

1. The Commissioners hearing Plan Change 7 ("PC7") have sought a legal opinion on the appropriateness of including an indicative road on an Outline Development Plan ("ODP") in the context of requirements of section 32 of the RMA. They have also asked whether a Notice of Requirement ("NoR") process should be pursued instead of the road being part of the ODP criteria.
2. The issue arises in the context of hearing submissions on PC7 which seeks to rezone land to provide for the future growth of Lincoln and Rolleston townships in accordance with the Greater Christchurch Urban Development Strategy ("UDS") and Plan Change 1 to the Regional Policy Statement ("PC1").

**Lincoln University's submission**

3. In the context of those hearings, counsel for Lincoln University has made legal submissions challenging the appropriateness of the requirement for the ODPs for Areas 1 and 5 in Lincoln to show an indicative bypass road on a route which the University claims would almost inevitably extend over land that it owns.
4. Specifically the University submits that the road alignment identified in PC7 endorses the location on the University as being the most appropriate but without an assessment having been undertaken in accordance with section 76(3) or pursuant to section 32 of the RMA, to support this. It says that if it is proposed to implement the bypass in the future, that should be done by way of the designation process under the RMA where the effects can be properly assessed and the alternatives considered.
5. The bypass road in question emerged from the Christchurch Rolleston and Environs Transportation Study ("CRETS"). This project identified, among other things, the desirability of having a potential future bypass road to avoid heavy traffic needing to pass through the centre of Lincoln Township. The potential road alignment identified

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in the CRETS study has been recognised in Policy B4.3.56 of PC7 by requiring an indicative alignment for it to be included in the ODPs for Areas 1 and 5. The University complains that while its land is not the subject of PC7, PC7 nevertheless creates a planning framework that would make it difficult to establish an alignment that does not include the University's land.

### PC7 provisions

6. Policy B4.3.56 specifies matters to be addressed by the relevant ODPs. In relation to ODP 1 this requires the *"provision of a main east-west road originating from Weedons Road, linking Springs Road to Moirs Lane in the southern area of ODP Area 1"*. In relation to ODP 5 it requires *"provision of a main road link originating from Weedons Road, linking to Springs Road aligning with the southernmost east-west main road from ODP Block 2."*
7. The explanation to Policy B4.3.56 states that *"Each ODP area within Lincoln has specific requirements that have been identified through this Structure Plan process. Where an ODP is not already prepared, important infrastructure requirements have been listed under the specific criteria and these include matters such as roading links, ..."*
8. Where a subdivision does not provide a roading corridor in accordance with the requirements for an ODP for these Areas, then the development will become a fully discretionary activity rather than a restricted discretionary activity under Rule 12.1.6.6. The University complains that this would *"drastically reduce the likelihood of any consideration of future alignment options not involving the University land"*.<sup>1</sup>
9. The University goes on to say there is no express discussion within the section 32 report which demonstrates that the bypass alignment proposed for ODPs 1 and 5 is the most appropriate way to achieve the objectives and policies of the Regional Policy Statement and/or the Selwyn District Plan, nor has there been an adequate consideration of adverse environmental effects on the University.
10. The University also complains that there has not been any cost/benefit analysis undertaken as required by section 32(4). The University considers that, given the uncertainty as to whether the bypass road would ever proceed, it is inappropriate to require development to be in general accordance with an ODP which requires provision for the bypass.

### Discussion of issues

11. The question of whether it is appropriate to require an indicative road in the ODP for Areas 1 and 5 of Lincoln is primarily a factual, rather than a legal issue. Unsurprisingly we have not found case law which is directly on point, so have considered the issues in light of the general legal principles which govern the development of plans and plan changes and in light of case law discussion of potentially analogous circumstances.

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<sup>1</sup> Paragraph 19 of their submissions.

12. The Commissioners will be familiar with the requirements articulated in case law for consideration of changes to district plans<sup>2</sup> and these requirements are well summarised at paragraphs 1.8 – 2.16 of the Officer's section 42A report. Of relevance, these include the requirement to design the plan change in accordance with the District Council's functions under section 31 (section 74(1)), to have regard to any proposed regional policy statement (section 74(2)), and to have regard to any relevant management plans and strategies under other Acts (section 74(2)(b)).
13. The proposed policies and methods (including rules) are to be examined, having regard to their efficiency and effectiveness as to whether they are the most appropriate methods for achieving the objectives of the district plan. That examination and evaluation must take into account: the benefits and costs of the proposed policies and methods (including rules) and 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. Finally, in making a rule, the local authority must have regard to the actual or potential effect of activities on the environment.
14. Such an analysis requires regard to be had to a relatively complex set of interacting, and at times competing, considerations. In the present case, PC7, and the objectives, policies and rules contained therein, is the product of multiple enquiries, including the UDS, PC1 to the Regional Policy Statement, the CRETS study and the Lincoln Structure Plan. From these enquiries emerged the desirability of future subdivision developing in accordance with ODPs, and of making provision for a future bypass road for Lincoln.
15. While the requirement for development to proceed in accordance with an ODP is generally accepted as appropriate, the specific reference to inclusion of an indicative road on the ODP for Areas 1 and 5 of Lincoln township is challenged for the failure to supply a supporting analysis under section 32 and for a lack of assessment of the environmental effects of making provision for a road along this alignment.
16. The question of the adequacy of the section 32 analysis, and of an assessment of environmental effects as required under section 76, is a factual issue for the Commissioners to determine. Clearly if there is a deficiency in the way in which the local authority has attempted to comply with section 32, that will have a bearing on whether the relevant provision of the plan should be recommended for adoption.<sup>3</sup> However a section 32 analysis is generally high level in nature and is not normally required to assess the impacts of the plan provisions on individual property owners.
17. The degree to which effects on specific properties need to be considered was discussed in the decision *Capital Coast Health Limited v Wellington CC W101/98*. There the Court had to consider whether the Council's section 32 analysis had been appropriate when it had zoned an individual's land as Open Space rather than Inner Residential. The Court held that:

<sup>2</sup> *Long Bay Okura Great Parks Society Inc v North Shore City Council* A078/08

<sup>3</sup> *Kirkland v Dunedin City Council* [2002] 1NZLR 184

*"the difficulties for the Council in assessing Open Space issues on the "micro" scale, as Mr Mitchell put it, are acknowledged. However, the imposition of such inhibiting development controls... on private land is a decision which requires particular consideration of the site specific factors involved.*

*Therefore, we find that aspects of the Council's section 32 analysis were not adequate. As a result the question as to whether the appellant's proposal satisfied the purpose of the Act as set out in section 5 was not adequately addressed either. Only as a result of the evidence given by the appellant's witnesses at this hearing however, have we concluded the appellant's proposal will allow for sustainable management of the site with some modification.*

#### *Conclusion*

*We agree with Mr Thomas that the appropriate method of establishing public Open Space for the site was through designation or acquisition. As this has not occurred, we therefore endorse Inner Residential zoning for the site."*

18. This decision (and a subsequent decision in the same proceedings, W004/00), endorses the principle that the duties under section 32 relate generally to generic plan provisions, rather than to distinct parts of the district identified in the plan, and they are not a duties which generally extend to separate properties within the district. However, where controls are specific to particular land, or where they effectively involve the reservation of particular private land for public purposes such as open space or reserve, then the Council is required to carry out a more site specific assessment of the costs and benefits of the proposed controls and to consider whether the method was necessary in achieving the purpose of the Act. In the final *Capital Coast Health* decision (W004/00), the Court held that the appropriate method of establishing public Open Space of the site was through designation or acquisition and, as that had not occurred, it endorsed a residential zoning for the site.
19. While on the face of it that decision suggests that it may be inappropriate for a district plan to require an indicative road to be shown on an ODP on a generally predetermined route, there are some clear distinctions between the present circumstances and the situation in the *Capital Coast Health* case.
20. Firstly, the requirement in policy B4.3.56 of PC7 to identify the indicative roading alignment does not constitute the equivalent of a zoning decision such as was proposed in the *Capital Coast Health* case. It does no more than require the developer of the relevant land to give consideration to this issue when the ODP is prepared. Where there are good reasons for departing from the matters which the policy requires the ODP to take into account, including the future road alignment, there is the flexibility to do that and such an ODP is categorised as a discretionary activity, rather than a non-complying activity with its more stringent threshold test.
21. Secondly, the requirement to make provision for a bypass road alignment on the ODPs for Areas 1 and 5 does not directly affect the University land as the zoning provision did in the *Capital Coast Health* case. Until and unless there is a

designation and/or acquisition process, then there is no change to the Plan's provisions as they affect the University's land. While it might be argued that it increases the presumption that the route affecting the University land should be preferred, in a strict legal sense that is not the case, and, in any event, it must be a readily rebuttable presumption until the land is designated or otherwise zoned for that purpose.

22. In addition, the University's submission appears to suggest that the section 32 analysis must involve a comparative assessment of the route through the University land with all of the alternative routes for the bypass road alignment and that the analysis is deficient for failing to do this. However the idea that a section 32 analysis would contemplate an assessment of alternative sites is expressly discarded in the decision *Brown v Dunedin City Council* [2003] NZRMA 420. In it Chisholm J says he is satisfied that *"section 32(1) does not contemplate that determination of a site specific proposed plan change will involve a comparison with alternative sites, particularly when the wording of section 32(1)(a) ...is compared with the wordings of section 171(1)(b) and of clause 1(b) of the Fourth Schedule it appears that such a comparison was not contemplated"*
23. Rather than focusing on an analysis of the merits of the route preferred for inclusion in the ODP, the appropriate enquiry for the Commissioners hearing the plan change is whether the policy requiring provision to be made for the indicative bypass route (in whatever form that might finally emerge) is more appropriate for achieving the objectives of the plan change, than omitting such a requirement. In making that decision they would need to consider what the likely consequence of the latter approach would be including that a future bypass road would not be catered for in the growth of the township, and should it be required, it would have to be a retrospectively imposed on the plan for the township, rather than being an integrated part of the town's development.

#### **Should a NoR process be pursued instead?**

24. While a NoR process is obviously available to the Council, (and would still need to be initiated if a road is to be provided for if the Council decided to proceed with a bypass that affected the University's land), it does not need to be seen as an alternative to the ODP process. The proposed ODP requirements of PC7 invite developers to anticipate the possibility of the road in the future and avoid development on a suitable route for the road. However that requirement could be dispensed with or varied. The merits of planning for that in the ODP, rather than leaving such planning to the point where the Council initiates a NoR process (which may be after incompatible development has proceeded), is again a factual issue to be determined on the evidence and submissions the Commissioners hear.

#### **Conclusion**

25. The question of whether it is appropriate to require an indicative roading route to be shown on the ODP of land adjacent to Lincoln University, is essentially a factual question as to whether there is a satisfactory section 32 analysis supporting this

aspect of policy B4.3.56, as opposed to recommending a plan that excludes such provision.

26. While the decision in *Capital Coast Health* would suggest that where private land is proposed to be set aside for some public purpose (which includes a road) it is better to proceed by a designation process, PC7 clearly does not go this far in terms of Lincoln University's land. We therefore do not consider that case's conclusions are directly applicable in the present circumstances. Nor do we think that the Council is required to undertake a comparison of various routes for the bypass in order to satisfy the requirements of section 32 (although it may be that evidence from the CRETS study or the Lincoln Structure Plan process provides some evidence to support the general route which is indicated).
27. In conclusion, we are reasonably comfortable with the inclusion of the requirement to show this indicative roading alignment on the relevant ODPs from a legal perspective, particularly as there is still clearly scope to advance an ODP with a different alignment, should that be considered justifiable on the facts.

Yours faithfully  
**BUDDLE FINDLAY**



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