
REPORT 2
(1215/52/IM)

KHOURI AVENUE RESERVE LAND EXCHANGE

1. Purpose of Report

The purpose of this report is to request the Committee to recommend to Council that it consider using Council's delegated powers under section 15 of the Reserves Act, and to approve the reserve land exchange proposal at the end of Khouri Avenue under section 15 of the Reserves Act 1977 (the Act).

2. Executive Summary

The proposal to exchange land at the end of Khouri Avenue first arose during the development of the District Plan when the 'Upper land' was identified as having significant open space values.

The proposal is to swap a piece of public reserve land (the Lower land – Sec 1 SO 32138) at the end of Khouri Avenue with the majority of a larger piece of privately owned land running up to the skyline ridge (the Upper land – Lot 2 DP 53184).

The Upper land will become part of Council's open space land (the Outer Green Belt), and the Lower land will be developed into residential allotments.

Council previously approved the land exchange in principle at a Built and Natural Environment Committee meeting in September 2003. Since then officers have been following the District Plan zone change and Reserves Act reserve land exchange processes.

The zone change process has been completed and the developer has been granted resource consent for a 20 lot subdivision to occur on the Lower land.

Approval for the reserve land exchange under section 15 of the Act is the final stage of this proposal.

In November 2005, Council resolved to recommend to the Minister of Conservation the Khouri Avenue reserve land exchange proposal. Over the last year officers have been in regular dialogue with the Department of Conservation and legal advisors regarding the decision making process for a reserve land exchange under section 15 of the Act and in particular, the delegated powers and limitations on those. Both parties have now confirmed that these powers have

been delegated to Council and the limitations attached to these powers do not apply in this instance.

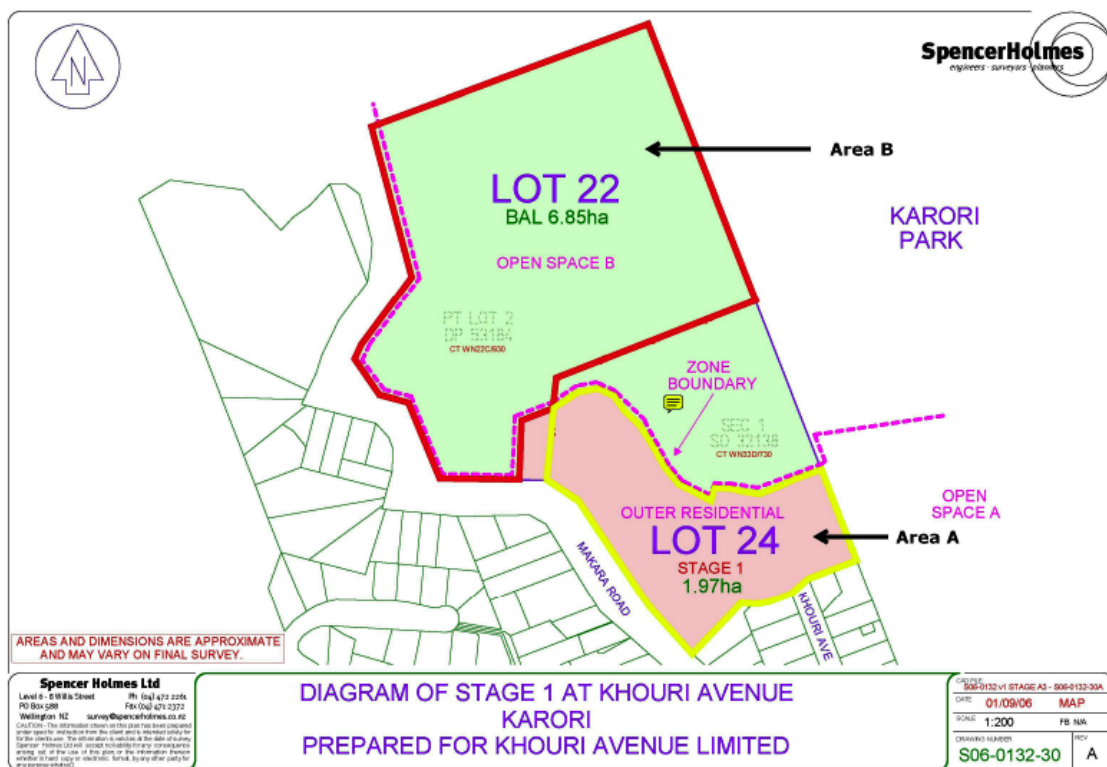
This report provides a brief background summary to the Khouri Avenue reserve land exchange proposal, discusses the issues around the delegated powers under the Act and provides information to approve the Khouri Avenue reserve land exchange.

3. Recommendations

It is recommended that the Committee:

1. *Receive the information.*
2. *Recommend to Council that it use its delegated powers under section 15 of the Reserves Act 1977 in considering firstly the authorisation of the proposed exchange, and secondly the request for the exchange.*
3. *Recommend to Council to approve the exchange of part of the Recreation Reserve at Sec 1 SO 32138 as marked Area A in figure One for part of the fee simple land at Lot 2 DP 52184 as marked Area B in figure One under section 15 of the Reserves Act 1977.*

Figure One: Reserve Land Exchange areas



4. Background

4.1 The proposal

The proposal is to swap a piece of public reserve land (the Lower land – Sec 1 SO 32138) at the end of Khouri Avenue with the majority of a larger piece of privately owned land running up to the skyline ridge (the Upper land – Lot 2 DP 53184).

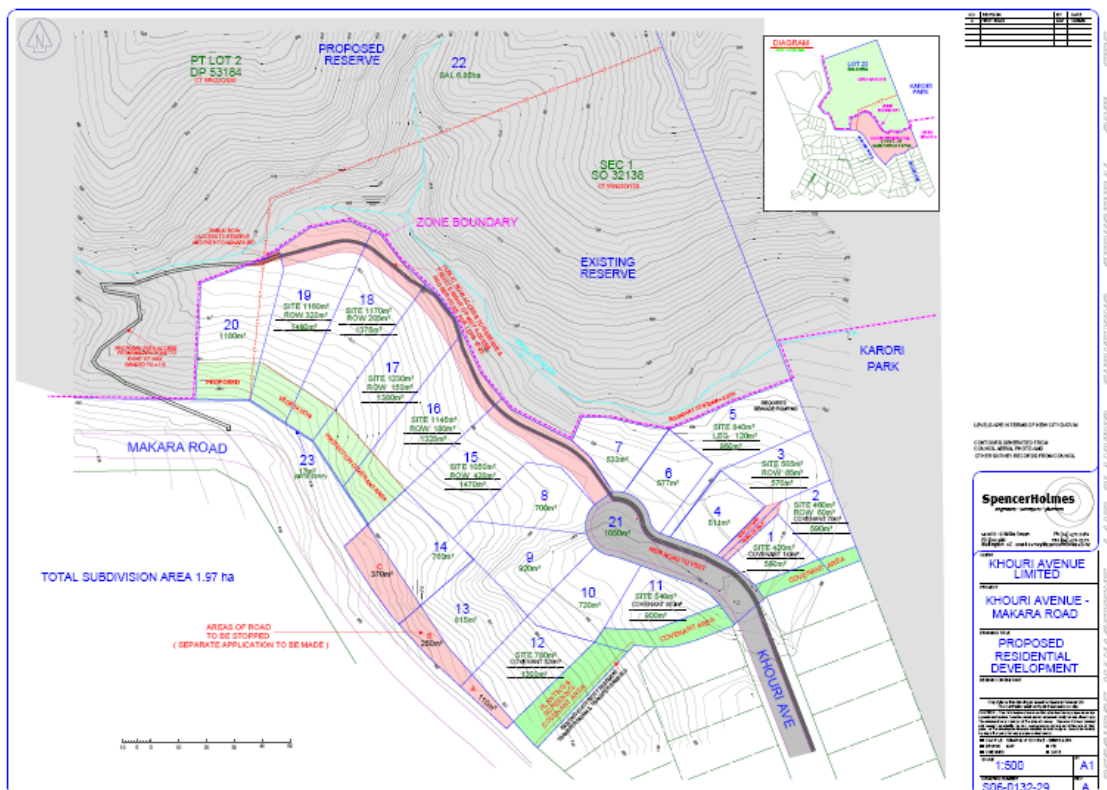
The Upper land will become part of Council's open space land (the Outer Green Belt), and the Lower land will be developed into residential allotments.

The proposal is attempting to find a balance between a number of issues such as:

- privacy for existing residents
- open space values (green belt, landscape)
- traffic management (safety, efficiency)
- recreation opportunities
- good urban form for the city.

The proposal to exchange land at the end of Khouri Avenue first arose during the development of the District Plan when the 'Upper land' was identified as having significant open space values. The Upper land is privately owned and the Lower land is owned by Council as Recreation Reserve.

Figure Two: The land exchange proposal (also showing the private developer's proposed subdivision layout)



4.2 The Process to Date

Council previously approved the land exchange in principle at a Built and Natural Environment Committee meeting in September 2003. The original proposal was to swap the majority of a piece of public reserve land at the end of Khouri Avenue (Lower land) with the majority of a piece of privately owned, Outer Residential land running up to the skyline ridge (Upper land).

Following the Built and Natural Environment Committee's decision, Council initiated a dual process involving an amendment to the District Plan, and a Reserves Act land exchange. The Lower (Council-owned) land, which was zoned Open Space B but still is Recreation Reserve, had to be re-zoned Outer Residential. The Reserve status is then uplifted through an exchange under section 15 of the Reserves Act 1977.

The District Plan change and Reserve Act applications were publicly notified separately and one hearing held for both. The Hearings Committee visited the site and deliberated on the evidence and requested further information from Council officers on whether the boundaries in the proposed plan change could be altered in order to have a lesser impact on the stream and other natural values of the Lower land. As a result the proposed land exchange and subdivision was amended. This has meant that a larger area (than originally anticipated) of the Council land is proposed to be retained for reserve purposes.

This latest proposal seeks a land exchange on the basis that Council receives the Upper land, the developer receives part of the Council land and additionally Council pays a financial contribution to balance the values of the two properties. The Strategy and Policy Committee on 3 March 2005 approved in principle (as land owner) this latest land exchange proposal, and noted that there was an inequality in value and size in the exchange and that the Council will be liable to pay for this inequality in value. The funding is available for this land exchange in the Reserves Property Purchases Project (CX033_Cf). The Committee also authorised the Manager of Property and Standards (then) to negotiate the final contract with the owners for the exchange.

The amended land exchange and District Plan change proposal was mailed to all the submitters for their concerns on 20 May 2005. Submitters were invited to provide written comments on the revised proposal, and were provided with the opportunity to be heard before the Hearing Commissioners when the hearing was reconvened on 28 July 2005.

The District Plan change has followed a separate legal process. The plan change hearing has been held (in combination with the Reserves Act hearing) and the Hearing Committee's decision and recommendation on the plan change was reported to the Strategy and Policy Committee on 3 November 2005 and Council on 23 November 2005.

There were no Environment Court appeals received on the District Plan zone change and the zone change was finalised in July 2006.

The Strategy and Policy Committee on 3 November 2005 considered the decision from the Hearing Commissioners in regards to the Khouri Avenue reserve land exchange. The Committee and Council resolved that;

Approve the recommendations from the Hearing Commissioners, that Wellington City Council recommends to the Minister of Conservation, the exchange of part of the Recreation Reserve at Sec 1 SO 32138 for part of the fee simple land at Lot 2 DP 52184 under section 15 of the Reserves Act 1977, subject to the making operative of Plan Change 27 to the Wellington City District Plan and the granting of a resource consent for a residential subdivision on part of the existing Recreation Reserve.

Officers understood at the time that Council did not have the delegated powers under section 15 of the Reserves Act 1977 to authorise the Khouri Avenue reserve land exchange, therefore a recommendation to the Minister of Conservation was required.

Over the last year officers have been in regular dialogue with the Department of Conservation and legal advisors to determine the extent of delegated powers which have been given to Council to authorise and request the exchange. The delegated powers are subject to certain limitations and there were some uncertainties around those initiations which have now been resolved directly with the Department of Conservation. That process involved the consideration of the acquisition history of the Council land.

It has now been confirmed that Council has delegated powers, which are not limited in this instance to authorise, request and approve the Khouri Avenue reserve land exchange under section 15 of the Reserves Act 1977. A further detailed discussion of this follows.

5. Discussion

a. Delegated Powers

As previously mentioned, the land exchange is being completed pursuant to section 15 of the Reserves Act 1977 (**Act**). Under section 15(1), the Minister may by notice in a Gazette authorise the exchange of the land comprised in any reserve or any part or parts thereof for any other land to be held for the purposes of that reserve. However, that power cannot be exercised with respect to any reserve vested in an administering body except pursuant to a resolution of that body requesting the exchange.

The Minister of Conservation delegated some of his powers under the Act to territorial authorities. Those delegated powers have most recently been recorded in an instrument of delegation for territorial authorities as at 22 June 2004. That instrument includes a delegation of the Minister's powers under section 15(1) of the Act enabling territorial authorities to exercise that power. However there is a limitation in the circumstances in which a territorial authority can do that. It can only use that delegation as

long as the land has not "derived title from the Crown or title would be deemed not to be derived from the Crown if the reserve was going through a revocation process."

The Department of Conservation have advised that "deriving title from the Crown" is interpreted so that it means the territorial authority did not derive title by virtue of the Crown having vested the land in it under the Reserves Act. In other words, if the land is simply acquired from the Crown in a normal commercial transaction, then in such circumstances the land would not be regarded as having been derived from the Crown, in the Reserves Act sense. In the Khouri Avenue reserve land exchange circumstance, and after some consideration of the acquisition history which involved purchase from the Crown, it was established that the title was not derived from the Crown in the sense of the limitations, in which case Council can use its delegated authority.

Having established that Council has the delegated power and it is not limited in the present case, we turn to the actual procedure required in the decision making process itself. Council where it is using the delegated power given to it in relation to section 15(1) of the Act must do two things due to this section having two components. Firstly, Council must consider the "authorisation" of the exchange and secondly, the "request" for the exchange. The authorisation cannot happen without the resolution requesting the exchange. Any resolution by Council must reflect both decisions i.e. it must resolve to request the exchange and also authorise the exchange under the delegated authority given to it. There are in that sense two separate steps.

b. Correspondence from the local Khouri Avenue Residents

A group of local residents are opposed to the Khouri Avenue Reserve Land exchange proposal.

Early last year Council received written correspondence from the local Khouri Avenue residents, requesting that Council should not act under its Reserves Act delegations and should invite the Minister of Conservation to act as an independent arbiter.

In their request they state that Council officers advised them that approval involved the Minister of Conservation, and in reliance on this advice the local residents did not pursue an appeal to the Environment Court on the zone change.

When a territorial authority has delegated powers under the Act, it is very rarely that the territorial authority does not exercise such powers.

The reserve land exchange and district plan zone change are two separate legal processes that are independent to one another. Regardless of who has delegated powers under the Reserves Act 1977, the local residents could have lodged an

appeal against the zone change to the Environment Court if they wished to do so.

c. Officers Recommendation

The previous advice from officers to the local residents and the Committee was based on the information available at the time. Officers accept that there has been a lengthy time delay to resolve who has the delegated powers to consider the reserve land exchange and the effect of the limitations on those powers.

Council has followed an unbiased process and the necessary legal steps to implement the Khouri Avenue reserves land exchange proposal. The process to date has been peer reviewed by the Department of Conservation and they believe that it has been followed comprehensively. (Please refer to Appendix One).

Officers recommend that the Committee authorise its delegated powers under section 15 of the Reserves Act 1977.

d. Approval for the Reserve Land Exchange

If the Committee recommends to Council to authorise its delegated powers under section 15 of the Reserves Act 1977, then the second stage of this report is for the Committee to recommend to Council to approve the Khouri Avenue reserve land exchange.

The 2005 Hearings Commissioners' decision and recommendation, is attached as Appendix Two to this report.

The Hearing Commissioners' recommendation is that:

Wellington City Council recommends to the Minister of Conservation, the exchange of part of the Recreation Reserve at Sec 1 SO 32138 for part of the fee simple land at Lot 2 DP 52184 under section 15 of the Reserves Act 1977, subject to the making operative of Plan Change 27 to the Wellington City District Plan and the granting of a resource consent for a residential subdivision on part of the existing Recreation Reserve.

Five submissions were received as a result of the notification under the Reserves Act 1977, four in opposition (one including 57 signatures) and one in support. The submitters are listed in Appendix Two of the Commissioners report.

The main Reserve Act issues which the Hearing Commissioners gave consideration to included, financial considerations, the process adopted by Council, loss of reserve and associated values, comparative values of the Upper land and Lower land, walking access and buffer areas. Please refer to the Hearing Commissioners report attached as Appendix Two for a detailed explanation.

The Commissioners concluded that the revised land exchange proposal represented significant improvement over the initial proposal and an overall

desirable outcome for the City's reserve network. The Commissioners considered that the exchange of 2 hectares of the lower land from the existing reserve, for 5.5 hectares of the privately owned land, ensures the protection of a much wider portion of the ridgeline (and its upper slopes). It also achieves the completion of the planned Outer Green Belt in this area. The land exchange ensures the protection of a much larger area of regenerating native bush and protection from development of the full length of the stream on the land which is a tributary of the Karori Stream.

6. Process – where to from here?

If the Committee approves the recommendations of this report then officers will request Council's solicitor to prepare the notice and then send to Land Information New Zealand (LINZ) to publish the notice in the New Zealand Gazette. (This notice advises the public and parties of the land parcels being exchanged).

The next steps include:

- Prepare and sign the Gazette notice
- Publish Gazette notice
- Send transfer instrument and Gazette Notice to the Registrar General of Land (LINZ) for registration.

7. Conclusion

The Khouri Avenue land exchange proposal has been a lengthy and complex process. The outcome will achieve significant open space values and an improvement to the city's urban form.

In accordance with Council's open space strategy, Capital Spaces, land exchange is one mechanism that can be used to achieve the City's open space vision.

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Supporting Information

1) Strategic Fit / Strategic Outcome

This project fits under the Environment Strategy and supports the outcomes identified in that strategy.

Biodiversity

The city environment hosts and protects a representative range of indigenous and non-indigenous plants and animals in their natural communities and habitats

Ecosystems

The City's varied marine and land based ecosystems are valued and, where appropriate, protected and restored.

Open Space Recreation

Wellington's open spaces including the coastline and harbour, Town Belt and Outer Green Belt are accessible to all and provide a wide range of recreational opportunities what do not compromise environmental values.

The land exchange also supports Council's overall vision for the Outer Green Belt and it is consistent with the Open Space Strategy – Capital Spaces.

2) LTCCP/Annual Plan reference and long term financial impact

The acquisition cost will be taken from the CX033_CF Reserves Purchase Budget.

3) Treaty of Waitangi considerations

There are no implications for the Treaty of Waitangi.

4) Consultation

a) General Consultation

Under the Reserves Act 1977 this process has been notified and submissions received. Three public meetings were held prior to this formal process.

b) Consultation with Maori

Iwi were notified of this exchange and have no objections.

6) Legal Implications

Council lawyers have been consulted during the development of this report.

7) Consistency with existing policy

This report is consistent with existing Council policy, particularly the Outer Green Belt Management Plan.

Appendix One
Letter from Department of Conservation

**Appendix Two
Hearing Commissioners Report**