LOCAL GOVERNMENT COMMISSION

Determination

of the right to succeed to ownership of land at Shelly Bay, Wellington

BACKGROUND

1 On 14 June 2001, Simpson Grierson, acting on the instructions of the Wellington City Council ("the WCC"), wrote to the Local Government Commission requesting determinations under clause 194(4) of the Local Government (Wellington Region) Reorganisation Order 1989 ("the Reorganisation Order") and section 37ZZZO of the Local Government Act 1974 ("the Act").

2 Specifically, the WCC requested the Cammission to determine the following matters:

- Whether the right ("the revesting right") of the Wellington Harbour Board ("the WHB") to have land at Shelly Bay (legally described as sections 89 and 90 Watts Peninsula District) transferred to it under an agreement with the Crown of December 1983, once that land was no longer requited for defence purposes, vested in the WCC or the Wellington Regional Council ("the WRC") under the Reorganisation Order; and
- Whether an amendment to the Reorganisation Order under section 37ZZZO of the Act, specifying that the right vests in WCC, is required to better enable the intention of the reorganisation scheme to be put into effect.

3 The land which is the subject of the 1983 agreement was reclaimed by the Crown during the Second World War and was incorporated into the rest of the Shelly Bay defence site at that time. Although the land was reclaimed from the sea by the Crown it remained in the ownership of rhe WHB. The 1983 agreement provided for the Crown to acquire the reclaimed land from the WHB for a purchase price of 10 cents. However, there was a proviso that if the reclaimed land or part of it ceased to he required hy the Crown for defence purposes, the Crown would retransfer the land back to the WHB for a purchase price of 10 cents. The; land was taken by the Crown under the provisions of the Public Works Act in March 1984.

4 **On** receipt **of** the WCC's request, the Commission made enquiries of the New Zealand Defence Force ("the NZDF") to ascertain the history of the land in question and its future intentions with respect to the land. The NZDF advised that the land is no longer required for defence purposes.

5 On 19 July 2001 the Commission also sought the comments of the WRC with regard to the WCC's request. Comments from the WRC were received on 25 October 2001. The WRC advised its contention that the revesting right vested in it under clause 199 of the Reorganisation Order.

6 After consideration of the comments received from the NZDF and the WRC, the Commission on 7 December 2001 invited the WCC and the WRC to make submissions on any factual or legal issues that might be material to the Commission's decision. Without limiting the matters on which the parties might wish to make submissions, the Commission specifically sought the views of each party on the following points:

- Whether the rights under clause 4(b) of the 1983 Agreement between the WHB and the Crown are "property" for the purposes of clause 194 of the Reorganisation Order and,, if so, what the nature of the "property" ie;
- Whether the property, if any, was situated in the district of the WCC and was adjacent to any harbour or the sea at the date **of** the Reorganisation Order; and
- Whether the Commission should exercise its power under section 372220 of the Act to amend the Reorganisation Order specifying that the right vest **it**: the WCC to better enable the intention of the reorganisation scheme to be put into effect.

The Commission also requested that the parties exchange their submissions and respond to each other's submissions.

7 Submissions and **submissions in reply were** forwarded by each party to the Commission on 22 February 2002.

THE RELEVANT PROVISIONS OF THE REORGANISATION ORDER AND THE LOCAL GOVERNMENT ACT 1974

8 The disposition of assets and liabilities of the WHB is dealt with in Part XI (clauses 194 to 199) of the Reorganisation Order.

9 Clause *194* contains 1. 1 sub-clauses. The sub-clauses relevant to the Commission's consideration of the issue are the following:

"(1) This clause shall *apply to that property, real and personal, vested in the Wellington Harbour Board as at the 31st day of October 1989.*

(2) Subject to subclauses (6), (8), (9), (10) and (1 1) *of this clause, all property-*

(a) Which is vested in the Wellington Harbour Board as at the 31st day of October 1989; and

(b) Which-

(i) Is a reserve under the Reserves Act 1977: or

(ii) *Is principally used for recreational purposes, whether or not it is a reserve under the Reserves Act 1977; or*

(iii) Is a marina, wharf, jetty, boat ramp or other harbour facility, used principally for recreational purposes; or

(iv) Is an item of plant or equipment used principally in association with the maintenance, use or operation of the facilities referred to in subparagraphs (i), or (ii) or (iii) of this paragraph.

is hereby vested in the territorial authority, in whose district it is situated, for the purpose which it is so reserved, or, where there is no such purpose, for the purposes of any function transferred by this order to that territorial authority.

(3) Subject to subclauses (6), (8), (9), (10) and (11) of this clause, all that property which is vested in the Wellington Harbour Board as at the 31st day of October 1989 which is situated in any district of a territorial authority, as constituted by this order, and which is adjacent to any harbour or the sea, is hereby vested in the territorial authority in whose district it is situated.

(4) Where there is any dispute over whether any property comes within a category of property referred to in this clause, the matter shall be referred to the Local Government Commission for determination.

(5) Subject to subclauses (8) to (10) of this clause, any property which is vested in the Wellington Harbour Board as at the 31st day of October 1989 and which does not come within a category of property referred to in subclause (2) or subclause (3) of this clause is hereby vested in the Wellington Regional Council."

10 Clause 199 deals with the residual assets and liabilities of the WHE. It provides:

"All the assets and liabilities of the Wellington Harbour Board as at the close of the 31st day of October 1989 for which provision for vesting is not otherwise made in this order are declared to be assets and liabilities of the Wellington Regional Council."

11 Section 37ZZZO of the Act empowers the Commission to mend certain reorganisationschemes;

*"**37ZZZO. Power** to amend **reorganisation schemes**- Where, in the case of any reorganisation scheme prepared under the former section 15D of this Act (as enacted by section 6 of the Local Government Amendment Act (No. 3) 1988) and given effect to by Order in Council, the Commission is satisfied either-*

(a) That some further or other provision is necessary to enable or better enable the intention of the scheme to be put into effect; or

(b) That some provision of the scheme is no longer relevant or appropriate to the intention of the scheme,-

the Commission may issue a determination amending the scheme, and every such determination shall be given effect to by Order in Council in the same manner as a reorganisation scheme.".

THE SUBMISSIONS OF THE WCC AND THE WRC

12 The WCC and WRC each made detailed submissions to the Commission. Their respective views may be briefly summarised as follows:

- The WCC claims to be entitled to the revesting right under clause 194(3) of the Reorganisation Order. It is of the view that the revesting right is property in terms of clause 194(1) of the Reorganisation Order, situated in the district of the WCC and adjacent to a harbour or sea in terms of clause 194(3).

- The WRC claims to be entitled to the revesting right under clause 199 of the Reorganisation Order, which provides for any residual assets and liabilities of the WHB for which provision for vesting has not otherwise been made in the Reorganisation Order to be declared the assets and liabilities of the WRC. It contends that the revesting right is not property in terms of the provisions of clause 194.

COMMISSION'S CONSIDERATION

13 The WCC claims to be entitled to the revesting right under clause 194(3) of the Reorganisation Order. In considering the WCC's claim the Commission decided that three elements had to be satisfied for the WCC's claim to be in order, Those elements are:

(a) The revesting right must be "property, real and personal, vested in the Wellington Harbour Board as at the 31st day of October 1989", in accordance with clause 194(1) of the Reorganisation Order,

(b) The property must have been situated in the district of the WCC, as constituted by the Reorganisation Order, in accordance with clause 194(3) of the Reorganisation Order.

(c) The property must have been adjacent to the harbour or sea, in accordance with clause 194(3) of: the 'Reorganisation Order.

14 Before considering the WCC's claim in terms of the above elements, the Commission satisfied itself that the revesting tight did not fall. within the ambit of clause 194(2) of the Reorganisation Order. It also took the view that the WCC's claim would only need to be assessed against the provisions of clauses 194(5) and 199 if the claim did not satisfy the three elements detailed above.

15 The Commission then proceeded to assess the WCC's claim against the three elements.

Is the revesting right "property, real OF personal, vested in the Wellington Harbour Board as at the 31st *day* of October 1989"?

16 The WRC submits that what property is intended to be dealt with under clause 194 needs to be ascertained from looking at the clause as a whole. 'It notes the various dispositions of property in clauses 194 and 199 of the Reorganisation Order and states in its submission that:

"Clause 194(5) cannot apply to the same assets as does clause 199 or it would be needless duplication. It must follow that the property referred to in clause 194 is therefore tangible property, i.e. freehold or leasehold land, plant and equipment associated with that land and moneys and liabilities relating to that land.

The assets of the Board which are to be vested in each of the local authorities under clause 194, therefore, are tangible assets then in existence. The fact that the Local Government Commission is to resolve any dispute would imply the property is not only identifiable but tangible and disputes will be resolved promptly (even to the extent that by the time the Order was ID take effect on 1 November 1989, such disputes would have been identified and even resolved)."

17 The WRC therefore submits that the revesting right was vested in the WRC under clause 199 as an asset of the WHB which is not disposed of otherwise in the Reorganisation Order.

18 However, in its submission the WCC argues that:

"In clause 194(1), neither "property" nor "real and personal property" is defined in the *Reorganisation Order. Nor does the Interpretation Act 1999 or its predecessor, the Acts Interpretation Act 1924, define these terms. WCC submits that there is no reason why the word "property" in clause 194(1) – or indeed in clause 194 as a whole – should not bear the same broad meaning as it does* in *other New Zealand legislation.*

The Local Government Act 1974, *under which the Reorganisation Order was made defines "property" as including:*

> *"all real estate, and all personal estate, chattels, and effects and all money and rates, whether in possession or reversion or recoverable by action or other legal proceeding, and the benefit of any contract or engagement, end every matter or thing the subject of property:"."*

19 In considering this issue, the Commission noted that the repealed section 37 of the Act provided that Orders in Council reorganising local authorities may *"vest in any local authority affected by the Order in Council or other instrument any real or personal property vested in any other such local*

authority". The Commission considers that this provision was intended to include all property of the affected local authorities, including intangible property.

20 The Commission also notes that the words "property, real and personal" are used elsewhere in the Reorganisation Order in the context of vesting the property of dissolved authorities. From studying the clauses concerned the Commission is satisfied that all property of the dissolved authorities – whether real or personal, tangible or intangible – is vested in the new authorities under those provisions, since there is no disposition of any residual property of those dissolved authorities elsewhere in the Reorganisation Order.

21 Because of the uniform usage of 'property, real and personal" throughout the Reorganisation Order, the Commission does not consider that the effect of clause 194 can be confined to tangible property only..

22 The Commission considers that the revesting right is a contractual chose in action (a property right which can only be enforced by proceedings in Court), making it the personal property of the former WHB.

23 In the Commission's view, all property, including intangible property, vested in the WHB on 31 October 1989 was disposed of under clause 194. *Accordingly, the Commission is satisfied that the revesting right was personal property vested in the WHB as at 31 October 1989 and was disposed of in accordance with clause 194.*

Was the revesting right situated in the district of the Wellington City Council?

24 Under clause 194(3) the revesting right vested in the WCC only if it was situated in the district of the WCC'.

25 The WRC in its submission, states with respect to the revesting right:

"Such rights, if they he described as property, do not have any location".

26 The WCC states in its submission:

"As shown at paragraph 2.4, the reclaimed land was and is situated in the district of WCC and is adjacent to Wellington Harbour. The disputed right is intimately connected with this land It is possible to argue that an interest in land, as opposed lo land itself, cannot be *"situated" anywhere, because an interest is by its very nature a form of intangible property. However, if the intention of the Commission was to confine clause 194(3) to actual land (or land which the Board he/d a freehold* **interest)**, *it could have easily have done so by using language to this effect.*".

27 The WCC also submits that the purpose of clause 194(3) is to vest ownership of *any* Harbour Board property which is adjacent to the sea within the district of the territorial authority in that territorial authority and that the wider purpose is to ensure that on the abolition of the WHB, the territorial authority is the owner of these assets. The WCC concludes:

"*In light of this purpose, clause 194(3) should be interpreted as covering not only tangible property which is physically situated in the district of a territorial authority and adjacent to the harbour or the sea; but also intangible interests in property which is in the district of a territorial authority and adjacent to a harbour or the sea.*".

28 The Commission notes that other provisions of the Reorganisation Order dispose of property of the former Porirua, Upper Hutt, Wellington and Lower Kutt City Councils by reference to where the property is situated, using similar language to clause 194(3) ("property.. situated in"). Those provisions make no distinction between tangible and intangible property and therefore require that a location be attributed to intangible property in any determination of the disposition of the property. The Commission. considers that the same interpretation must be applied to clause 194(3) and therefore that a location must be attributed to the revesting right to ascertain whether or not it vested in the WCC under that clause.

29 The revesting right entitles the WHB to reacquire the sections 89 and 90 Watts Peninsula District when they become surplus for defence purposes. 'The Commission is of the view that the revesting right must be treated as situated where the land is situated.

30 *Given that sections 89 and 90 Watts Peninsula District are situated in the territorial* district *of the WCC', the Commission is therefore satisfied that the revesting right was property situated in that district.*

Was the revesting right property which is adjacent to the harbour or sea?

71 Being satisfied that the revesting right is attributed to a physical location, the final issue for the Commission to consider is whether sections 89 and 90 watts Peninsula District are located adjacent to the harbour or sea.

32 The Commission notes that the land at issue is located on the seaward side of the legal road at Shelly Bay.

33 In its submission the WRC accepts that section 90 and the part of section 89 on the seaward side of the formed road are adjacent to the harbour. In respect of that land the Commission is therefore satisfied that the elements of clause 194(3) are met.

34 The WRC does, however, raise concerns regarding the land on the inland side of the formed road. In its reply to submissions made by the WCC the WRC submits:

"Had the road been legalised, us the Crown was entitled to expect and require under the 1983 agreement, WHB would have succeeded to two parcels of land, one of the seaward side of the road and one inland. WCC would have succeeded only to the seaward land. WRC would have succeeded to the inland parcel as it did in other parts of Wellington City. Evans Bay is an example The Signallers Grove subdivision was of land (to which WRC succeeded) to the landward side of Evans Bay Road. Land to the seaward side was vested in WCC."

35 The Commission notes that the subdivision of land to the landward side of Evans Bay Road is known as "Treasure Grove", not "Signallers Grove". Signallers Grove is accessed from 'Beacon Hill Road. The name of the subdivision is immaterial to the Commission's deliberations. It is raised only to ensure that the subdivision referred to in the WRC submission is correctly identified.

36 The Commission also notes that if the proposed legalised road. were to proceed both the seaward and inland parts of the residue of section 89 Watts Peninsula District remain as part of SO 32424 and are described accordingly in. SO 33633-33635. *Therefore, the Commission considers that the revesting right applied to all of Part Section 89 SO 32424, i.e. the seaward and inland parts of . section 89 together, rather than us separate parcels.*

OVERALL CONSIDERATION

3'7 Having assessed that the elements of clauses 194(1) and 194(3) of the Reorganisation Order have been satisfied the Commission is of the view that the revesting right vested in the WCC in accordance with clause 194(3) of the Reorganisation Order.

38 The Commission does not consider that it is necessary to utilise the provisions of section 372220 of the Act amend the reorganisation scheme, given effect to by the Reorganisation Order.

GENERAL COMMENT

39 The Commission notes that the dispute between the Councils regarding the entitlement to the revesting right has developed over a number of years, The dispute has had an impact on the ability of the NZDF to progress its work on disposing of land no longer required by it at Shelly Bay. The Commission hopes that this determination will enable the disposal process to be advanced to a satisfactory conclusion.

40 The Commission acknowledges the comments *made in* the WCC submission in reply to the WRC which states:

"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.".

The Commission does not consider it appropriate to include such a condition in its determination. The WCC may make its offer directly to the WRC if it so wishes.

DETERMINATION

41 Pursuant to clause 194(4) of the Local Government (Wellington Region) Reorganisation Order 1989 the Local Government Commission makes the following determination -

Whereas the Wellington Harbour Board entered into an agreement with the Crown in December 1983 providing the Wellington Harbour Board with the right to be revested with land, legally described as sections 89 and 90 Watts Peninsula District, once that land is no longer required for defence purposes;

And there is a dispute between the Wellington City Council and the Wellington Regional Council over whether the revesting right vested in the Wellington City Council under the provisions of the Local Government (Wellington Region) Reorganisation Order 1989;

The Commission, being satisfied that the revesting right is

(a) property, real and personal, vested in the Wellington Harbour Board as at the 31st day of October 1989;
(b) situated in the district of the Wellington City Council as constituted by the Reorganisation Order; and
(c) located adjacent to Wellington Harbour;

hereby determines that the revesting right did vest in the Wellington City Council in accordance with clause 194(3) of the Local Government (Wellington Region) Reorganisation Order 1989.

THE LOCAL GOVERNMENT COMMISSION

Grant Kirby (Chairman)

Linda Constable (Member)

Kerry Marshall (Member)

22 May 2002