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Section 32 Report Proposed District Plan Variation 11

Amendments to Proposed District Plan
Change 48 (Central Area Review) –
Wellington Waterfront

December 2008

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SECTION 32 REPORT

PROPOSED DISTRICT PLAN VARIATION 11 AMENDMENTS TO PROPOSED DISTRICT PLAN CHANGE 48 (CENTRAL AREA REVIEW) – WELLINGTON WATERFRONT

Introduction

Before a proposed District Plan variation is publicly notified the Council is required under section 32 of the Resource Management Act 1991 (the Act) to carry out an evaluation of the proposed variation and prepare a report. As prescribed in section 32 of the Act:

An evaluation must examine:

- (a) the extent to which each objective is the most appropriate way to achieve the purpose of the Act; and*
- (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.*

An evaluation must also take into account:

- (a) the benefits and costs of policies, rules, or other methods; and*
- (b) 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.*

Benefits and costs are defined as including benefits and costs of any kind, whether monetary or non-monetary.

A report must be prepared summarising the evaluation and giving reasons for the evaluation. The report must be available for public inspection at the time the proposed variation is publicly notified.

In carrying out a Section 32 analysis, the purpose and principles of the Act must be taken into account. Section 5 sets out the purpose of Act, which is to promote the sustainable management of natural and physical resources. Sustainable management includes managing the use, development, and protection of natural and physical resources to enable people and communities to provide for their social, economic and cultural

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wellbeing and for their health and safety. In achieving this purpose, the Council must also refer to both matters of national importance identified in section 6 and other matters referred to in section 7.

Also, in terms of section 76(3) of the Act when making a rule, the Council shall have regard to the actual and potential effect on the environment of activities including, in particular, any adverse effect.

Background

From a statutory District Plan perspective the Wellington waterfront has been subject to long and extensive processes to determine appropriate provisions to manage development commencing with the Combined Scheme in 1989 through to the District Plan proposals under the Resource Management Act, 1994-2000.

In 2000 the Council commenced work on the preparation of a non statutory framework for the waterfront area. The Waterfront Framework which was adopted in April 2001 sets out the vision, values and principles that have continued to guide the ongoing development of the waterfront.

The current Operative District Plan provisions were developed with reference to the framework and promulgated as Proposed Variation 22 in August 2001. This variation generated over 100 submissions and resulted in only one appeal relating to the existing buildings on Queens Wharf. The variation proposals were adopted into the Plan in July 2004.

More recently the waterfront area was subject to review under District Plan Change 48 (Central Area Review) which was notified in September 2006. This review raised few submissions relating to the waterfront and no specific waterfront appeals were lodged.

In light of this planning history and the comprehensive nature of both the Variation 22 and District Plan Change 48 processes it was accepted that the waterfront provisions were in accordance with the legislation and were working appropriately to give effect to Council's policy as expressed in the Waterfront Framework (April 2001).

However, on 14 March 2008 the Environment Court issued its decision on the resource consent appeals relating to the proposal to construct a new Hilton hotel on the Outer-T of Queens Wharf (Decision No 015/2008). This decision raised important issues relevant to the operation of the existing District Plan provisions and the future determination of resource consents on the waterfront.

With regard to the District Plan the Court found that provisions that purport to incorporate the Waterfront Framework into the Operative District Plan were *ultra vires* or beyond the law. Specifically this related to:

- The provisions that refer to the Waterfront Framework as a design guide (meaning a design guides similar to the existing guides in Volume 2 of the District Plan)

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- The references to the Waterfront Framework applying as assessment criteria for the consideration of resource consent applications.

The decision also commented on various matters relating to the protection of both public and private views. On this matter the height and bulk of buildings are the most important considerations. Currently a zero height limit applies over most of the waterfront. This limit was imposed as a trigger to activate resource consents for new building development and not as a means to prevent development. It is now considered that to continue with a zero height limit in areas of the waterfront identified for development would be problematic. As a zero height limit provides no permitted baseline for the assessment of resource consents it is possible that future resource consent applications could face significant planning and legal obstacles if issues such as building height and the intensity of development were to be raised by submitters.

To activate the original intention of devising tailored District Plan provisions for identified areas on the waterfront and to address the issues arising from the *Hilton* decision it has been recommended that appropriate changes to the District Plan be initiated before further resource consent applications for new developments are made.

The following six key amendments and additions have been proposed which form the substance of Proposed Variation 11:

- The removal of references in the policies to the Waterfront Framework being a design guide.
- The inclusion of more detailed policy provisions for future building development within the waterfront and in particular the North Kumutoto area.
- The inclusion of a new policy and rules to ensure that the ground floors of buildings are predominantly accessible by the public and have active edges to significant public and open space areas.
- The inclusion of a specific rule (Rule 13.3.4A) to provide for new development in identified areas on the waterfront as a non-notified Discretionary Activity (Restricted) application in accordance with building height and footprint requirements.
- The inclusion of new design guide provisions to provide for the assessment of applications for new building development and the development of related public spaces within the North Kumutoto area.
- The amendment of Rule 13.4.7 to make it clear that any building development within an identified area that is not covered by the Discretionary Activity (Restricted) provisions will require consent as a Discretionary Activity (Unrestricted).

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As Proposed Variation 11 is essentially about ensuring the effective operation of existing District Plan and the proposed changes and amendments reflect standard planning approaches that have been well tried and tested over a long period this report has been limited to the following two options:

1. maintaining the status quo, i.e. doing nothing and retaining the provisions as currently drafted.
2. Amending and adding to the existing provisions to ensure they are legally sustainable and will provide appropriately for new development in defined areas of the waterfront.

Consultation

Consultation was undertaken with statutory agencies as required under Clause 3 of Schedule 1 of the Resource Management Act 1991 (RMA) involving:

- Minister for the Environment
- Nga Runanga O Ngati Toa
- The Wellington Tenth Trust
- Greater Wellington Regional Council
- Porirua City Council
- Hutt City Council

Key Documents

The primary documents considered were:

The Wellington City District Plan – Operative 27 July 2000.
Proposed District Plan Change 48 – Central Area Review
Proposed District Plan Change 48 – Section 32 Report
The Wellington Waterfront Framework, April 2001
North Queens Wharf Brief Development (compilation of documents including Waterfront Development Sub-Committee reports and urban design studies.
Building Visualisations for the North Kumutoto Area, Boffa Miskell, August 2008.
Heritage Values, North Kumutoto Area – R&D Architects, 18 June 2008.
Validity of Redevelopment at ‘North’ Kumutoto, WCC, November 2008

Appropriateness of objective to achieve the purpose of the Act

As Proposed Variation 11 does not involve any change or amendment to the existing District Plan objectives, no evaluation has been made in this regard.

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Efficiency/Effectiveness – Benefits/Costs of Policies, Rules or Other Methods

In considering whether having regard to their efficiency and effectiveness, the proposed provisions are the most appropriate for achieving the objectives for the waterfront the following two options were evaluated:

Option 1. Status Quo – Do nothing - retain existing provisions

Option 2. Change and amend the existing provisions as detailed in the Variation 11 proposals.

Option 1 – Status Quo (Do nothing)

Explanation

Under Option 1 the following key provisions under District Plan Change 48 would remain unaltered:

- The references to Waterfront Framework being a design guide in the Policies 12.2.8.3, 12.2.8.5 and 12.2.8.6.
- Policy 12.2.8.6 which includes generic design requirements for the management of developments in the waterfront character areas including the North Kumutoto area.
- Rule 13.4. 5 providing for the development of new or the modification of existing open space in the Lambton Harbour Area as a Discretionary Activity (Unrestricted).
- Rule 13.4.7 providing for the construction of new buildings and structures, or the alteration of, and addition to existing buildings and structures in the Lambton Harbour Area as a Discretionary Activity (Unrestricted).
- A zero height limit for all new building development on the waterfront as shown on District Plan Maps 32 and 32A.

Efficiency and Effectiveness

The efficiency and effectiveness of the existing provisions has been considered in light of the Council's publicly approved policy of providing for new development on the waterfront as expressed in the Waterfront Framework (April 2001) and in light of the recent Environment Court decision in the *Hilton* case.

In general, the District Plan provisions for the waterfront under District Plan Change 48 are standard tools or methods for implementing planning or resource management

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policies. They have been tried and tested over a long period of time and to this extent can be considered to be efficient and effective. They have evolved through extensive plan change and review processes and have been widely supported.

In particular the requirement that all new building development and the development of all open space areas on the waterfront be a Discretionary Activity (Unrestricted) was agreed to provide the certainty that nothing would happen on the waterfront without the opportunity for public involvement. In the absence of specific design proposals that could be implemented through less restrictive provisions while retaining the desired level of public confidence as to the design outcomes it is believed that the existing Discretionary (Unrestricted) approach provides an effective and efficient means of implementing the waterfront proposals. The public nature and measured pace of development on the waterfront has not been unduly frustrated by the necessity to publicly notify proposals and the expectation of full public involvement in the consent process has been met.

One unusual feature of the existing controls is the zero height limit for all areas of the waterfront except land occupied by existing buildings which have height limits reflecting existing building heights. The zero height limit was originally imposed as a 'trigger' to require resource consents for all new development. This mechanism was to ensure public notification and provide the opportunity for the public to be involved in the consent process. It was not intended as a mechanism to prevent development. To this end the zero height limit has been successful and has worked effectively.

Notwithstanding the above it has now been determined that the references in the policies to the waterfront framework being a design guide are *ultra vires* and there are issues with retaining a zero height limit in areas where development is proposed.

Unless these issues are addressed the continued operation of the existing District Plan Change 48 provisions would undermine the efficiency and effectiveness of providing for new development in identified areas on the waterfront.

Knowingly retaining policy provisions deemed *ultra vires* would most certainly result in legal challenges to future development proposals and the resulting litigation would be time consuming and costly. It would also create uncertainty for development and frustrate the completion of the waterfront plans. Efficient and effective District Plan provisions must first and foremost be in accordance with the law to ensure that the determination of applications under the rules are based on the planning and resource management merits of a proposal and not necessarily on legal concerns.

The retention of the zero height limit in proposed development areas may also generate potential legal and planning challenges on the grounds that the absence of a permitted base line should be applied so as to prevent development. This would similarly result in time consuming and costly litigation and ongoing uncertainty for development.

Overall the efficiency and effectiveness of the Plan would be significantly compromised by retaining defective provisions without amendment. Not only would administrative and compliance costs be increased but the air of regulatory uncertainty

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that would prevail would frustrate the achievement of agreed waterfront objectives on both the District Plan and the Waterfront Framework.

Option 2 – Change and amend the existing provisions

Explanation

Under Option 2 the following key amendments are proposed:

- The removal of references in the policies to the Waterfront Framework being a design guide.
- The inclusion of more detailed policy provisions for future building development within the waterfront and in particular the North Kumutoto area.
- The inclusion of a new policy and rules to ensure that the ground floors of buildings are predominantly accessible by the public and have active edges to significant public and open space areas.
- The inclusion of a specific rule (Rule 13.3.4A) to provide for new development in identified areas on the waterfront as a non-notified Discretionary Activity (Restricted) application in accordance with building height and footprint requirements.
- The inclusion of new design guide provisions to provide for the assessment of applications for new building development and the development of related public spaces within the North Kumutoto area.
- The amendment of Rule 13.4.7 to make it clear that any building development within an identified area that is not covered by the Discretionary Activity (Restricted) provisions will require consent as a Discretionary Activity (Unrestricted).

Efficiency and Effectiveness

The overriding intent of the changes and amendments proposed under Option 2 is to ensure that the waterfront provisions are legally sound and will work appropriately to achieve the objectives of the District Plan and the Council's Waterfront Framework.

The removal of the references in the policies to the Waterfront Framework being a design guide will resolve the legal issues in this regard and therefore promote the more efficient and effective operation of the Plan by avoiding future litigation on this matter.

The remaining proposals are focused primarily on establishing a framework to provide for future development within identified areas of the waterfront. These include:

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- New Policy 12.2.8.6A providing for the site planning and design of new buildings and related public spaces.
- New Policy 12.2.8.6B requiring design excellence for developments within the North Kumutoto identified area.
- New Rule 13.3.4A providing for the construction of new buildings and structures to specified standards and the development of new open space as a Discretionary Activity (Restricted) including a presumption for the non-notification of resource consent applications.
- New Policy 12.2.8.6C and related rules requiring ground floor accessibility and active edges for any building in the Lambton Harbour area.

From a broad perspective these provisions reflect existing provisions in District Plan Change 48 which have recently been endorsed through a public review process and in turn reflect longstanding methods of regulating land use in the city. To this extent it is considered that they provide a sound and acceptable means for managing future development on the waterfront in an efficient and effective manner. The provisions will enable the widely held public expectations for the development of the waterfront in accordance with the District Plan and the Waterfront Framework (2001) to be fulfilled whilst ensuring that that key site development and design issues are appropriately managed.

While proposed Rule 13.3.4A will change the status of resource consent applications in identified areas from Discretionary (Unrestricted) to Discretionary (Restricted) with a presumption for the non-notification of resource consent applications it is not believed that this will undermine the ability of interested parties to be involved in the planning of the waterfront. Public involvement is a key principle of the Waterfront Framework (2001) and reflected in the District Plan policies. Under the proposed Variation 11 regime the primary opportunity for involvement will move from the resource consent stage to the plan formulation stage. The necessary variations or plan changes to introduce specific provisions in identified areas will enable involvement at the planning stage. Subsequent resource consents under Rule 13.3.4A will deal with matters of detail in line with the agreed development constraints. This is a normal and acceptable approach employed elsewhere in the city and one that will be effective and efficient in providing for the completion of the waterfront project.

An important aspect of the proposed provisions is that they only apply to specifically identified areas for development on the waterfront. The existing District Plan rules will continue to apply to all areas outside the identified areas. As the North Kumutoto area has been programmed for more immediate development the opportunity has been taken as part of Proposed Variation 11 to apply new provisions to this area. It is intended that specific provisions for other identified areas will be introduced through plan change or variation processes in the future.

For the North Kumutoto area a comprehensive planning and urban design assessment was undertaken to establish the parameters for development and the specific development constraints that will apply (refer to the Attachment 1, report entitled

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Validity of Redevelopment at 'North' Kumutoto, November 2008). The investigation and analysis in this report has supported the following key District Plan requirements:

- An appendix plan showing the boundaries of the North Kumutoto area to which Rule 13.3.4A will apply including building height limits and identified building footprint areas.
- Specific design guide provisions for the North Kumutoto area to be included in the Central Area Urban Design Guide for the assessment of all new buildings and the development of related public spaces.

In terms of their efficiency and effectiveness the appendix plan provisions will establish measurable standards or baselines against which future development proposals can be assessed. They will determine the general form and scale of building development that is considered appropriate for the area in light of the urban design analysis that has been undertaken. Importantly, the standards will provide reasonable certainty regarding the maximum extent of proposed new development. The assessment of development proposals against prescribed standards is a longstanding planning/resource management practice and provides an efficient and effective means of managing the effects of development.

The proposed design guides on the other hand apply more qualitative 'tests' are relatively recent additions to the District Plan. However, as a method, design guides have been endorsed through various District Plan review and plan change processes and are now an accepted regulatory component of the District Plan. As a sub-component of the existing Central Area Urban Design Guide it is considered that the proposed North Kumutoto Design Guide will work appropriately in unison with other rules to achieve the design focussed policies for the waterfront.

With regard to the use of the ground floor of buildings on the waterfront it is a key principle of the Waterfront Framework that the ground floor of buildings will be predominantly accessible to the public. This is supported by the current District Plan policies which include an explanation to the effect that ground floors will be predominantly accessible to the public and will have 'active edges'. There is however no specific requirement in the Plan to achieve this outcome.

It is therefore proposed to include a new policy (Policy 12.2.8.6C) and related standard 13.6.1.23 to address this issue. While the Council, as land owner, would retain some ability to require the public use of ground floor areas this would not achieve the level of certainty that could be gained through regulation. The proposed new provisions will provide greater assurance to the users of the waterfront that over time the key principle of public accessibility will be upheld.

Section 76 (3) requirement

In terms of section 76(3) of the Act when making a rule, the Council shall have regard to the actual and potential effect on the environment of activities including, in particular, any adverse effect.

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In this case the primary rule is to provide for the management of new building development on the waterfront and specifically in the North Kumutoto area.

With regard to the effects of future building development consideration has been given to both wider contextual matters and more localised site development issues.

Contextually, the waterfront forms an integral part of the central area zoning under the District Plan which provides for a wide diversity of activities within an intensive urban form. New building development on the waterfront would not therefore be inconsistent with the existing central area environment and any effects would relate generally to those arising from normal central city building activity.

However, the waterfront does occupy a special location on the interface between the city and the sea and from a planning perspective has therefore been subject to more restrictive provisions over a long period. These restrictions have been underpinned by urban design objectives supporting a built form that steps up from the waters edge and the provisions of the Waterfront Framework (2001) that promotes the development of a high quality public environment with a range of recreational, residential and business activities.

Although most of the waterfront is to remain as open public space there is an allowance for new building development. Specifically with regard to the North Queens Wharf area the Waterfront Framework acknowledges that this area has a strong connection to the city's Central Business District which is to be reflected with a stronger sense of the city form being developed in this area through a higher proportion of buildings than the rest of the waterfront.

Within this context, detailed consideration has been given to the effects of proposed development in the North Kumutoto area with regard to the following:

- Building height, bulk and location
- Building design/visual amenity
- Sunlight and daylight protection
- View protection
- Coastal yards
- Heritage

The planning and urban design analysis is supportive of development to the extent prescribed as a Discretionary Activity (Restricted) as all key effects would be appropriately managed. Existing site constraints (viewshafts, coastal yards and sunlight protection areas) are recognised and the potential mass of development on the identified building sites would respect the scale of surrounding development. In particular the proposed height limits provide acceptable transitions and retain reasonable view protection for central area properties to the west. The design guide provisions will work to ensure a high standard of visual amenity and a sympathetic relationship between new buildings and existing heritage buildings.

To provide the opportunity for buildings of excellence that may exceed the discretionary restricted limits provision is made for larger developments to be

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considered as a Discretionary Activity (Unrestricted). This will enable the effects of proposals to be fully assessed.

Benefits and Costs

The key benefits and costs of Options 1 and 2 are summarised as follows:

	Option 1 - Status quo – retain existing provisions	Option 2 – Amend existing provisions and include new policies and rules for identified areas and ground floor accessibility
Appropriateness		
Environmental costs	Under Option 1 developments are a Discretionary Activity (Unrestricted) which enables all relevant matters to be assessed but the lack of specific provisions defining intended development outcomes may potentially compromise the design and environmental quality of waterfront development.	Under Option 2 Existing waterfront/harbour views (established as a result of building demolition) would be obscured and there would be additional shading of open spaces.
Environmental benefits	The Discretionary (Unrestricted) approach enables: <ul style="list-style-type: none"> • The appropriate management of potential adverse effects including building height and design. • The development of visually attractive areas in accordance with the objectives and policies of the District Plan. • The recognition of historic heritage. 	Option 2 would provide for: <ul style="list-style-type: none"> • The appropriate management of potential adverse effects including building height and design. • The development of visually attractive areas in accordance with the objectives and enhanced policies in the District Plan. • The recognition of historic heritage.
Social costs	The perceived loss of public open space land. Actual loss of accessible public space if ground floor of buildings are not predominantly accessible to the public	The perceived loss of public open space. Actual loss of accessible public space if ground floor of buildings are not predominantly accessible to the public
Social benefits	The Discretionary (Unrestricted) approach will enable the development of: <ul style="list-style-type: none"> • Attractive ‘people places’ for residential, business and recreational purposes • enhanced public safety with ‘eyes on open spaces’. • Improved comfort levels – weather protection to enable people to enjoy city life on the waterfront. • Improved pedestrian connections. • Accessible public space on 	The proposed new provisions will promote the development of: <ul style="list-style-type: none"> • Attractive ‘people places’ for residential, business and recreational purposes. • Enhanced public safety with ‘eyes on open spaces’. • Improved comfort levels – weather protection to enable people to enjoy city life on the waterfront. • Improved pedestrian connections.

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	the ground floor of buildings	<ul style="list-style-type: none"> • Accessible public space on the ground floor of buildings, but more likely with specific policy and standards.
Economic costs	The implementation of provisions deemed <i>ultra vires</i> would most likely result in legal challenges that would frustrate the completion of the waterfront project and the realisation of the economic benefits to the city that would accrue.	No perceived economic costs.
Economic benefits	<p>The development of identified areas in part for commercial purposes will contribute to the cost of developing public open space within the waterfront area.</p> <p>High quality development will enhance the waterfront as an events and tourist destination thereby supporting Wellington's economy.</p>	<p>The development of identified areas in part for commercial purposes will contribute to the cost of developing public open space within the waterfront area.</p> <p>High quality development will enhance the waterfront as an events and tourist destination thereby supporting Wellington's economy.</p>
Administrative/implementation costs	<p>Application costs for a Discretionary Activity (Unrestricted) resource consent will be incurred.</p> <p>The existing provisions deemed <i>ultra vires</i> or otherwise challengeable would create uncertainty for all stakeholders and increase the potential for litigation.</p>	<p>Application costs for a Discretionary Activity (Restricted) resource consent will be incurred.</p> <p>Less likelihood of publicly notified processes at the resource consent stage.</p>
Administrative/implementation benefits	There would be a short term benefit of preceding with resource consent applications without initiating a District Plan variation .	<p>Amended provisions that are legally valid and more explicit in terms of policy/ rule content will provide greater certainty for all stakeholders and minimise potential litigation.</p> <p>Proposed Discretionary (Restricted) provisions will facilitate the implementation of the waterfront proposals.</p>

Recommendation

With regard to the above it is considered that the option of amending the waterfront provisions and providing new policies and rules for the assessment of development in identified areas provides the most appropriate regulatory course and is recommended for adoption.

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The Risk of Acting or Not Acting

The evaluation under section 32 must consider the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the proposed approach. In this case, it is considered that there is sufficient information available to further both the plan change and variation. It is therefore considered that there is a very low risk of any untoward outcomes resulting from the adoption and implementation of the plan change and variation.

Conclusion

Recent events relating to the ongoing planning and development of the waterfront have prompted a need to change the District Plan by way of a variation to DPC 48. An assessment of the main options has shown that the proposals put forward as Option 2 will more effectively and efficiently achieve the relevant provisions of Part 2 of the Resource Management Act 1991, the objectives of the District Plan and the outcomes sought under the Waterfront Framework 2001. The Option 2 proposals are therefore recommended for adoption.