

**AGENDA FOR A MEETING OF THE PLANNING AND REGULATORY COMMITTEE TO BE
HELD AT WAITAKERE CENTRAL, 6 HENDERSON VALLEY ROAD, HENDERSON,
WAITAKERE, ON TUESDAY, 8 MAY 2007 COMMENCING AT 9.30 AM**

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PART A - OPENING OF MEETING

1 APOLOGIES



2 URGENT BUSINESS

Section 46A(7) of the Local Government Official Information and Meetings Act 1987 provides that where an item of business is not on the agenda, it may only be dealt with at the meeting if:

- (i) the Committee by resolution so decides; and
- (ii) the Chairman has explained at the beginning of the meeting (when open to the public) that the item will be raised for discussion and decision, why the item is not on the agenda, and why it cannot be delayed until a subsequent meeting.

The Committee may make a decision on a matter determined to be urgent.

NOTE: Urgent Business need not be dealt with now and may be delayed until later in the meeting.



3 CONFIRMATION OF MINUTES

Meeting Minutes - Tuesday, 10 April 2007
Hearing Minutes - Tuesday, 10 April 2007

RECOMMENDATION

That the minutes of the Meeting of the Planning and Regulatory Committee held on Tuesday, 10 April 2007 and the minutes of the Planning and Regulatory Committee (To Hear Submissions on Plan Change 23), as circulated, be taken as read and now be confirmed.



PART B - REGULATORY / ENFORCEMENT

4 LEGAL UPDATE (AS AT 27 APRIL 2007)

INTRODUCTION

The following is a list of legal actions in respect of matters which are currently before the Courts and which are ongoing or have been commenced since the date of the preceding report. The list does not include minor prosecutions for dogs, swimming pools, health, parking, and litter although advice on any particular such prosecution can be provided to the Planning and Regulatory Committee if it wishes. References to Council's District Plan were not included in previous reports but will be included separately under the Environment Court heading in all future reports.

COURT OF APPEAL

***(Unchanged)* Carter Holt Harvey v Waitakere City Council, North Shore City Council and Rodney District Council (April 2006)**

Councillors are already aware that Justice Asher handed down a decision on these matters on Monday, 3 April 2006 and they have been given a report in respect of the decision. One of the aspects of the decision was Justice Asher's confirmation that in relation to the challenge by Carter Holt Harvey to the licensing provisions of the bylaw, that paper destined to recycling was "waste" for the purposes of both the bylaw and the Local Government Act 1974, and that the Local Government Act 1974 expressly authorised the proposed licensing regime. Carter Holt Harvey has appealed this aspect of the decision and is proceeding with the appeal. The matter is set down in the Court of Appeal for 14 June 2007 at 10.00 am. The decision on costs from the High Court has been reserved until the matter is heard before the Court of Appeal.

HIGH COURT

***(Changed)* Waitakere City Council v C P Brunel and the Cove Limited (December 2006)**

Council commenced a process to take land under the Public Works Act 1981 for a carpark at the Westpark Marina boatramp. The owners objected to the Environment Court which held that the Council could not take land. Council appealed and the High Court overturned the decision and declared that the Council could take the land.

A claim by Council for costs for both hearings has been made. In the meantime the property owners have applied for leave to appeal, which was argued on 19 March 2007. The Court has declined to grant Brunel and the Cove's application for leave to appeal.

More recently, there have been negotiations towards settlement of the purchase of the properties. The negotiations have been successful and the Council now owns the land, but with some minor compensation issues unresolved, including the costs issues. Hopefully the outstanding issues can be resolved with minimum disagreement.

***(Changed)* C W Williams and others v Waitakere City Council (February 2006)**

Council has been served with seven sets of proceedings under the Public Works Act in the High Court claiming Council breached its duty to offer back land on the Te Atatu Peninsula bordering the Waitemata Harbour. Council filed applications to strike out the various claims on the basis that the events which triggered an obligation under the Public Works Act occurred prior to the offer back obligation coming into force.

Associate Judge Faire declined the applications in a decision delivered on Thursday, 19 October 2006. An application to review the Associate Judge's decision was heard before Williams J on 26 February 2007. We are awaiting a decision.

Shortly before Christmas, Council filed requests for further and better particulars in relation to all proceedings. The plaintiffs had until 16 February 2007 to respond to our request; they are now out of time. The Court is likely to take this into consideration when issuing its decision. The plaintiffs may consider a response to our request for further and better particulars after the decision has been released.

Substantive hearings involving Mr Mawhinney

(Changed) **P W Mawhinney (substituted plaintiff) v Waitakere City Council (February 2002) (Civil Proceedings)**

The judgment of Fogarty J in relation to Council's strike out application was released on 14 September 2006. The result was a complete success for Council. The Court held that there was no prospect of any of Mr Mawhinney's causes of action succeeding and the claim was struck out in its entirety. The Judgment also contains some helpful remarks about the ability to bring actions based on common law duties against local authorities generally.

A substantial costs application in respect of the proceedings from 1999 to date has been lodged with the Court. Further submissions have been sought by the Court from the parties in respect of recent case-law as to higher costs awards. Council has filed further submissions. Mr Mawhinney filed and served a reply on 26 April 2007, in accordance with the Court's directions. The Council had until 30 April 2007 to file any further submissions in reply. The Court has indicated that a decision will be made thereafter.

(Unchanged) **Mawhinney and Glorit Subdivision Limited v Waitakere City Council (February 2006)**

A further appeal in the High Court by Glorit Subdivision Limited/Peter Mawhinney in relation to a refusal by Council to issue Certificates of Compliance for boundary changes to 27 separate Certificates of Title. This appeal was struck out by the Environment Court in December 2005 and Mr Mawhinney's application to be reheard has also been dismissed by Judge Shepherd in the Environment Court.

Both decisions have been appealed to the High Court. The matter has not yet been set down for hearing in the High Court. Mr Mawhinney has lodged security of costs of \$1,500. Subsequently, Glorit Subdivision Limited has been wound up, which Mr Mawhinney was a sole director and shareholder of.

Debt Recovery proceedings involving Mr Mawhinney

(Changed) **Waitakere City Council v P W Mawhinney (February 2006)**

The Council issued a bankruptcy notice against Mr Mawhinney to recover payment of unpaid costs and disbursements awarded to Council in March 2006. The Council was required to obtain substituted service orders as Mr Mawhinney was avoiding service. Mr Mawhinney paid the debt and costs of \$3,475 in accordance with the bankruptcy notice. The Council sought indemnity costs against Mr Mawhinney due to additional costs incurred by Council for being forced to make an application for substituted service. This application was heard on 31 January 2007 before Associate Judge Doogue.

On 12 February 2007, Associate Judge Doogue delivered his judgment awarding Council full indemnity costs of \$2,598 against Mr Mawhinney, plus Council's disbursements. A bankruptcy notice will be served on Mr Mawhinney for these costs in the week of 30 April 2007.

(Changed) Waitakere City Council v Glorit Subdivision Limited (March 2006)

Council has been seeking to recover the costs awarded to it in these proceedings.

Mr Mawhinney's barrister had advised that Mr Mawhinney has no liquid assets to pay the debt. Despite this, Mr Mawhinney paid the judgment debt of \$14,290.50 plus costs for the bankruptcy notice on 28 March 2007. Mr Mawhinney's barrister advised Mr Mawhinney would not be paying the other outstanding costs owing to Council of \$1216.88. Kensington Swan, Council's solicitors in this matter will take further action to recover these costs for Council.

(New) West Auckland Enterprises Limited

Council has made a liquidation application to put West Auckland Enterprises Limited (formally Sunderland College Property Limited) into liquidation.

This company owes Council \$17,000 for unpaid resource consent hearing fees and has failed to comply with a statutory demand. The matter will first be called in Court on 5 July 2007.

ENVIRONMENT COURT

(Changed) Waitakere City Council v Estate Homes Limited (28 March 2002) (Ranui Station Road)

An appeal by Council to the High Court (from an Environment Court decision) regarding a decision by Council relating to a requirement to construct and vest Marinich Drive, an arterial road that passes through Estate Home's subdivision in Ranui Station Road. The appeal was heard before Justice Venning on 29 June 2004. A decision was received from the Court on 30 July 2004 in Council's favour. The decision reversed the decision of the Environment Court. Estate Homes was granted leave to appeal to the Court of Appeal (on two issues, out of an original seven pursued). Subsequently the Council appealed the Court of Appeal decision to the Supreme Court successfully.

The Supreme Court remitted the matter of compensation back to the Environment Court. The matter was scheduled for a review in the Environment Court chambers on 2 March 2007. The question is whether the compensation should be based on local/arterial road or collector/arterial road; Council has already paid compensation on a collector/arterial road basis. Estate Homes sought leave to call further evidence. The Council opposed the application on the basis that all relevant evidence had been called. The Court determined that a hearing would be required to determine the scope of the jurisdiction referred back to the Environment Court and therefore further evidence could be called. The Council is yet to receive any further evidence from Estate Homes, so some uncertainty exists as to what their proposed additional evidence might be, given that the Supreme Court decision is limited to the issues upon which the case was to be referred back on. The matter is set down to be heard on 28 May 2007.

(Changed) Ritchies Transport Holdings Limited, v Waitakere City Council, and Rex Campbell, Section 274 Party (September 2006)

This is an appeal against an abatement notice issued to the directors of Ritchies Transport Holdings Limited ("Ritchies"). The appeal relates to the requirement of the abatement notice to reduce the buses parked on the boundary, reduce daily traffic movements, undertake mitigation measures in respect of noise and ensure the hours of operation are between 6.00 am and 9.00 pm. The requirements are those set out in the Ritchies resource consent (RMA 991374). The appeal is on the grounds that the business enjoys existing-use rights, that the resource consent does not limit the number of vehicles, the vehicle movements, noise levels and hours of operation. An application for stay was concurrently filed with the notice of appeal. Mr Rex Campbell, a neighbour on the eastern boundary of Ritchies, has joined the proceedings as an interested party.

A judicial telephone conference was held between the parties to consider the application for stay on 27 September 2006. Mr Campbell, the Section 274 party joined the conference by consent. The Court granted the application for stay upon the agreement of all parties, including Mr Campbell, for a three-week period to permit the parties to resolve the appeal. As a result, the appeal has been put 'on hold'. The Council met with the parties on 16 October to resolve the appeals. As a result, the parties agreed for the stay to continue and that Ritchies would lodge resource consent (lodged on 9 January 2007) to address the matters raised in the abatement notice. The Council reported back to the Court on 30 March 2007 that the consent application was being processed, and notification of the application is pending. The Council is still in the process of receiving expert reports in support of the application. The Council will report back to the Court by 30 April 2007 as to progress. That progress report will outline that the applicant, Ritchie's, has sought an extension of time to submit further information as to acoustic issues.

**(Changed) David Paul Leaky v Waitakere City Council (May 2005)
All Seasons Properties Limited v Waitakere City Council (May 2006)**

These were appeals by two parties against a decision of Council to grant consent to a proposed medical centre located at 382, 384 and 386 Te Atatu Road and 9 Karamu Street, Te Atatu Peninsula. The activity is a non-complying activity. The appeals alleged that the location of these premises in a residential area would adversely affect the integrity of the District Plan. A hearing was held on 7 and 8 February 2007 and 2 March 2007. The Court has upheld Council's decision to grant consent, subject to a new condition for additional on site car parking being provided and agreed upon by the applicant and Council.

An application for costs has been filed on behalf of Council seeking costs against All Seasons Properties Limited and D Leakey. The applicant has also filed an application for costs against All Seasons Properties Limited and D Leakey.

In the interim the appellants, Four Seasons Properties Limited have filed an appeal in the High Court against the decision of the Environment Court. The Notice of Appeal contends that the Environment Court erred in its application of the permitted baseline test. The Notice of Appeal is being reviewed and a Notice of Reply will be filed and served on the next 15 days.

(Unchanged) R & G Britten - 19 Church Street, Swanson (October 2005)

An application by the Council for interim and final enforcement orders in respect of a land slip that occurred at the Britten's property in Church Street, Swanson. The Council seeks interim orders requiring the cessation of all vehicular use of the access road that was affected by the slip/instability and prohibiting any earthworks in the vicinity of the slip. Council sought final orders to require that the Britten's undertake appropriate remedial works to stabilise the affected area and to pay the costs incurred by the Council in its initial remedial operation undertaken in July/August 2005.

Separately and in parallel, the Council has initiated a mediation process with Mr Britten in an attempt to find an alternate resolution to expedite the matter. As a consequence of that process the parties are working towards concluding an agreement for the completion of remedial work in accordance with the Council resolution at its meeting held on Thursday 20 July 2006.

The enforcement proceedings are now 'on hold', with a further report to the Court required by 31 May 2007 to allow time for the proposed remedial earthworks (etc) to be completed.

**(Unchanged) Auckland Regional Council v Waitakere City Council (May 2005)
Waitakere Ranges Protection Society Incorporated v Waitakere City Council (May 2005) (“the Duncan appeal”)**

An appeal by the Auckland Regional Council and Waitakere Ranges Protection Society Incorporated against a decision of the Council to grant consent to a subdivision by M and K Duncan, relating to the property at 46 Christian Road, Swanson. Both the Auckland Regional Council and Waitakere Ranges Protection Society Incorporated oppose the consent on the basis of the density of the proposed subdivision and alleged precedent effect. These appeals have been on hold since September 2005, by direction of the Court, to allow time for resolution of the appeals on the Swanson Structure Plan. At a judicial conference held on 13 September 2006, the Court directed that these appeals be set down for hearing and has made timetabling orders for exchange of evidence.

The Council decided to abide by the Court’s decision and will call no evidence.

This appeal was heard on 12 and 13 March 2007. The Court has reserved its decision.

(Unchanged) M and C Brickell, W Ashton and L Schwab v Waitakere City Council (June 2005)

This is an appeal by the applicants M and C Brickell, W Ashton and L Schwab under Section 121 of the Resource Management Act 1991 against a decision of the Council to refuse to grant consent to a seven-lot subdivision at 54-56 Christian Road, Swanson. The Auckland Regional Council and Waitakere Ranges Protection Society Incorporated have lodged applications with the Court in support of the Council as Section 274 parties. This appeal was heard on 14 to 16 March 2007. The hearing will resume on 21 May 2007 to hear the evidence of a witness for one of the Section 274 parties who was not available during the March hearing.

Mawhinney Matters in the Environment Court

(Unchanged) Perceptus Limited and Swanson Heights Limited v Waitakere City Council, Waitakere Resource Consents Limited and Glorit Subdivision Limited v Waitakere City Council, and Glorit Subdivision Limited and London and Greenwich General Trading Company Limited v Waitakere City Council

These three appeals are laid by entities associated with Mr Mawhinney and/or his land interests against the Council’s decision under Section 358 of the Resource Management Act declining subdivision consents and certificates of compliance. Council has filed an application to strike out the appeals. Mr Mawhinney filed his submissions in opposition on 30 January 2007. The Court has placed these matters on hold until mid 2007.

(Unchanged) Waitakere Resource Consents Limited v Waitakere City Council (December 2005)

This is an appeal against a refusal to issue a certificate of compliance under Section 139 of the Resource Management Act. In essence the application contends that through a ‘sequence’ of activities, the establishment of 77 barns/residential units are a permitted activity under the District Plan. The application includes the creation of various ‘allotments’, the creation of barns and sheds, the conversion of barns to dwellings, terraces, decks and pergolas, earthworks, clearance of vegetation, driveways, establishment of lawn, and vesting of land as road.

The matter has been on hold for a considerable period pending the determination of Dilworth Structure Plan proceedings (RMA 886/98). The proceedings have recently been reactivated and Council has filed a strike out application with the Court. Mr Mawhinney has filed a notice of opposition. The Court has notified us that it is likely the strike out application will be heard in the week of 30 April 2007.

(Unchanged) Abacus Developments Ltd & Mawhinney v Waitakere City Council (February 2000)

This case has been placed in the 'on hold' list by the Environment Court, until the Dilworth Structure Plan proceedings (Resource Management Act 886/98) have been concluded.

Plan Change Hearings

(Unchanged) Te Atatu Residents' and Ratepayers' Association Incorporated (TARRA) v Waitakere City Council (2004)

TARRA appealed the Council's decision on the proposed Plan Change 2. This Plan Change concerns the identification and use of the Harbour View Orangihina park land. The Plan Change identifies the majority of the land as Open Space Environment and a 2.5ha area at the southern end of the park as Marae Special Area. TARRA opposed that identification and use of the land and seeks that the park be identified as distinct Special Area. The Court's decision was released on 1 March 2007. The Court has dismissed TARRA's appeal and confirmed Council's decision, subject to amendments being made to the assessment criteria (as suggested by Sarah Flynn at the hearing) to address ecological concerns, and other matters raised by the Court in its decision in respect of Rule 21.2(a). The Court has directed that Council confer with TARRA and present revised text for the relevant policy and rule to take account of the above matters by Friday, 27 April 2007 (this timeframe having been extended by Court).

(Unchanged) I and Z Farac v Waitakere City Council (March 2004)

A site-specific reference has been filed by Mr and Mrs Farac, relating to their property at 172A Don Buck Road, Massey. The appellants sought to rezone a greater part of the property as 'Living 2 Environment' (as opposed to "Living 4").

Subsequent to discussions and consultant input, the appellants and Council have agreed on the rezoning of part of the subject property from Living 4 to Living 2. Consent documentation is being prepared and will be filed shortly.

DISTRICT COURT

(Changed) J and P Cottingham - 122 Lone Kauri Road, Karekare (May 2006)

Charges were laid under the Resource Management Act and Building Act in respect of the use of numerous unauthorised minor household units on the site. The matter was set down for a first call on 11 December 2006. The matter was adjourned on 22 January 2007 with intimation that guilty pleas may be entered to some of the charges. The adjournment was also requested to permit the defendants to seek expert advice on use of their property and to meet with Council to consider what consent applications were necessary. The matter was called on 2 April 2007. One of the defendants, Mr P Cottingham pleaded guilty to a charge of permitting building work without consent. The other charges of contraventions of the Resource Management Act and charges against Mrs J Cottingham were withdrawn by the leave of the Court. The Resource Management Act contraventions are being addressed by negotiation. The defendants are seeking a determination from the Department of Building and Housing in respect of the Council's decision to decline their application for a certificate of acceptance for the illegal conversion of 4 household units at the property. For this reason sentencing is scheduled for 2 July 2007.

(Unchanged) Waitakere City Council, Fistonich, Walker - Henderson Valley and Laingholm Roads (August 2006)

This prosecution relates to the removal of six houses from the above addresses without building consent for the Twin Streams Project. The Council contracted out and approved the removal of the buildings without ensuring that building consents had been obtained prior to the removal. Fistonich and Walker are the contractors who undertook the removal of the houses without consent. The matter was set down for a first call on 1

December 2006. The Council entered a guilty plea. The other defendants entered guilty pleas on behalf of the company on 12 February 2007 and the charges against the directors personally were withdrawn. The companies will be sentenced in May 2007.

The Council was sentenced on 9 March 2007. It was \$4,800 plus costs. The Judge made some useful comments as to the importance of the prosecution for showing consistent administration of the Building Act.

(Changed) S and F Lese, S Nuuola - 50 Kelman Road, Kelston (August 2006)

Charges have been laid under the Building Act for internal alterations to the dwelling and excavation underneath the dwelling without building consent. The matter was called on 15 September 2006 but was adjourned to permit disclosure to be completed. The matter was called on 5 March 2007, but was adjourned to 30 April 2007 as the defendants had changed their Counsel and were not ready to enter a plea. A Meeting with the builder's solicitor indicates that a guilty plea may be entered by the builder on 30 April 2007.

(Unchanged) J Bell, G Payne - 3175 Great North Road (August 2006)

Charges have been laid under the Building Act for removal and replacement of pile foundations without building consent. The matter was called on 15 September 2006 but was adjourned to permit disclosure to be completed. The matter was called 1 December 2006; the defendants did not appear. The matter is set down to be formally proved on 5 March 2007 prior to sentencing taking place. The defendants again did not come into Court, but the Court has given them one more month to enter an appearance before sentencing. The matter is set down for 30 April 2007.

(Unchanged) G and Q Potts - 88 Wiseley Road, West Harbour (August 2006)

Charges have been laid under the Building Act for converting the house into two separate households. No consent has been obtained for this work. The defendants have been previously prosecuted and convicted for similar unauthorised work. The matter was called on 15 September 2006. Q Potts intimated a guilty plea but the matter was adjourned for him to seek legal advice. This was called on 5 March 2007. As a result of questions arising from the disclosure of the Council file, the Council and the Potts are going to go through the issues and then the Potts will decide how they wish to plead. The Court adjourned the matter to 30 April 2007.

(Unchanged) H K Graham - 11 Karaka Road, Whenuapai (July 2006)

Charges have been laid under the Resource Management Act and Building Act in respect of the use of numerous unauthorised minor household units on the site. There are also fire safety and insanitary (drainage facilities) issues at the site due to the buildings being used for residential purposes.

A defended hearing was held on 22 February 2007. Leave was given to both counsels for Council and the defendant to file written submissions which have occurred. The Court has reserved its decision.

(Unchanged) Graham W Gordon - 159A Scenic Drive, Titirangi (October 2005)

This matter relates to breaches of the Resource Management Act and Building Act. Both matters were called on 31 March 2006 at the Waitakere District Court. Mr Gordon entered a not guilty plea to both charges. The Resource Management Act matter was transferred to the Auckland District Court to be considered by an Environment Warranted Judge of the District Court. This matter will proceed to a jury trial. The Resource Management Act matter was set down to be called on 26 April 2007 for pre-hearing issues to be considered. At the call-over on 26 April 2006, Mr Gordon entered not guilty pleas to all the charges. The matter was set down for depositions on 15 June 2006. In respect of the Building Act matters, a defended hearing was set down for 30 October 2006 to 1 November 2006. The matter was to be heard with other similar

offences to which Mr Gordon has pleaded not guilty. However, Mr Gordon was unwell and was not able to attend Court. The matter has been adjourned for a new date to be given by the Registrar for next year. The Resource Management Act charges have been set down for five days at the Auckland District Court before a jury in May 2007.

(Changed) McGuigan Syme Chilcott Ltd, G Pitts, - 71 Riverlea Road, Whenuapai (August 2005)

Charges laid under the Building Act for unauthorised building work undertaken to construct concrete foundations and timber framing, as well as failing to stop work following the direction of an authorised officer. A building consent was lodged, but work commenced prior to the consent being granted. The matter was called on 19 May 2006 where all but the owner of the site, Mr Engel, entered a guilty plea. As the engineering company McGuigan Syme Chilcott Limited entered a guilty plea, charges against the directors of the company were withdrawn. Sentencing was set down for McGuigan Syme Chilcott Limited, G Pitts and D Owens Builders Limited on 28 September 2006. However, only the matter of D Owens Builders Limited was heard on 28 September 2006 as the other two parties were seeking to be discharged without conviction.

The builder, D Owens Builders Limited was convicted and fined \$3,500 on 28 September 2006, 90% of which is given to the Council in accordance with the Act and costs of \$450 for solicitor's costs, and \$130 for court costs were imposed in addition to the penalty.

The matters of McGuigan Syme Chilcott Limited (engineer) and G Pitts (architect) were heard on 17 April 2007. The Court noted that it had not maintained adequate minutes of the previous proceedings which lead to some difficulty in sentencing these defendants given the length of time that had gone by and the separate sentencing of the defendants.

The Court determined that the defendants were remorseful and had done all they could to mitigate the offending which was unintentional. As a result the defendants fulfilled the requirements of Section 107 of the Sentencing Act 2002 and were both discharged without a conviction. However, costs were imposed of \$3,500 on each defendant plus court costs of \$130.

Overall the penalties for all four defendants, including costs due to the Council amounts to \$11,000.

RECOMMENDATION

That the Legal Update (As At 26 April 2007) report be received.

Report prepared by: Setareh Masoud-Ansari, Contract Solicitor.



PART C - ENVIRONMENTAL MANAGEMENT

5 CHANGES TO THE CRITERIA FOR A-GRADE FOOD PREMISES

PURPOSE OF THE REPORT

The purpose of this report is to provide the Planning and Regulatory Committee with an update on changes to the criteria for the award of an A-grade food premise certificate.

BACKGROUND

Since 1 July 2003, all food premises inspected and licensed by Council have been issued with a food hygiene grading certificate pursuant to Council's Food Safety Bylaws. The Food Safety Bylaw was renewed in 2005 with the requirements governing the display of the food grading certificate and food hygiene training being strengthened.

The food grading regime has proved to significantly contribute to the raising of food hygiene and safety standards in food premises in the City and to maintaining those standards.

STRATEGIC CONTEXT

One of the objectives of the Strong Communities platform of the Long Term Council Community Plan is to “make the City a safe and interesting place to live”. This has the aim of protecting and improving the health, wellbeing and safety of the community.

The purpose of Council’s Food Safety bylaw is to improve the standards of food hygiene, and reduce incidents of food related diseases within the City, which is consistent with this key objective. In addition, the bylaw is wholly consistent with the Chief Executive Officer’s Policy initiative that “food safety is not negotiable in Waitakere City” and also contributes to Council’s strategic priority of a “Safe City”.

ISSUES

The current criteria for an A-grade certificate provided a huge incentive for large numbers of food premises to lift their standards. Over the 4 years that the current grading methodology has been in place, the number of premises that meet the A-grade criteria has steadily risen, as premises awarded an A-grade maintained that standard and as premises that previously met the B-grade criteria, undertook improvements beyond statutory compliance to meet the superior standard necessary for an A-grade. The rise in A-grades has appeared to have provided a “knock-on” type effect with a steady rise in B-graded premises, as premises that previously fell below statutory requirements and were awarded either a D or an E-grade, undertook improvements to progress towards a B-grade and eventually an A-grade.

In order to seek continuous improvement in the superior standard required of A-grade premises a change to the criteria for the award has been implemented that will raise the bar and ensure food safety and hygiene continues to evolve and improve.

Principal changes include:

- Increasing the minimum scores that must be attained on the grading assessment sheet to be eligible for an A-grade;
- Improving the requirements for the cleaning of customer furniture;
- Improving the requirements for the unrefrigerated display of readily perishable foods such as sushi, cooked meats and custards, etc;
- Highlighting an improved emphasis on temperature monitoring records;
- Highlighting an improved emphasis on cleaning records;
- Highlighting an improved emphasis on food protection;
- Taking account of the food hygiene and safety history of the premises.

All food premises in the City have been sent a pamphlet outlining the changes to the A-grading criteria. These changes are set to take effect from the commencement of the 2007/2008 food premise registration year on 1 July 2007.

RESOURCES

No additional resources are required to implement these changes.

CONCLUSION

“Lifting the bar” for the award of an A-grade food hygiene certificate will provide the motivation for the continued and sustained improvement to the standard of food hygiene and safety in food premises in the City.

RECOMMENDATIONS

That the Changes to the Criteria For A-Grade Food Premises report be received.

Report prepared by: Alan Ahmu, Team Manager: Environmental Compliance.



6 REGIONAL POLICY STATEMENT CHANGE 10 NATURAL HAZARDS - BECOMING A PARTY TO AN APPEAL

PURPOSE OF THE REPORT

The purpose of this report is to advise the Planning and Regulatory Committee of a notice lodged on behalf of the Council (as authorised by the Chief Executive Officer) to become party to an appeal by the Auckland City Council (ACC) and Metrowater against a decision by the Auckland Regional Council in relation to Regional Policy Statement Change 10 Natural Hazards.

BACKGROUND

Chapter 11 of the Regional Policy Statement addresses the management of natural hazards, including flooding, in the region. In September 2005, the Auckland Regional Council (ARC) notified an amendment to this chapter (Proposed Change 10 - Chapter 11 Natural Hazards). The purpose of the plan change was to:

- provide clarity surrounding roles and responsibilities with respect to natural hazard management – particularly those of the Regional Council and the Territorial Authorities; and
- address a more comprehensive range of natural hazard and hazard management responses – in particular, to better address flooding hazard issues; and
- update the legislative framework in the light of a number of new pieces of legislation that had been introduced subsequent to the chapter being written, including the Civil Defence Emergency Management Act 2002, the Building Act 2004 and the Resource Management (Energy and Climate Change) amendment Act 2004.

The Waitakere City Council lodged submissions to the plan change, addressing a range of matters covered by the plan change. In particular, the submission sought:

- a clearer discussion of the different responsibilities of the various agencies involved in natural hazard management, and in particular the actions and level of resourcing required to fulfil these responsibilities compared to the current situation; and
- clearer identification of the adoption of a precautionary approach when managing natural hazards; and
- clarification of the mandate for introducing a more stringent standard for development in the flood plains of streams. This issue arises because the Building Act 2004 and the Building Code restrict development only in terms of (variously) the 1 in 50 year (2% AEP) flood, and the 1 in 10 year (10% AEP) flood. However, amendments proposed in Plan Change 10 set more stringent requirements to manage some development in the 1 in 100 year (1% AEP) flood. This latter point is the subject of the appeal under discussion here.

The ARC held hearings on this matter in August 2006, and released its decisions in February, 2007.

The Council was largely happy with the provisions as amended through the decision notice, with several of the Council's submissions being accepted by the Committee. Amendments were made to the chapter addressing all of the points set out above. Accordingly, no appeal against the ARC's decision on submissions was considered necessary.

However, ACC and Metrowater have given notice that they have appealed one aspect of the ARC's decision. Namely, they object to the inclusion of provisions which place some restriction on the location of development within the 100 year (1% AEP) flood plain of streams. They consider that this is an inappropriately stringent standard to be applied uniformly throughout the region, and that the standards imposed by the Building Act 2004 and the Building Code (which explicitly only identify restrictions in relation to the 1 in 50 year (2% AEP) and 1 in 10 year (10% AEP) flood plains), are the ones most appropriately applied in Auckland City.

Section 274(1)(b) of the Resource Management Act 1991 allows for a local authority to become party to any proceedings before the Environment Court, and the Council has used this provision to become involved in this appeal.

The Council lodged notice of becoming a party to this appeal on or about 23 April 2007. (Reference: ENV-2007-AKL-000288)

The Council's position is that it does not support the relief being sought by ACC and Metrowater in this appeal. In effect, the Council will be supporting the ARC's position in relation to this issue.

STRATEGIC CONTEXT

Plan change 10 – Natural Hazards relates directly to the Three Waters strategic platform, as it includes provisions which impact on the management of flooding and streams. This plan change also relates to the Strong Communities strategic platform, as community confidence around the management of natural hazards and civil defence emergencies is a component of the level of safety felt by the community.

The ARC considers that development should not occur within the 100 year flood plain unless it can be demonstrated that such development will not be subject to, or exacerbate, flooding and inundation hazards. This more stringent approach is justified in order to give effect to the Resource Management Act 1991, which has a broader purpose than the Building Act 2004.

The Council, like the ARC, considers that it is appropriate to place some restrictions on development in the 100 year flood plain, and includes provisions of this nature in its District Plan (in the Natural Hazards and the Natural Area Rules). Having a clear direction in the Regional Policy Statement that this is appropriate significantly strengthens the Council's mandate for inclusion of such provisions in its District Plan, and the robust implementation of those provisions.

ISSUES

It is possible that, during the course of Environment Court proceedings on this matter, the relevant provisions will be amended or deleted entirely in response to ACC and Metrowater's appeal. By becoming a party in opposition to this appeal, the Council can be sure it will be involved in any negotiations, mediation or hearings that are held, and hence have the opportunity to influence the final outcome of the appeal.

For this reason, the Chief Executive Officer has authorised the Council becoming a party to the appeal.

RESOURCES

Management of the appeal is already in the work programme, and requires no additional resourcing.

CONCLUSION

The Council has lodged notice of becoming party to the above appeal in order to influence the nature of final provisions in the Regional Policy Statement.

RECOMMENDATIONS

That the Regional Policy Statement Change 10 Natural Hazards - Becoming a Party to an Appeal report be received.

Report prepared by: Jenny Fuller, Senior Adviser: Sustainable Management.



7 PROPOSED DISTRICT PLAN CHANGE 22: WHENUAPAI AIRPORT SPECIAL AREA

PURPOSE OF THE REPORT

The purpose of this report is to provide an update to the Planning and Regulatory Committee on the progress of Proposed Plan Change 22 relating to the creation of a Policy and Special Area Rule framework for Whenuapai Airport in the Waitakere City Council District Plan.

BACKGROUND

At its meeting on 29 November 2006, the Council resolved:

- “1. That the Proposed District Plan Change 22: Whenuapai Airport Special Area report be received.
2. That pursuant to the First Schedule to the Resource Management Act 1991, the Council resolve to publicly notify proposed Plan Change 22 relating to the Whenuapai Airport Special Area as set out in pages A35 to A53 to the Agenda.
3. That the statutory period for public submissions for proposed Plan Change 22, Whenuapai Airport Special Area, be 40 working days from the date it is notified, being double the statutory minimum period.”

2284/2006

Subsequently the Plan Change was publicly notified on 20 December 2006, with the closing date for submissions being 7 March 2007.

STRATEGIC CONTEXT

A leading strategic priority for Waitakere City Council is the creation of a strong local economy and more local jobs. The future development of the Whenuapai area is a key project for the City in relation to this objective.

The Whenuapai Airbase represents a substantial physical resource in a strategic location. Because of the combination of its existing and historical use and the current infrastructure, it would be difficult, if not impossible to replicate this resource elsewhere in the Auckland region. The Proposed Plan Change sets the framework to protect this important resource and its future potential.

The City has a clear policy position on Whenuapai which it has been pursuing for a number of years. While Waitakere City has no control over any decision by the Crown to pursue joint use of the Airbase, or how it decides to dispose of the land under the options available to it (i.e. Airport Authorities Act or Public Works Act) the Council is responsible for the management of the natural and physical resources within its boundaries. The Proposed Plan Change has been prepared as part of an on-going process to secure the future use of the Airbase for commercial airport activities.

ISSUES

Submissions Received

A1-A105

A total of 2655 submissions were received, 82 in support, 2571 in opposition and two which were neutral. Of those in opposition, over 2000 were pro forma submissions. Of the total submissions received, 245 were received after the closing date of 7 March 2007, 14 of these were in support and 231 in opposition. A summary of decisions sought by submissions (attached in draft format at pages A1 to A105) and the request for further submissions will be notified pursuant to the First Schedule to the Resource Management Act 1991, in due course.

Waitakere City Council's Submission

Once a Plan Change is publicly notified, the content of that Plan Change can only be amended in two ways; via the submission process or via Clause 16 of the First Schedule of the Act. Clause 16 allows for correcting minor errors that either would not disadvantage any person or would have no material effect on the meaning of the rule. Clause 16(2) states: 'A local authority may make an amendment, without further formality, to its proposed policy statement or plan to alter information, where such an alteration is of minor effect, or may correct any minor errors.'

Following notification of the proposed Plan Change further review and work on the Plan Change has occurred. This further review resulted in the identification of a number of minor corrections or re-wording to the document which were deemed necessary to provide clarification on some aspects of the Plan Change, its Rules, Policies and methods. Some of these changes are deemed to fall beyond the scope of Clause 16 and therefore in order to undertake these changes it was necessary to make a submission on the Plan Change.

A106-A112

Due to the timeframes, with submissions closing on 7 March 2007, the submission was prepared and approved by the CEO on 2 March 2007. Approval is therefore sought retrospectively from the Project Special Committee to submit on Plan Change 22. A copy of the submission is attached at pages A106 to A112.

Use of Independent Commissioner

A number of submissions seek that an independent commissioner be used to hear the Plan Change. Submitters have raised concerns over a potential conflict of interest given Council's Joint Venture Agreement with Infratil to establish a commercial airport at Whenuapai.

Legal advice is being sought on this matter, and a report specific to this issue will be presented to the Committee following close of the further submission period.

RECOMMENDATIONS

1. That Proposed District Plan Change 22: Whenuapai Airport Special Area report be received.

2. That the Planning and Regulatory Committee approve retrospectively the Waitakere City Council submission on Plan Change 22: Whenuapai Airport Special Area.

Report prepared by: Bronwyn Allerby, Senior Planner: Policy Implementation



8 POLICING OF PUBLIC PLACES

PURPOSE OF THE REPORT

The purpose of this report is to inform Councillors as to the regulatory options available for the more effective policing of public places. This report is given in response to the resolution passed at the Council meeting on Thursday, 26 April 2007, requesting that a report on this issue be referred to the May 2007 meeting of the Planning and Regulatory Committee.

BACKGROUND

Concerns have been expressed about the policing of behaviour in and about public places within the City generally and in central Henderson in particular. A particular focus of those concerns has been recent incidents of violent and/or anti-social in and about Catherine Mall Henderson. In an article in the Western Leader on 26 April a Henderson business owner was quoted as saying a bylaw banning loitering might help.

The Council's current bylaws in relation to public places are contained in chapter 2 of the General Bylaw (Bylaw no. 4) where "public place" is defined to include "every road, street, public highway, footpath, footway, court, alley, lane, access way, and thoroughfare of a public nature or open to all used by the public as of right; and every place of public resort or place to which the public have access, so open or used; and every place of public resort for the time being". This is a very broad definition. By way of example, the following places are included within this definition:

- the pedestrian footbridge over the railway line at Waitakere Central,
- the Japanese garden,
- the public squares in Ratanui Street and at Waitakere Central,
- Catherine Mall (which remains legal road, although declared as a pedestrian mall under Section 336 of the Local Government Act 1994), and
- any land owned or administered by the Council under the Reserves Act 1977.

Clause 231.1 of the General Bylaw provides that:

"No person shall:

- (a) Loiter or stand or hang about or remain in any one place on any public place after being directed to move on by any constable, traffic officer, or inspector appointed by the local authority; or
- (b) Loiter in or about the entrance to any premises abutting on a public place after having been requested to move on by the owner or occupier of such premises or by a constable, traffic officer, or inspector appointed by the local authority."

Subclause (a) relates to the public place itself, while subclause (b) relates to private property abutting on a public place. There is no record that Council has ever attempted to prosecute anybody for a breach of clause 231.1. Nor is there any record that the police have ever relied upon the bylaw as a basis for requiring people to "move on".

The maximum penalty in the event of a successful prosecution under the current bylaw is limited to a fine not exceeding \$500. In the case of a repeated and continuing breach of the bylaw it is theoretically possible to obtain an injunction to prevent future breach. If an injunction is granted then a further breach would constitute a contempt of court.

The Council's general bylaw making power under Section 145 of the Local Government Act 2002 may be exercised for any of the following purposes:

- protecting the public from nuisance;
- protecting promoting and maintaining public health and safety;
- minimising the potential for offensive behaviour in public places. The phrase "public places" is not defined for these purposes, although it is defined for the purposes of liquor control. It is likely to be given a meaning very similar to that contained in the council's existing bylaw. The matters under discussion in this report fall under this third heading, and possibly also under the "public safety" element of the second heading.

The Local Government Act 2002 has mandated a requirement to review all existing bylaws. It has introduced some new rigour and discipline into the bylaw review/new bylaw process. It is no longer sufficient simply that the proposed bylaw falls within the statutory purposes. It is necessary to also ask 3 key questions:

- Is a bylaw the most appropriate way of addressing the perceived problem?
- Is the bylaw in the most appropriate form?
- Will the bylaw give rise to any implications under the New Zealand Bill of Rights Act 1990?

If the answer to any one of these 3 questions is "no" then the proposed subject matter is not appropriate for a bylaw. In the case of review of an existing bylaw the particular bylaw should be repealed. In the case of a new bylaw, the proposal for a bylaw should be abandoned. In this context the key tests are contained in the first and third bullet points.

STRATEGIC CONTEXT

One of the Council's strategic priorities is that Waitakere City should be a safe place to be; that the City is a place where people feel safe and there is a strong sense of community. The ability to deal with unruly, threatening or offensive behaviour in public places is a key element in achievement of that strategic priority.

DISCUSSION

The appropriate starting point for this discussion is the New Zealand Bill of Rights Act 1990. The Act records a number of fundamental human freedoms in statutory form, including the rights to freedom of peaceful assembly (Section 16), freedom of association (Section 17) and freedom of movement and residence in New Zealand (Section 18). If these fundamental rights are to be interfered with there must be a clear and persuasive case to support that interference with the response being reasonable, or "proportionate", to the perceived problem being addressed. The limit is expressed in Section 5 of the New Zealand Bill of Rights Act in this way "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This language requires a clear and unequivocal case to be made out.

In many cases the public place to which the bylaw will relate will be legal road. Here we are talking about all of the land between the legal boundaries of the road including any berm and footpath as well as the formed carriageway. At common law there was a right to free and reasonably unimpeded use of the carriageway, which right also technically extends to any berm or footpath within the road. The common law, however, has long recognised that roads are something more than a means of passage from one place to another. Justice Fisher expressed it this way in *Papzrik v Tauranga District Council*, "The use of roads has never been confined to travel and transportation. Mr Gittos (counsel for the plaintiff) cited the commercial activity of the pīeman in the authoritative *Simple Simon* case. Roads provide an important opportunity for public activity. Wherever people habitually pass or congregate in public there are likely to be social, political, recreational and commercial activities." In other words the roads within any community are important part of the social fabric of the place so that any attempt to unreasonably interfere with common law rights exercised in respect of that place must be reasonable and "proportionate". A bylaw which regulates activities within the road, for example by requiring licensing of street traders, is more likely to find favour than a bylaw which prohibits those activities.

The Trespass Act 1990 authorises an occupier of "any place" to give any person notice requiring that person to stay away from that place ("a trespass notice"). Where a person has received a trespass notice warning him or her to stay off that place, an offence is committed if the person wilfully trespasses on that place again within two years after the giving of the warning. The penalty is a fine not exceeding \$1000 or imprisonment for a term not exceeding 3 months. The issue of a trespass notice can be very effective in relation to a public place which is not a road. It can be used, for example, to ban an unruly person from a library where that person's conduct is disturbing other users of the library or the person is behaving in an abusive or threatening way towards staff. In relation to a road, however, the use of a trespass notice is more problematic principally because the road is *prima facie* a means for getting from one place to another, but also because of the traditional common law uses of roads as outlined above.

It is for this reason that the police have in the past suggested that one of the solutions to the policing of Catherine Mall might be to take steps to stop the road so that the Mall became land held in fee simple owned by the Council and more readily susceptible to the use of the trespass notice mechanism. There are, however, inherent difficulties in such a proposal.

- First, the properties with frontage onto Catherine Mall rely in part upon the legal road for legal access. Stopping the road may affect property values.
- Secondly, road stopping is a publicly notified process. There is the potential to attract opposition from civil libertarians who might view the road stopping process as a misuse of power for an "improper" purpose. In the absence of a valid "traffic" reason for the road stopping the process might not be successful.
- Thirdly, if steps are taken to ban the unruly elements from Catherine Mall by the use of trespass notices then the end result might only be that the parties who have received a notice would congregate on a road somewhere else in the immediate vicinity, but outside the boundary of Catherine Mall.

For those reasons the proposal that a road stopping procedure should be undertaken in relation to Catherine Mall has not found much favour with Council officers.

In addition to these points it is worth observing that the police do have some powers under the Summary Offences Act 1981. The relevant provisions are:

- Section 3 - which is the general "disorderly behaviour" provision relating to behaviour which is "riotous, offensive, threatening, insulting or disorderly.... that is likely in the circumstances to cause violence against persons or property". The penalty on a conviction is a fine not exceeding \$2000 or imprisonment for a term not exceeding 3 months.

- Section 4 - which relates to a range of offences in relation to public places in respect of offensive or disorderly behaviour, threatening, insulting or obscene language. The penalty on a conviction is a fine up to \$1000.
- Section 5A - which relates to a disorderly assembly of three or more people in a public place where a person in the immediate vicinity fears on reasonable grounds that the assembled persons will use violence against persons or property or will commit an offence under s3. Again the penalty is a maximum fine not exceeding \$2000 or a term of imprisonment not exceeding 3 months.

Within that range of offences it is difficult to see what might be achieved by a trespass notice or a "no loitering" by law which could not be achieved by relevant steps taken under the Summary Offences Act 1981. Furthermore one might reasonably have thought that the provisions of that Act would be much more effective vehicle than either a trespass notice or a prosecution for an offence under a bylaw. A bylaw is subordinate legislation to a statute. An Act of Parliament vacates the Bill of Rights so that issues of vires are not relevant. It is perhaps possible to argue that a prosecution under the Summary Offences Act 1981 is a more serious matter than a prosecution under a "no loitering" by law and that the latter can therefore better respond to "minor" cases where the invocation of the statutory offences might be viewed as a disproportionate reaction. Conversely, however, if the behaviour is "minor" then why should it be regulated by a bylaw at all?

One problem is no doubt that the police are under-resourced and that the enforcement of offences under the Summary Offences Act 1981 cannot always be afforded high priority.

When the review of the public places bylaw comes before Council it will come with the Council officer recommendation that clause 231.1 should not be retained following a review of the bylaw. That recommendation will flow from the following considerations:

- A bylaw which purports to prevent behaviour which might be viewed as offensive or a threat to public safety is prima facie valid.
- Subclause (a) would be no more effective than the provisions of ss.3 & 4 of the Summary Offences Act 1981 and to that extent is redundant. A bylaw is not therefore necessary. In addition to this a good argument can be made out that the better way to address the problem is at a social level rather than a regulatory level. The Bylaw deals with the effects of the underlying social problem rather than the cause of that problem. It should be noted that any measures that the Council might wish to pursue in this area would likely require additional resources and should be the subject of further specialist advice.
- In relation to public places generally and roads in particular a good argument can also be made out that the bylaw would infringe Section 5 of the New Zealand Bill of Rights Act in so far as such restrictions could not be "demonstrably justified in a free and democratic society". Any bylaw which purports to interfere with rights of assembly and movement is likely to be viewed very suspiciously by the courts and is at serious risk of being declared ultra vires.
- Subclause b) does no more than substantially replicate the remedies available to a private land owner or occupier under the Trespass Act 1980 and is therefore otiose.
- The effective policing of a "no loitering" by law would require a substantial commitment by way of budget. If no budgetary provision is to be made, or inadequate provision is to be made, then there is no point in the bylaw. A bylaw is not the appropriate means by which a council makes a symbolic gesture. If limited budget is available it might be better directed to programmes which address the underlying social issues.

Finally, it is noted that in the United Kingdom local authorities have been empowered by central government to pass bylaws which permit the banning of specified individuals from specified parts of the city. Anecdotal evidence suggests that these banning orders have been largely ineffective but this is one course of action that Council may wish to investigate further. Specific legislation would be required.

CONCLUSIONS

The Council has a "no loitering" by law on its books already. The bylaw has never been policed nor enforced. On the review of this bylaw it will be the officers' recommendation that the bylaw be repealed.

The use of a trespass notice as a means to prohibit specified individuals from frequenting public places is not recommended where that public place is legal road.

There is no obvious reason why the existing powers of police under the Summary Offences Act 1981 are not adequate to respond to the problems currently manifesting within the City. It is, however, accepted that the police may have resourcing issues.

RECOMMENDATIONS

That the Policing of Public Places report be received.

Report prepared by: Denis Sheard, Manager: Legal Services.

