

## **DISTRICT PLAN DECISION NOTICE**

### **PROPOSED PLAN CHANGE 24: COMMERCIAL SEX ACTIVITIES**

#### **1.0 INTRODUCTION**

As a result of information presented both in submissions and at a hearing, the Waitakere City Council Planning and Regulatory Committee (“the Committee”), acting under delegated authority to issue decisions on Proposed District Plan Changes, has made the following decisions in relation to Proposed Plan Change 24 to the City of Waitakere District Plan.

This decision notice follows the hearing of submissions received by the Council that relate to Proposed Plan Change 24 to the City of Waitakere District Plan (referred to in this Decision Notice as “the Plan”).

The submissions and further submissions, along with the evidence provided to the Committee are considered in this Decision Notice. The analysis, together with the formal decision in Section 5 of this Decision Notice, are provided in part fulfillment of section 32 of the Resource Management Act 1991.

The Proposed Plan Change seeks to insert into the District Plan a policy and rule framework to administer the environmental effects arising from the commercial sex industry in Waitakere City.

#### **2.0 BACKGROUND**

Council’s Planning and Regulatory Committee approved the draft Plan Change 24 for notification at its meeting on 12 December 2005. The Proposed Plan Change was publicly notified on 20 December 2006, and 4 submissions were received. A summary of submissions was notified on 28 March 2007. One further submission was received.

The Committee heard the submissions on 10 July 2007.

The issues raised in submissions generally related to the following matters;

- Opposing small brothels acting as home occupations in residential areas, and seeking a ban for small brothels
- Amendments to clarify the policy, rules and assessment criteria in the Plan Change
- Clarification of the definition of terms used in the Proposed Plan Change

### 3.0 BACKGROUND INFORMATION

The Prostitution Reform Act 2003 (PRA) decriminalises the soliciting and provision of sexual services for reward. Decriminalisation means that the previous laws relating to prostitution no longer apply, and it is now subject to the same laws and controls that regulate other businesses. It is now viewed by Parliament as just another “commercial” activity, meaning that sex workers have the same status in law as their clients; and labour laws and health and safety regulations can be applied.

Reports on the implications of the PRA were presented to the August 2003 and July 2004 meetings of the (then) Environmental Management Committee, the October 2003 Council meeting, and the December 2004 Planning and Regulatory Committee meeting. At its July 2004 meeting of the Environmental Management Committee, the Committee resolved

2. *That the Council continue to use the current District Plan and policies to regulate commercial sex premises (including brothels, sex shops, striptease clubs, massage parlours or activities of a similar nature) while it develops an integrated strategy and regulatory framework for dealing with any effects relating to the decriminalisation of prostitution.*

1283/2004

The Planning and Regulatory Committee considered the Draft Commercial Sex Strategy in March 2006. The Committee resolved:

2. *That the Planning and Regulatory Committee approves that the revised draft Commercial Sex Strategy and associated District Plan Changes be put out for public consultation.*

385/2006

Following receipt of comments on the Draft Strategy, the Draft Plan Change was amended to reflect the revisions to the Strategy that related to matters able to be addressed via the Resource Management Act framework. This has led to the notification of Proposed Plan Change 24.

### 4.0 STRATEGIC CONTEXT

As a result of the decriminalisation of prostitution, the Council has developed a Commercial Sex Strategy (the Strategy). This Strategy seeks to address issues relating to prostitution in the City. The Strategy was approved by the Planning and Regulatory Committee in December 2006.

The Strategy is supportive of the Prostitution Reform Act's endeavour to decriminalise prostitution and to create a framework that safeguards the human rights of sex workers and promotes the welfare and occupational health and safety of sex workers (amongst other things). Several of Council's strategic priorities are supported by the Strategy, in particular Safe City, which requires a focus on occupational health and safety considerations in addition to the general safety of the community. Safety in the community will be enhanced by influencing prostitution activities to take place on privately owned premises in well-managed brothels and away from public spaces and streets.

The Council has strategic goals for the City's town centres, and is working with a range of partners (including business and community groups) to revitalise the centres to make them attractive, economically vital, safe and people friendly. With this as the focus, the Strategy seeks to ensure that sex industry premises are integrated into the town and

neighbourhood centres by emphasising the need for them to integrate into the overall urban design vision.

The objectives of the Strategy are:

1. Recognition of legitimacy of the sex industry
2. Reduction of environmental effects
3. Awareness of developments in the sex industry
4. Collaborative working with key stakeholders
5. Commitment to developing workable responses and solutions
6. Establishment of minimum hygiene standards

The Strategy outlines five approaches to achieve the objectives, which are:

1. Manage the adverse environmental effects of brothels through location controls
2. Controls on signage
3. Controls on hygiene standards
4. Urban design standards and guidelines
5. Monitoring and response measures

The Strategy applies to brothels, businesses of prostitution and commercial sexual services, but does not address issues relating to street prostitution. This approach aligns with the Prostitution Reform Act.

## **5.0 STATUTORY REQUIREMENTS AND PLANNING FRAMEWORK**

### **5.1 Resource Management Act**

The Resource Management Act 1991 (RMA) provides for changes to be made to the District Plan. The Section 32 report for Proposed Plan Change 24 clearly identifies the relevant sections of the RMA, and other statutory documents that must be taken into account when notifying a Proposed Plan Change.

The purpose of the RMA as outlined in Part II of the Act is the sustainable management of natural and physical resources. Part II also outlines the matters, including those of national importance, to which Council must have regard to and provide for in achieving that purpose. The purpose of a district plan as outlined in section 72 of the RMA is to assist Council to carry out its functions. Councils' functions are outlined in Section 31 as the control of actual and potential effects of the use, development or protection of land and associated natural and physical resources in order to achieve the purpose of the Act. Council is to establish, implement and review the objectives, policies and methods to achieve this and can also include rules, which prohibit, regulate or allow activities.

The Act provides a statutory framework for the management of natural and physical resources. The purpose of the RMA is *'to promote the sustainable management of natural and physical resources'*.

Section 5 (2) defines the purpose of the Act, sustainable management as:

*"managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –*

- (a) *Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*

- (b) *Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and*
- (c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment.”*

Section 6 outlines Matters of National Importance that must be recognised and provided for:

- “6. *Matters of National Importance –*  
*In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
- (a) *The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development:*
  - (b) *The protection of outstanding natural features and landscapes from inappropriate subdivision, use and development:*
  - (c) *The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:*
  - (d) *The maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers:*
  - (e) *The relationship of Maori and their culture and traditions with their ancestral lands, water, site, waahi tapu and other taonga:*
  - (f) *The protection of historic heritage from inappropriate subdivision, use and development.”*

Section 7 sets out Other Matters that must be given particular regard including:

- (a) *“Kaitiakitanga;*
- (b) *The efficient use and development of natural and physical resources;*
- (c) *The maintenance and enhancement of amenity values;*
- (d) *Intrinsic values of ecosystems;*
- (e) *Maintenance and enhancement of the quality of the environment;*
- ...

Section 8 of the Act requires that managing the use, development and protection of natural and physical resources, takes into account the principles of the Treaty of Waitangi.

Part IV of the Act relates to functions, powers and duties of Central and Local Government.

Section 31 sets out functions of territorial local authorities for giving effect to the Act within its boundaries. These functions include the integrated management of the natural and physical resources of the district and the control of the effects of the use or development of land.

Section 32 imposes a statutory responsibility to evaluate the options available to achieve the Council’s particular objectives or policies.

Part V of the Act relates to Standards, Policy Statements and Plans. Section 73 of the Act provides for changes to District Plans. The First Schedule of the Act sets out the process that must be followed for plan changes.

Section 74 states the matter Council must have regard to when changing its District Plan and includes its functions under the act and any Regional Policy Statements. Under section 75, a District Plan must give effect to a Regional Policy Statement.

Section 76 requires that when making a rule that Council must have regard to the actual or potential effect on the environment including adverse effects of that rule.

Section 35 of the Resource Management Act 1991 requires that a local authority monitor the suitability and effectiveness of its plan in managing the City's environment. Council therefore has a duty and care to ensure that its District Plan remains relevant in order to achieve integrated management of its natural and physical resources.

## **5.2 Auckland Regional Policy Statement**

Section 75(3) of the Resource Management Act 1991 requires that a district plan should give effect to a regional policy statement. The Auckland Regional Policy Statement (RPS) provides a resource management framework for managing environmental effects within the Auckland region.

It is considered that Proposed Plan Change 24 would give effect to the RPS, in particular Strategic Policy 1 and Strategic Policy 2.6.1.2. These Strategic Policies recognise the importance of ensuring that high standards of amenity are maintained in the residential areas of the City, and the need for high standards of urban design in town centres and the Community Environment.

Proposed Plan Change 24 is also consistent with Proposed Plan Change 6 to the RPS. Rules such as the requirement for above ground level brothels in town centres give effect to the strategic policies relating to urban design and urban structure. The Rules do this by providing for the establishment of brothels in a way that would contribute to the high quality built environment and streetscape that is sought in Proposed Plan Change 6 to the RPS.

Proposed Plan Change 24 is also consistent with Proposed Plan Change 18 to the District Plan – Citywide Urban Design Rules-which is considered to give effect the RPS. Providing for commercial sex activities within the City provides choice for residents and the community whilst ensuring that amenity values are protected, thus giving effect to strategic policies relating to urban design and urban structure.

## **5.3 Current District Plan Provisions**

The current District Plan provisions relating to the commercial sex industry are non-existent, as the District Plan was prepared prior to the enactment of the Prostitution Reform Act 2003. The industry is managed by the pre-existing policies and rules within each Human Environment, and these are not designed to address any adverse effects arising from the operation of the industry.

## **5.4 Section 32 Considerations**

Section 32 of the Resource Management Act 1991 requires an evaluation to be undertaken by a local authority before any objective, policy, rule or other method is adopted.

Council's obligations under section 32(3) are divided into five parts that comprise the following:

- examining the extent to which each objective is the most appropriate way to achieve the purpose of the Act;
- examining whether, having regard to efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives;
- taking into account the benefits and costs of the policies, rules or other methods;
- taking into account 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; and
- summarising the evaluation and providing reasons for that evaluation.

The Section 32 analysis done prior to notification of Proposed Plan Change 24 identified that the Proposed Plan Change was necessary and the most efficient and effective means of achieving the purpose of the Act. The section 32 analysis has been updated in this decision notice where amendments to the proposed plan change are made in response to submissions.

## **6.0 ANALYSIS OF SUBMISSIONS**

A total of four submissions, and one further submission were received on Plan Change 24. A full copy of the submissions is attached in Appendix 'A' of this Decision Notice.

### **6.1 Submission from Tjeerd Smilde (Submission 24/1)**

The submitter seeks that small brothels should be banned from operating in residential areas.

Mr Smilde's submission was supported by Further Submission 24/5.

Mr Smilde did not present evidence in support of the submission at the hearing.

#### **Discussion**

This submitter has concerns relating to brothels operating in residential areas, and draws on personal experience to form this view. The submitter raises issues associated with personal safety within the immediate community surrounding a small brothel. The submitter seeks that small brothels be enabled to occur in industrial areas, away from residential areas.

The Committee is advised that the Council has taken action against the brothel operating in Mr Smilde's locality. The Committee considers that the effects identified by Mr Smilde are part of the reason why the Council has publicly notified Proposed Plan Change 24, as the Council currently has little ability under the District Plan to address environmental effects arising from brothels in residential areas. The Committee notes that Mr Smilde also raises social issues associated with the brothel operating in his locality.

The Committee considers that the Proposed Plan Change will assist in avoiding the issues the submitter raises by requiring small brothels to obtain resource consents if they wish to establish in residential Human Environments. The Plan Change will then give the Council more ability to act if a small brothel operates in breach of the conditions of its resource consent.

The Council has previously taken the view that banning small brothels in residential areas is unenforceable (i.e. implementing a ban will not stop brothels operating). A ban will also act to re-criminalise sex workers, which is an approach that is not in keeping with the Prostitution Reform Act 2003. Consequently the Committee does not accept Mr Smilde's submission.

#### **The Committee's Decision is that:**

Submission 24/1 be rejected.

## **6.2 Submission from Waitakere City Council (Submission 24/2)**

This submitter supports the Proposed Plan Change and seeks a number of detailed amendments to the Policies and Rules that are provided in Proposed Plan Change 24.

The Council did not present evidence in support of the submission at the hearing.

### **Discussion**

The Council made a submission in support of Plan Change 24, subject to further detailed amendments as identified in the submission. The Council's submissions were as follows.

### **Typographical Errors**

The Committee supports this submission as it seeks to clarify matters within the District Plan and enable Plan users to understand and effectively implement the District Plan Provisions.

### **Retail Sales**

The Committee notes that there is a strong likelihood that brothels that establish in the Working Environment will want to sell goods usually found in "adult" shops. Currently the Committee understands that the District Plan would make this type of retail sale in a Working Environment a permitted activity in terms of such sales being in a convenience shop associated with a brothel.

These shops are limited by the District Plan to 100 square metres, and if greater floor space is proposed, a resource consent for a discretionary activity is required. The definition of "convenience shop" specifies that certain goods can be sold, and the definition of "retail sales" enables 10 percent of that floor space to be utilised to sell goods not listed in the definition. These provisions cover the variety of goods expected to be retailed as a subsidiary activity in brothels located in the Working Environment. The Committee considers that it is not therefore necessary for Working Environment Rule 5: Retail Sales to be amended.

The Council does not wish to encourage a proliferation of activities that have retail sales as their sole function in the Working Environment. A discretionary activity resource consent will provide the necessary consideration of the nature and extent of the retail sales proposed as a subsidiary activity to a brothel if that proposal exceeds 100 square metres. The Committee rejects the submission.

### **Policy 11.18**

The submission seeks to delete explanatory text associated with Policy 11.18, as explanation of activity status is unnecessary. The Committee considers that this deletion is appropriate.

### **Policy 11.50**

This submission seeks to clarify the Council's intention for brothels in terms of their location above ground. This phraseology is intended to mean at the first floor of a building or above. This amendment is supported by the Committee as it clarifies the intention of the Proposed Plan Change. A further clarification where the words "...the proposed activity..." is replaced by the word "...prostitution..." is also supported by the Committee as it provides greater clarity and certainty.

### **Section 15 of the Prostitution Reform Act**

This submission seeks to make it clear that section 15 of the Prostitution Reform Act will be applied to all resource consent applications. This amendment is supported by the Committee as it provides greater clarity and certainty.

## **Waitakere City Council Proposed Plan Change 18 Urban Design Matters**

The Council expects that a commercial sex activity will locate in new buildings, or may seek to alter existing buildings as part of its establishment. The submission seeks to ensure that the Council's policy of directing these activities to the first floor or above apply to new buildings or amendments to existing buildings. The Committee understands that through the hearing of submissions on proposed Plan Change 18, City Wide Rule 4 Building Design – Mixed Use has been deleted, and it is appropriate to remove cross references to this Rule. These amendments are considered by the Committee to be appropriate as they provide greater clarity and certainty.

### **Assessment Criterion 1(f)**

This submission incorrectly refers to Assessment Criterion 1(f), when the matter it refers to is contained in Assessment Criterion 1(e). The Committee considers that it is important to widen the scope of this assessment criterion, as there are many public places that may not be a "street" in the literal meaning of the term. This amendment is appropriate as it provides greater clarity and certainty.

### **Assessment Criterion 1(g)**

This submission seeks to better align Assessment Criterion 1(g) with Policy 11.50, and in particular the Council's approach to ensuring that commercial sex activities do not locate together in clusters. The Committee consider that this amendment is appropriate as it provides greater clarity and certainty.

### **Definition of Prostitution**

This submission seeks to include a definition of the word "prostitution" to ensure that there is no uncertainty about what is meant when this word is used. The Committee considers that the definition of prostitution is unnecessary as the Proposed Plan Change refers Plan users to the definition of commercial sexual services.

The word "prostitution" is, however, replaced by "commercial sex services" in the definition of the term "small brothels" to clarify this matter. This amendment is supported by the Committee as it provides greater clarity and certainty.

### **The Committee's Decision is that:**

Submission 24/2 be accepted in part, to the extent identified in the discussion above.

## **6.3 Submission from M Mahwhinney and R Nicolson (Submission 24/3)**

These submitters made detailed submissions on wording within the Proposed Plan Change.

The submitters supported the proposed amendments to Policy 11.11, City Wide Rule 1 Commercial Sex Activities, and City Wide Rule 2 Commercial Sex Activities - Signs.

M Mahwhinney provided oral evidence in support of the submission, and restated the relief sought in the submission, with reference to a "fall back" position.

### **Policy 11.18**

The submitter seeks the amendment of the Explanatory text introduced by the Proposed Plan Change to suggest that small brothels operating as a home occupation must have similar effects to other home occupations. It is expected that the environmental effects of small brothels acting as a home occupation will be similar to other home occupations, and if the effects are not, then those effects will be addressed through the resource consent process. The approach advocated by the submitter was not considered to be consistent

with the Prostitution Reform Act and would also be inconsistent with the effects based approach of the District Plan. This submission was not supported by the Committee.

### **Policy 11.50**

The submitter seeks the substitution of the word “discouraged” with the word “prohibited” in Policy 11.50. This Policy relates to commercial sex activities other than home occupations located in residential Human Environments. The term “discouraged” is carried through to the City Wide Rule 1 by making such activities non-complying. The Committee understands that to make the substitution sought by the submitters would require the elevation of this activity to be a prohibited activity, which is not consistent with the Council’s approach to commercial sex activities. This submission was not supported by the Committee.

### **City Wide Rule 2 Commercial Sex Activities - Signs**

The submitter seeks the prohibition of signage for commercial sex activities in all Human Environments, other than the Community and Working Environment. The Committee considered that this approach is not consistent with the Prostitution Reform Act, and would also be inconsistent with the effects based approach of the District Plan. This submission was not supported by the Committee.

### **Non Residential Activities**

#### **Item A**

The submitters seek that every person involved in a home occupation must reside on the site of the home occupation. The submitters are concerned that sex workers are not prepared to work in their own areas, and so will travel to work at another sex worker’s home occupation.

The Committee notes that the District Plan requirement applies to all home occupations, not just small brothels. The Committee considers that travel to a home occupation by three sex workers will not amount to a significant traffic generation effect from their travel to and from work. The Committee also consider it likely that the sex workers will travel from their home to a place of work, and the effect of that travel will be less than minor. The Committee notes that the effects of patrons visiting small brothels are addressed by the relevant Human Environment Rules. The approach advocated by the submitter is not considered by the Committee to be consistent with the effects based approach of the District Plan, and so this submission is not supported.

The submitter also seeks that the definition of “Small brothels” be amended to reflect this submission, and this is also not supported by the Committee for the reasons provided in the paragraph above.

#### **Item B**

The submitter supports the exclusions that are provided for in discretionary activities, as long as the bullet points that follow are all included. This submission appears to mainly apply to the Living Environment, and the Committee considered that this matter can be addressed by improving the punctuation of the Living Environment Rule.

#### **Item C**

The submitter supports the limitation on the hours of operation contained within the non-residential activity rules. The Committee notes this support.

### **The Committee’s Decision is that:**

Submission 24/3 be accepted in part, to the extent identified in Item B in the discussion above.

#### **6.4 Submission from the New Zealand Prostitutes Collective (Submission 24/4)**

The New Zealand Prostitutes Collective presented evidence in support of its submission.

The Collective's submission was opposed by Further Submission 24/5.

The New Zealand Prostitutes Collective provided a discussion of By-laws, and the merits of By-laws vs District Plan Changes. The Collective consider that a District Plan Change may subvert appeal options for people with an interest in the regulation of prostitution. This view was not accepted by the Committee.

The Collective wish to ensure that regulation ensures that sex workers are able to remain within the law to avoid harm to themselves. The Committee considers that the Proposed Plan Change achieves this, by enabling small brothels to operate in residential areas as home occupations, while larger brothels are encouraged to locate in Community and Working Environments.

The Collective seek the clarification of definitions within the Proposed Plan Change, in particular the exclusion of small brothels from the definition of Commercial Sex Activities. The Committee notes that this definition has been formulated to exclude small brothels acting as a home occupation from being subject to City Wide Rule 1. Small brothels acting as a home occupation in residential human environments are assessed using the existing policies and rules that apply to non-residential activities and home occupations in that Human Environment. Small brothels that are not home occupations are subject to City Wide Rule 1.

The Collective also wish to ensure that commercial monopoly situations are not able to be created by the District Plan. The Committee notes that such considerations are outside of the scope of the Resource Management Act 1991.

The Collective are concerned that sex workers operating in their home may be exposed to the public by the requirement to obtain a resource consent. Notification guidance is provided for any "commercial sex activity". Small brothels acting as home occupations are expressly excluded from the definition of commercial sex activities, and so if they meet the permitted activity status, will not require a resource consent. The Committee notes, however, that all non-residential activities operating outside the permitted activity hours of operation will need a notified resource consent. The Collective's concern is about the safety of the sex workers, and while this is an issue that the New Zealand Police may address in terms of personal safety, it is not considered by the Committee to be appropriate to enable sex workers to avoid a resource consent on this basis.

The submitter raised the matter of the use of the word "legalise" instead of "decriminalise". The Committee accepted the need to use the appropriate terminology, and directed that the word "decriminalise" be used throughout the District Plan when referring to prostitution.

The submitter raised the matter of screening of activities.

City Wide Rule 1 Assessment Criterion 1(c) addresses personal safety at entrances and exits.

City Wide Rule 1 Assessment Criterion 1(d) addresses landscaping associated with the activity, and is an extension of Assessment Criteria 1(c).

City Wide Rule 1 Assessment Criterion 1(e) relates to the interior of the home occupation. This is considered to be appropriate by the Committee.

The Committee considers that these assessment criteria are appropriate for commercial sex activities.

The Human Environment Rules also include screening requirements associated with permitted activities. The Committee is aware that home occupations providing sexual services may wish to retain discreet entrances and exits, and this is provided for in the permitted activity standard. If the home occupation does not meet this standard, the City Wide Commercial Sex Activities Rule 1 will apply, and assessment criteria 1(c), 1(d) and 1(e) will then be applied as part of the assessment of the resource consent. The Committee considers that the rule framework is correctly integrated, and no amendments are required.

**The Committee's Decision is that:**

Submission 24/4 be accepted in part, to the extent identified in the discussion above.

**7.0 RECOMMENDED CHANGES TO THE PLAN CHANGE**

Changes to the text of Proposed Plan Change 24 as recommended in the analysis of submissions and consideration of the evidence presented at the hearing are included in the Table of Changes in Appendix B attached to this Decision Notice.

**DECISION**

1. That pursuant to Clauses 10 and 16 of the First Schedule of the Resource Management Act 1991, Proposed Plan Change 24: Commercial Sex Activities, is adopted, with the amendments as described in Sections 6.0 and 7.0 of this report and detailed in Appendix B.
2. That pursuant to Clause 10(1) of the First Schedule to the Resource Management Act 1991, the relief sought by the submitters is accepted, accepted in part or rejected, as outlined in the discussions relating to each submission in the body of this report:
3. The Waitakere City District Plan is hereby amended in the manner set out in Appendix 1 to the Proposed Plan Change 24 decision notice.

**Appendix A**

**COPY OF SUBMISSIONS**

## **Appendix B**

### **PROPOSED CHANGES TO PROPOSED PLAN CHANGE 24**

Revised as a result of submissions and the hearing of those submissions