

**BEFORE THE ENVIRONMENT COURT**

Decision [2012] NZEnvC 74

ENV-2009-WLG-000224

ENV-2009-WLG-000225

**IN THE MATTER**

of appeals under Cl 14 of Schedule 1  
to the Resource Management Act 1991

**BETWEEN**

WATERFRONT WATCH INC

QUEENS WHARF HOLDINGS

Appellants

**AND**

THE WELLINGTON CITY COUNCIL

Respondent

Court: Environment Judge C J Thompson  
Environment Commissioner H M Beaumont  
Environment Commissioner A C E Leijnen  
Hearing: 12-15 & 23 March 2012 at Wellington. Submissions 29 March 2012  
Counsel: C Anastasiou for Waterfront Watch Inc and Land Lease Ltd  
I M Gordon for Queens Wharf Holdings  
K M Anderson and A M White for the Wellington City Council

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**DECISION ON APPEALS**

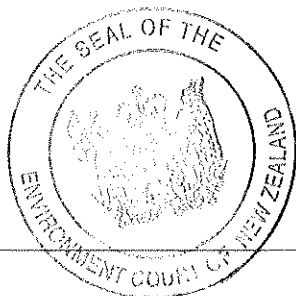
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Decision issued: **24 APR 2012**

The appeal by Waterfront Watch Inc is allowed

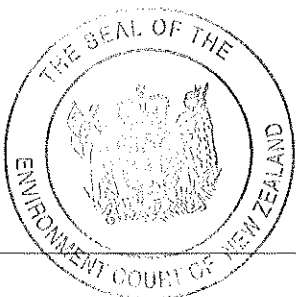
The appeal by Queens Wharf Holdings is allowed

Costs are reserved



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*The parties*

[1] Waterfront Watch Inc is an organisation which has been actively involved in planning and resource management issues relating to Wellington's waterfront since the mid 1990s. It is an appellant and took full part in the hearing.

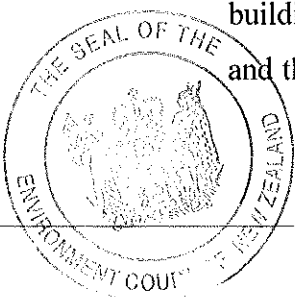
[2] Queens Wharf Holdings No. 1 Ltd, Queens Wharf Holdings No. 2 Ltd, and Queens Wharf Holdings Ltd are, obviously enough, related entities and each of them are appellants, and also s274 parties to Waterfront Watch's appeal. The interests of the companies are identical, and it will be convenient to refer to them collectively as Queens Wharf Holdings, or QWH. QWH owns existing developments on Queens Wharf.

[3] Land Lease Ltd is a s274 party to Waterfront Watch's appeal and owns a commercial property on the southwestern corner of the Customhouse Quay/Whitmore Street intersection, presently occupied by a service station. It too was a full participant.

[4] Wellington Waterfront Ltd is a Council Controlled Organisation and owns the land affected by Variation 11. It was a s274 party to the appeals but has withdrawn from them and did not take part in the hearing. The New Zealand Historic Places Trust (HPT) was also an appellant against the Council's decision on Variation 11 but it has been able to resolve its issues with the Council and it did not take part in the hearing either.

*Introduction and background*

[5] Debates and issues about the development and redevelopment of Wellington City's CBD/Waterfront interface have been loud and contentious for many years. Probably no other part of the City attracts such impassioned scrutiny. Changes in maritime transport modes for cargo and passengers have meant that much of the Port's older wharves and infrastructure, once devoted to commercial shipping, are no longer required for that purpose and that has presented opportunities for alternative commercial uses and for public and recreational space. Two of the oldest wharf sheds, once used for cargo handling, are now restaurant/bars; some old sheds have been removed and the space developed as open recreational areas. Other waterfront buildings and sheds have been built or adapted, for instance Te Papa, Te Wharewaka, the former Odins and St John's buildings, the Harbour Board Offices and, perhaps more controversially, the TSB Arena and the Queens Wharf Retail Centre. There are others also. A proposal to redevelop the



northern outer-T of Queens Wharf as a hotel was eventually declined after an appeal to this Court: - see *Intercontinental Hotel and Ors v Wellington Regional Council* (W015/2008), commonly known as the *Hilton* decision.

[6] These appeals are a continuation of the debate and are concerned with Variation 11 to the Wellington City District Plan.

[7] Variation 11 covers a waterfront area of some 8.2ha extending along the Quays at the harbour water's edge for the southern part of its eastern boundary, with commercial port land at the northern end. To the south are the Harbour Board Gates opposite Waring Taylor Street (adjacent to Shed 13 and the new Meridian Building and open space) and to the north is Shed 21 (now redeveloped as waterfront apartments). The area is known as *North Kumutoto* - Kumutoto being the name of the stream the mouth of which has been exposed as part of the public space adjoining the Meridian Building.

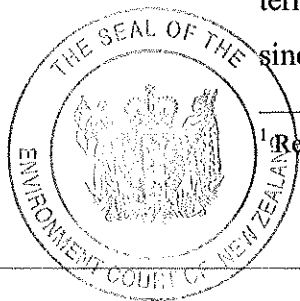
[8] Shed 13 (and its partner Shed 11) and Shed 21 are listed as Category I items by the Historic Places Trust and are scheduled historic buildings in the District Plan. The former Eastbourne Ferry Building (Ferry Building) along with the Harbour Board Iron Gates and Railings (along the Quays frontage) are listed as Category II. The Ferry Building and the Wharves and Wharf edges from the Tug Wharf to the Overseas Passenger Terminal and the reclamation edge Lagoon to Tug Wharf vicinity<sup>1</sup>, are identified in the Regional Coastal Plan in a list of buildings and features of historic merit.

[9] The city side of the area fronts to Customhouse Quay and Waterloo Quay; the intersection of those thoroughfares with the eastern end of Whitmore Street forms the current vehicle entry point to the subject area. There were substantial port buildings on the area, but they were demolished many years ago. Presently, the area is largely used for campervan and general parking.

#### *Plan Change 48*

[10] Plan Change 48 (PC 48) was notified on 27 November 2006 and was, in general terms, a review of the Central Area chapters of the District Plan, which has been operative since 27 July 2000. The Plan Change has proceeded a good way through the process, but

<sup>1</sup>Regional Coastal Plan Planning Map 4D



has, we understand, a few site specific appeals as yet unresolved. Variation 11 is a modification of PC 48 as it relates to a part of the City's waterfront.

### *Summary of Variation 11*

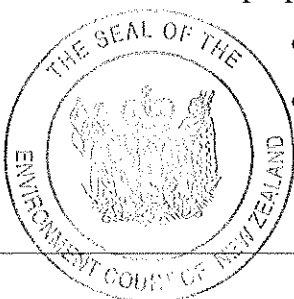
[11] Variation 11 changes the specific provisions relating to the Lambton Harbour Area. It introduces the North Kumutoto Precinct into the Central Area Urban Design Guide and proposes that this design guide form part of the District Plan. It removes references to the Wellington Waterfront Framework as a design guide, but retains it as a policy document, with the expressed intent that it is to ... *meet the principles and objectives as set out in The Wellington Waterfront Framework 2001*. The *Framework* is a non-statutory document, discussed at some length in the *Hilton* decision, and we shall return to it later.

[12] The Variation defines three areas in the North Kumutoto Area as suitable for building. These areas have, in some documents, been numbered 8, 9 and 10, and in others as Blocks A, B and C. For simplicity we shall use only the letter identifiers. Each of them has a prescribed building footprint within which buildings may be constructed, to a range of specified maximum heights. On the northernmost, Block A, which fronts Waterloo Quay, a height limit of 30m (described to us as 6-7 storeys) is proposed. (Heights are expressed as above mean sea level (msl) – ground level is c2.5m above msl). A building there could be approximately 103-104m long and 24-28m wide, thus having a footprint of c2700m<sup>2</sup>. On the northern half of Block B (on the Customhouse Quay frontage), it proposes a 25m maximum height (described as 5-6 storeys), and on the southern half of Block B, a 16m (described as 3 storeys) maximum. The total footprint of Block B is c920m<sup>2</sup>. Block C (which is to the seaward of Block B) also has a maximum height of 16m, and, as shown on Appendix 13, has a footprint of c525m<sup>2</sup> – that however may be subject to adjustment given the Block's proximity to the line of MHWS.

### *New building development*

[13] The Variation makes buildings within the prescribed dimensions in Appendix 13 *Discretionary (Restricted)* activities – see Rule 13.3.4A, with a presumption of non-notification for such applications. The matters over which discretion is retained (as now proposed - post agreement with the HPT) are:

- Design, external appearance and siting
- Height



- Public space structure and public space design
- Historic heritage
- The effects of building development on the former Eastbourne Ferry Building

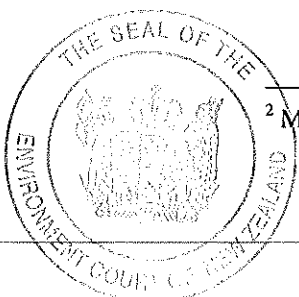
[14] Importantly, that list includes *historic heritage* as one of the matters the Council has discretion over under Rule 13.3.4A. This reference obviously links to the wording of s6(f) RMA. The settlement agreement between the Council and the HPT introduced specific wording to deal with a *Transition Area* which was added to Block A to address views to the Ferry Building, primarily from the streets to the west.

[15] There is a substantive change to Policy 12.2.8.6 altering the meaning of this policy by the addition of the word *building* in front of *development*. Thus the policy is restricted to provision for new building which adds to the waterfront character and quality of design, rather than development per se. This we understood is a deliberate move.<sup>2</sup>

[16] A further policy is added at 12.2.8.6A. We understand this to be how the Council has introduced the Central Area Urban Design Guide as a planning method for the management of site planning and design of new buildings and public spaces within specifically identified areas.

[17] This new policy reads as a sub-policy of 12.2.8.6. (as do the B and C which follow). The explanation which follows retains existing explanatory paragraphs and adds further explanation. In particular the section outlining ... *general matters which will be considered in relation to any application for a new building or structure on the waterfront* includes the following list:

- the relevant provisions of the Central Area Urban Design Guide.
- the principles and objectives of the Wellington Waterfront Framework.
- whether the ground floor of the building has an 'active edge' that supports the public use of the space and which is predominantly accessible to the public.
- whether the addition or alteration building work will result in a building that will be complementary to, and of a scale appropriate to, other existing buildings adjacent and nearby.
- whether the addition or alteration building work will have a material effect on sunlight access to any open space.



<sup>2</sup> McKay EIC Para 53

- whether the addition or alteration building work will intrude on an identified viewshaft.
- the adverse effects of the building work on wind, views, shading and sunlight on adjacent properties in the Central Area.
- The amount of vehicle parking and the extent to which any parking (and associated access and manoeuvring spaces) will ensure the protection of the pedestrian environment on the waterfront and the public use of ground floor building space. (our emphasis)

(There is also a list about additions and alterations which is not relevant to our discussion).

[18] Further, under 12.2.8.6A, there is a paragraph specific to building works on *Queens Wharf Special Height Area*:

... for building works within the Queens Wharf Special Height Area shown in Appendix 4 the extent to which additions or alterations have regard to the principles and objectives of the Wellington Waterfront Framework and are designed to complement the existing buildings. Particular consideration will be given to ensuring that the pitch of roofs generally match existing roof slopes (other than any gable windows or other minor roof features) and that all new work is strongly modelled and well integrated into the existing design and that any additional floors are clearly articulated in their external appearance

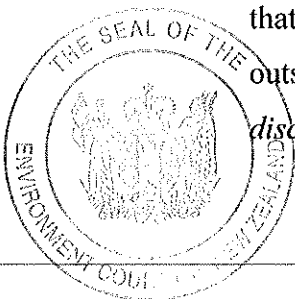
[19] Lastly, there is a section (under 12.2.8.6A) specific to building works and associated open space within North Kumutoto:

Building works and associated open space within identified areas

1. North Kumutoto area

In the North Kumutoto area new buildings within the identified footprints are a Discretionary Activity (Restricted). Larger new buildings and additions and alterations to any existing building that extend beyond the footprint areas (where the height limit is zero), or exceed the specified building height limits are a non-complying activity. In all cases consideration will be given to the extent to which buildings and related public spaces accord with the North Kumutoto provisions in Appendix 4 of the Central Area Urban Design Guide.

[20] It is our understanding that both the general and specific policy provisions apply to the subject development area. We note that the version we have quoted has changed from that contained in the Council's decision. The Council's decision was that development outside the footprint and height parameters set in Appendix 13 will be considered as fully *discretionary*. However, we understand the Council's position now is as reflected above:



- that development which does not comply with the standards for buildings or structures will be *non-complying*.

[21] In reviewing these changes so far we observe, consistent with the evidence of several of the expert witnesses, that there is a subtle move in policy towards an emphasis on buildings (for instance as noted in Mr Steven's evidence<sup>3</sup>, and Mr McKay's evidence<sup>4</sup>). We believe that this shift is linked back to a specific reference (Section 4.2) in the Wellington Waterfront Framework, which we will come to shortly.

[22] The specific (new) tool for addressing buildings and structures within the North Kumutoto area is found in the list of Buildings and Structures provided for as Discretionary Activities (restricted). Rules 13.3.4 and 13.3.4A provide (relevant parts only<sup>5</sup>):

13.3.4 The construction or alteration of, and addition to buildings and structures in the Central Area that are not Permitted or Controlled Activities, except:

- buildings and structures in the Lambton Harbour Area, except buildings and structures within identified areas under Rule 13.3.4A or buildings under Rule 13.3.5A. ...

13.3.4A The construction of new buildings and structures or the alteration of, and addition to buildings and structures and the development of new Open Space within identified areas in the Lambton Harbour Area (as shown in Appendix 13) are a Discretionary Activity (Restricted) in respect of:

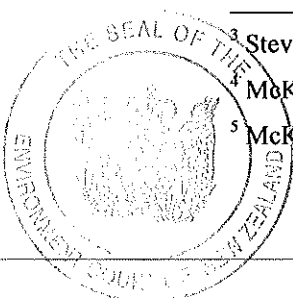
- 13.3.4A.1 design, external appearance and siting
- 13.3.4A.2 height
- 13.3.4A.3 public space structure and public space design
- 13.3.4A.4 historic heritage
- 13.3.4A.5 the effects of building development including bulk, dominance, shadowing and scale within the Transition Area on Block A in the North Kumutoto Precinct on the adjacent former Eastbourne Ferry Building.

We will come to Rule 13.3.5A at para [32]ff.

<sup>3</sup> Steven EIC Pages 5-7

McKay EIC Para 53

<sup>5</sup> McKay rebuttal Appendix 2 version





[23] The following text is set out in a side panel attached to these provisions, (which we understand to be by way of explanation):

Building work covered by rule 13.3.4A will be assessed against the provisions of the Central Area Urban Design Guide.

Note, section 3.2.4 requires a Design Statement to accompany any application for resource consent that is to be assessed against a Design Guide.

If the proposal does not comply with standards for buildings and structures in 13.6.1 Rule 13.3.8 applies in addition to this Rule. If the proposal does not comply with standards for buildings and structures in 13.6.3 Rule 13.5 applies.<sup>6</sup>

(Rule 13.3.8 provides for these matters to be considered as *restricted discretionary* activities and Rule 13.5 is the *non-complying* activity provision).

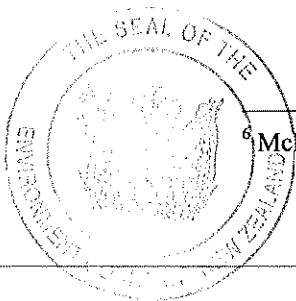
#### *Ground floor details*

[24] A substantive change occurs with a further policy added under 12.2.8.6 as 12.2.8.6B which is to ... *ensure that significant buildings in the North Kumutoto area and related public spaces display design excellence*. The methods for achieving this policy are cited as Rules and design guidelines being the *Central Area Urban Design Guide - including the North Kumutoto provisions*. As with policy 12.2.8.6A, several paragraphs of explanation then follow.

[25] The second paragraph refers to assessment of buildings which might exceed the specified height limits and/or fall outside the specified footprints. We anticipate that this paragraph will not now be relevant, since the Council has altered its position, now regarding such development as a *non-complying* activity.

[26] The third paragraph is particularly relevant to the Appellant's case:

When processing a consent application Council will consider the proposals in relation to their immediate surroundings and the extent to which they will make a positive contribution to the waterfront environment, and deliver design excellence. Particular consideration will be given to the relationship of new buildings with adjacent listed heritage buildings, the maintenance of viewshafts, the protection of pedestrian access through the area and the shading of open space areas including lanes.



<sup>6</sup> McKay rebuttal Appendix 2 version

[27] The last substantive change relative to Policy 12.2.8.6 occurs with a further Policy 12.2.8.6C, as follows:

To ensure that the ground floor of buildings be predominantly accessible to the public and have active edges to significant adjacent public spaces.

Rules and the design guidelines are cited as methods for implementing this policy.

[28] In the text that follows this policy, the waterfront is referred to as *...one of the City's prime public spaces. As such, ... it is important that the entire Waterfront area, including the ground floor of buildings, be predominantly accessible to the public.* Specific rule provisions requiring public accessible ground floor (60% of ground floor gross floor area) and active (*entrance or display windows*) frontages (60% of ground floor frontage) have been included as new provisions. This introduces a new category of *permitted* activity standard in the Activity Rule 13.1.1, and the Building and Structures Rule 13.1.2.7.

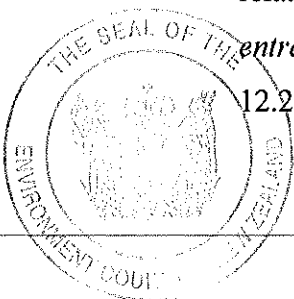
[29] Further, in the *Controlled* Activities rule relating to Building and Structures, a further activity is added; that of *additions and alterations to ground floor frontages* and the criteria for assessment are slightly amended to take account of this activity.

[30] These Rules can be waived but the proposal will be considered as a *Restricted Discretionary* activity. The provisions stipulate that such an application will not require public notification, nor will affected parties need to be served with notice of an application for such a resource consent.

[31] Rule 13.3.3A sets out the matters to which the Council has restricted its discretion relating to the 60% accessibility rule (13.1.1) which is limited to *public accessibility to ground floors*. A definition for this term has been provided:

Ground Floor Accessibility (in respect of developments in the Lambton Harbour Area): means those areas within the gross floor area of a building (excluding colonnades or similar partially enclosed spaces) that is generally available for use by the public notwithstanding that access may be denied at certain times.

[32] Rule 13.3.5A sets out the matters to which the Council has restricted its discretion relating to the 60% active frontage rule (13.1.2.7) which is limited to *the provision of entrance ways or display windows*. The relevant policy reference for this Rule is noted as 12.2.8.6C, as described above. This includes an explanatory statement which lists some



six matters which the Council will consider where this Rule is not adhered to. These matters are not reflected in the actual rules.

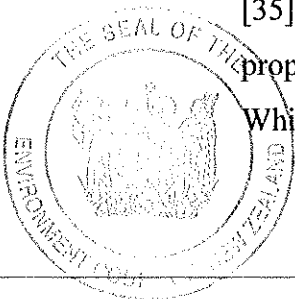
*The 'zero permitted height rule'*

[33] Currently the District Plan does not provide a permissive height limit for buildings in the Lambton Harbour area. It adopts this technique as a mechanism to trigger a requirement for a resource consent. Such development would be publicly notified. The present Plan provisions do not have any height below which a development would be a *permitted* activity. Somewhat misleadingly, this is occasionally referred to as the *Zero Height Rule*, but there is no *Rule* properly so-called – there is just no permitted building height below which a resource consent is not required. Following the *Hilton* decision the Council formed the view (as recorded in its s32 Report for Variation 11) that the zero height mechanism was *problematic* because it meant that there was no relevant permitted baseline. We share the doubts expressed about that conclusion. Of itself, we would not have thought that the absence of a *permitted baseline* is likely to raise a question about the validity or workability of a Plan. Appendix 13 to the variation is proposed as a height rule and links to existing District Plan maps 32 and 32A.

*The parties' positions*

[34] Waterfront Watch has a particular concern that the scale and bulk of buildings indicated by the maximum dimensions (as a restricted discretionary activity) will overwhelm the remaining heritage buildings, and will both spoil the views of the harbour from the City, and destroy the sense of open space along the waterfront. The presumption of non-notification of applications for *Discretionary (Restricted)* resource consents is also of concern. It regards Variation 11 as being *development driven* and intended to facilitate inappropriate and oversized buildings which will not take account of adverse effects on the environment, and generally fail to comply with Part 2 of the Act. The Society's primary objective is to have the whole of Variation 11 overturned, but as a fallback provision it regards the requirement of a percentage of the ground floor of any building being available for public access as desirable, and promotes a figure of 80%.

[35] Land Lease Ltd wishes to protect the amenity and development potential of its property which occupies the whole of the block bounded by Customhouse Quay, Whitmore Street, Featherston Street and Ballance Street.



[36] The QWH properties are the building originally developed as a retail centre on the northern side of the Queens Wharf central plaza, and the front portion of the building to the south, originally the Events Centre, and now known as the TSB Arena. That front portion has been leased as licensed premises. There is also a basement carpark extending beneath both buildings. The development was built under different ownership in the mid-1990s. As a retail centre it was a resounding failure and the northern building has since been reconfigured as commercial and office space, with very limited ground floor food and beverage outlets. QWH believes it has rescued the properties from a parlous situation and is concerned that it is not unfairly disadvantaged by finding that the proposed Rules for Variation 11 will, in a sense retrospectively, impose design controls on its Queens Wharf buildings, even though it may have existing use rights for their present configurations. In particular, the proposed provisions (Policy 12.2.8.6C, Rules 13.3.3A and 13.3.5A, and Standard 13.6.1.23) requiring 60% of ground floor frontages to be display space or entranceways, and 60% of a ground floor to be publicly accessible, have proved to be not viable for retail tenancies. It also has concerns about the application of building mass standards to the Queens Wharf Special Height Area (QWSHA).

[37] The City Council is content with its decision on Variation 11 and supports it, with the proposed modifications arising from the negotiations with the NZHPT.

*The legal framework for considering a proposed plan provision*

[38] Variation 11 was notified on 1 February 2009. Accordingly, the law to be applied is the RMA before the 2009 amendments, which came into force on 1 October 2009. The RMA's legal framework for considering a proposed plan (or change or variation of a plan) begins with sections 72 – 76 and incorporates, by reference, sections 31 and 32. The process of analysis, once the matter is before the Court, was reviewed in the decision of *Long Bay – Okura Great Park Soc Inc v North Shore CC* (A078/2008), and further commented on in the more recent decision in *High Country Rosehip Orchards Ltd and Ors v Mackenzie DC* [2011] NZEnvC 387. In that appeal, the law to be applied was also the Act as it stood post the 2005, but before the 2009, amendments. At para [19], the *High Country Rosehip* decision summarises the legal factors against which the evidence in any given case should be assessed in this way:

A. General requirements

1. A district plan (change) should be designed to accord with, and assist the territorial authority to carry out its functions so as to achieve, the purpose of the Act.

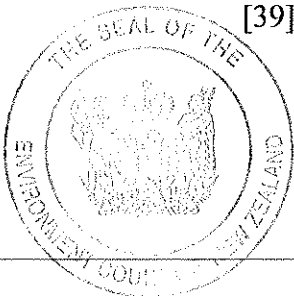


2. When preparing its district plan (change) the territorial authority must give effect to any national policy statement or New Zealand Coastal Policy Statement.
3. When preparing its district plan (change) the territorial authority shall:
  - (a) have regard to any proposed regional policy statement;
  - (b) give effect to any operative regional policy statement.
4. In relation to regional plans: (a) the district plan (change) must not be inconsistent with an operative regional plan for any matter specified in section 30(1) or a water conservation order; and (b) must have regard to any proposed regional plan on any matter of regional significance etc;
5. When preparing its district plan (change) the territorial authority must also:
  - have regard to any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations; and to consistency with plans and proposed plans of adjacent territorial authorities;
  - take into account any relevant planning document recognised by an iwi authority; and
  - not have regard to trade competition;
6. The district plan (change) must be prepared in accordance with any regulation and any direction given by the Minister for the Environment;
7. The requirement that a district plan (change) must also state its objectives, policies and the rules (if any) and may state other matters.
- B. Objectives - the s32 test for objectives
8. Each proposed objective in a district plan (change) is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act.
- C. Policies and methods (including rules) - the s32 test for policies and rules
9. The policies are to implement the objectives, and the rules (if any) are to implement the policies;
10. Each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives of the district plan:
  - (a) taking into account:
    - (i) the benefits and costs of the proposed policies and methods (including rules); and
    - (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of policies, rules, or other methods; and
  - (b) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances.
- D. Rules
11. In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment. ...
- E. Other statutes:
12. Finally, territorial authorities may be required to comply with other statutes.
- F. (On Appeal)
13. On appeal the Environment Court must have regard to one additional matter - the decision of the territorial authority

#### *Relevant Planning Documents*

[39] Apart of course from the District Plan itself, the relevant documents in this case are:

- New Zealand Coastal Policy Statement
- The Operative Regional Policy Statement (May 1995)



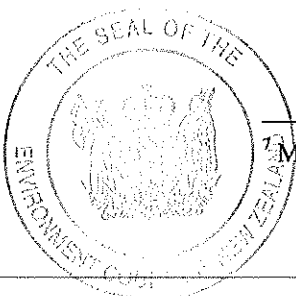
- The Proposed Regional Policy Statement (May 2010)
- The Regional Coastal Plan (May 2000)
- s74(2)(b)(i) (management plans and strategies):
  - The Wellington Waterfront Framework (April 2001)
  - “Capital Spaces” (November 1998) (Council’s open space strategy)
- s74(2)(b)(iia) Historic Places Register entries:
  - Category I:
    - Shed 21 (Record No.237)
    - Shed 13 (Record No.236)
  - Category II:
    - Eastbourne Ferry Terminal Building (former) (we will refer to this as the Ferry Building) and Ferry Wharf (Record No 7807)
    - Wellington Harbour Board Iron Gates and Railings (Record No 1447)

[40] Mr Brett McKay, a former senior planner with the Wellington City Council who was much involved in the preparation of Variation 11, was called by the Council and provided the Court with useful background and statutory context for the variation, and this information was generally relied upon by other witnesses.

[41] In considering Variation 11 generally we shall discuss the various planning documents in approximately the order in which they appear above, although there are some overlaps, and we shall then deal with particular issues raised in the appeals.

#### *New Zealand Coastal Policy Statement*

[42] Mr Ian Leary, called as a planning witness for Waterfront Watch, drew a distinction between the NZCPS objectives and policies that relate to the Coastal Environment and those relating to the Coastal Marine Area (CMA). It is the Coastal Environment that is more relevant in this case because it includes land above MHWS, influenced by coastal processes and character. In these matters both he and Mr McKay were satisfied that Variation 11 is not inconsistent with the NZCPS<sup>7</sup>. However, Mr Leary drew our attention to Objective 6, and Policies 6 and 17, which address historic heritage and the maintenance of character.



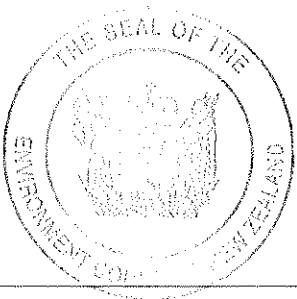
[43] We were provided with a joint expert witness statement on heritage matters prepared by Ms Barbara Fill (called by Waterfront Watch), Mr Adam Wild and Ms Vivien Rickard (both called by the Council). Mr Wild and Ms Rickard agreed that there were no formally recognised (ie Registered by the NZHPT or Listed in a District Plan) buildings or objects on the specific area covered by Variation 11. However, Ms Fill pointed out the curtilage protection applying to the Ferry Building. Ms Fill also expressed the view that the context of a heritage building is important to the understanding of heritage. Notably, all three experts agreed that a place or object does not need to be listed or registered to be of heritage value.

[44] *Historic heritage* is defined in s2 RMA as:

- (a) ... those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
  - (i) archaeological:
  - (ii) architectural:
  - (iii) cultural:
  - (iv) historic:
  - (v) scientific:
  - (vi) technological; and
- (b) includes—
  - (i) historic sites, structures, places, and areas; and
  - (ii) archaeological sites; and
  - (iii) sites of significance to Maori, including wahi tapu; and
  - (iv) surroundings associated with the natural and physical resources

[45] Based on the evidence we heard, it is our view that the following physical resources specifically contribute to the understanding and appreciation of New Zealand's history and cultures, as set out in the Act's definition, and are influential in considering the Variation's consistency with the NZCPS (and with s6(f)). Some, although not identified, are within the diagram of Appendix 13, and some are at its edge, and all are relevant:

- Ferry Building
- Wharves and wharf edges
- Reclamation edge (Rip-rap wall)
- Sheds 13 and 21
- Iron Gates and Railings



- Ferry wharf

[46] In addition to the sections of the NZCPS specifically brought to our attention, we note that there are several other policies which in our view should be considered. Those are Policies 18, 19 and 20 dealing with public open space, walking access and vehicle access.

[47] In summary then, we conclude that in order to be consistent with the NZCPS the variation should protect historic heritage in the coastal environment from inappropriate subdivision, use and development. The NZCPS calls for the identification of historic heritage sites, and we note that Variation 11 does not identify the Wharf gates and railings, the Ferry Building, Shed 13 or 21, or the heritage wharf edge, in Appendix 13. While some of these features fall outside the development area, they nevertheless influence, and will be influenced by, what will take place within the development area. In NZCPS terms they set part of the context for use and development in this area. The settlement with NZHPT regarding the introduced *transition zone* is an illustration of an attempt to address this heritage context.

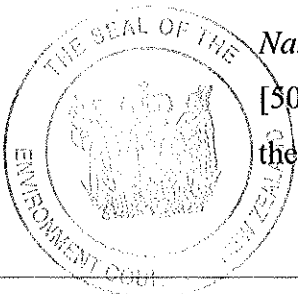
[48] The Variation is also required to recognise the need for public open space and the opportunity presented is relevant to the formulation of the district plan provisions for this area. Further, pedestrian access to and along the coastal marine area is a key requirement of the NZCPS and it generally seeks further opportunities for, and enhancement of, these features. The control of, and identification of, locations where vehicle access is required is another matter that should be addressed.

#### *Conclusion on the Coastal Policy Statement*

[49] While, overall, Variation 11 may not be *contrary to* the NZCPS it nevertheless does not meet that document's expectations of identifying and protecting historic heritage from inappropriate development. Nor does it address the opportunity to develop public open space, enhance public pedestrian access to and through the area. Vehicle access to the area is also an aspect requiring more specific attention.

#### *National Policy Statements*

[50] No other national policy statement was brought to our attention as being relevant to the issues.





*Regional Policy Statement*

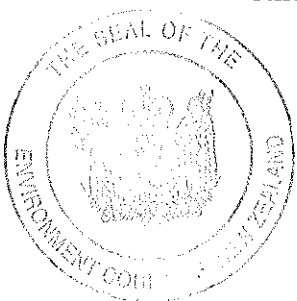
[51] The Wellington Regional Policy Statement (1995) has recently been reviewed so there are two documents currently in place. The proposed Statement (2010) has passed through its decisions on submissions stage and is subject to a number of appeals. We were not told if any of the relevant parts were subject to appeal. Both Mr McKay and Mr Leary indicated that the operative provisions do not contain specific objectives and policies relevant to Lambton Harbour. However, Mr Leary drew our attention, in a more general sense, to Policy 2 in Chapter 7 concerning the coastal environment and the need to consider actual or potential adverse effects of use and development on areas of, amongst other things, cultural, heritage, recreation and open space and amenity values. In addition, Mr Leary took us to Chapter 10 which deals with Landscape and Heritage matters. In particular, Objective 3 and its policies with respect to cultural heritage.

[52] In relation to the Proposed Regional Policy Statement, both Planning witnesses noted that this document introduces objectives and policies around regional urban form and, in Mr McKay's words, *... the importance to the region of maintaining central Wellington (of which the waterfront area forms part) as a viable, vibrant and accessible centre and that it specifically mentions that commercial activities may be appropriate in highly modified coastal areas.*

[53] However, Mr Leary noted that the proposed RPS continues the theme of protection of features within the coastal environment with heritage values through various methods including district plan implementation. He referred us to Chapter 3, Section 3.2 (Coastal Environment), 3.5 (Historic Heritage) and 3.9 (Regional form, design and function). Mr Leary thought that Variation 11 goes too far, in increasing the efficiency of use of the land in a commercial sense and not appropriately addressing heritage matters.

*Conclusion on Regional Policy Statement*

[54] We find that Variation 11 does not meet the expectations of either the operative or proposed RPS with respect to managing heritage resources in an integrated manner with other resources.



*Regional Coastal Plan*

[55] The Regional Coastal Plan addresses the coastal marine area (below MHWS) of the Wellington region and, in particular, Wellington Harbour. Mr McKay noted the special position of the waterfront in the context of this Plan. He referred us to the following paragraph which is contained under the heading *General Issues – Management (2.1.18)*

The Lambton Harbour area has special characteristics which set it apart from the remaining coastal marine area. The area itself spans the line of mean high water springs, and the area has its own development plan. It is important that the management of the coastal marine area recognises the special nature of this area.

[56] Chapter 4 of this Plan contains general objectives and policies. We set out the relevant parts as they were provided to us.

Objective 4.1.24

The comprehensive development of the Lambton Harbour Development Area is provided for.

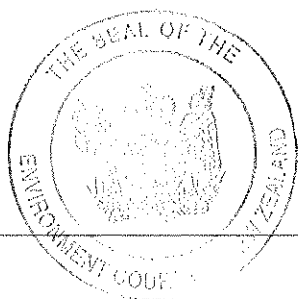
Policy 4.2.45

In the Lambton Harbour Development Area to:

- provide for a wide range of activities appropriate to the harbour/city interface;
- provide for development compatible with the urban form of the city;
- recognise the heritage character, development and associations of the area;
- develop and have particular regard to any design guides for the area which are contained in any proposed or operative Wellington City District Plan;
- provide for a range of public open spaces, access and through-routes, and to ensure that their nature, purpose and function is maintained;
- ensure that the effects of development and activities do not detract from people's enjoyment of the area; and
- ensure that the area is an integral part of the working port of Wellington ...

Policy 4.2.46

To vary or change the Plan, if necessary, as soon as practicable after the Wellington City District Plan becomes operative, to align rules in the Lambton Harbour Development Area (for activities and structures on wharves on the seaward side of the coastal marine area boundary) with the rules in Wellington City Council's District Plan for the Lambton Harbour Development Area (for activities and structures on the landward side of the coastal marine area boundary).



[57] Several matters are of note here. There is to be a consistency of approach across the administrative line between the District Plan and the Regional Coastal Plan. There is a clear understanding that this area provides the main open space for the central city and is primarily a *place for people*. There is a clear indication that the working port function will remain.

[58] The subject site is at the boundary of the Regional Coastal Plan administrative area and there is currently a working wharf including access, parking, and sheds adjoining the area on the seaward side. New development, particularly on Block A, will overlook this port area. We understand from these provisions that the Plan balances the city waterfront *people place* imperative with the needs and functions of a working port. Planning Map 4A identifies the Lambton Harbour Development Area (within the CMA) and Map 4D identifies protected wharf and reclamation areas. Both these areas extend along the water side edge of the Variation 11 planning area. We anticipate that because part of the wharf area immediately adjoining the Variation 11 land is within the Lambton Harbour Redevelopment Area, this area may change focus in the future. However we were not told of any plans, nor provided with any details, of how the Regional Coastal Plan might enable future development or gentrification, if at all.

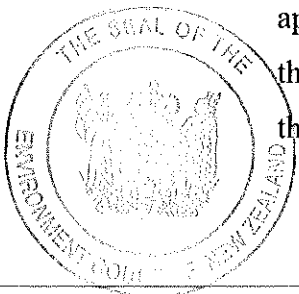
[59] The variation is silent on expectations or influences across the CMA boundary. We find this a shortcoming in that Block A in particular directly faces onto this area and the 9m wide space to the east, at least in part, is abutted by the nominated redevelopment area under the Regional Coastal Plan. The remaining area would seem to be commercial port.

#### *Conclusion on the Regional Coastal Plan*

[60] In our view, the Variation is deficient in dealing with cross-boundary issues with the CMA heritage and open space provisions.

#### *District Plan*

[61] To place it in context, Variation 11 is a variation to Plan Change 48 to the Wellington City District Plan. As we understand it, PC 48 has reached a point where all appeals have been resolved apart from some site specific matters which are not relevant to these appeals. The context for the variation is therefore the objectives and policies as they are now set out in PC 48.



[62] PC 48 encompassed a review of the Central Area planning provisions for Wellington City. However, while restructuring and reformatting the Central Area chapters, PC48 did not make any substantive changes to the waterfront provisions.<sup>8</sup>

[63] Chapter 12 of the district plan contains the Central Area provisions. The changes to the Plan through Variation 11 essentially take place in Section 12.2 Central Area Objectives and Policies where reference to the Wellington Waterfront Framework document is replaced with a direct reference to the Central Area Urban Design Guidelines as a method for achieving various policies.

[64] The Plan's Central Area provisions are based on eight principles that will guide future development.<sup>9</sup> Relevant to these appeals, these address *sense of place* and enhancement of *built form, quality of the public environment, and city/harbour integration*.

[65] The single specific objective for the Lambton Harbour Area set out at 12.2.8 in the decisions version of PC 48 remains unchanged:

12.2.8 To ensure that the development of the Lambton Harbour Area, and its connections with the remainder of the city's Central Area, maintains and enhances the unique and special components and elements that make up the waterfront.

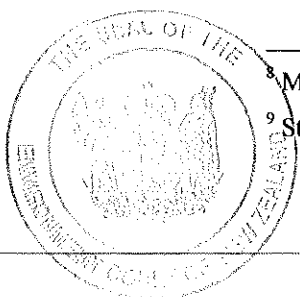
[66] Some key changes are made to certain policies which flow from the objective. The changes are sometimes subtle but have significant effect. We will attempt to describe the result in the following paragraphs.

[67] We note that Policy 12.2.8.4, which was the subject of much discussion, remains unchanged:

12.2.8.4 Maintain and enhance the heritage values associated with the waterfront.

Methods

- Rules
- Operational activities (The Wellington Waterfront Framework)
- Advocacy
- Conservation Plans



<sup>8</sup> McKay EIC Para 39

<sup>9</sup> Steven's EIC Para 24

The methods referred to for implementation of this policy do not include the Design Guidelines.

### *Design Guidelines*

[68] As we have discussed, one of the objectives of Variation 11 was to introduce the Central Area Urban Design Guidelines as a tool for assessment at the waterfront. The Council had up until this point relied upon the (non-statutory) Wellington Waterfront Framework for assessment of new development. Thus throughout the relevant sections of the Plan the variation replaces the words *Wellington Waterfront Framework* with *Central Area Urban Design Guidelines*. However, it retains references to the *Framework* document where it refers to methods to be used to give effect to certain policies in relation to *operational activities*, which we understand to mean the Council's own activities that it conducts in this area, for instance through Wellington Waterfront Ltd.

[69] The variation introduces a new section to the Guidelines specifically relevant to North Kumutoto<sup>10</sup>. Each set of guidelines is put in place by reference to an objective.

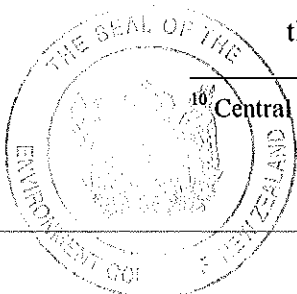
The seven guideline objectives are:

- (Nk) O1.0 To deliver design excellence in the form of buildings and public space
- (Nk) O2.0 To provide design coherence both within the area and the wider environment.
- (Nk) O3.0 To complement and maintain the sense of place and waterfront character of this area.
- (Nk) O4.0 To provide buildings that are robust enough to allow mixed use development and possible changes in use over time.
- (Nk) O5.0 To enhance the pedestrian links and experience in the area.
- (Nk) O6.0 To design and develop buildings that enhance new and existing public spaces.
- (Nk) O7.0 To provide a strong built edge to the Quays

We note the lack of specific reference to heritage in these objectives.

[70] As we have indicated, several guidelines sit beneath each of these objectives. The language of these guidelines can in some instances be very elaborate - for instance the first guideline under (Nk) O1.0:

- (Nk) G1.1 Deliver creativity and imagination in the conceptual design to provide exquisite resolution of buildings and public space to complete the waterfront and elevate the city's reputation as a centre of creativity. Architectural creativity and imagination



should be linked with conceptual clarity, conviction and control, and the cleverness of response to the project programme and site. Exquisite resolution will come about through the quality of detailing, and the appropriateness of materials rather than their cost.

[71] The Guidelines perform the function of assessment criteria. As the word *guide* implies, they are not rules and are not thus imperatives. Not all need to be achieved, and thus the process of assessment is extremely important.

[72] The process of assessment which is currently adopted by the Council uses an independent panel of experts to inform the decision making. There is no guarantee of public input into the process that the Council may adopt.

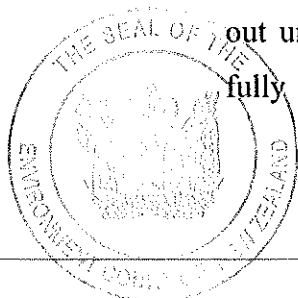
[73] This issue was clearly of concern to Waterfront Watch as they perceive a conflict of interest between the Council's role as land owner and its role as regulatory authority. We were told of the use of the same experts in decisions made by the Council in approval of development as the land owner and Council approval of development under its RMA obligations.

[74] The guidelines operate within the parameters of the rules set out in the relevant general standards and Appendix 13. As the opening paragraph explains under the heading *Using this Appendix* there are an infinite range of design solutions as to how a building (or buildings) could sit in Blocks A, B or C and ... *there needs to be design flexibility that can respond to these locations.*

[75] The question is whether the guidelines are sufficient to deliver the outcome sought by the district plan policies, irrespective of the Council's internal practices? This leads us to consider two things:

- [a] What should be identified as an imperative and what should be left to a guideline?
- [b] What do the guidelines mean?

[76] The process is also defined in the Plan by reference to the classes of activities set out under the RMA. Variation 11 adopts a *restricted discretionary* approach over the *fully discretionary* approach in the current provisions. As a *restricted discretionary*



activity the consideration of a resource consent application is restricted to only those matters over which the Council has reserved control in its Plan.

[77] We consider that the existing policies, proposed policies and the likely environmental effects of development enabled by the Variation, require a fuller list of assessment matters than have been set out in the proposed restricted discretionary rule.

[78] *Height*, as defined by Appendix 13, is an imperative beyond which a building cannot go. Mr McKay's view, as we understood it, was that the height maximums were just that and the development essentially was assessed from the ground up and may not actually achieve the maximum height if it did not meet assessment under the design guidelines. He relied on the fact that the proposal must be assessed as a *restricted discretionary* activity and thus the Council could decline consent. However, we have noted that there are short comings to the list of matters over which the Council has reserved discretion and there are limitations as to the status of a guideline.

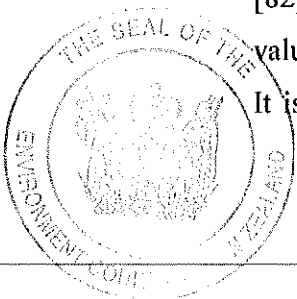
[79] Mr Wild held a slightly different view to Mr McKay; in questioning from the Court he confirmed that Appendix 13 sets up the volume of building and thus the application of the guidelines represented a whittling away at that volume until a suitable response was achieved.

[80] Mr Anastasiou submitted that the language of the Plan set up the Appendix 13 heights as the height rule and thus there was an expectation that they will be achieved.

[81] As set out in our discussion on environmental effects, we have established that there are some imperatives which need to be adhered to. Further, we noted that there are some guidelines which the Council expected would be adhered to. The inter-storey heights which relate specifically to the overall height limit are one such imperative that Mr Morten Gjerde, a consultant urban designer called by the Council, considered essential.

#### *Wellington Waterfront Framework*

[82] 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. It is not a statutory document, but is intended to remain as a policy reference, adopted by



Variation 11. Up until the *Hilton* decision the Council and community have relied upon this framework for design guidance in assessing development at the waterfront. Thus it was expected by Waterfront Watch that the relevant principles contained in it would be reflected in Variation 11. Section 3 of the Framework sets up values, principles and objectives for the waterfront which include reference to the heritage and history of the area, including its heritage buildings, and refer to a sense of place in a similar way to the district plan. Waterfront Watch brought to our attention the third bullet point principle under *sense of place*:

- Any new buildings will be complementary to, and in a scale appropriate to, the existing buildings around them.

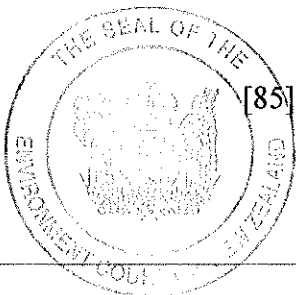
[83] In respect of experience of space and openness, the Framework principles note the harbour as the primary open space on the waterfront; that there will be a network of paths throughout the area, and a series of different open spaces that cater for diverse uses and activities will predominate. Importantly, relative to QWH concerns, we were pointed to the following principle:

- Buildings will support the open spaces, both in their design and their associated uses and activities

[84] Section 4 of the Framework was the main focus of discussion of the parties and both sides relied to a certain extent on elements of this section. The Framework identifies North Queens Wharf as one of several key features of the waterfront and sets out the following description:

- Strong connection to CBD
- Maritime character
- New buildings in scale with heritage buildings and enhanced with squares and lanes
- Sheltered route from Railway Station along Customhouse Quay
- Underground parking preferred – an alternative could be above-ground parking in a building on Site 102
- Views from city streets to be preserved, and improved where possible
- “Two parts” promenade – one path along the Tug Wharf and a more sheltered path incorporated by new buildings along the inner water’s edge
- Tug Wharf refurbished and access to water for fishing and pleasure boats improved.

[85] More specifically, Section 4.2 which deals with North Queens Wharf indicates:





North Queens Wharf has a strong connection to the city's Central Business District. This will be reflected with a stronger sense of the city form being developed in this area through a higher proportion of buildings than on the rest of the waterfront.

The character of the area will be of squares, lanes and new buildings in scale with the heritage buildings, such as Shed 21 at the northern end and the Queens Wharf Apartments and Sheds 11 and 13 at the other end.

[86] Further, out of the matters expressed in this section, the following paragraph was key to the concerns raised by Waterfront Watch.

New buildings in the North Queens Wharf area will be sympathetic to, and relate to the scale and size of, the heritage buildings, bearing in mind that Shed 21 at the northern end is higher than the heritage buildings at the southern end. They will also be designed in a coherent fashion so they relate to and complement each other.

[87] Section 4.2 as identified seemed to be the underlying reference for the adoption of the building regime set out in Appendix 13. We understand the words to mean that because this part of the waterfront has a strong connection to the CBD it is appropriate to accommodate a higher proportion of buildings here than the rest of the waterfront. The Framework underpins the Variation.

*Queens Wharf Holdings appeal – building mass standard*

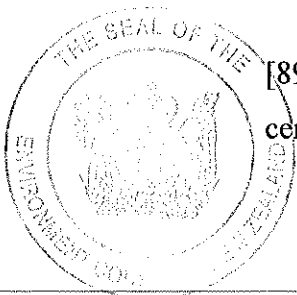
[88] Previously there had been no District Plan control on building mass, and development could be up to 100% of the volume produced by the site area x the nominated height. The formula relevant to buildings on the waterfront is contained in Rule 13.6.3.2 as:

In areas where building heights are measured above mean sea level:

Total mass = site area x (height – assessed ground level) x .75

The volume is measured in cubic metres from exterior faces and includes all enclosed portions of the building above assessed ground level, but does not include decks, recessed balconies, architectural features protruding beyond the facade, etc. Obviously enough, the purpose of the Rule was to manage potential adverse effects related to wind, light, impacts on heritage items, viewshafts and the like.

[89] The general Central Area standards (contained in Section 13.6 of the Plan) set out certain environmental standards relating to matters such as noise emission, lighting, dust,



parking, and wind etc. They include a building mass rule (13.6.3 Buildings and Structures – 13.6.3.2). *Mass* in this sense can also be referred to as *volume*. Rule 13.6.3.2.4 makes it clear that this Rule does not apply in the north Kumutoto area.

[90] The Rule requires a site boundary upon which to operate. The specific Rule occurs at 13.6.3.2 and contains its own definition of *Site Area*:

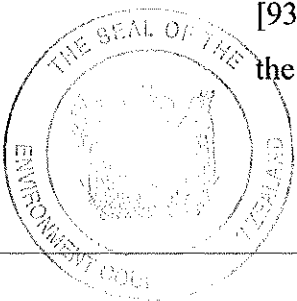
Site Area - means the total area of the site (or sites) that forms part of the development, but does not include any portion of the site subject to a strata title. See also the definition of site. [defined in the Plan itself as:]

Site: means any area of land comprised wholly in one certificate of title or any allotments as defined by the Act, or any allotments linked pursuant to the provisions of section 37 of the Building Act 1991.

[91] We understand that the building footprints in Blocks A, B and C in Appendix 13 are currently contained within the one certificate of title that includes most of the precinct. Their identification is restricted to that contained in the Appendix diagram, which does not accord with the Building Mass standard. Thus there is an issue as to the effectiveness of this Rule being applied to the North Kumutoto area.

[92] It was the clearly expressed view of Mr Alistair Aburn, QWH's consultant planner, that such a control was unnecessary and indeed inappropriate in the Lambton Harbour Area where the sites are often very large and where there are other means in place of controlling building mass. For instance, Rule 13.6.3.8.1 imposes a maximum building coverage for the whole Lambton Harbour Area of 35%, meaning of course that 65% of that Area must remain open space. In the course of expert witness conferencing prior to the hearing, Mr Aburn, Mr McKay and Mr Leary concurred in that view. On reading the Council's Commissioners' post-hearing recommendations it clearly appears that they too concurred in that view, but for reasons now unclear that was not translated into the Decisions Version of the Variation. That disconnect between the recommendations and the result did not become apparent until after the Notices of Appeal had been lodged, so there is no direct reference to the Building Mass Standard in them.

[93] For that reason Mr Gordon submitted that we should exercise the power in s293 of the Act to direct the Council to make the necessary amendments. As mentioned earlier,



the law to be applied in dealing with these appeals is the Act as it stood before the 2009 amendments. At that time the relevant part of s293 provided:

293 Environment Court may order change to policy statements and plans

(1) After hearing an appeal against, or an inquiry into, the provisions of any policy statement or plan that is before the Environment Court, the Court may direct the local authority to—

- (a) prepare changes to the policy statement or plan to address any matters identified by the Court;
- (b) consult the parties and other persons that the Court directs about the changes;
- (c) submit the changes to the Court for confirmation.

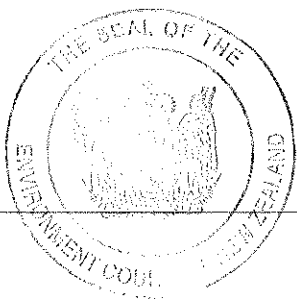
(2) The Court—

- (a) must state its reasons for giving a direction under subsection (1); and
- (b) may give directions under subsection 1 relating to a matter that it directs to be addressed.

It is clear that although s293 (as it then stood) spoke only of *Plans* rather than *proposed* Plans or Changes and Variations, the power to direct amendments must be directed to the latter documents, if only because the Court could not be hearing an appeal or inquiry into a planning document that is already operative: - see eg *Foodstuffs (Otago Southland) Properties Ltd v Dunedin CC* (1993) 2 NZRMA 497.

*Conclusion building mass standard and on the use of s293*

[94] We agree with the planning witnesses on this issue. While the 35% coverage provision certainly may create a first come, first served, situation it does ensure that as a whole the Lambton Harbour Area will not be over-developed. Further, to have two not-necessarily compatible mass/coverage rules in effect over the same area is a recipe for confusion and conflict. However, examination of this issue before us was confined to the Queens Wharf area and therefore we can only be confident of the impact in respect of that area and not the remainder of the waterfront. Given the unanimity of opinion of three very experienced planners, and the at least tacit concurrence of the parties, we are satisfied that a sound argument for removing the building mass standard from the QWSHA has been made out, and that this is one of the relatively rare occasions on which, subject to our views on the appeals overall, we should exercise our discretion to direct the Council to make that change accordingly.



*Queens Wharf Holdings appeal – public accessibility*

[95] Variation 11 introduced a Policy (12.2.8.6.C) and Rules incorporating a new Standard – 13.6.1.3.23:

The ground floor of buildings within the Lambton Harbour Area shall have:

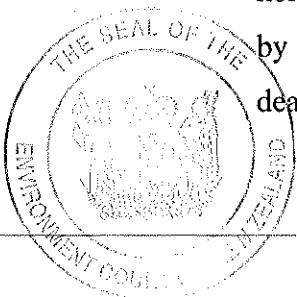
- (i) no less than 60 per cent of its floor area accessible to the public
- (ii) at least 60 per cent of any frontage to a road, lane, boardwalk, promenade, park or square as entrance space or display windows.

It is QWH's position that introducing such a constraint on building design and use across the whole of the Lambton Harbour Area is inappropriate. As mentioned, its buildings within the QWSHA were a complete failure as retail space. It is concerned that the new provisions will put at risk their somewhat frail viability and their ability to contribute in any way to the vitality of the waterfront.

[96] Mr Gordon advances the argument that in the face of the former Retail Centre's proven inability to survive as predominantly public space, the proposed new Policy and Rules have not been shown to be the appropriate method of implementing Objective 12.2.8:

To ensure that the development of the Lambton Harbour Area, and its connections with the remainder of the City's Central Area, maintains and enhances the unique and special components and elements that make up the waterfront.

[97] If the effect of Variation 11 was to oblige QWH to immediately *open up* the ground floor of the QWSHA buildings, with the result that the existing commercial and office tenants would find the space unusable, then we would be entirely sympathetic to the argument that the 60 per cent rule should not apply to it. But it does not do that. It is accepted by all that QWH has existing use rights under s10(1) of the Act. It may continue to have the building in its present layout (ie with some 90% of ground floor area in office space) indefinitely, subject only to the limitations in subsections (2) and (3) – ie that the existing use rights may be lost if the use is discontinued for more than 12 months, or the building is altered or extended in a way that increases the degree of non-compliance. If either of those situations should come to pass, QWH has the ability to seek an extension of the existing use rights, or to apply for a resource consent authorising the otherwise non-complying activity. In that regard, the addition of text to Policy 12.2.6.8C suggested by Mr McKay should make the basis on which a resource consent application should be dealt with very clear. The Policy would read:



12.2.8.6C To ensure that the ground floor of buildings be predominantly accessible to the public and have active edges to significant adjacent public spaces.

Methods

- Rules
- Design Guides (The Central Area Design Guide)
- Operational activities (The Wellington Waterfront Framework)

The waterfront is one of the City's prime public spaces. It is important that the entire Waterfront area, including the ground floor of buildings, be predominantly accessible to the public.

To support this principle, specific rule provisions have been included that require the ground floor of buildings to be predominantly accessible to the public and also to have active edges to significant adjacent public spaces. The application of these provisions will work to achieve a high quality public environment.

The following matters will be considered in respect of applications for proposals that do not comply with the requirements:

Public accessibility to ground floors:

- Whether the depth of the building footprint is such that the interior space is unsuitable for uses to which the public should otherwise have access.
- Whether the publicly accessible space from the building frontage is of a reasonably usable depth (a minimum depth of approximately 10m will generally be expected).
- Whether the use or uses within the building are visible and will provide 'an experience' for the public on a continuing basis.
- Whether it is appropriate for space to be used for a specified period of time without compliance.

Entrance ways and display windows:

- Whether the nature of the adjacent public space is such that compliance with the entrance way and/or display window provisions should be reduced or waived.
- Whether it can be demonstrated that frontages are readily capable of modifications to comply with the entrance way and/or display window provisions in future.

*Conclusion on the public accessibility issue*

[98] Contrary to the submission made for QWH on this issue, we think that the 60% rule is an effective method of *opening-up* the waterfront and so enhancing the possibilities of its use as a recreational and social asset for the city's population and visitors. We heard no evidence to persuade us that there is good reason to exempt the QWH buildings from a Rule of general application along the Lambton Harbour Area. With its existing use rights, its present configuration is protected and if the market should change, and



retail/food and beverage/gallery or similar space there comes into demand, there is nothing to inhibit it from adapting the building accordingly. That part of the QWH appeal is declined. We should perhaps add also that the alternative relief sought by Waterfront Watch of requiring 80% of the ground floor of waterfront buildings to be publicly accessible was not supported by any cogent material, and we see no need to pursue it further.

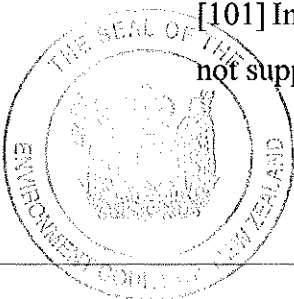
[99] However, we consider that the rules should clearly set out the matters in respect of which the Council has restricted its discretion and provide criteria for such assessment. Thus the statement which accompanies the policy(s) as outlined above need to be clearly articulated in the rule. The current drafting is clumsy and unclear.

*Queens Wharf Holdings appeal – controls for areas outside North Kumutoto*

[100] Fundamental to QWH's position here is the view of its consultant urban designer, Mr Gerald Blunt, that there has been insufficient thought given to development parameters and controls for the Queens Wharf area, as opposed to North Kumutoto. He describes Queens Wharf as the central feature of the waterfront, and has the view that the existing buildings – the former retail centre and the TSB Arena - are challenging in planning terms in that they pay little or no respect to the historic context; they are very large footprint buildings, the size of which is unlikely to be replicated on the waterfront, and have their issues for public accessibility. Mr Blunt believes that applying the same controls to Queens Wharf as will apply to North Kumutoto will be a mistake, and that it needs its own set of rules. He points out that the Council's s32 report for Variation 11 had this to say:

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.

[101] In respect of the nature of the changes which will impact upon queens Wharf we do not support Mr Blunt's view as we have discussed above.



*Waterfront Watch appeal – North Kumutoto – Appendix 13*

[102] As we have mentioned Variation 11 identifies three building sites within the North Kumutoto Area. Rule 13.3.4A provides that buildings on those sites, and the development of new open space, will be a *Discretionary (Restricted)* activity in respect of design, external appearance and siting, height, and public space structure and public space design, historic heritage and effects of building development on the Eastbourne Ferry building. It also provides:

In respect of rules 13.3.4 and 13.3.4A applications do not need to be publicly notified and do not need to be served on affected persons.

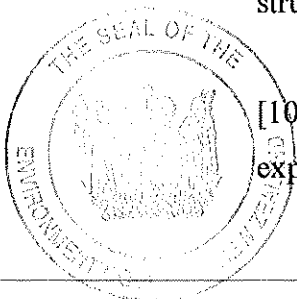
We shall return to the notification and service issue later. For the moment we turn to consider each of the three sites identified in Appendix 13.

*Block A*

[103] Block A (the northern most of the three), is against and parallel with Waterloo Quay on its western boundary. There is a prescribed separation of 14m between its northern face and the existing Shed 21. A prescribed but undimensioned space of some 9m lies between its eastern face and the edge of the Wellington Waterfront land. This borders onto the working Port area. Its southern edge is a little more complicated, because negotiations between the HPT and the Council resulted in the southern edge having a so-called *transition area*, the purpose of which, we understand, is to reduce impacts on the Eastbourne Ferry building. We have described the approximate footprint of permissible building in Block A in para [12]. The maximum height of the possible building is 30m AMSL.

[104] The Waterfront Watch position is that a maximum height of 30m is incongruous in its surrounding context, and fails to meet the provisions of the relevant guidelines and planning documents. Fundamental to that argument are the heights of the heritage buildings on the Waterloo Quay - Customhouse Quay frontage such as: Shed 21 a brick building with roof hidden by a brick parapet immediately to the north at 21m (to top of parapet), Shed 13 also a brick building with pitched tile roof to the south at 15m to the roof apex and 9m to the eaves, and the Ferry Building which is a 2 storey weatherboard structure with tile roof.

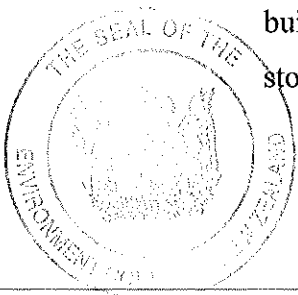
[105] As a first issue, we have to say that we agree with the view that although the 30m is expressed as a maximum, and height is an issue over which discretion is retained, it is



unlikely in the extreme that any would-be developer will opt for something less. There is simply no incentive to do so. The release by Wellington Waterfront, just a short time before the hearing, of artists impressions of a building proposed for Block A, and which it was reported as enthusiastically endorsing, rather confirms that view. Although the published material did not contain dimensions, Mr Leary was able to calculate them from the display material available, and confirmed that the building would occupy the whole of the available envelope. Further, the Minutes of the Council's Technical Advisory Group recorded its view that that proposed building ... *meets the policy expectations for the waterfront*. Those urban design witnesses who do not favour the size of building envisaged by Block A point to this proposed building as being exactly what they feared would happen – a building that is quite out of scale with its surroundings, that overbears the historic heritage of the existing buildings, and that dominates what public open space it leaves available.

[106] On the other side of Waterloo Quay is the New Zealand Post head office building, a modern concrete building some 67m high, and with a quite pronounced 5 storey, 30m high, podium. That building, and the footprint of the Block A building will run parallel to each other along Waterloo Quay for some distance (possibly 60m.) One criticism levelled at the Block A height is that the two buildings will create a *canyon* effect for Waterloo Quay where they stand opposite each other and that, we agree, is highly likely. At that point, so its detractors say, there will be little, if any, sense of *step-down* from the high city to the waterfront. We agree, in part. There might be a sense of step-down from the *high city* of the CBD, but certainly not enough to relate to the much smaller heritage buildings of the waterfront. We would also expect this to be difficult to perceive for the pedestrian in this part of Waterloo Quay.

[107] We are inclined to agree also with the view that there will be little, if any, sense of relativity between the Site A building height and the heights of any other building on the waterfront side of the Quays. At this point we consider it would be useful to discuss the descriptors which influence the height of Block A. 30m (AMSL) equates to approximately 27.5m above ground level and this has been described to us as a 6 storey building on the basis of the design guideline ((NK) G4.1). The concept allows for an inter-storey height at ground floor level of 6m and above this 4.2m between storeys thus





arriving at a 6 storey building. While this descriptor is a design guideline, it was considered an imperative as far as the urban design witnesses were concerned.

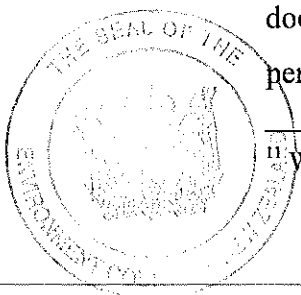
[108] By comparison Shed 21 reads as 3 storeys but in fact includes mezzanine floors, Shed 13 (and its sister Shed 11 further to the south) reads as a single storey with an elaborate roof structure. The Ferry Building is clearly a lighter two storey structure.

[109] The other building in the setting for development of the North Kumutoto area is the Meridian Building. This is a new addition being a modern 4 storey glass, concrete and timber building with a height of 19m (annex roof ie opposite Shed 13) and 20.25m for main roof or 21.7m to the top of the roof plant.

[110] Whether the height differences mean that the Block A building conforms with, or is in conflict with, the principles in the various planning documents was the subject of sharp debate at the hearing.

[111] We agree that being *in scale* is not an absolute requirement for dimensional equality. Our understanding is that scale relates to a number of features which are likely to influence relative acceptable proportionality. For instance, this is demonstrated clearly by the treatment of the window detailing in Shed 21 relative to the actual number of floors and its apparent height.

[112] We accept the Council's position that *the imposition of Design Guidelines is a move away from a rigid set of rules that may stifle initiative and which may miss out in terms of achieving quality*<sup>11</sup>. However, some certainty of outcome is essential to meet the objectives and policies of the district plan. In this case, the size of the footprint, including its significant length relative to other buildings in the development area and for that matter adjoining the development area, and the permissive 30m height limit without any imperative design features such as the inter-storey dimension, allows for a significant volume of building relative to any proximate neighbour. We consider this formula will not achieve the outcome enshrined in the District Plan and other relevant planning documents. To this end the footprint in terms of continuous building volume for permissible building in 'A' should be adjusted so that the form reads as more than one

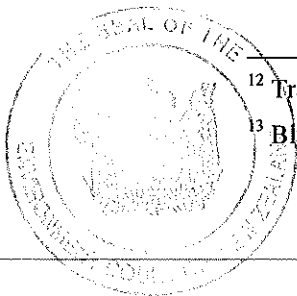


<sup>11</sup> WCC Submissions in Reply Para 31

building. We consider a permissible height of 22m is appropriate. (We note that this figure tends to equate with the lower figure recommended in the Blunt Report.) This dimension should be referenced to the inter-storey height (6m ground floor and 4.2m above) which should be implemented as a rule. The result would amount to a 4 storey building(s) with scope for rooftop plant.

[113] A further question arises as to the depth of setback for Block A from the Port land/ south-eastern boundary. At 9m this appears to replicate the dimension between Shed 13 and the annex of the Meridian building<sup>12</sup>. We were told the carriageway between Shed 13 and Meridian is 6.5m wide (consistent with the gap proposed in Appendix 13 between the buildings for Blocks B and C). There are a number of issues which affect this setback:

- The setback is for the most part adjoining a working port area (*CentrePort*<sup>13</sup>) including access, parking sheds and wharf.
- It is to provide pedestrian access and links through to the access along this frontage of Shed 21 and around that building towards the railway station. We observed this access being used by pedestrians and cyclists when we visited the site.
- We were presented with no traffic analysis with regard to the proposed arrangements in Variation 11. We would expect assessment of pedestrian and cyclist desire lines, an analysis of the likely parking to be accommodated in the area, loading and parking access for new buildings etc and, need for drop off etc bearing in mind the range of activities and focus of the area related to entertainment and business activities. While we accept detailed planning will occur at the point of seeking a resource consent, this is a variation and sets in place the framework for development.
- This is an open space and as such its development under the variation requires a separate resource consent. It is unclear how this might integrate with a private development on A.
- Mr Gjerde made a distinction between two types of open space in terms of their primary use: *places to be and places to move through*. It is unclear what purpose



<sup>12</sup> Transcript questions of Mr Gjerde existing lane between Shed 13 and Meridian approx. 9.5 to 10m.

<sup>13</sup> Blunt report Page 228 Wellington City Council Bundle

this 9m wide space serves and it may well serve as access to parking and loading beneath a future building.

- This open space is a long stretch of the wharf frontage and the nature of future activities which might about it has not been investigated, or at least was not presented to us.

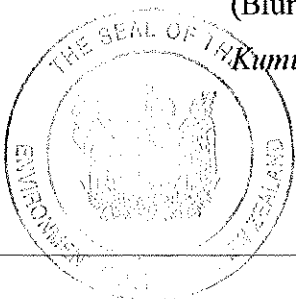
[114] Overall, we consider that the raw permissible footprint of building within 9m of this edge is too susceptible to an outcome which might not provide for both types of spaces. Given the length of frontage at issue we do not find the 9m setback, as it has been crafted, acceptable. We consider that a greater setback is required, given the available depth of building from Waterloo Quay. There could possibly then be a mechanism for intrusion into it as a design issue rather than provision of a minimum, which may well result in compromise. We do not consider an outcome such as the lane between Shed 13 and Meridian is acceptable for a space that will be an extension of the waterfront promenade. We also consider that issues of traffic management and pedestrian access should, at the least, be included in the matters over which discretion is retained.

#### *Block B*

[115] The footprint of Block B was generally considered as quite satisfactory across the relevant witnesses, and we agree. However, in relative terms its height should be adjusted downwards to complement the lowered height of Block A. The maximum height of the Block B should be 16m and 19m accordingly (a lowering of the 25m allowance to 19m which would equate to the Meridian Building annex and provide relativity to Shed 13).

#### *Block C*

[116] Our conclusion is that Block C is better left open space. Counsel for the Council suggested in her reply that since Mr Murray did not give evidence, limited weight can be given to his report, compared with the evidence of other heritage experts and that in any case Mr Murray's report was based on a *de minimus* effect on heritage values. However, Mr Blunt who prepared the report entitled *Validity of Redevelopment at North Kumutoto* (Blunt Report) relies on the R&D Architects report entitled *Report on Heritage Values – Kumutoto Area* dated 18 June 2008, the author of which is Mr Murray. The Council



provided both Mr Blunt's report and the Murray Report in its Bundle of documents for the Court. Mr Blunt did give evidence and his report was the subject of examination.

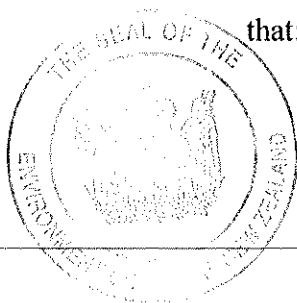
[117] The historical features are not all within the area defined in Appendix 13 but some are and others are at its boundary (eg: the Wharf Gates, the Ferry Building). As the Blunt report indicates, the harbour is at its closest to the Quays at the Whitmore Street intersection. In this area are several historical features in relative close proximity, being the Gates, the Ferry Building and Shed 13, as well as the protected wharf and reclamation area (Regional Coastal Plan). As well, the landscaped open space associated with the Meridian development and the Kumutoto Stream interface is accessed from here and provides a foreground to the Meridian building from this aspect. There is a remaining visual connection between Shed 13 and the water as well as the developed open space and the area currently used for parking nominated as Block C.

[118] The Blunt report sets out at Part 3 *Issues and recommendations* an assessment of Block C which reads:

- As an open space it is neither too large nor too small to make work. It has no built edges, and it is not big enough to have its own identity or function, this in comparison to Kumutoto Plaza which has two strong built edges as provided by the Meridian Building.
- A new building would make use of a space that can be described as classic space left over after planning – S.L.O.P.
- A new building can be a foreground building as viewed from the promenade and compared to buildings in Block A and B which are potentially constrained having vehicle movements on two sides
- A new building would frame entry into the lane from the north – giving the lane more legitimacy
- A new building would give an edge to the promenade
- A building would define the edge of Kumutoto Plaza and provide shelter
- A building would provide accommodation that will support existing and new public relevant uses at ground level

[119] Conversely, as noted in the Blunt report, Mr Murray had concluded in his report that:

Keeping this area clear would effectively protect views through the Kumutoto area, preserve a surviving aspect of the former relationship of Sheds 11 and 13 to the sea, and



would avoid encroaching on the ongoing use of the wharves, public access to the water and pedestrian use of the area.

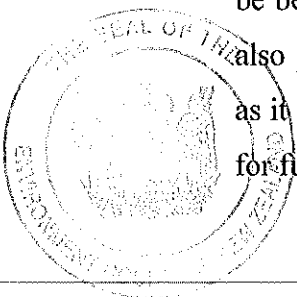
[120] Mr Blunt's rejection of Mr Murray's opinion, as recorded in his report, centres on the relationship between Sheds 11 and 13 having been highly modified, that the proposed new lane width would not be dissimilar to the current lane width and he did not see that a building at Block C would encroach, as suggested by Mr Murray.

[121] However, in the joint statement produced for the Court by the urban design and landscape experts (James Lunday, Morten Gjerde, and Michael Steven) it is recorded that while Meesrs Lunday and Steven consider that the building footprint on C should be deleted and replaced with open space (*thus preserving connection with the waterfront for Sheds 11 and 13 and the Kumutoto Stream*) Mr Gjerde considered that while a building would in his opinion be appropriate in this area if the site were to be developed as open space the outcome would be also appropriate.

[122] Further we heard from Ms Fill (heritage expert for Waterfront Watch) that a visual connection from heritage building to heritage building as well as a visual connection between buildings and the sea has heritage significance as it aids interpretation.

[123] We consider that Block C will provide a useful enlargement of the existing open space which has been established particularly around the stream and is presently focused towards the Meridian building.

[124] This would also facilitate views between the water and Shed 13 and allow for a visual connection between Shed 13 and the Ferry Building. Further we find that the proposed separation distance between Block B and C too small, as it replicates the carriageway width only as aligned with the lane between Shed 13 and the Meridian building. It seems, on the face of it, that this building footprint opportunity is somewhat contrived to maximise the opportunity for buildings in this area. We find that the balance of building to open space and visual connections characteristic of the heritage values will be better served by the deletion of Block C and its nomination as open space. This will also provide balance to the likely vehicle orientated area at the head of Whitmore Street as it concludes within the subject area and will by necessity provide access and servicing for future development.



[125] We also find Mr Blunt's report somewhat narrow in its approach as Block C will be included in an existing open space, it does not sit in isolation, it will be edged by a building at Block B and the southern edge will continue to be the Meridian Building. Block C will provide a focal point of open space immediately adjoining the water in a part of the harbour which, we were told, is closest to the Quay.

### *Notification*

[126] A key significant change as far as Waterfront Watch is concerned is the move to a presumption of non-notification or service for applications for resource consent in the area covered by the proposed Appendix 13 (North Kumutoto Area/Precinct). The District Plan currently has Policy 12.2.11.8:

To provide for and facilitate public involvement in the waterfront planning process.

#### Methods

- Rules
- Operational activities (The Wellington Waterfront Framework)

The waterfront is predominantly a public area, a place owned by all Wellingtonians

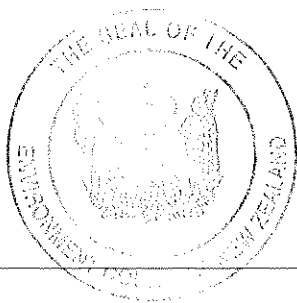
Governance arrangements for the waterfront include a broadly based group consisting of both professional and community representatives. This group will have primary responsibility for the on-going planning and development of the waterfront, as well as responsibility for monitoring all proposed developments. The group will actively engage the public in waterfront decision-making.

Thus, the public will be consulted on the development of plans for the waterfront (Stage 2 of the waterfront planning process) and enabled to participate through the statutory planning process about any proposed new buildings and any significant changes to existing buildings.

[127] That text is to be replaced by the following:

The statutory requirements under the Resource Management Act provide for public participation with respect to the development of plans in identified areas or via the resource consent process for specific development proposals outside those areas.

In addition, governance arrangements for the waterfront include a Waterfront Development Plan process which reviews and reflects the on-going planning and development of the waterfront. This is undertaken on an annual basis and confirms the direction of waterfront development over the following year.



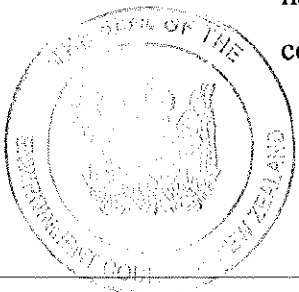
The approval process for the Waterfront Development Plan will provide for public submissions into the decision making process undertaken by the Council in its capacity as land owner.

[128] It is the Council's position that Variation 11 *is* the *Stage 2* process referred to in the current text and thus the change remains reflective of this policy. The text though, as we see it, is explanatory only. The policy remains unchanged. The question thus is whether Variation 11 continues to achieve this policy. Given the uncertainty of development outcome enshrined in the Variation as it stands, we do not consider that a presumption of non-notification supports this objective.

[129] We note that the introductory chapter to the Central Area provisions of the plan, after clause 12.1.8, refers to *Special Areas*. This discussion sits in behind the policy at 12.2.8.8. While we accept that the formulation and process for undertaking a variation to the plan engages with the public, the evidence we heard was that while Waterfront Watch has an extensive history of involvement with decision making at the waterfront, the Council did not consult directly with Waterfront Watch. The Council held the position that general public consultation is not a requirement under cl 3(2) of Schedule 1.

[130] In his rebuttal evidence for the Council, Mr McKay confirms the long association and input Waterfront Watch has had in planning matters on the waterfront. He further makes reference to the Waterfront Watch website setting out the Waterfront Watch policy which clearly states ... *that any new building development should be no higher than the existing Sheds 11 and 13 (i.e. 15m amsl) and that all proposals should be publicly notified.*

[131] While the RMA sets out a minimum consultation requirement, it certainly does not preclude wider consultation. Given the history of this particular organisation in the planning of the Wellington waterfront we find it rather extraordinary that the Council chose not to consult it. The attitude that the Council ... *knew what they were going to say anyway* ... is presumptuously dismissive. Engagement with Waterfront Watch would have informed the Council of matters clearly missing from its own analysis, as we have come to learn through this hearing and which we discuss elsewhere.

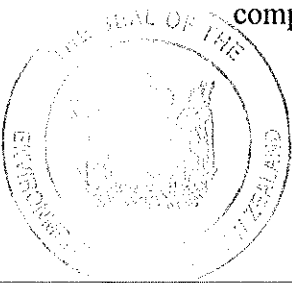


[132] The Council's justification for the non-notification presumption is that the Variation process is the opportunity for public participation in the development parameters for North Kumutoto, and that once the dimensions and boundaries of Blocks A, B and C have been set the Council's reserved discretions can be exercised without further public participation. It wishes to avoid, it says, the sort of extended and expensive litigation that has surrounded waterfront developments in the past. Waterfront Watch has two essential problems with that position. The first is that the proposed dimensions and parameters are unsatisfactory. Secondly, and in any event, it holds that public participation should not be dispensed with in such a special environment. Underlying its position is an unspoken but readily discernable view that the Council cannot be relied upon to *get it right*, and that only public opinion and action, litigious or otherwise, has averted poor planning and design outcomes on the waterfront in the past.

*Conclusion on non-notification*

[133] We have considered the presumption by asking whether it accords with and assists the Council to achieve the purpose of the Act. In terms of s32, is the Objective the most appropriate way to achieve the purpose of the Act, and do the Policies and Rules meet the test of being an efficient and effective method of achieving the Objective? Considering the proposal's benefits, it does give a developer a degree of certainty that if the proposed building is within the set parameters it is likely to be given consent, subject perhaps to meeting the requirement of design excellence, whatever that may actually mean.

[134] Its costs, or disbenefits are, first, that may impose on a developer and the Council to some degree, the costs and time of a disputed hearing before the Council and possible appellate proceedings. In the overall scheme of things, we consider that to be neither unusual nor disproportionate with either the environmental values to be debated or the likely overall cost of the project. Secondly, it removes the ability of the public to raise before decision-makers the issues about a defined project rather than a rather abstract set of dimensions. Much has been said about the public participation philosophy of the Act, and we need not review that here, save to say that we see it as a cornerstone of the Act's processes which should not be dispensed with unless the reasons are clear and compelling. We do not think that is so here, at least in the form of the rules as proposed.





*Overall assessment:*

*Does the variation assist the Council in carrying out its functions so as to achieve the purpose of the act?*

[135] While the Variation removes an *ultra vires* reference to the Waterfront Framework as a district plan method it does not encapsulate key features of this Framework which reflect established public policy for the development of the waterfront. The basis for the Variation was in part to carry this policy through into the district plan and that has not occurred particularly in relation to building development appropriate to the protection of historic heritage.

[136] The Variation removes the ability for the public to participate in development decisions at North Kumutoto without providing sufficient certainty in terms of desired outcome. Given the joint role the Council plays as land owner and regulatory authority and the lack of certainty from the proposed methods, the ability of the Council to carry out its regulatory function may be compromised.

*Does the variation give effect to the NZCPS?*

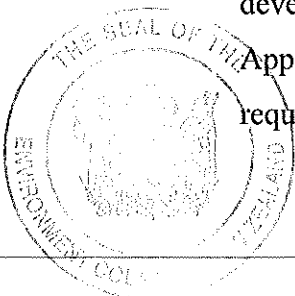
[137] We have found that the Variation does not assist to the extent it should, given the directives of the NZCPS concerning heritage matters, and nor will it necessarily enhance public access to and along the coastal marine area. Nor does it adequately address cross-boundary management.

*Does the Variation address the relevant Regional documents?*

[138] We have found that the Variation does not adequately address the heritage and open space matters identified in the Plan and cross boundary management of resources and environmental impacts are not addressed.

*Does the Variation have regard to relevant plans and strategies under other Acts, and the Historic Places Register?*

[139] The Variation as drafted sets in place rules which will not necessarily protect historic heritage from inappropriate development. There is the potential for new development to overwhelm existing registered historic buildings. The area identified in Appendix 13 and its context contains a significant quantum of historic features which require protection.



*Section 32 issues*

[140] We find that the s32 report is deficient in that:

- [a] It is founded on a misconceived assumption that the *zero height limit* is necessarily inefficient because it triggers a resource consent and thus provides no permitted baseline.
- [b] While consultation was undertaken to meet the statutory minimum, a key party to the formulation of waterfront policy was excluded from consultation.
- [c] Variation 11 does not involve any change or amendment to the existing Plan objectives. The alterations which have been made to policies have placed an emphasis on building development whereas development per se was the concern as originally conceived (ie includes open space). This has altered the balance and is not addressed in the s32 report. With that, the explanatory statements particularly relative to Policy 12.2.8.6 refer to the need for new buildings to be generally complementary and in a scale appropriate to existing buildings around them. They also address matters such as pedestrian access and traffic management. These statements are not included in the policies themselves and are not reflected in rules pertaining to assessment of new development. The s32 report does not consider the environmental outcomes associated with the specific proposed rules.
- [d] Terminology used in the design guidelines is unclear and as such reliance on these is limited. Further, this tool represents a guide only.

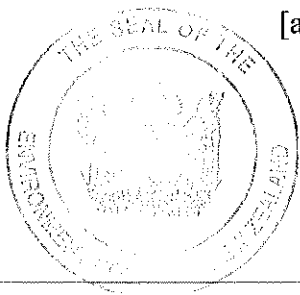
*Are the relevant changes to objectives the most appropriate way to achieve the purpose of the Act?*

[141] There are no changes to objectives proposed.

*Do the policies implement the objectives and the rules implement the policies by reference to their efficiency and effectiveness as to whether they are the most appropriate method for achieving the objectives of the Plan?*

[142] We have identified a number of shortcomings in the Variation.

- [a] Poor drafting in terms of policy formulation, where the explanation to the policy describes outcomes sought are not articulated in the policy, and in terms



of rules we describe below, where rules do not reflect outcomes sought from policies.

- [b] Benefits and costs where there is a suggested difference seem to concentrate on the administrative costs and do not address potential environmental costs relative to the potential outcomes enabled by the application of the variation.
- [c] The efficiencies and effectiveness of the proposed provisions are unclear from the s32 analysis.

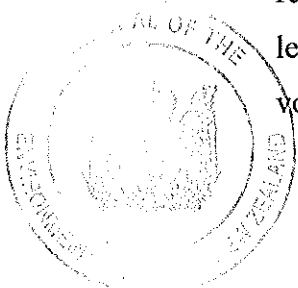
*Do the rules have regard to the actual and potential effect of activities on the environment?*

[143] Appendix 13 in particular does not have regard to the actual and potential effect of activities on the environment. We have found that the overall height and volume of the building outcome capable on Block A would not achieve the plan objectives and policies and do not adequately address the impact upon heritage buildings and structures and amenities relating to open space and pedestrian access and traffic management.

[144] We have found that in some instances policies are not carried through to rules and in other cases the rules are poorly drafted. For instance:

- [a] Matters over which the Council would like to retain discretion are not articulated in the rule although they appear in explanatory statements concerning the waiver provisions relating to public accessible ground floor and active edge rules.
- [b] The list of matters over which the Council has reserved discretion does not include scale relative to heritage buildings, or traffic matters (including pedestrian access), while these matters are articulated in the relevant policy explanations and are clearly articulated in the Waterfront Framework from which the provisions are derived.

[145] Overall, Appendix 13 is too blunt a tool and requires greater precision in respect of public access and open space planning both for pedestrians, cyclists and vehicles. It will require a greater setback than 9m on the eastern edge of Block A at least for much of its length. It also requires greater control on permissible building heights and apparent volumes to better relate to the scale of heritage features on and adjoining the area.



*Section 290A – the Council’s decision*

[146] Section 290A requires the Court, when considering an appeal, to *have regard to* the Council’s decision at first instance. That does not create a presumption that the first instance decision is correct, or impose on any party an evidential burden of showing that the Council erred in any particular respect. But it does require us to consider the views expressed with an open mind and to take account of them in forming our own conclusions. We have done that, but the evidence and submissions we heard have brought us to the conclusion that we should differ from the Council’s conclusions.

*Results*

[147] For the reasons we have traversed we have come to the view that Variation 11 does not meet the statutory requirements set out in para [38] in the respects we have set out.

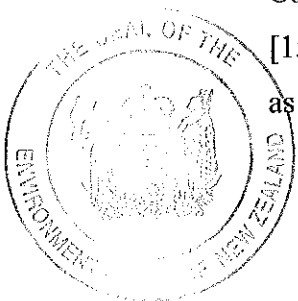
[148] We have given considerable thought to the way in which that conclusion should be expressed as a formal decision. There was the possibility of issuing an interim decision, pointing out what we consider to be the Variation’s deficiencies, and asking the parties to redraft the relevant provisions. We decided against that: - the deficiencies are numerous and some are fundamental, and drafting by committee with the Court acting as arbiter did not seem a promising formula for a coherent and sound outcome.

[149] We came to the view that the soundest course would be to simply uphold the appeals against Variation 11 and leave it to the Council, if it so wishes, to propose a new set of Plan provisions for this area, considered against the background of what, hopefully, has been learnt from this rather frustrating exercise.

[150] The appeals therefore succeed and the Council’s decision is not upheld. Given that overall view, the possibility of using s293 to require the Council to remove the Queens Wharf Area from the ambit of the proposed Building Mass Standards (see paras [88] to [94]) need not be pursued.

*Costs*


[151] The conventional view is that orders for costs are rarely made in plan appeals, but as a matter of formality we shall reserve the issue of costs. If there is to be an application



it should be lodged within 15 working days of the issue of this decision, and any response lodged within a further 10 working days.

Dated at Wellington the <sup>24<sup>th</sup></sup> day of April 2012

For the Court



C J Thompson  
Environment Judge

