
REPORT 3
(1215/11/IM)

WITHDRAWAL OF PROPOSED DISTRICT PLAN CHANGE 65 – EARTHWORKS AND REPLACEMENT WITH PLAN CHANGE 70 - EARTHWORKS

1. Purpose of Report

The purpose of this report is to recommend to the Council that it withdraw Plan Change 65 Earthworks and notify a new Plan Change addressing earthworks, Plan Change 70.

2. Executive Summary

Council notified Plan Change 65 (DPC65) Earthworks in July 2008. At the same time the Councils Earthworks Bylaw expired. DPC65 sought to bring together all aspects of earthworks management into a single regulatory environment. A number of submissions on DPC65 identified that it was unnecessarily complicated, and a review of DPC65 was initiated in early 2009. The review included work to look at gaps between the operative District Plan and the Building Act (in relation to earthworks) and assess the risk of those gaps. In addition it looked at how the provisions could be streamlined and made easier to understand and implement.

As a result of that work, significant changes are proposed to the content of Plan Change 65 resulting in the need to notify a new Plan Change addressing earthworks (Plan Change 70).

3. Recommendations

It is recommended that the Council:

- 1. Receive the information.*
- 2. Agree to publicly notify Proposed District Plan Change 70 (attached as Appendix One of this report), in accordance with the First Schedule of the Resource Management Act 1991 (the Act) concurrently with the withdrawal of DPC65 and Variation 6.*
- 3. Agree to withdraw Proposed Plan Change 65 (DPC65) and Variation 6 (to Plan Change 33 (Ridgelines and Hilltops (Visual Amenity) & Rural Area) at the time of notifying DPC70.*

4. *Agree to adopt the Section 32 Report for Proposed District Plan Change 70 (attached as Appendix Two of this report).*
5. *Delegate to the Portfolio Leader for Urban Development and Transport, the authority to approve minor editorial changes to Proposed District Plan Change 70, and the authority to sign off the final plan change documentation prior to notification.*
6. *Delegate to the Portfolio Leader for Urban Development and Transport, the authority to approve and sign off minor editorial changes to the Section 32 Report for Proposed District Plan Change 70.*

4. Background

4.1 Earthworks Bylaw and Operative District Plan

Prior to DPC65, Council used the following mechanisms to regulate earthworks.

4.1.1 Earthworks Bylaw

The main function of the Earthworks Bylaw was to control the engineering aspects of earthworks to minimise the risk of landslips and other types of earthworks failure. The majority of consents under the bylaw were issued in conjunction with Building Consents and often people were unaware that they required (or were issued) an Earthworks Bylaw Consent. Ongoing issues with the administration of the Bylaw coupled with the limited enforcement powers under the Local Government Act led to a review of the appropriateness and suitability of the Earthworks Bylaw. In 2005, the Strategy and Policy Committee agreed to replace the Earthworks Bylaw with a district plan change and the Bylaw expired on 30 June 2008.

4.1.2 Building Act

The Building Act provides for the regulation of building structures to ensure that people can use them safely and without endangering their health. The Act requires landowners to obtain a building consent for siteworks directly associated with a specific building site or to construct a wall that retains ground more than 1.5 metres deep or which carries a surcharge. The Building Act only applies to earthworks preparatory to or associated with construction and does not cover other earthworks such as driveway construction or general landscaping.

4.1.3. Operative District Plan

The Operative District Plan earthworks rules principally address the visual effects of earthworks and have a trigger of 2.5 metres for cuts and fills. Earthworks that are not a permitted activity are a restricted discretionary activity and Council discretion is restricted to the alteration and disturbance of the ground, the degree of the slope, earthworks in a flood hazard area and earthworks within 5 metres of a water body. As a consequence under the Operative District Plan there is limited ability to address other relevant aspects of earthworks such as stability and the transportation of material to and from a site as discretion has not been retained over these matters.

4.2 Plan Change 65 – Approach

DPC65 reviewed all existing earthworks rules in the District Plan and incorporated matters previously dealt with through the Bylaw into the District Plan. The review was a detailed assessment of all issues related to earthworks. It also introduced for the first time the ability to assess the stability of proposed earthworks through the resource consent process. In addition, PC65 updated the Plan to address issues such as sediment and erosion control, earthworks near streams and wetlands, effects on visually sensitive areas, the transport of material and potential effects on cultural and archaeological sites.

DPC65 took a conservative, engineering based approach to earthworks imposing a limit of 600mm for cuts on moderate to steep slopes (26° to 34°) and 1.5m cuts on gentler slopes (0 to 26°). For fill, the limit was 600mm on slopes up to 18° . The rules also specified the angle at which the cut face must be finished at. As a result all earthworks (other than extremely minor earthworks) were required to obtain a resource consent and be assessed for their stability. The rules attempted to address the full range of engineering issues and as a result were complicated and difficult for applicants to understand and difficult for Council to administer. Any earthworks requiring a resource consent needed an assessment by a suitably qualified person such as a structural or geotechnical engineer, with subsequent cost implications.

DPC65 raised concerns about the high level of regulation imposed on what were often considered to be minor earthworks, and the resulting cost to applicants. Where previously an Earthworks Bylaw consent cost approximately \$200, a resource consent now cost approximately \$850, plus the significant cost of a geotechnical report. In addition, where retaining structures were to be constructed, a building consent was also required. The building consent often addressed the same issues, resulting in a duplication of processes.

4.3 Plan Change 70 - Approach

The principles underpinning DPC65 have now been re-evaluated. Further discussions have been undertaken with Building Control and Licensing Services (BCLS) and a risk and gap analysis undertaken to determine the gaps between the earthwork provisions of the Operative District Plan and the Building Code.

As a result of that analysis a new approach has been developed that seeks to:

- Provide for regulation only where it was necessary;
- Manage risk according to the degree and severity of that risk;
- Create rules that are clear and easy to understand and implement ;
and
- Reduce (where appropriate) the duplication of processes by streamlining and co-ordinating processes for similar issues.

Plan Change 70 and the Section 32 Analysis are attached as Appendix One and Two to this Report.

5. Discussion

5.1 Overview of the Proposed Plan Change

5.1.1 Earthworks Issues

Plan Change 70 (DPC70) maintains a stand-alone chapter for earthworks that applies to all Areas of the city (Residential, Suburban Centres and Institutional Precincts etc).

The issues that proposed DPC70 addresses are:

- earthworks stability
- erosion, dust and sediment control
- earthworks associated with streams and wetlands
- flooding hazard of earthworks
- earthworks for tracks
- visual amenity of earthworks – general
- visual amenity of earthworks – sensitive areas
- transport of material
- cultural and archaeological material and sites

Proposed DPC70 follows the new approach adopted under Plan Change 48 for the Central Area, with greater emphasis placed on the policies and no assessment criteria under the discretionary activity rule. The policies provide the rational and guidance for assessing consent applications.

Overall the policy framework that was developed for DPC65 has been retained with only minor changes. The issues identified through the preparation of DPC65 such as erosion and sediment control; cultural and archaeological sites; effects on streams and wetlands; effects on visually sensitive areas and the transport of material all remain within DPC70. Some minor changes have been made to the policies, to reflect changes requested by submitters on DPC65 and to clarify the distinction between the role of the Regional Council and the Council.

5.1.2 Plan Change 70 – Provisions

The new approach in Proposed Plan Change 70 increases the thresholds for permitted cuts and fills and provides for a higher cut/fill threshold if building consent for a retaining structure is obtained concurrently. While increasing the thresholds adopts a greater inherent risk than was expressed by PC65, it is considered that this approach reaches a more acceptable balance between risk and resource consent processing complexity and costs. An evaluation of this approach and assessment of the risk is provided for in the Section 32 Analysis (attached as Appendix Two to this Report).

The rules have been reformatted to be clearer, with a simpler list of thresholds and conditions. There are two principle permitted activity rules. The first rule covers general earthworks across all Areas of the city, and the second addresses earthworks in visually sensitive locations. A brief description of the permitted

activity rules is provided below and a full copy of the Plan Change is attached as Appendix One to this Report.

(a) General Earthworks Rule

The general earthworks rule applies in all areas of the city including the Residential Area, Rural Area, Institutional Precincts, Central Area, Airport and Golf Course Precinct, Open Space A and C Areas and Suburban Centres.

The new permitted activity rule provides for;

- a higher permitted threshold of up to 2.5m if the cut/fill is retained by a structure authorised by a building consent; or
- a lower threshold of 1.5m if the cut or fill is not to be retained. This threshold is also subject to a number of conditions such as; the slope must not exceed 34 degrees; and the cut/fill must be at least its own height from the boundary.

This approach addresses the issue of stability while reducing the potential duplication between the building consent and resource consent process.

In addition, the permitted activity rule provides for cuts and fills to a height of 2.5m for the construction and maintenance of farm tracks in the Rural Area, and cuts and fills to provide for walking and cycling tracks in Open Space and Conservation sites with a maximum track width of 1.5m.

The permitted activity rule also contains a number of conditions which address the issues of erosion, dust and sediment control, distance from waterbodies, and earthworks in flood hazard areas.

(b) Visually Sensitive Areas

Visually sensitive areas have been identified as the Suburban Coastal Edge, the Ridgelines and Hilltops Overlay Area, Open Space B Areas and Conservation sites.

In visually sensitive areas there is a lower cut/fill threshold of 1.5m (whether retained or unretained) to ensure that the visual effects of earthworks on these areas can be considered. The same conditions relating to slope and distance from boundaries apply.

Overall the number of standards has been reduced with the removal of the transport of material as a standard. This now becomes a matter for consideration if a resource consent is required. Overall the conditions have been simplified from those in DPC65, reducing complexity of the rule and providing a clearer format.

5.3.3 Non-notification of applications

Some aspects of the assessment of earthworks resource consent applications, such as stability, are highly technical and require input and assessment by appropriate experts such as geotechnical or structural engineers. It is proposed that the majority of resource consent applications for earthworks be assessed on a non-notified basis without the need for the application to be publicly notified,

or notice being served on people who may be affected in some way. It is noted that this does not preclude the notification of an application where it has been identified that there will be significant adverse effects.

5.3.4 Council Earthworks and Earthworks associated with underground utilities

The Council undertakes a large number of earthworks activities in its day to day operations. Activities such as the upgrading and maintenance of roads, the maintenance of underground Council services, the construction of walking and cycling tracks in reserves and the maintenance of sports fields, can all involve earthworks. In addition utility operators undertake activities in and on roads to maintain essential services such as power, water and telecommunications.

The Operative District Plan currently exempts many of these activities from requiring earthworks consent and it is intended that this approach be retained.

To achieve this the definition of earthworks (Section 3.10) excludes the maintenance of sports fields, while the permitted activity rule provides an exemption for walking or cycling tracks up to 1.5m wide in Open Space Areas and Conservation Sites. A trench is separately defined in Section 3.10 as a long narrow excavation for the purpose of installing drainage, irrigation or service connections and is also excluded from the definition of earthworks.

The proposed plan change maintains the provisions of the Operative District Plan relating to the maintenance and upgrade of roads and access ways as permitted activities. The plan change amends the Operative rule by inserting the word “public” to clarify that this rule only applies to publicly owned roads and access ways.

5.4 Consultation

Consultation was undertaken for DPC65 and consisted of targeted consultation with appropriate groups and organisations as well as consultation with statutory bodies. The results of that consultation are still relevant and have been taken into consideration in drafting the new provisions.

Consultation with statutory bodies is currently being undertaken on DPC70.

The following matters from DPC65 submissions have been specifically incorporated into the new plan change provisions;

- higher cut/fill thresholds;
- simpler rules;
- the incorporation of the Ridgelines and Hilltops provisions into the earthworks chapter; and
- provision for the construction, maintenance and upgrade of farm tracks in the rural area.

5.5 The Need for a New Plan Change

The review of DPC65 was undertaken as a result of the number of submissions raising significant issues and consent processing issues identified through the application of the rules. The review has resulted in changes to the rules that are significant in terms of both content and format.

To implement the new approach considerable changes are required to the provisions of DPC65. The principle change of using the building consent process for retaining structures to manage minor earthworks is a major departure from the approach adopted in DPC65, which required all aspects of stability to be addressed through the resource consent process. The changes to the permitted activity rules are also considerable and would probably be outside of the scope of the submissions to DPC65.

The alternative approach of retaining DPC65 and amending it through the hearing process would mean that the existing rules would be in effect until Council issued a decision on DPC65 and then that decision would be subject to appeal to the Environment Court. Proposed Plan Change 70 will introduce new provisions that will apply immediately upon notification, enabling the public and consent staff to implement the revised approach immediately, reducing the current duplication of processes and reducing unnecessary regulatory processes and costs for applicants.

5.6 Plan changes and plan variations

DPC65 was drafted as a district plan change to the Operative District Plan. At the time DPC65 was publicly notified the Council had a number of proposed district plan changes that had been publicly notified but which had not completed their statutory processes under the Act and were therefore not operative.

These existing plan changes had interrelationships with the PC65 and it was important that the wording of all the changes was consistent. To achieve this it was necessary to vary some of the plan changes that had already been notified. This required a district plan variation, which was publicly notified in the same way as DPC65.

The adoption of DPC65 required two variations to existing plan changes:

- Variation 6 (to Plan Change 33 Ridgelines and Hilltops (Visual Amenity) & Rural Area); and
- Variation 7 (to Plan Change 43 Heritage Provisions).

Variation 6, Plan Change 33 Ridgelines and Hilltops (Visual Amenity) & Rural Area

Plan Change 33 was a major review of the rural rules and introduced the Ridgelines and Hilltops overlay into the District Plan. Variation 6 removed the earthworks rule that applied in the Rural Area and incorporated that rule into the Earthworks Chapter. However, it did not change the Earthworks rule that applied to the Ridgelines and Hilltops Overlay area, which remained in the Rural Area rules.

All appeals on Plan Change 33 Ridgelines and Hilltops (Visual Amenity) & Rural Area have now been resolved through an Environment Court decision issued 29 January 2009. It is proposed to make DPC33 operative on 10 July 2009 prior to notification of DPC 70. Variation 6 will therefore no longer be required and changes to the Rural Area can be included in DPC70.

In addition, the earthworks provisions relating to Ridgelines and Hilltops have been incorporated into the Earthworks Chapter (an outcome sought by a number of submitters on Plan Change 65 and Variation 6).

Variation 7, Plan Change 43 Heritage Provisions

District Plan Change 43 (DPC43) was a review of the Heritage provisions of the District Plan and significantly amended the provisions that applied to heritage areas and listed heritage items. DPC43 has been appealed to the Environment Court.

Variation 7 proposed changes to ensure that the provisions of the Earthworks chapter (such as stability) applied in addition to the specific earthworks provisions in the Heritage rules (which only consider the effects of earthworks on a heritage item). The changes made by the Variation to cross reference the Earthworks rules are still necessary and therefore Variation 7 does not need to be withdrawn. Variation 7 received no submissions and therefore has merged with DPC43.

5.7 Plan change process

The withdrawal of DPC65 and notification of DPC70 will be done concurrently to ensure that there are always earthworks provisions that apply.

Currently plan changes take effect upon public notification. However, changes currently being proposed to the RMA may mean that plan changes will not take effect until Council has issued a decision on that Plan Change. It is therefore proposed to publicly notify DPC70 in July to ensure that it has immediate effect.

It is proposed to allow 6 weeks for submissions on the Earthworks Plan Change and it is anticipated that hearings will be held in November/December 2009.

5.8 Implementation and Guidance

The new approach adopted in DPC70 will require co-ordination between building control, resource consent and compliance staff.

It should also be recognised that the rules set thresholds for a minimum level of development to trigger the need for a resource consent application, and allowing the consideration of any potential adverse effects.

While the new provisions reduce the duplication of processes contained in DPC65 circumstances will always exist where both a building consent and resource consent are required, especially where earthworks cuts or fills exceed 2.5m. This is necessary as the separate pieces of legislation each have a

different focus. The Building Act addresses the safety of buildings and structures while the Resource Management Act looks at all the effects of an activity, which for earthworks incorporates a range of matters such as stability and visual amenity.

To assist public understanding of the different roles of the Building Code and the District Plan with regard to rules and regulations relating to earthworks, and provide information on “best practice” in the field of earthworks and retaining structures, information sheets and pamphlets will be prepared for the public and applicants.

6. Conclusion

DPC65 was notified in July 2008. It is recommended that DPC65 Earthworks be withdrawn and replaced by DPC70.

DPC70 provides for minor earthworks as a permitted activity with scope for larger permitted earthworks if they include retaining structures built in accordance with a building consent. This approach allows the issue of stability to be addressed while avoiding the need for a resource consents in some cases. While increasing the thresholds adopts a greater inherent risk than was allowed by DPC65, it is considered that this approach provides a more acceptable balance between risk and regulation. In circumstances where retaining structures are not proposed, the threshold is lower to enable the assessment of the stability of the proposed earthworks.

DPC70 seeks to manage risk according to the degree and severity of that risk. The proposed approach also reduces the duplication of process between the building consent and resource consent processes.

Contact Officer: ***Alison Newbald***, Policy Advisor, Strategy

Supporting Information

1) Strategic Fit / Strategic Outcome

The district plan change relates to the Urban Development and Environmental Strategies and specifically the long term outcome that:

Wellington will be a memorable, beautiful city, celebrating and building on its sense-of-place, capital city status, distinctive landform and landmarks, defining features, heritage and high quality buildings and spaces.

And

Wellington will recognise and protect significant features of its coastal and terrestrial landscape and natural heritage.

2) LTCCP/Annual Plan reference and long term financial impact

Relates to the ongoing review of the District Plan. Project C533 – District Plan

3) Treaty of Waitangi considerations

All District Plan work is required to take into account the principles of the Treaty of Waitangi (refer to section 8 of the Resource Management Act 1991).

The Iwi Authorities have been consulted on the preparation of the plan change.

4) Decision-Making

The proposals to change the District Plan are in accordance with the Council's wider strategic framework. The changes to the Earthworks provisions reflect the direction taken by Council in previous plan Changes and Councils decision to not renew the Earthworks Bylaw.

5) Consultation

a) General Consultation

Consultation has been undertaken with the construction industry, community groups and other groups; and residents of coastal properties.

b) Consultation with Maori

Consultation has taken place with the Iwi Authorities: Wellington Tenth's Trust and Ngati Toa Rangatira

6) Legal Implications

The Council's lawyers have been involved in preparation of the proposed change to the earthworks rules.

7) Consistency with existing policy

The proposed plan change builds on the existing Wellington Consolidated Bylaw 1991 for earthworks and the existing District Plan provisions for earthworks and heritage. New elements for the control of sediment and the protection of streams and wetlands are consistent with the Council's Environmental Strategy and the strategic initiatives for stream protection and biodiversity.