

**COMMISSIONER'S  
RECOMMENDATION:**

**FOR WELLINGTON CITY COUNCIL**

**SUBJECT:**

**DISTRICT PLAN CHANGE N<sup>o</sup> 70  
EARTHWORKS PROVISIONS**

**DATE OF HEARING:**

**10 DECEMBER 2009**

## **1. INTRODUCTION**

District Plan Change 70 (DPC70), Earthworks, was publicly notified in July 2009 and submissions closed on 14 September 2009. In total 26 submissions were received. The Summary of Submissions was prepared and publicly notified on 13<sup>th</sup> October 2009 with further submissions closing on Friday 13 November. Nine further submissions were received.

The purpose of DPC70 is to change the way that earthworks are managed under the District Plan following the lapse of the Earthworks Bylaw in July 2008 and the withdrawal of Plan Change 65.

DPC70 creates a stand-alone District Plan Chapter for earthworks that applies to all Areas of the City (Residential, Suburban Centres and Institutional Precincts etc), and includes new and amended definitions for cut height, fill depth, existing slope angle and trenching. Rules provide for minor earthworks as a Permitted Activity including specific rules for visually sensitive areas. Discretionary Activity (Restricted) status is given to the majority of earthworks that don't comply with the Permitted Activity conditions, with discretion retained over stability, erosion, dust, sediment control, visual amenity, transport of material and flooding hazard.

The issues that DPC70 addresses include:

- 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

DPC70 places greater emphasis on policies and contains no assessment criteria under the discretionary activity rules. The policies provide the rationale and guidance for assessing consent applications. The major change for the consideration of earthworks under the District Plan is the introduction of stability as an issue that requires assessment.

DPC70 provides a balance between allowing people to undertake minor earthworks while controlling the adverse effects of earthworks, including stability.

## **2. RECOMMENDATION**

As Hearing Commissioner with delegated authority to hear submissions and recommend a decision on DPC70, I have given careful consideration to the advice from Council officers, the content of all submissions, the alterations to DPC70 requested by submitters, and the evidence and/or submissions of those submitters and further submitters that appeared at the hearing.

### **I recommend that Council:**

1. *Receive the information.*
2. *Approve District Plan Change 70 with the additions, amendments and deletions resulting from the consideration of submissions as set out in Appendix 1 to this report:*
3. *Accept and/or reject in whole or in part the submissions and further submissions as set out in Appendix 2 to this report for the reasons therein.*
4. *Adopt the Notified Section 32 Report, amended as set out in Appendix 3 to this report, as the 'Post-hearing' Section 32 Report.*

### **Attachments:**

Appendix 1	Additions, amendments and deletions to DPC70
Appendix 2	Decisions on Submissions
Appendix 3	Amendments to Notified Section 32 Report

### 3. SUBMISSIONS

At the time of close of submissions on 14 September 2009, 25 submissions on DPC70 had been received. One late submission from Foodstuffs (Wellington) Co-operative Society Ltd was received on 16 September 2009. Submission, 19 Building Solutions Ltd, has subsequently been withdrawn. Nine further submissions were received.

Of the submissions and further submissions received, 17 submitters indicated that they wished to be heard.

On the recommendation of the reporting officer for the Council (Ms Newbald), I accepted the late submission of Foodstuffs (Wellington) Co-operative Society Ltd (Foodstuffs).

Submissions were received from:

Submitter Number	Submitter Name
1	Ascape Design – John Wierenga
2	Alexandra Hills
3	Karen Lyness
4	Denis Patrick O'Neill
5	Transpower – C/- Burton Consultants
6	Shell NZ, BP Oil NZ Ltd, Chevron NZ Ltd and Mobil Oil NZ – C/- Burton Consultants
7	Powerco Ltd – C/- Burton Consultants
8	CentrePort Ltd – Neville Hyde
9	Rosemary Fineman
10	Tony Flynn
11	Dale McTavish
12	Mighty River Power Ltd – Rob Hunter
13	Wellington International Airport – Mike Brown
14	Ngaio Progressive Association (Inc.) – J. F. McGuire
15	Michael Fleming
16	Yvonne Legarth
17	Department of Conservation – Kris Ericksen
18	Trelissick Park Group – Peter Reimann
19	WITHDRAWN - Building Solutions Ltd – C/- Morrison Kent Lawyers (Morgan Slyfield) –
20	Wellington Electricity Lines Ltd – C/- Environmental Challenge Ltd (Alex Gardiner)
21	Cardno TCB – David Gibson
22	Greater Wellington Regional Council
23	New Zealand Historic Places Trust – Sacha Gilbert
24	Linda Katherine Dale
25	Wellington City Council
26	Foodstuffs (Wellington) Co-operative Society Ltd - C/- Urban Perspectives Ltd (Peter Coop)

Further Submissions were received from:

<b>Further Submitter No.</b>	<b>Submitter Name</b>
FS1	Transpower C/o- Burton Consultants
FS2	Powerco – C/- Burton Consultants
FS3	Shell NZ, BP Oil NZ Ltd, Chevron NZ Ltd and Mobil Oil NZ – C/- Burton Consultants
FS4	Mighty River Power
FS5	Wellington International Airport
FS6	Cardno TCB – Dave Gibson
FS7	New Zealand Institute of Surveyors – Dave Gibson
FS8	New Zealand Historic Places Trust
FS9	CentrePort – Neville Hyde

A general overview of submissions is set out in the following summary:

### **General Submissions**

A number of submissions support DPC70, albeit with amendments. There is general support for the bulk of the new provisions from utility companies, oil companies and other commercial and community organisations as well as some individuals.

The most significant submission in opposition is from New Zealand Historic Places Trust (NZHPT) who seek that DPC70 be postponed until such time as a separate plan change is undertaken that improves protection for Historic Sites and Maori Heritage.

The most significant amendments sought are from Ngaio Progressive Association and Michael Fleming wanting detailed provisions to be included relating to the assessment of natural hazards associated with earthworks. Other significant amendments are sought by Foodstuffs Limited who request that DPC70 not apply to the Central Area or the Suburban Centres; and NZHPT who request amendments to policies and rules to provide a stronger connection between the heritage schedule and the effects of allowable earthworks.

### **Objectives and Policies**

Additional explanatory wording is sought for the Introduction Section. There is only one submission requesting amendments to the new Objective 29.2.1. This requires more specificity in the description of the natural resources that are to be protected by the objective.

Submissions on the 12 policies that are proposed to implement Objective 29.2.1 are generally supportive, with few amendments requested to the wording of the policies themselves. Where amendments have been requested to the policies these relate mainly to clarifying wording and terminology. There are some requests to amend the policies to provide better protection for historic heritage. One submission seeks that Policy 29.2.1.3 refers only to 'large' earthworks to attempt to define the scope of the provisions.

Most submissions on policies relate to the explanatory paragraphs where, in general, further specificity and detail is sought as a means of improving the effectiveness of the policies.

## **Permitted Activity Rules**

Wellington International Airport Limited (WIAL) requested that the Airport and Golf Course Precinct be exempt from complying with the permitted activity rules. Transpower New Zealand Limited (Transpower) requested that a number of new permitted activity conditions be included that seek to consider the potential effects of earthworks on high voltage transmission lines. CentrePort Limited (CentrePort) requested that certain of its activities be exempt from the proposed rules. The Wellington City Council (WCC) requested that specific provisions relating to the Churton Park Concept Area be included in the Earthworks Chapter.

Most other submissions on the permitted activity rules focused on the conditions to be complied with and had the intention of clarifying the wording of these and/or narrowing or enlarging the scope of the conditions depending on the viewpoint of the submitter.

Submitters on permitted activity rules included NZHPT, WCC, Greater Wellington Regional Council (GWRC), Department of Conservation (DOC), Cardno TCB Limited (Cardno TCB), New Zealand Institute of Surveyors (NZIS), CentrePort, WIAL the utility and oil companies and some individuals.

## **Urban Coastal Edge Maps**

Mr Tony Flynn requested that properties at Hutt Rd and Sar Street be removed from the Urban Coastal Edge Area.

## **Discretionary Activity Rules**

Transpower requested inclusion of a new rule for activities that do not comply with permitted activity conditions relating to earthworks in close proximity to electricity lines and support structures and CentrePort requested various amendments that it perceived would cause difficulty with its operations.

Yvonne Legarth, opposed by CentrePort, requested that rules be included to control earthworks and associated structures in Open Space A or B; Conservation Sites; Areas of High Natural Character; land adjacent to the coastal marine area; land adjacent to a waterway or stream, or within the coastal environment; land held subject to the Reserves Act or the coastal marine area.

The Ngaio Progressive Association and the Trelissick Park Group generally wanted applications to be notified rather than non-notified, but Cardno TCB wanted the non-notification/non-service provisions retained. Cardno TCB also requested that the Council's discretion be restricted to the extent of non-compliance with the permitted activity conditions and that limits be set for the transport of material.

NZHPT requested a number of amendments including amendments to the rule to specify maximum cut and fill heights and the addition of a performance condition that an applicant must demonstrate to the effect that earthworks proposals will not adversely affect a listed historic place; and the inclusion of an advice note regarding the need for separate archaeological authorities.

WCC requested the amendment of the rule to include cut and fill height limits regarding visual amenity.

## **Discretionary (Unrestricted) Activity Rules**

Transpower requested that a new discretionary (unrestricted) activity rule be included for earthworks in close proximity to transmission lines; and WCC requested that additional rules be included that address earthworks specifically in the Churton Park Village Concept Area.

## **Definitions**

A number of submissions requested minor amendments to the definition of earthworks and a number of other subsidiary definitions including height of cut, height of fill, trench, and existing slope angle. GWRC requested that the definition of 'stream' be replaced with the Resource Management Act 1991 (RMA) definition of 'River' (which includes a stream) and that other RMA terms such as 'water body' and 'coastal water' also be used.

## **Information to be supplied with a Resource Consent Application**

Transpower requested that additional requirements be included in section 3.2 of the District Plan that requires applicants to show the location of high voltage transmission lines. Michael Fleming requested that a checklist be included in the District Plan which contains a list of fundamental site investigations and testing that are essential to prove that an appropriate study of natural and manmade hazards has been carried out. Other additions and or amendments to this section were requested by DOC, NZHPT, the Trelissick Park Group, and the Ngaio Progressive Association.

## **Changes to Other District Plan Chapters**

A number of requests for amendments to other Chapters of the District Plan were received. These included requests by:

- CentrePort that the Central Area permitted activity rules be amended to include reference to "paved operational areas
- Ngaio Progressive Association that a referencing error be corrected
- Cardno TCB that references in Rule 5.2.5 be amended to the relevant Earthworks Chapter rules.
- NZHPT that an advice note advising of the requirements of the Historic Places Act in relation to Archaeological sites be included alongside permitted activity rules 7.1.5, 9.1.4, 11.1.4, 11.5.3, 13.1.6, 13.14.4, 13.20.4, 15.1.7, 17.1.14 and 19.1.4.

## **Chapter 23 Utilities**

Transpower) and Powerco Limited (Powerco) requested that the proposed amendments to Chapter 23 Utilities be retained without further modification, but CentrePort requested that the references that require network utilities to comply with the square metre area (Rule 30.1.1 - 250m<sup>2</sup> or 30.1.2 100m<sup>2</sup> permitted activity conditions), be deleted. CentrePort also requested that the reference to the Te Ara Haukawakawa Precinct be changed to the Pipitea Precinct and that the last paragraph amended to refer to Contaminated and Potentially Contaminated land.

WCC) requested that a referencing error be corrected.

## 4. THE HEARING

Pursuant to section 161(2) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009, DPC70, being a change that was publicly notified before 1 October 2009, must be determined as if the amendments made to the Resource Management Act 1991 by the Resource Management (Simplifying and Streamlining) Amendment Act 2009 had not been made.

### Parties

I heard submissions from those parties who wished to be heard on 10 December 2009, including the following:

CentrePort Limited	Submitter	8
Greater Wellington Regional Council	Submitter	22
Cardno TCB Limited	Submitter	21
NZ Institute of Surveyors	Further Submitter	7
Mr Tony Flynn	Submitter	10
Trelissick Park Group	Submitter	18
Ngaio Progressive Association (Inc.)	Submitter	14
New Zealand Historic Places Trust	Submitter	23
Wellington International Airport	Submitter	13

Correspondence received on behalf of Shell NZ Limited, BP Oil NZ Limited and Chevron NZ (the Oil Companies – Submitter 6), Transpower, Powerco (Submitter 7) and Mighty River Power Limited (Submitter 12), indicated that with the exception of one matter these submitters support the recommendations in Ms Newbald's report and for that reason they did not wish to appear but requested that their correspondence be tabled at the hearing.

The one matter of disagreement that Transpower identified concerned the non-notification clause associated with the new restricted activity rule. Transpower's concern is that activities that breach the permitted activity conditions may affect the National Grid and there is no clear trigger that will alert Transpower to such an application. Transpower requests that a specific notification statement referring to the new rule be included as follows:

*“Non-notification/service: Applications do not need to be publicly notified and do not need to be served on affected persons unless the activity is restricted discretionary because of noncompliance with the performance condition in Rule 30. 2.X. relating to separation distance from the National Grid, then the application will need to be served on Transpower NZ Limited.”*

### Council's Report

The hearing commenced with Ms Alison introducing her report, briefly identifying the main issues, and confirming her recommendations. Ms Newbald tabled a supplementary report that addressed submission 20/1 of Wellington Electricity Lines Limited. This submission concerned Rule 30.1.1 and the need for underground network utilities to comply with the specified maximum area of cut/fill.

Ms Newbald's supplementary report explained that it was anticipated by Council staff that the majority of underground network utilities will be placed within a trench and therefore be excluded from complying with the earthworks rules, including the maximum area requirement for cuts and fills. Concerning trench widths Ms Newbald advised that it is certainly not the intention of the definition to constrain or limit trenching for underground

utilities. In order to address possible ambiguity of the definition of trench she recommended that reference could be made to “electricity cables” within the definition.

## **CentrePort**

Mr Neville Hyde, Corporate Advisor for CentrePort presented evidence in support of the company’s submissions. Mr Hyde acknowledged that the majority of the company’s submissions had been addressed by the recommendations in Ms Newbald’s report. However he identified a number of aspects of DPC70 which he said failed to address the unique needs of CentrePort with its large land holdings, extensive paved surfaces, and in-ground networks all positioned adjacent to the coastal marine area. Mr Hyde identified these outstanding matters as including:

### *Transport of Material*

The first matter concerned the application of Policy 29.2.1.11 and Rule 30.2.1.1(vi) and 30.2.1.2(vi) relating to the transport of materials to or from an earthworks site. Mr Hyde advised that CentrePort did not wish to be subject to the ‘micro-management’ of the policy when moving material between its contiguous ‘sites’ while not using a public road.

### *Works near Coastal Marine Area*

The second matter related to constraints on Port operations imposed by Rule 30.1.1.2 relating to the 5 metre setback from the Coastal Marine Area. CentrePort sought exemptions from this rule for foundation works supporting equipment and structures, maintenance of reclamation facings, maintenance of paved surfaces and works that comprise maintenance to existing structures and utilities infrastructure.

### *Pavement Maintenance*

In respect of Rule 13.1.6 which provides for earthworks associated upgrading of existing formed roads and public accessways in the Central Area to be a permitted activity, CentrePort seeks to have similar exemption for its paved operational areas.

### *Utility Rules*

A further matter were the references in Chapter 23 to the proposed permitted activity rules in Chapter 30 insofar as they may cause confusion in the application of those rules to underground utilities. CentrePort wanted the references deleted, or clarification in Chapter 23 that the earthworks rule conditions do not apply to underground utilities.

## **Greater Wellington Regional Council**

Ms Lucy Harper, Team Leader Environmental Policy for GWRC presented evidence in support of the GWRC submission on DPC70.

Ms Harper identified the parts of the submission that had been supported by Ms Newbald’s report and asked that these be accepted as part of the approved plan change. Ms Harper also identified the areas of the submission that were supported in part only or were recommended to be rejected, as follows:

### *Erosion Hazard*

In respect of Rules 30.2.1.1 (iv) and 30.2.1.2(iv) which specify ‘flooding hazard’ as a matter where the Council has restricted its discretion, the GWRC asks that the words ‘erosion and’



be inserted immediately prior to the word 'flooding' so as to deal with any potential erosion hazard.

#### *Width of Riparian Margin*

GWRC support Ms Newbald's recommendation that there be no earthworks as a permitted activity with 10 metres of the Porirua Stream through the Suburban Centre Area, but ask that this be extended to the:

*"Full length of Porirua Stream and tributaries from: the toe of Stebbings Dam, the outlet from the Seton Nossitor Dam (SH1) and the Takapu Stream from the northern boundary of the Takapu Industrial area."*

This request is based upon on the fact that in Wellington City, GWRC shares the responsibility for flood risk management of the Porirua Stream and its tributaries under an agreement with the City Council and requires access along some water bodies to maintain flood carrying capacity and to maintain the bank edge on a regular basis.

Ms Harper noted that the suggested setback for the Porirua Stream would apply only in the Suburban Centre Area thereby making an artificial distinction between properties in the Residential Area and the Suburban Centre Area, which does not reflect the behaviour of floods or the flood and erosion hazard.

She acknowledged the comment in Ms Newbald's report that residential sections are likely to be smaller in area than in the Suburban Centre Area, but in her view this does not make them less flood and erosion prone. Ms Harper advised that earthworks in either the Residential Area or the Suburban Centre Area produce the same vulnerabilities and potential risks, both to property owners and downstream landowners. She contended that human safety is even more of an issue in the Residential Area. Ms Harper advised that GWRC is also concerned that habitable buildings and accessory buildings are not placed in areas where they are exposed to flooding or erosion risk and which, as a consequence, may require extensive mitigation works.

#### *Protection of Archaeological Sites*

Ms Harper advised that GWRC's submission asked for a new policy, supported by methods, to prevent the loss of significant historic heritage values associated with unidentified archaeological sites but Ms Newbald's report did not support this request, in part because of the difficulties in providing protective provisions for archaeological sites which are unidentified.

Ms Harper submitted that Policy 29.2.1.12 has many of the elements which GWRC were seeking to incorporate and with some further changes could meet its concerns. One aspect that Ms Harper identified as requiring change was to remove the distinction in the policy between pre 1900 and post 1900 archaeological sites on the basis that neither the RMA or the Regional Policy Statement makes such a distinction when referring to archaeological values.

Secondly Ms Harper noted that the explanation of Policy 29.2.1.12 has been amended to clarify the intent of the Policy but not the Policy itself, and she requested that wording which refers to '*Maori and non-Maori material*', which is very broad and could include items which have little or no heritage value, be deleted or replaced.

Ms Harper also submitted that the policy appears to incorporate the methods and she asked

that this be rectified. In this respect she also suggested other methods be included such as archaeological assessments and predictive overlays.

### **Cardno TCB Limited and New Zealand Institute of Surveyors**

Mr David Gibson presented evidence on behalf of the joint submission by Cardno TCB and NZIS (the joint submitters).

Mr Gibson advised that the joint submitters agreed with the following provisions and or agreed with Ms Newbald's recommendations in respect of them:

Policy 29.2.1.2

Policy 29.2.1.3

Rule 30.2.1

In relation to Policy 29.2.1.1, Mr Gibson advised that without amendment of the explanation to this policy the concern remained that too much emphasis is placed on Council's ability to assess and control the future use of land when assessing an application for earthworks. In particular he considered that the matter of the future use of the land is not relevant to the assessment of the effects of earthworks, particularly for small scale earthworks.

Mr Gibson submitted that Council had to list the matters that it restricted its discretion to and could not give itself jurisdiction beyond those matters. He submitted that the future use of the land will be a use that is either permitted or not, according to the relevant zone. If it is permitted, then there is no need to assess the use. If it is not permitted, then it must be subject to a resource consent process, which is specifically intended to assess the use and will determine if it is appropriate based on its effects. The joint submitters sought that the explanatory statement be amended as per the submission.

Mr Gibson advised that the joint submitters were not satisfied that the wording, explanations and diagrams relating to the permitted activity rules and the definitions of cut and fill height. Their concern was that a setback distance (equal to the height of the cut or fill) has to be applied all around the edges of the earthworks. He considered that this is an overly onerous requirement for no justifiable reason.

Mr Gibson presented diagrams and explanations that, in his opinion, illustrated the unworkable nature of the proposed permitted activity rules. He submitted that the corresponding rule in the original PC65 version is preferable and only referred to a setback from the top of a cut and the bottom of a fill as this is where there is a risk of instability.

Mr Gibson submitted that the outcome that the joint submitters sought was that where a setback is required, it should be equal to the height of the cut or fill measured from that point within the cut or fill. He further described that in effect there is a 45 degree angle of influence from the ground level at the boundary (or building/structure) where a cut should not be deeper than the 45 degree line, or the fill should not be higher than the 45 degree line. He noted that this approach would be similar to that used in the Porirua City District Plan. Mr Gibson said that he did not agree with Ms Newbald's report where in the last paragraph at the bottom of page 29 it claimed that this is essentially how the rule is written.

### **Mr Tony Flynn**

Mr Flynn spoke in support of his submissions. Firstly he was concerned that the words 'associated structures' used in relation to earthworks in DPC70 could be interpreted to include a building covering the earthworks. He wanted clarification as to what visual impacts were to be assessed under DPC70, buildings or free standing retaining walls?

Mr Flynn submitted that the new area of “Urban Coastal Edge” was a new zone by default and would further erode private property rights by giving the public and Council more control over the affected land. However, he supported Ms Newbald’s recommendation to exclude his properties from the proposed “Urban Coastal Edge” and made a plea for clarity of planning jurisdiction based on property boundaries.

Mr Flynn advised that in his opinion the definition of earthworks left a lot of gaps and as written would include a deep driven pile and a deep site investigation core sample bore. In his opinion it would be better to define what earthworks is rather than having an all inclusive definition with exclusions.

Finally Mr Flynn submitted that all earthworks were generally the first phase of any development and visual effects should be determined by looking at the finished product rather than a temporary intermediate stage.

### **Trelissick Park Group**

Mr Peter Reimann spoke in support of the submission by the Trelissick Park Group (the Group). He said that the Group was particularly concerned about monitoring and suggested that this should be reviewed and include periodic random inspections, sign off and certification on completion and, where necessary, on-going monitoring.

Mr Reimann expressed concerns about the non-notification of consents. The Group considers that consent applications for major earthworks should be publicly notified and that affected parties should be informed of all applications. “Affected parties” should include those downstream in the catchment.

Mr Reimann also referred to the Group’s submission that District Plan Section 3.2.2.7.2 should include a request for information on provisions for control of sediment and slowing down of stormwater run-off.

### **Ngaio Progressive Association Incorporated**

Mr J F McGuire presented written material in support of the submission by the Ngaio Progressive Associate Incorporated (the Association). In addition to the correction of a number of typographical and other errors the Association specifically seeks amendments to DPC70 that:

- Refer to a design life for significant earthworks of 100 years;
- Produce a “Design Guide” for earthworks;
- Achieve policies and rules to define a requirement that earthworks and associated structures (eg retaining walls) integral with the stability and durability be sound in 100 years time and are able to withstand the loads and environment for that period;
- Define a way of assessing the quality of an applicant’s proposal;
- Establish as a policy that the Council will resource and have either within its staff or independent consultants the facility to be a sound technically informed organization capable of assessing applicant’s proposals independent of the applicant and its technical advisors and that includes ready access to independent geotechnical, geological and engineering expert advice;
- More clearly defines the requirements for satisfying public risk and design criteria;
- Require all applications to be publicly notified and served on affected parties;
- Introduce mandatory standards including NZS 4404:2004 Land Development and Subdivision Engineering; NZS 4431: 1989 Code of Practice for Residential

- Earthworks and NZS 1170: Structural design actions;
- A statement in the rules and a philosophy to minimise risk;
- A 5 year sunset clause on earthworks consents.

### **New Zealand Historic Places Trust**

A joint statement of evidence was given by the NZHPT Heritage Advisor/Planner, Sacha Gilbert and Regional Archaeologist Kathryn Amy Hurren. In addition to the written evidence, Ms Hurren showed a power point presentation entitled 'Archaeology in Wellington' which illustrated some of the mapping aids available to assist with the identification of archaeological sites and photographs of recent archaeological discoveries in and around the Wellington Central Business District.

The NZHPT evidence focused on the potential impact of the proposed plan change on historic heritage values and in particular the archaeological record of Wellington. NZHPT had originally opposed DPC70 and requested that Council postpone the change until a separate plan change was introduced to improve protection to historic sites (including archaeological sites) and Maori heritage.

However NZHPT advised at the hearing that if the changes recommended in Ms Newbald's report were implemented this would result in an improved set of earthworks controls with better outcomes for historic heritage. In addition, NZHPT now accepts that there is an imperative for this plan change to be implemented promptly as the bylaw previously governing earthworks has been removed. NZHPT also appreciates that it is not practical for the Council to wait until a separate plan change covering archaeology, historic sites and Maori heritage is completed.

Given the above factors, NZHPT has revised its position and now supports the plan change as notified, with amendments.

The joint statement of evidence described the legislative relationship between the RMA and the Historic Places Act and the need for District Plans to recognize and provide for matters of historic heritage, which includes archaeology. In this respect the evidence also described the approach now adopted by the recently notified Proposed Regional Policy Statement, particularly Policy 20, which requires Councils to identify places, sites and areas with significant historic heritage values in District and Regional plans.

The NZHPT evidence stated that there is a clear directive for Councils to identify and deal with archaeology in District Plans, to identify archaeological sites, consider the effects of development, and protect significant sites from inappropriate subdivisions, use and development as a matter of national importance under section 6(f).

The relief sought by NZHPT in response to its submission and further submission included:

- That the changes recommended in the Officer's Report be implemented;
- While, NZHPT accepts that it may be outside the scope of this plan change, NZHPT seeks that WCC makes it a matter of urgency that a plan change is brought to include significant archaeological sites in the district plan. By doing so Council can then remedy the implausible situation of allowing earthworks as a permitted activity on sensitive archaeological sites by requiring these sites to be considered as restricted discretionary activities in relation to earthworks.
- In relation to this imperative that significant archaeological sites be urgently included in the district plan, NZHPT suggests another method is added to Policy 29.2.1.2 outlining the actions needed to include significant archaeological sites in

the plan. Such a method could be worded as follows or similar;

*“Significant archaeological sites are identified and added to a separate schedule of the heritage appendix via a plan change incorporating controls on earthworks for those sites identified.”*

- That Council develops a predictive overlay, showing areas where discovery of archaeology is likely based on proximity to coast, ridgelines, waterways, known areas of pre-1900 activity and recorded archaeological sites and a further method be added to policy 29.2.1.2 outlining the actions needed to include archaeological overlays in the plan as follows:

*“Archaeological overlays will be developed and added via a plan change to help identify undiscovered archaeology and provide a framework to identify the need for an archaeological assessment when archaeological values are likely to be adversely affected by a proposed activity and the need for an archaeological authority under the Historic Places Act (1993.)”*

- Earthworks on identified sites of significance to Maori as identified in the district plan’s heritage schedule, are considered as restricted discretionary activities in relation to earthworks.

In conclusion, NZHPT considered that if implemented with the amendments sought the DPC70 will result in a robust set of earthwork controls that will protect historic heritage, including the substantial archaeological record present in Wellington from the effects of inappropriate subdivisions, use and development as outlined in part 2 and section 6(f) of the RMA .

### **Wellington International Airport Limited**

Mr Mike Brown, Airport Planner for Wellington International Airport Limited (WIAL), stressed the importance of the airport as essential infrastructure and the need for certainty as to its availability for flight operations and the avoidance of disruptions. He considered that as DPC70 was essentially about stability/instability of proposed earthworks its provisions were not relevant to the Airport Precinct.

Dr Ian Brown, a well qualified and experienced geotechnical engineer, gave evidence in support of WIAL’s submission that the Airport Precinct be excluded from the proposed earthworks controls. His evidence described the airport topography and geological setting and the three main potential adverse environmental effects that are addressed by DPC70, these being land stability, runoff and siltation and landscape.

Dr Brown concluded that:

*“17 The provisions of Proposed Plan Change 70, ii applied to land controlled by Wellington International Airport Ltd, are unlikely to result in improved land stability outcomes for any future project. I therefore recommend that the submission provided by Wellington International Airport Ltd is fully taken into account.*

*18 If Proposed Plan Change 70 is adopted, there is potential that an unnecessary level of control of the airport company’s activities would lead to inflexibility and uncertainty with respect to future development, even at a minor scale.”*

## 5. CONSIDERATION OF SUBMISSIONS

### 5.1 GENERAL SUBMISSIONS

**Alexandra Hills**, although supporting the DP70 raises concerns about a particular site in Lyall Bay. While the support provided is noted, the rules will not prevent people from making applications for resource consents, and DPC70 would not prevent an application for earthworks such as those occurring at Lyall Bay from being made. I am advised that the site in Lyall Bay is being closely monitored by Council compliance staff with all appropriate measures undertaken to ensure work is completed in accordance with the resource consent conditions.

**Ngaio Progressive Association** requests that the District Plan specifies detailed design criteria for earthworks and associated retaining structures. I do not consider that the District Plan is the appropriate place for such criteria. Rather, the purpose of the District Plan is to establish appropriate limits for activities as permitted activities (those that do not require resource consent) and to provide a framework for the consideration of the effects of earthworks when these limits are exceeded. In that way, discretion is retained over a number of matters including 'stability'. Therefore, when the permitted activity limits are exceeded matters relating to stability, including the suitability of any proposed retaining structure, will be taken into account.

It will be necessary for an applicant for resource consent to provide information in sufficient detail from a suitably qualified professional that the proposed structures or earthworks are designed to the appropriate or relevant standard. The consideration of 'design working life' and 'durability' are matters which can be assessed as part of a resource consent application. It is not necessary for the District Plan to specify the matters requested as they are covered by the general term 'stability'.

In addition, earthworks undertaken for subdivisions must comply with the Council's Code of Practice for Land Development. This document (compliance with which is usually imposed as a condition of resource consent) specifies compliance with relevant New Zealand Standards and other technical documents to ensure all work associated with land development, including earthworks, is designed and undertaken to the appropriate standard.

The Association also requests that Council have access to independent geotechnical, geological and engineering expert advice and undertakes proper processing procedures. I accept Ms Newbald's advice contained in her report that Council does have access to independent advice and does seek expert opinion when necessary, or when faced with contradictory information, and that Council follows the procedures prescribed in the RMA.

**The Trelissick Park Group** requests that the District Plan include matters relating to periodic inspection, monitoring and sign off, of resource consents. I consider that these are all matters that are provided for and addressed through the resource consent process and it is not necessary for them to be included in the District Plan.

**The New Zealand Historic Place Trust** has revised its original position of opposition to DPC70 and now supports it as notified, with amendments. I concur with the view expressed by NZHPT at the hearing that it is imperative that DPC70 be implemented promptly as the earthworks bylaw has been repealed and it is not practical for Council to wait until a separate plan change covering archaeology, historic sites and Maori heritage is completed before proceeding with the earthworks plan change.

NZHPT believes that the new earthworks provisions do not provide a strong enough connection between the heritage schedule and the effects of earthworks provided for as permitted or restricted discretionary activities and requests changes. However, the changes requested to the permitted activity rule are not able to be granted because they would not meet the test of certainty required for such activities. I am satisfied that by including 'Heritage Areas and sites containing Heritage Items' in the 'visually sensitive' Rule 30.1.2, as recommended by Ms Newbald, an appropriate balance is achieved between avoiding adverse effects and allowing individuals to maintain and enhance their properties.

The point raised by NZHPT that consideration of the effects of earthworks activities on heritage values is missing from the restricted discretionary activity rule is valid. This should be rectified as recommended by Ms Newbald so that any effects on heritage value are adequately assessed when a resource consent is considered. Changes to Rule 30.2.1 and Policy 29.2.19 are required to address this issue.

At the hearing, NZHPT sought that:

*“...earthworks on identified sites of significance to Maori as identified in the WCC district plan in the heritage schedule, are considered as restricted discretionary activities in relation to earthworks.”*

This specific requested alteration does not accord with the relief sought in its submission but does reflect the general point made in the submission that there should be protection from the effects of earthworks for sites of significance to Maori as well as all significant archaeological sites, known and unknown. As acknowledged, at least in part, by NZHPT this is a task that goes beyond the scope of this plan change and for that reason it is not possible to deal with this request.

However, it is noted that there is some protection given to Maori sites under Rule 21.3.1 of the Operative District Plan and proposed Rule 21E.1. (Plan Change 43) both of which provide that the total or partial demolition, destruction or removal of any listed site of significance to tangata whenua or other Maori, is a Discretionary Activity (Unrestricted). In addition, proposed Rule 21B.1.3 of Plan Change 43 limits earthworks as Permitted Activities to 10m<sup>3</sup> or a surface area of 10m<sup>2</sup> in listed Historic Areas. Earthworks that exceed these requirements are Discretionary Activities (Restricted) in respect of Historic heritage (proposed Rule 21B.2.3 – Plan Change 43).

In my opinion DPC70 provides a more comprehensive approach to the management of earthworks and a better framework for the consideration of all the effects of earthworks than is currently provided for in the Operative District Plan. This is particularly so if Ms Newbald's recommendations are adopted, and this point was acknowledged by NZHPT at the hearing. In addition, DPC70 provides for more restrictive earthworks provisions in 'visually sensitive areas' which includes Heritage Areas and sites containing Heritage Items.

**Tony Flynn** has requested that all references to 'associated structures' and 'any associated structures' be changed to 'associated free standing retaining wall structures' and 'any associated free standing retaining wall structures'. However, in many circumstances the earthworks will be retained by an actual building rather than a free standing structure and it is important that where this is the case the exemptions relating to cut and fill height and obtaining a building consent still apply. After discussing these issues at the hearing, it was apparent that Mr Flynn's concern was that the proposed earthworks rules could be used to assess the visual impact of buildings. I do not believe this would be the case, and see no reason for amending the rules as requested.

**Michael Fleming** requested a range of matters to be included in the District Plan or undertaken as part of a separate study. I consider that the earthworks rules provide a

balance between allowing minor earthworks activities while ensuring that any issues associated with larger scale earthworks can be taken into consideration at the resource consent stage. While some information on slope stability and hazards is held by the GWRC, and is used to indicate when further information should be sought, I accept Ms Newbald's advice that further work on hazard identification is not considered necessary.

Mr Fleming also requested the inclusion of 21 conditions of consent in the District Plan. Conditions of consent can be imposed on resource consents without being specified in the District Plan, provided discretion is retained over the particular aspect of the activity. In this case discretion has been retained over 'stability' which provides the scope to seek additional engineering, geological or geotechnical information should it be required and/or impose appropriate resource consent conditions. Conditions imposed on a resource consent will be specific to that consent and the issues relevant to that site and may contain a provision for review in certain circumstances.

Mr Fleming also requested that reports containing disclaimers not be accepted. I agree with Ms Newbald's advice that disclaimers are a normal part of any contractual arrangement or report and it is considered that it is unrealistic to expect them not to be part of engineering reports.

In regard to Mr Fleming's request that information be accepted from "approved practitioners", I consider that the additional paragraph to be included in *Section 3.2 Information to be Submitted with an Application for a Resource Consent* satisfies this request. The new paragraph 3.2.2.4a is as follows:

*"For the stability of earthworks; drawings, calculations and a written report by an appropriately qualified and experienced person for example, a chartered engineer practicing in the field of civil / geotechnical engineering".*

Mr Fleming requested that a performance criteria or an "end result" be included in the earthworks provisions. It is well established RMA law that Permitted Activity conditions must be measurable in order to determine with certainty whether an activity is permitted activity or not. The criteria provided by the submitter do not achieve this. Neither are they practical, as they would require all earthworks no matter how minor to be designed and undertaken by a geotechnical engineer or geologist.

I am satisfied that the proposed provisions adequately address the issue of stability by either requiring earthworks to be retained by a structure that must have a building consent, or requiring earthworks that are more than minor to obtain a resource consent. However, compliance with District Plan provisions does not absolve responsibility of the owner of a property of their obligations under common law to not undertake work that will undermine, damage or otherwise effect an adjoining property or to avoid remedy or mitigate adverse effects under section 17 of the RMA.

I agree with Ms Newbald's advice that in circumstances where resource consent is required Council has retained discretion over stability and will therefore require the applicant to undertake and obtain whatever information is necessary to satisfy Council that the earthworks and structures are suitable for the proposed purpose.

**Yvonne Legarth** requests that sufficient discretion be retained for the Council to assess each case for earthworks activities and associated structures on its merits, and that a new rule is included to ensure that batters created by earthworks are not held in place by sprayed concrete. This submission was opposed by CentrePort. I believe that the proposed rules retain sufficient discretion to deal with individual cases and the potential adverse effects of instability, erosion, dust and sediment control, visual amenity, flooding hazard, earthworks and structures associated with a stream, and the transport of material.



I do not consider that it is necessary to have a specific rule to ensure batters are not held in place by sprayed concrete as visual impact can be considered at the time of assessment of a resource consent and must be balanced against stability and security of the proposed earthworks.

**Foodstuffs** requests that DPC70 not apply to the Central Area or Suburban Centre Areas. Foodstuffs consider that if there is a proven need for the reintroduction of control to ensure stability of adjoining sites that this can be achieved by an appropriately worded condition. They consider that earthworks in Central and Suburban Centre Areas are already adequately controlled under the District Plan, Regional Plans and NZ Standards.

DPC70 has introduced a level of control previously not provided for in the Operative District Plan, but this has been done because the previous earthworks bylaw has been removed. The previous earthworks bylaw required consent for earthworks exceeding 600mm high and 10m<sup>3</sup> in volume and addressed the issues of stability, management of sediment, and effects on Council roading network and stormwater system. These effects need to be managed under the District Plan.

Ms Newbald has provided detailed advice in her report concerning the need for earthworks rules in the Central Area. She has concluded that it is considered unnecessary to have limits on cuts and fills within the Central Area for the purpose of managing visual amenity. In this respect I agree with her recommendation and also her reasons which include that:

- the Central Area is characterised by predominantly flat land with a highly modified and built environment;
- many aspects of visual amenity that result from earthworks in other parts of the City do not apply in the Central Area; and
- many aspects of the design of buildings and space around buildings are addressed through rules and design guides in other parts of the district plan.

However, Ms Newbald does believe that earthworks rules are necessary for sediment control and the transport of material as these matters are not covered by other District Plan provisions, Regional Plans or through NZ Standards and they do have the potential to cause sediment to leave the area of earthworks and adversely effect the roading network or Council's stormwater system, and to adversely affect pedestrians and disrupt the flow of traffic.

Ms Newbald also advises that within the Central Area the majority of buildings tend to cover the entire site and therefore the issue of stability is addressed through the building consent process. However, she recommends that it is necessary to have a permitted activity standard that addresses the circumstances where cuts or fills are proposed without retaining structures.

I agree with and accept Ms Newbald's recommendations in regard to the above matters and believe that the permitted activity and restricted discretionary activity rules for the Central Area are appropriate and address some of the concerns raised.

**Foodstuffs** also considers that earthworks provisions should not to the Suburban Centre Areas. However, the Suburban Centre areas of the City are extremely diverse in topography and design. In addition, the level of development proposed within these areas is often not as intensive as that in the Central Area. As a result there is more opportunity for space around buildings where earthworks may be visible or exposed. Therefore I considered that it is

appropriate to retain provisions in Suburban Centres that allow the consideration of visual amenity.

## 5.2 OBJECTIVES AND POLICIES

### Introduction 29.1 Earthworks

As requested by **NZHPT** I consider that it is appropriate to include additional wording in the Introduction to provide background and context to the advice notes as well as highlight the need for people to comply with the archaeological provisions of the Historic Places Act 1993.

In response to the submission from **Foodstuffs**, a specific rule has been provided for the Central Area. The Suburban Centre Area remains subject to Rule 30.1.1. As the request includes wording that states that the earthworks rules do not apply to Central and Suburban Centre Areas it is not appropriate for inclusion. In addition, I do not believe there is a need to describe individual Areas within this general introductory passage.

### Earthworks Objective 29.2.1

**Yvonne Legarth** requests changes to the objective to recognise that natural character and amenity is protected from inappropriate use and development. However, I considered that the outcomes sought to be achieved by the submitter are already addressed in the relevant Area based Chapters of the District Plan. I believe that the proposed objective accurately reflects the intent and focus of the Chapter and its strategic direction to manage earthworks activities while avoiding remedying or mitigating any adverse effects. The earthworks provisions seek to achieve a balance between providing for development and managing adverse effects.

The earthworks policies address many of the issues raised by Ms Legarth, including the character and amenity of streams and wetlands (Policy 29.2.1.6), the need for earthworks to reflect natural land forms (policy 29.2.1.7) and the identification of visually sensitive areas (Policy 29.2.1.9).

### Earthworks Policies - General

**Yvonne Legarth** requests that the policies be amended to address a number of issues and she raises concerns that there are no policies that address the effects of earthworks within the coastal marine area; that the plan change fails to address the effects earthworks may have on the natural character of water bodies, rivers, streams and their margins and that the plan change contains no guidance about when earthworks are inappropriate due to adverse effects on places with high natural amenity or conservation values.

Activities within the coastal marine area, the bed of rivers and water bodies are the responsibility of the Regional Council, therefore it is not possible for the District Plan to contain rules or policies that address the appropriateness or otherwise of activities within these locations.

However, I believe that DPC70 does address the effects of earthworks on related areas that are under the Council's jurisdiction, including the margins of rivers, water bodies and land adjacent to coastal marine area. Proposed Policy 29.2.1.4 addresses sediment to streams, wetland and coastal waters, Policy 29.2.1.6 addresses the character and amenity of streams and Policy 29.2.1.7 requires that earthworks be designed to reflect natural landforms and have regard to the character and visual amenity of the local area. In addition, the rules require that there be no earthworks within 5m (built environment) or 20m (Rural Area, Open Space B and Conservation Sites) of the edge of a river, the coastal marine area or a

wetland. Limits are also placed on the area that can be earthworked to enable the control of sediment.

DPC70 in conjunction with existing objectives and policies of other Area or topic based Chapters addresses the majority of the issues raised by Ms Legarth. In particular, proposed Policy 29.2.1.8 requires that earthworks in Open Space and Conservation Sites be managed in accordance with the relevant purpose and use these areas have for the City. This is a direct reference to the need to consider policies of other chapters. The policies of the Area and topic based chapters, provide the framework for determining the character, local amenity or purpose of an area within the City, and therefore the appropriateness of any earthworks. In this regard, what is acceptable from a visual amenity perspective in a residential or built environment may not be acceptable within a Conservation Site.

In respect of the request to ensure that the Wellington Regional Council's Guidelines for Culverts be complied with, it is the Regional Council's responsibility to give consent if a culvert is required. Therefore it is not necessary for the District Plan to contain any policies or rules in relation to the culverting of streams.

**GWRC** requests that a new policy be included that controls the effects of earthworks on unidentified archaeological sites. Whenever earthworks are undertaken there is the potential to destroy, damage or modify unidentified archaeological sites. The very fact that they are unidentified means that rules within the District Plan are very difficult to create, administer and enforce. Addressing these issues is beyond the scope of DPC70. However, DPC70 does contain advice notes directing readers to the relevant provisions of the Historic Places Act as well as Policy 29.2.1.12 that seeks to continue to advise applicants of their responsibilities under the Historic Places Act. This provides a mechanism for including conditions relating to the discovery of archaeological sites on resource consents should archaeological sites be discovered during earthworks.

### **Earthworks Policy 29.1.1.1 and associated Explanation**

**Transpower** supports of the explanation to the Policy.

**Cardno TCB** requests that wording relating to the consideration of the future use of the land be deleted because there is too much on the consideration of future use of the land.

I am satisfied that the explanatory material is a useful adjunct to the Policy. Earthworks are rarely, if ever, carried out in isolation from an existing or future use of land. It is necessary to know the future use of the land to determine appropriate design and compaction standards and what are the relevant issues relating to visual amenity. A coordinated approach to the assessment of effects on the environment will result in a better environmental outcome and is to be encouraged. This is consistent with the Council's functions under section 31 of the RMA and with the promotion of sustainable management of natural and physical resources.

### **Earthworks Policy 29.2.1.2**

Policy 29.2.1.2 is supported by **Cardno TCB** and **Transpower**. Network Utilities are an essential component to the establishment and maintenance of network utilities. Some minor wording changes have been requested and I consider that these are appropriate.

### **Earthworks Policy 29.2.1.3**

**Ngaio Progressive Association** requests the inclusion of a number of matters in the District Plan, including mandatory compliance with a number of New Zealand Standards. Standards are a useful tool in establishing if activities are being undertaken in an

appropriate manner and are referred to in the matters to consider when assessing an application for resource consent under Policy 29.2.1.3. However, I do not consider that it is practical or necessary to make such standards mandatory because to have a binding effect the full standard would need to be incorporated into the District Plan. This cannot be justified. However, I consider that it is appropriate to use relevant standards as conditions of resource consents.

**Ngaio Progressive Association** also requested that where the scale of the retaining structure is significant it should have a 100 year design life. Significant earthworks and associated structures will require a resource consent and if as a result of that process it is considered necessary, conditions requiring a 100 year design life could be imposed. However, it is not something that needs to be specified in the District Plan. The restricted discretionary rule has retained discretion over 'stability' and this provides extensive scope to impose a wide range of conditions if the circumstances of the application warrant it.

In addition, this submitter requested that a design guide for earthworks be created to clarify the requirements as well as the provision of user friendly public information. Both these purposes can be achieved by the provision of information about earthworks by the Council once DPC70 becomes operative. In my view a design guide is not necessary.

**Cardno TCB** originally requested that Policy 29.2.1.3 refer only to large earthworks. However at the hearing this request was abandoned given Ms Newbald's comments in her report that small cuts or fills on steep slopes can result in instability, and there may be other circumstances when the proposed earthworks are only small but are still inappropriate due to their potential risk to stability. I agree with the recommendation that the Policy remains unchanged.

#### **Earthworks Policy 29.2.1.4**

**CentrePort, GWRC and the Department of Conservation** have requested a number of changes to the text of the policy principally related to consistency of terms such as *rivers* and *coastal marine area*. I accept Ms Newbald's recommendations in this regard.

#### **Earthworks Policy 29.2.1.5**

The additional words proposed by **GWRC** are useful in providing context for structures within Flood Hazard Areas it is therefore considered appropriate to include these additional words.

#### **Earthworks Policy 29.2.1.6**

This Policy was generally supported by **GWRC. The Department of Conservation** has requested a number of amendments. Ms Newbald advises that biodiversity values of a stream are in the first instance the responsibility of the Regional Council and that is why the earthworks rules do not seek to address this issue. It follows that it is inappropriate for the policy to include a reference to biodiversity values of streams. With that exception, I am satisfied that the amendments proposed to this policy are appropriate.

#### **Earthworks Policy 29.2.1.7**

**CentrePort** requested that an additional bullet point be included that recognises the contribution earthworks make to social and economic wellbeing. I consider that this is appropriate wording to be included in the explanation. In addition, reference to the Area or other topic based objectives and policies of the District Plan is included to recognise that earthworks are often part of wider developments.

**NZHPT** request that Policy 29.2.17 be amended to specifically recognise heritage areas or items. It is accepted that 'Heritage Areas and sites containing Heritage Items' are missing from the Policy framework of the Earthworks Chapter. However, I agree with Ms Newbald's advice that the appropriate place to recognise Heritage values is in Policy 29.2.1.9. I endorse that amendment and the others recommended to this Policy and explanation to address the concerns expressed in submissions 25/1 on Policy 29.2.1.9 and 22/7 on Policy 29.2.1.12.

#### **Earthworks Policy 29.2.1.9**

Sites containing Heritage Items and Heritage Areas have been classified as visually sensitive areas and are contained in Rule 30.1.2, which addresses earthworks within these areas. However, Heritage Areas and Items are not included in Policy 29.2.1.9 with other identified visually sensitive areas and this error should be rectified. In addition, it is appropriate to include a list of "matters to be considered when assessing a resource consent" as has been done for other visually sensitive areas. I considered that the changes recommended to Policy 29.2.1.9 will also address submission 22/7 (on Policy 29.2.1.12) and submission 23/4 (on Policy 29.2.1.7).

#### **Earthworks Policy 29.2.1.11**

**CentrePort** request that the Policy focus more on the consideration of the "offsite transportation of material". However, it is considered that the Policy does focus on this issue (i.e. the transport of material to and from a site) rather than the transportation of material within a site, because the Policy clearly states 'to and from a site'. In the situation that may pertain in respect of the submitter's land holdings where transport is between adjoining sites, the Policy is also relevant, but not all of the assessment matters will be relevant.

#### **Earthworks Policy 29.2.1.12**

**GWRC** requests that Policy 29.2.1.12 be amended to better reflect the protection of other areas of historic heritage not just archaeological values. As a result of submission 25/1 it is recommended that a reference to Heritage Areas and sites containing Heritage Items be included in Policy 29.2.1.9. I considered that this is the most appropriate policy to refer to the effect on heritage values. In order to address GWRC's concern that earthworks respect heritage values, a list of assessment criteria have been included in the explanation to Policy 29.2.1.9 to assist the consideration of resource consent applications. It should also be noted that where resource consents are required, consideration should be given to other relevant policies in the District Plan either topic or area based.

**NZHPT** request that the 2nd sentence of the explanation to Policy 29.1.1.12 be amended to delete reference to 'Maori and non-Maori sites' and simply refer to 'archaeological sites' and change the word 'disturb' to 'destroy, damage or modify'. I consider that this wording better reflects the Historic Places Act and it should be adopted.

### **5.3 PERMITTED ACTIVITY RULES**

#### **Rule 30.1.1**

**Transpower** requested that new permitted activity standards/conditions in relation to earthworks activities undertaken in close proximity to high voltage transmission lines be included in DPC70. The National Policy Statement on Electricity Transmission 2008 (NPSET) requires that decision makers recognise and provide for the effective operation (among other things) of the electricity transmission networks (NPSET Policy 2) and manage activities to avoid reverse sensitivity and to ensure that the operation and maintenance

(among other things) of the electricity network is not compromised (NPSET Policy 10). A District Plan is required to give effect to a provision in a national policy statement.

The standards requested propose to restrict earthworks around the foundations of high voltage transmission lines and that ground levels below the centreline of high voltage transmission lines are not raised so that a vertical clearance of 12 metres is maintained between the lines and the ground level. Ms Newbald has recommended a 10 metre clearance to suit Wellington's topography and this has been accepted by Transpower.

**Transpower** requested that the additional permitted activity standards be added to Rule 30.1.3 as well but that they do not apply to new or existing network utilities. On Ms Newbald's advice I accept that it is not necessary for the standards to apply to Rule 30.1.3. as this relates only to facilitating the stabilisation of landslips and does not envisage additional earthworks being required. I also accept the advice that network utilities are already exempt from the earthworks rules except in relation to compliance with permitted activity conditions relating to erosion, dust and sediment control, flooding hazard and location adjoining the coastal marine area, streams and wetlands as specified in Chapter 23, Utilities.

**Wellington Electricity** requested that the underground network utilities be excluded from complying with the square metre requirement imposed by Conditions 30.1.1.1(a) (iv) and 30.1.1.1.(b) (iii) and Condition 30.1.2.1(a) (iv) and Condition 30.1.2.1(b) (iii) or that network utilities are included in the list of exclusions that are not required to comply with the earthwork rules (under 30.1).

As identified in the above discussion of Transpower's submission, network utilities are only required to comply with the permitted activity conditions relating to the flooding hazard, distance to streams wetlands and the coastal marine area and the area requirement, which relates to sediment, dust and erosion control. They have been excluded from all the remaining permitted activity conditions to recognise that the provision of network utilities is important for the social and economic wellbeing of the community. I agree with Ms Newbald's recommendation that network utilities should comply with the remaining conditions to ensure any potential adverse effects on the flooding hazard, streams, wetlands of the coastal marine area and the control of sediment can be managed.

**Wellington Electricity** is concerned about underground network utilities. It is my view that the majority of underground network utilities will be placed within a trench and therefore be excluded from complying with the earthworks rules, including the square metre area requirement. The submitter's concern that the definition of 'trench' does not expressly include provision for underground electricity cables has been rectified.

**The Oil Companies** request that the removal of underground petroleum systems be exempt from complying with the earthworks rules. I accept Ms Newbald's recommendation that a general exception for earthworks associated with this activity be included because it is controlled by Rules in Chapter 32 Contaminated Land.

**CentrePort** requested that an additional margin note be included alongside the permitted activity rules referring to the specific rules that apply to network utilities under Chapter 23. Rather than a marginal note, I believe that it is more appropriate to provide an exception to the Earthworks rules under 30.1.

**CentrePort** also requested that certain activities within the Operational Port Area be exempt from Permitted Activity Condition 30.1.1.2 relating to the distance from the coastal marine area and requests the inclusion of an additional condition that states:

*Except that in the Operational Port Area and the Port Redevelopment Precinct this does not apply in relation to foundation works supporting equipment and*

*structures, maintenance of reclamation facings, maintenance of paved surfaces and works that comprise maintenance to existing structures and utilities infrastructure.'*

Given the specialised nature of Port activities it is reasonable to provide an exception from the permitted activity rules for earthworks near the coastal marine area as follows:

*'The cut or fill is no closer than 5m the coastal marine area (except for the maintenance of reclamation facings and the maintenance of foundations which support existing equipment and structures in the Operational Port Area and the Port Redevelopment Precinct).'*

Activities such as piling, trenching for network utilities will be excluded from the definition of earthworks.

**Yvonne Legarth** requests that there earthworks not be permitted activities in Open Space A or B; Conservation Sites; areas of high natural character; land adjacent to the coastal marine area; land adjacent to a waterway or stream, or within the coastal environment; land held subject to the Reserves Act or the coastal marine area. A number of difficulties arise in accommodating these requests:

- Activities within the coastal marine area, including earthworks, are the responsibility of the Regional Council and in this regard it is not possible for the district plan to contain rules for this area. The permitted activity rules proposed by DPC70 already contain provisions that require resource consents for earthworks within 10m - 5m of streams, the coastal marine area and wetlands.
- Areas of "high natural character" and the "coastal environment" are not specifically defined in the District Plan and would need to be mapped in some way before it is possible to apply rules to them.
- District Plan rules are based on Areas (sometimes referred to as zones), not whether land is held under the Reserves Act.

Earthworks are necessary to maintain active recreational areas, including Open Space A and C Areas, and some provision must be made for this activity. The permitted activity rules contain provisions that require resource consents for earthworks within 5m of streams, the coastal marine area and wetlands, and more restrictive earthworks rules apply to 'visually sensitive areas', including Open Space B and Conservation Areas. There are other rules in the District Plan relating to these areas that restrict the construction of buildings and structures to maintain their relatively undeveloped state. However, these areas still need to be managed and maintained for access and passive recreation and this may involve minor earthworks.

I consider that it is appropriate to have permitted activity rules that will provide for various levels of earthworks in the areas referred to by the submitter and that the provisions as recommended by Ms Newbald are appropriate in the circumstances.

In regard to Ms Legarth's supports for the permitted activity provisions that restrict earthworks within 20m of the Ridgelines and Hilltops, Conservation Sites and Open Space B, DPC70 contains no such provision. For clarification, within the Ridgelines and Hilltops Overlay, Open Space B Areas and Conservation Sites, Rule 30.1.2 applies and provides for earthworks up to 1.5m in height (subject to conditions). The 20m permitted activity condition relates to the distance earthworks must be from a stream, wetland or the coastal marine area.

**Wellington International Airport** requests that the Airport and Golf Course Precinct be exempt from complying with the permitted activity rules and that an exclusion be included within the Permitted Activity Rule. The majority of the Airport area is flat and highly modified. Chapter 11A of the District Plan provides comprehensively for the provision of airport related activities and includes conditions related to the movement of dust and the avoidance of the siltation of water bodies. In addition, specific provisions are included for earthworks on the Rongotai Ridge Area. I consider that it is appropriate to exempt the Airport and Golf Course Precinct from the Earthworks Chapter. The appropriate location for the exemption is under 30.1, Permitted activities.

**The Department of Conservation** requests that the words “measured on a horizontal plane” be added to the permitted activity conditions 30.1.1.2 and 30.1.2.2 along with similar wording in the relevant restricted discretionary activity standard and terms. The wording amendment clarifies how the distance should be measured and aligns it with other permitted activity conditions.

**Cardno TCB** request that amendments be made to the wording of the permitted activity condition in and where necessary the accompanying diagrams. Importantly, the request is that the prescribed setback from the site boundary be measured from all parts of the earthworks and that the setback distance be equal to the height of the earthworks at each point, making the separation distance a sliding scale that increase as the height of the earthworks increases.

The relevant considerations in respect of Rules 30.1.1.1(a) (iii) and 30.1.2.1(a)(ii) include that the rules relate to comparatively small un-retained earthworks that can be considered as permitted activities. Any one of the specified maxima of 1.5m height, 250m<sup>2</sup> “footprint” or a 34 degree slope of the land will trigger the need for a resource consent as a Discretionary (Restricted) Activity.

I agree with the submitter that the setback from a site boundary for earthworks can be regulated by a 45 degree recession plane as requested. This means that an excavation could commence at the site boundary, where its height would be zero, and continue at a 45 degree slope. To achieve this result, amendments to both the rule and the definition of height of cut are necessary. In the case of fills, while the recession technique is still applicable, I consider that the definition of depth of fill should remain as notified, that is, the vertical distance between the top and bottom of the fill. In this way the setbacks relate to the bulk of the fill placed, rather than its vertical depth at any point, which is relevant to considerations of slope failure and adverse effects on adjoining properties.

**Cardno TCB** also requested that there be an exemption for small scale earthworks retained by a structure that is less than 1m high. However, at the hearing the submitter indicated that this request was abandoned and the recommendation of Ms Newbald to retain the provision was accepted. However the rule should refer to ‘buildings’ as well as ‘structures’ to ensure that where earthworks are retained by a building the second part of the rule also applies.

**GWRC** requests clarification of the permitted activity standards. Standard 30.1.2.3 requires that there shall be no cut/fill in a Hazard (Flooding Area) while 30.1.2.2 provides that there be no earthworks closer than 5m to a stream and wetland or coastal marine area. It is not considered that there is any conflict between the permitted activity standards and that they are not mutually exclusive. Therefore, while there will be circumstances where only one standard applies, there will also be circumstances where they both apply. The submitter also requests an increase in the width of riparian margins stating that often 5m is not enough space within which to gain access along a river bank in order to undertake flood maintenance, especially in situations where the bank is steep.



I considered that it would be appropriate to bring the set-back requirement into line with the recently notified Plan Change 73 (Suburban Centres) which requires a margin of 10m in the Suburban Centre Area along the Porirua Stream. However, a riparian margin of 10m is unrealistic for residentially zoned properties which will on the whole be smaller than those in the Suburban Centre Zone. In addition, both the Operative District Plan and DPC 72 which is a review of the provisions relating to Residential Areas, allow buildings as a Permitted Activity to within 3-5 metres of a water body. It would be inconsistent to require a greater setback for earthworks. It is considered that a 5m set-back is adequate for the remaining residentially zoned area along the Porirua Stream (that is not within the flood hazard area) and for the remaining streams within Wellington City.

**NZHPT** requests amendments to the advice note beside Rule 30.1.1. The amendments suggested by NZHPT are considered appropriate as they better reflect the obligations of people undertaking earthworks in relation to archaeological sites under the Historic Places Act.

**NZHPT** request that amendments be made to include permitted activity conditions for Rule 30.1.1.1(a)(i) and Rule 30.1.2.1 (a)(i) that require the effects on listed historic sites to be considered. NZHPT requests amendments to their original submission through the further submission process to amend the condition to state:

*‘on a site that is listed in the schedule of heritage areas, buildings, objects trees and Maori Sites or has known archaeological site present, the proposal will not affect the historic values of the site.’*

Permitted activity conditions must be measurable and the condition proposed by NZHPT does not meet this basic requirement. That is, the condition does not allow a person to immediately establish whether there proposed earthworks will be permitted. The wording suggested by NZHPT is more appropriate for restricted discretionary activity, as a matter over which discretion has been retained, should the permitted activity conditions not be met. In this regard, Historic Areas and sites containing listed Historic Items are included in Rule 30.1.2. If the permitted activity conditions of this rule are not met a resource consent is required and consideration must be given to the effect of the earthworks on the heritage value of the site (included as result of another NZHPT submission).

The schedule of archaeological sites referred to by NZHPT is not currently part of the District Plan. In order for the District Plan to apply earthworks rules to these sites a Plan Change would need to be undertaken to include the schedule of archaeological sites in the District Plan. It should be noted that the Archaeological Authority provisions of the Historic Places Act address the issue of undiscovered archaeological sites. These provisions require people undertaking earthworks to notify the Historic Places Trust if archaeological sites are found and obtain an archaeological authority before continuing work.

**WCC** requested a minor amendment to change the “and” to an “or” in 30.1.1.1(c)(i) order to be ensure consistency with all other permitted activity conditions.

**WCC** also requests the inclusion of specific provisions relating to the Churton Park Concept Area. Plan Change 60 (recently settled through a Consent Order) provided for specific provision relating to the Churton Park Concept Area to be included in the district plan. The majority of these provisions have been included in the recently notified Suburban Centres Chapter (Plan Change 73). However, a number of these provisions related to earthworks and it was considered that they would be more appropriately located in the Earthworks Chapter. Although the provisions reflect the format of the Earthworks Chapter they have the same intent and effect as those settled by Consent Order.

I agree with both requests.

### **Permitted Activity Rule 30.1.2 – Visually Sensitive Areas**

The support of **Dale Mc Tavish** is noted. **Linda Dale, Tony Flynn** and **Denis O’Neil** all request changes to make the provision that apply to identified visually sensitive areas less restrictive, including that an increase in the height of a cut and/or fill is permitted provided it is covered by the footprint of a building.

The Urban Coastal Edge, along with other areas (e.g. the Ridgelines and Hilltops Overlay Area) are highly visible parts of the City and contribute much to the City’s character and sense of place. In this regard it is important that new development be undertaken in a way that is sensitive to the character and amenity of these areas and that the earthworks rules reflect that. I consider that the proposed permitted activity conditions of 1.5m maximum height and 100m<sup>2</sup> maximum surface area are justified for these “visually sensitive areas” and provide a balance between allowing for minor earthworks activities “as of right” while ensuring adverse effects are avoided, remedied or mitigated.

The proposed permitted activity rule will cover the majority of small scale earthworks, which is appropriate, while large developments in these areas will require a resource consent, of which earthworks will only be one element. The permitted activity conditions work as a package to address a number of effects of which only one is visual amenity. Other effects such as erosion, dust and the creation of sediment are also addressed by these conditions and need to be addressed when these limits are exceeded. While it is accepted that the location of a building over earthworks can mitigate visual effects, it is considered that this is best assessed through a resource consent application. Providing an exemption to the earthworks rules on the basis that the earthworks are to be covered by a building ignores the fact that earthworks have effects other than those on visual amenity.

## **5.4 DISCRETIONARY (RESTRICTED) ACTIVITY RULES**

**Transpower** requested that a new discretionary activity rule be included for activities that do not meet certain permitted activity conditions. With the acceptance of the new permitted activity conditions relating to distance from the foundations and centreline of high voltage transmission it will be necessary to include an appropriate restricted discretionary activity rule to address the activities that do not meet these standards.

**CentrePort** requests that the term ‘structures’ be removed from 30.2.1.1 (v) (the list of matters over which Council has retained discretion). The effect of this would be that Council would not have the discretion to comment on the structures used to retain cuts or fills in areas close to the coastal marine area or streams. While the type and extent of any proposed cut and fill in these areas is the trigger for the rule, the type of structure (if any) proposed to retain the proposed cuts and fills is an important part of the proposal as it may have the potential to either mitigate or exacerbate any potential adverse effects.

**CentrePort** also requests that the volumes of material to be transported (in 30.2.1.1(vi) and 30.2.1.2 (vi)) be increased to 2000m<sup>3</sup> for the Central Area or that an exception to the Central Area be provided for the Pipitea and Port Redevelopment Precincts up to 2000m<sup>3</sup>. The Port area is located on a major arterial (Aotea Quay) with access to and from the site controlled by traffic lights. This provides a different traffic environment from the majority of the Central City where the movement of material to and from the Port Area does not have the same potential to impact on the roading and pedestrian network. I consider that the higher limit of 2000m<sup>3</sup> is appropriate.

**Yvonne Legarth** requests that restricted discretionary activity rules be included to manage activities within certain areas. For the same reasons as specified in respect of the submitter’s

similar request relating to permitted activities, the request is not considered to be practical, necessary or conducive to managing the adverse effects of earthworks within the City.

**Ngaio Progressive Association** request amendments to the non-notification clause associated with Rules 30.2.1 and 30.2.3 requesting that it state that all applications be publicly notified.

**The Treilissick Park Group** request major earthworks applications be publicly notified.

**Cardno TCB** request that the non-notification statement be retained.

Mr Newbald's advice on this matter is as follows:

*"The Operative District Plan currently contains a non-notification clause and only addresses the issue of visual amenity. Other processes that have in the past (the Earthworks Bylaw) or currently do (the Building Act) address earthworks do not contain any provisions for the involvement of third parties within the earthworks process. The RMA has recently been amended with a fundamental change to the way notification decisions are made with the presumption towards notification reversed. As a result of these changes it will be necessary to undertake a comprehensive review of all the notification provisions within the district plan."*

I agree with her recommendation that in order to maintain consistency with the way notification decisions are made across the District Plan no changes should be made to the non-notification clause, and that any future changes should be as a result of a comprehensive review of all the non-notification clauses within the district plan.

I also note that under the RMA the determination of who is an affected party is done on a case by case basis. It is entirely inappropriate to predetermine who may be an affected party by a rule in a plan.

**Cardno TCB** request that the discretionary restricted rule be abbreviated to make it shorter and easier to understand as follows:

*'Council's discretion is restricted to the extent of non-compliance with the permitted activity conditions; and the transport of material where the following limits are exceeded...'*

However, I concur with Ms Newbald's advice that specifically mentioning the matters over which Council has retained discretion indicates to applicants the matters that will need to be addressed in a resource consent application. I also believe that a reasonable degree of specificity in restricted discretionary rules is particularly helpful in administering the rule because of the statutory constraints on refusal of consents and the imposition of conditions.

**NZHPT** requests that the additional matter of the effect on heritage values be included as a matter over which Council has retained its discretion, in Rules 30.2.1.1 and 30.2.1.2. Heritage Areas and sites containing heritage items have been included in the permitted activity rule that applies to visually sensitive areas. Ms Newbald advises that in order to be able to consider the effect of earthworks on the heritage values of a site or item it is necessary to retain discretion over this matter, but in Rule 30.2.1.2 only. I agree with that advice.

**NZHPT** also requests amendments to the advice note associated with Rule 30.2 relating to Archaeological sites. The amendments better reflect the duties of people under the Historic Places Act in relation to archaeological sites and are therefore considered appropriate.

**WCC** request the inclusion of an additional matter over which discretion is retained in regard to visual amenity. Currently the consideration of visual amenity of earthworks is limited to when the cut height exceeds 2.5m (or 1.5m in visually sensitive areas). However, in addition to the height/depth of earthworks, the area over which the earthworks are undertaken can also have an adverse effect on visual amenity. Therefore, the inclusion of the area limits of 250m<sup>2</sup> and 100m<sup>2</sup> in the relevant matter over which Council has restricted its discretion is considered appropriate.

## 5.5 DISCRETIONARY (UNRESTRICTED) ACTIVITY RULES

**Transpower** has requested that a new discretionary (unrestricted) activity rule be included for earthworks that do not comply with conditions of the new discretionary (restricted) activity rule relating to earthworks in close proximity to high voltage transmission lines. However, because there are no such conditions in the new discretionary (restricted) activity rule all activities that do not meet the permitted activity conditions will automatically become discretionary restricted activities. There is, therefore, no need for a further rule as requested.

**WCC** requested the inclusion of specific provisions relating to the Churton Park Village Concept Area. Specific rules for the Churton Park Village Concept Area were included in the District Plan by Plan Change 60 (the appeal on which was recently settled by Consent Order). The majority of the rules that apply to the Churton Park Village Concept Area have been included in the recently notified Suburban Centres Plan Change (Plan Change 73). However, a number of the provisions for the Churton Park Village Concept Area related to earthworks which are more appropriately located in the new Earthworks Chapter. Although the format and layout of the rules has changed due to the new location in the Earthworks chapter, the effect and intent of the rules is the same as those introduced and agreed through the Plan Change 60 process. It is appropriate that the specific earthworks provisions are now located in the Earthworks Chapter.

## 5.6 URBAN COASTAL EDGE MAPS

The Urban Coastal Edge is an area along the costal of Wellington that has been identified as having a particular character that can be adversely affected by earthworks. The area extends around the urban coastline and extends along the fault escarpment of the Hutt Road. It does not include areas within the rural environment beyond Owhiro Bay on the South Coast.

The lots requested to be removed from the Urban Coastal Edge are the only lots zoned Suburban Centre on the Hutt Rd to have been included in the Urban Coastal Edge. The lots have already been developed and contain residential units accessed off Sar St and commercial premises accessed off Hutt Rd. Although highly visible, they are no more visible than the adjoining commercial properties to the south. It is appropriate to remove these properties and have the Urban Coastal Edge begin at the adjoining Open Space B Area.

## 5.7 CHANGES TO EXISTING DISTRICT PLAN

### ***Definitions***

**CentrePort** requests that the word 'piling' be included in the list of exclusions in the definition of earthworks. It was not anticipated that the earthworks rules should apply to activities such as piling and onsite networks utilities, therefore the definitions could usefully be amended to include piling in the list of exclusions and also include 'onsite network utilities such as lighting' in the definition of trenching.

**Tony Flynn** requests that the definition of earthworks and height of cut be amended to exclude a hole 2.5m in diameter and all excavation under a building. I accept the recommendation of Ms Newbald that no change to the definition is necessary on the basis that permitted activity conditions adequately provide for minor earthworks and would not preclude the creation of a 2.5m wide hole or excavations under a building, providing the conditions relating to cut height and slope angle are met. I consider that once the thresholds are reached a number of effects can arise that need to be addressed through the resource consent process, including stability, visual amenity, erosion and sedimentation effects.

**Cardno TCB** request that the definition of cut height, fill depth and existing slope angle be rewritten on the grounds that these are overly complicated and problematic. As seen above under the consideration of the Permitted Activity Rules 30.1.1.2 and 30.1.2.2, some amendments have been recommended. I believe these accord with the submitter's intention as far as excavations are concerned, but for the reasons cited above I believe the definition of depth of fill should remain as notified.

In regard to the slope angle I agree with Ms Newbald's recommendation that this remain unchanged for the following reasons:

*"The definition of existing slope ensures the management of stability by considering the steepness of the slope above or below the area of cut or fill. For cuts it is necessary to consider the slope of the ground above the cut and for fills it is necessary to consider the slope of the ground below the fill. The definition ensures the area around the earthworks is taken into consideration in order to avoid cuts and fills inappropriate situations.*

*An alternative approach would be to take the average slope angle within either the cut/fill area or within a designated area either side of the cut/fill. However, it is considered that an average slope angle ignores an overly steep section within the area of the cut; above the cut; or below the fill. In such situations the proposed cut may only be removing a small section of a particularly steep slope, which when taken as an average with the remainder of the sloping ground, may not result in the slope angle standard being triggered. If the area to be cut is at the toe of a hillside (or fill placed at the top of a steep slope) the result can be a large area becoming unstable."*

Overall, I believe that the definitions provide a balance between allowing for earthworks where stability issues are minimal and requiring resource consent for earthworks in situations where there is a potential risk to the stability of a slope.

I recommend that the following definition of 'Cut Height' be substituted for the notified definition and that the associated diagrams be deleted:

***"CUT HEIGHT:** means the maximum height of the earthworks cut at any time measured vertically and includes any working cut height during the course of the earthworks."*

**Michael Fleming** requests that the term "track" be defined. Defining a term in the district plan is only necessary when the definition is essential to understanding and interpreting the rule. The term "track" is used only in the rule that applies to the Rural Area which allows the construction and maintenance of tracks associated with permitted rural activities. The definition for track requested to be included does not add value to the rule or assist with its interpretation. In this context the term is given its ordinary dictionary meaning and does not require further explanation.

**GWRC** requests that the definition of 'stream' be deleted and that the definitions of "river" or "water body" and "coastal water" as defined by the RMA be included. This submission is further to the earlier submission to replace the term "streams" with "rivers" in Policy 29.2.1.4. As noted previously, all references to streams to streams in the rules should also now include "rivers".

The definition of 'water body' included by DPC70 refers to the RMA definition and is considered adequate. As a result of a submission by CentrePort all references to 'Coastal waters' have been replaced with 'coastal marine area' which is defined by the RMA.

**WCC** requested that the definition of trench include a maximum width and depth. While it is considered that a maximum width could be helpful in some circumstances it is also recognised that it is difficult to determine what the maximum dimensions of a trench should be, as it will vary according to the needs of the utilities being installed and the ground conditions. It is therefore not recommended to include a maximum depth or width for a trench.

### ***Information to be supplied with an Application for Resource Consent***

There have been a number of requests to include additional information to be submitted with resource consent applications. Where the information is relevant to determining the need for a resource consent, has the potential to change the activity status of an application, or determines what effects may be considered, it is appropriate that the information be included. Therefore the requests to include the location of heritage areas and items, transmission lines and streams, wetland and water bodies are considered appropriate.

**Trelissick Park Group** requested that an additional bullet point be included that requires information to be provided on sediment control. Sediment control is a matter over which discretion is specifically retained under the earthworks restricted discretionary activity rules it would therefore be necessary for applicants to address this matter in any assessment of effects on the environment.

**Michael Fleming** requests that a checklist be included in the District Plan outlining a list of fundamental site investigations and testing that should be undertaken for all earthworks applications. Section 3.2.2.4a (included in the district plan by Plan Change 70) requires that the following be provided with resource consent applications for earthworks:

*'drawings, calculations and a written report by an appropriately qualified and experienced person, for example, a chartered engineer practicing in the field of civil, geotechnical engineering'*

In my opinion it is not necessary for the District Plan to specify what the investigations should be undertaken as it is expected that an 'appropriately qualified person' would comply with all the necessary requirements of their profession and undertake the necessary site investigations and testing necessary to determine the appropriateness or otherwise of the earthworks. In addition the extent and scale of the proposed work and the particular characteristics of the site will determine what testing and investigation is necessary.

### ***Chapter 23 Utilities***

When earthworks exceed the maximum area requirement there is the potential for adverse effects in relation to erosion, dust and sediment. In particular, exposure of large areas by earthworks can result in sediment entering and blocking Council's stormwater system as well as creating a nuisance effect on the roading network. While network utility operators do not need to comply with a number of the permitted earthworks conditions it is considered appropriate that they comply with the maximum area requirement to avoid

potential adverse effects. In this regard, trenching is not considered to be earthworks and would not need to comply with this provision.

The changes requested by **CentrePort** to include reference to Contaminated and Potentially Contaminated land in the last paragraph can not be made as this paragraph was not amended by DPC70. If such a change is necessary it may be able to be made as a consequential amendment to Plan Change 69 Contaminated sites. In relation to the reference to the Te Ara Haukawakawa Precinct, once Plan Change 48 becomes operative, this line will no longer be relevant and will be able to be deleted as a consequential amendment to Plan Change 48.

### ***Other Changes***

**CentrePort** requested that the Central Area permitted activity rules be amended to include reference to “paved operational areas”. It is considered that the maintenance of “paved operational areas” would not fall within the definition of earthworks, and therefore not trigger the need for a resource consent. However to avoid any doubt it is recommended that proposed Rules 13.1.6 and 13.14.4 have the words “paved areas within Operational Port Areas” inserted after the words “formed roads”.

**Ngaio Progressive Association** requested that a referencing error be corrected. Although not part of DPC70 this is a consequential amendment and should be made. The submitter also requests that the non-notification statement for Rule 5.2.5 be amended. This non-notification statement does not form part of the Plan Change and can not be considered a consequential amendment.

**Cardno TCB** requested that the reference in Rule 5.2.5 be amended to 30.1.1.1(a). However, the earthworks stability provisions of Rule 30.1.1.1 include both (a) and (b) parts of the rule and therefore it is appropriate that the reference in Assessment Criteria 5.2.5.11 be 30.1.1.1. For consistency however, the assessment criteria should also refer to 30.1.2.1 which relates to the Urban Coastal Edge area (which includes Residential Areas).

**NZHPT** requested that an advice note advising of the requirements of the Historic Places Act in relation to Archaeological sites be included alongside permitted activity rules 7.1.5, 9.1.4, 11.1.4, 11.5.3, 13.1.6, 13.14.4, 13.20.4, 15.1.7, 17.1.14 and 19.1.4. It is considered that the advice note would be useful in that agencies undertaking work on legal roads are made aware of their obligations under the Historic Places Act.

## **6. STATUTORY CONSIDERATIONS**

The decision of the Environment Court in **The Long Bay-Okura Great Park Soc Inc v North Shore CC A078/08** sets out a comprehensive summary of the mandatory requirements for district plans or plan changes as follows:

### *“(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 and any regional policy statement.*
3. *When preparing its district plan (change) the territorial authority*

*shall:*

- (a) Have regard to any proposed regional policy statement;*
- (b) Not be inconsistent with 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 national significance etc.*

*5. When preparing its district plan (change) the territorial authority must also:*

- (a) Have regard to any relevant management plans and strategies under other Acts, and to any relevant entry in the Historical Places Register and to various fisheries regulations; and to consistency with plans and proposed plans of adjacent territorial authorities;*
- (b) Take into account any relevant planning document recognised by an iwi authority; and*
- (c) Not have regard to trade competition.*

*6. The district plan (change) must be prepared in accordance with any regulation (there are none at present).*

*7. The formal 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 section 32 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 (section 32(3)(a)).*

*(C) Policies and methods (including rules) (the section 32 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 taking into account:*

- (a) The benefits and costs of the proposed policies and methods*



*(including rules); and*

- (b) The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.*

*(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.*

## **6.1 COUNCIL FUNCTIONS – SECTION 31**

The District Plan is one means to assist the Council to carry out its functions under section 31 of the RMA for the purpose of giving effect to the RMA in its district. These functions include the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district.

The purpose of DPC70 is to change the way that earthworks are managed under the District Plan following the lapse of the Earthworks Bylaw in July 2008 and the withdrawal of Plan Change 65.

It does this by proposing a comprehensive package of objectives, policies, methods and rules, for earthworks activities as a stand-alone Chapter of the District Plan that applies to all Areas of the City (Residential, Suburban Centres and Institutional Precincts etc).

The comprehensiveness of the proposals, which I believe contribute significantly to the statutory imperative of achieving the integrated management of the effects of activities, is demonstrated by the issues that DPC70 addresses. These include stability, erosion, dust and sediment control, earthworks near water bodies, visual amenity, effects of transport of material, and the adverse effects on cultural and archaeological material and sites.

Integrated management of effects of earthworks activities is achieved through a carefully constructed hierarchy of permitted, restricted discretionary and unrestricted discretionary activities with appropriate conditions, underpinned by a policy approach based on sustainable management principles.

With the amendments now recommended, I am satisfied that DPC70 is entirely consistent with and the Council's functions under the RMA and will assist it to carry them out.

## **6.2 NATIONAL POLICY STATEMENT**

The National Policy Statement on Electricity Transmission 2008 (NPSET) requires that decision makers recognise and provide for the effective operation (among other things) of the electricity transmission networks (NPSET Policy 2) and manage activities to avoid reverse sensitivity and to ensure that the operation and maintenance (among other things) of the electricity network is not compromised (NPSET Policy 10).

With the amendments now recommended (as requested by Transpower) I consider that DPC70 does give effect to the relevant provision of the NPSET.

### 6.3 REGIONAL POLICY STATEMENTS

With the amendments resulting from the submissions of GWRC I consider that DPC70 is consistent with the Operative Regional Policy Statement (RPS) and gives effect to the relevant Policies under Chapter 5 Fresh Water, Chapter 9 Ecosystems and Chapter 11 Natural Hazards of the RPS by introducing complementary controls to those of GWRC. This is achieved by setting relatively low thresholds for permitted activities subject to conditions that recognise and mitigate the potential adverse effects on fresh water, ecosystems and natural and physical resources. When thresholds are exceeded, or conditions cannot be met, resource consents are required that enable a closer examination of the potential effects and the imposition of appropriate conditions.

I have had regard to the Proposed Regional Policy Statement and in particular the Policies referred to in the evidence of Ms Harper, being Policies 14 and 40 'Minimising the effects of earthworks and vegetation disturbance', Policy 21 'Protecting historic heritage values', and Policy 42 'Protecting aquatic ecological function of water bodies'.

In respect of Policies 14, 40 and 42, I consider that the provisions of DPC70 as now recommended to be adopted do control appropriately control earthworks to minimise erosion and sedimentation that may affect aquatic ecosystems and their functioning. In respect of Policy 21, I consider that DPC70 protects historic heritage values as far as is possible in the absence of a comprehensive City-wide assessment of relevant sites and a methodology being devised for including appropriate protection of known and unknown sites in the District Plan. This will require extensive research, consultation and policy development leading to a further plan change, all of which is outside the scope of DPC70.

### 6.4 RELEVANT MANAGEMENT PLANS AND STRATEGIES UNDER OTHER ACTS

The Historic Places Act 1993 is a relevant statute when earthworks are being contemplated and carried out. The District Plan already makes use of advice notes that refer readers to other relevant legislation including in respect of earthworks provisions the need for compliance with the Historic Places Act 1993. With the amendments now recommended to be adopted, DPC70 includes a number of such advice notes directing attention to the requirement to obtain an appropriate authority from the NZHPT.

There are no other relevant management plans or strategies that have been brought to my attention in respect of DPC70.

### 6.5 SECTION 32

I have examined the Section 32 Report that was prepared for DPC70 when it was notified and am satisfied that it was an appropriate evaluation in terms of the statutory requirement.

I have considered whether the amendments now recommended to DPC70 as a result of submissions would cause the Section 32 evaluation to be re-visited. The principal amendments recommended can be summarised as follows:

- There is no amendment to the new objective;
- There is virtually no amendment to the new policies, although the explanatory material has been amended in a number of areas. The exception is that Policy

29.2.1.9 now relates to Heritage Areas and sites containing listed Heritage Items as well as open space, and coastal edge and ridgeline locations;

- A number of new exemptions from the earthworks rules have been included. These are earthworks associated with the removal of underground storage tanks, the Airport and Golf Course Precinct and Network utilities;
- Earthworks in the Central Area have been located under separate rules to recognise the differences in character and land use in this Area;
- Earthworks in the Churton Park Village Concept area have been included following a District Plan Change for that area;
- The conditions of permitted activities and the matters over which discretion have been restricted in respect of discretionary restricted activities have been amended, following submissions by Transpower, the Oil Companies, other Network Utility operators, NZHPT, GWRC and DOC.

The Section 32 Report concluded that the policies, rules and methods of DPC70, which it describes as the *“Integrated District Plan and Building Act Control”* Option, were the most appropriate for achieving the objectives of the District Plan. I can see nothing in the amendments now recommended that would lead me to a different view.

Foodstuffs has opposed DPC70 on the grounds that the Section 32 Report has failed to recognise that earthworks within the Central Area and the Suburban Centre Areas are already adequately controlled under the District Plan, Regional Plans and New Zealand standards.

I accept that DPC70 has introduced a level of control previously not provided for in the Operative District Plan. However, it needs to be recognised that this has been done within the context of the removal of the Earthworks Bylaw. The Earthworks Bylaw required consent for earthworks exceeding 600mm high and 10m<sup>3</sup> in size. The Earthworks Bylaw addressed the issues of stability, management of sediment, and effects on Council roading network and stormwater system. With the removal of the Bylaw, these effects need to be managed to avoid adverse effects on the environment.

In my opinion the Section 32 analysis properly evaluates the benefits and costs associated with the policies, rules and methods of the various options and concludes correctly that Option 3 is the most appropriate. In this Option two key benefits (among others) are identified that reinforce that appropriateness. These are:

- The ability to address and assess all issues relating to earthworks (e.g. erosion, dust sediment control, visual amenity etc) through comprehensive rules and policies; and
- The two complimentary and integrated processes used to consider stability issues, namely; Building Consent and District Plan Consent.

The Foodstuffs submission, in effect, alleges a further unidentified ‘cost’ to Option 3, that could be described as duplication of District Plan controls. Even if this was added to the listed costs I believe the benefits still outweigh the costs and the provisions of DPC70 remain the ‘most appropriate’.

I therefore recommend that the existing Section 32 Report be adopted as the post-submission report with the following amendments:

Page 17 - The heading to 5.5.2 to read - ***The key benefits and costs of Option 1***

Page 19 – The heading to 5.3.2 to read - ***The key benefits and costs of Option 2***

Page 22 – The heading to 5.4.2 to read - ***The key benefits and costs of Option 3***

Page 23 – Add a further ‘Cost’ as follows:

***“Some duplication of District Plan Controls”***

**6.6 PART 2**

DPC70 must be prepared in accordance with the provisions of Part 2 of the RMA. These include, in section 5, the purpose of the Act which is to promote the sustainable management of natural and physical resources. Sustainable management means:

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

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

Under sections 6, 7 and 8, in achieving the purpose of the Act, the Council, in exercising its functions and powers under the RMA, in relation to managing the use, development, and protection of natural and physical resources shall:

- recognise and provide for certain matters of National Importance;
- have particular regard to certain ‘Other Matters’; and
- take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

As the introduction to DPC70 records:

*“The objectives, policies and rules of DPC70 have been developed to achieve the sustainable management of earthworks. They concentrate on both, the type of earthworks that are environmentally acceptable, and the detail of how the adverse effects of earthworks and associated structures can be acceptably avoided, remedied or mitigated”.*

The objective proposed by DPC70 is :

*“To provide for the use development and protection of land and physical resources while avoiding, remedying or mitigating any adverse effects of earthworks and associated structures on the environment.”*

This embraces the enabling function of section 5 by recognising that earthworks contribute to people's social, economic and cultural wellbeing as an integral part of expanding and/or re-developing urban and suburban settlements, facilitating rural activity, creating recreational areas and enabling movement around and through the City.

The objective also recognises the need to balance the use and development of land and physical resources with its protection and with avoiding, remedying, and mitigating adverse effects.

The Policies, methods and rules proposed by DPC70 are the means by which DPC70 sustains the potential of resources, safeguards the life-supporting capacity of natural elements and avoids, remedies and mitigates adverse effects on the environment pursuant to section 5 (2) (a), (b) and (c).

In particular the policies methods and rules provide that earthworks proposals are designed and executed to:

- Minimise the risk of instability;
- Minimise erosion and the movement of dust and sediment beyond the site particularly to water bodies;
- Not exacerbate flood events in Hazard areas;
- Protect character and amenity of streams and wetlands;
- Reflect natural landforms and reduce visual impact;
- Recognise the special character of Open Space and Conservation areas, the Urban Coastal Edge and the City's ridgelines and hilltops;
- Minimise the adverse effects of the transport of material;
- Protect historic heritage (as far as possible within the existing structure of the District Plan).

In this way, it is my opinion that the statutory requirements of the relevant parts of sections 6, 7 and 8 are met.

## 6.7 CONCLUSIONS

DPC70 proposes to change the way that earthworks are managed under the District Plan by creating a stand-alone chapter for earthworks that applies to all Areas of the City, providing a balance between allowing people to undertake minor earthworks as Permitted Activities subject to specified conditions but requiring resource consents when those conditions are not met.

DPC70 places greater emphasis on policies, and contains no assessment criteria under the discretionary activity rules. The policies provide the rationale and guidance for assessing consent applications. The major change for the consideration of Earthworks under the District Plan is the introduction of 'stability' as an issue that requires assessment.

As a result of submissions a number of amendments to the notified DPC70 are recommended which improve the efficacy of its provisions and meet many of the individual and corporate requests. However, not all requested amendments are supported because a number are outside the scope of DPC70 and/or require further research.

Overall, I conclude that District Plan Change 70 has been prepared in accordance with the relevant provisions of the Resource Management Act 1991 and in the form now recommended is consistent with the purpose and principles of that Act and promotes sustainable management of natural and physical resources.

Stuart Kinnear

Independent Commissioner

Date 28 April 2010