

19. SUPPLEMENTARY REPORT ON SEEKING AN ORDER IN COUNCIL FOR HERITAGE

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PURPOSE OF REPORT

1. The purpose of this report is to provide supplementary advice to the Regulatory and Planning Committee to assist in deliberations on the proposal to ask the Ministry for the Environment (MfE) to draft an Order in Council for Heritage.

EXECUTIVE SUMMARY

Background

2. At the 2 February 2011 meeting of the Regulatory and Planning Committee, the Committee received a report on seeking an Order in Council (OIC) for Heritage. Deputations were heard from Christchurch Civic Trust and the New Zealand Historic Places Trust (NZHPT) on this matter. A number of clarifying questions were asked of staff. A record of those questions and answers is attached in **Appendix 1**.
3. Consideration of the agenda item was then deferred to 18 February 2011 to ensure that sufficient time be available for the Committee to deliberate on the proposal, and to give staff the opportunity to further liaise with the NZHPT on the matters raised in their deputation, and to resolve matters of divergence where possible.
4. The proposed contents to be sought for an OIC for Heritage have been developed in response to a resolution of the Council on 6 October 2010 to *“Approve that officers work with the relevant government departments to seek an Order in Council from the Government to address the streamlining of the resource consent process for heritage buildings, as outlined in paragraph 46 of this report”*.
5. At the meeting of 6 October 2010 the Council further resolved that *“any Order in Council only apply to resource consent applications for change to heritage buildings resulting from the earthquake damage”*. Council sought advice on options to stream line the resource consent process through an OIC given the scale of the number of listed heritage buildings damaged by the earthquake, and the consequential time and financial costs that may occur as a result of a protracted resource consent process.
6. At the time of the October 2010 report, the process for requesting Orders in Council was via the Canterbury Earthquake Recovery Commission. Since that time the process has evolved and the advice received from the Ministry, is to work through the appropriate government department, in this case the Ministry for the Environment.

Current situation/Issues

7. Based on the sample of 414 heritage buildings initially assessed in Christchurch City in September 2010, 181 buildings (43 per cent) suffered moderate to severe damage and could be expected to require repairs and, in the more severe cases, partial or full demolition. Selwyn District Council (SDC) has identified approximately 45 damaged heritage buildings, and Waimakariri District Council (WDC) approximately 62 Heritage buildings.
8. Since 4 September 2010 there have been over 3,200 aftershocks. On 26 December 2010 there was a further aftershock, which due to its magnitude and depth resulted in ground shaking of a similar intensity in central Christchurch to that of the initial 4 September 2010 earthquake. The aftershocks, in particular that on Boxing Day, have caused additional damage in a number of cases and therefore the assessments indicated above are subject to change and regular review. There were over 40 additional heritage buildings in central Christchurch reassessed as a danger to public safety due to the Boxing Day event.

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9. Given the number of heritage buildings damaged there have been a limited number of resource consent applications received to date. Many building owners are still working with their structural engineers and insurers to determine the best course of action. This is particularly the case for buildings more recently damaged, for example, commercial buildings in the Central City damaged as a result of the Boxing Day earthquake. As at February 2011, 40 resource consent applications for work to earthquake damaged listed heritage buildings have been received, six of these for demolition and 34 for repair and/or stabilisation work. Of the 34 applications for repair/stabilisation, 22 have been approved and were non notified. Of the six applications for demolition, a decision has been made to notify two of these, one consent for demolition has been granted, two will be non notified and two are still being processed. Only two of the six applications for demolition, received are for commercial buildings, however the majority of pre application discussions that staff are having with building owners now are for commercial buildings.
10. As a consequence of the damage, resource consent applications are being, and will have to be, sought to either repair or demolish affected buildings. Based on experiences to date, applications to repair a building are generally able to be processed as a non notified application on the basis that the heritage values of the building will not be (further) diminished or destroyed as a result of the repair. Resource consents for repair are in most cases able to be processed within statutory timeframes, although this is dependent on full applications being submitted. An OIC is therefore not needed to streamline the processing of these applications.
11. Where an application is received for demolition of a building notification will usually be required because the effect on heritage values is likely to be more than minor. Even when the structural integrity of the building is so compromised as to be beyond reasonable repair, the intangible values associated with that building may still mean that it remains of historic significance to the City, thus requiring a notified process. Opportunities to streamline resource consent processes though an OIC for Heritage are therefore more relevant for listed heritage buildings where demolition is sought.
12. The issues associated with damage to heritage buildings are not confined to the scale of the damage itself but extend to the community effects arising from the consequential consent processes that are then initiated to manage repair or demolition. While consents to manage repairs to damaged buildings appear to be progressing smoothly under the current statutory regime, demolition consents are considerably more complicated. The costs (both financial and time) for progressing notified consents impacts both applicants and Council. There is some uncertainty regarding outcome for applicants, Council and interested parties from these processes. Timeframes and costs may also be considerably extended through appeals. Protracted content processes may also impact directly on neighbouring/adjoining buildings contained within safety cordons. The general public are also restricted in their ability to access, and transition through, the city where footpaths or roads are encroached upon by cordons. The financial costs of consent processes extend beyond the consenting fees and time considerations to include economic impacts of business disruption/cessation, transport congestion, and opportunity costs.
13. In seeking to address these issues, the outcomes sought are a reduction in or minimisation of the ongoing costs, delays and disruption that has occurred to businesses and the community in general as a result of the earthquake damage to heritage buildings while ensuring that as far as possible transparent robust decisions are taken that do not undermine heritage values.

Benefits and Risks of streamlining resource consent processes

14. A key benefit of streamlining resource consent processes is reducing the financial and time costs to applicants, Council and in some cases adjoining/neighbouring businesses, through a shorter resource consent process. This includes less time/resources in preparation and processing applications, reduced disruption to the business community and the public. In addition, the recovery of the city in general may also be promoted, for example though the earlier removal of cordons allowing public access to, and movement through the city. Streamlining the resource consent process thereby facilitates the City's response and recovery from the Canterbury earthquake. Depending on the specific mechanisms advanced, an OIC for Heritage may also give enhanced certainty to applicants and Council of an outcome.

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15. The risks associated with streamlining the consent process are a perceived or actual loss of transparency and a reduction in the opportunity for the community to participate in the resource consent process. This may increase the risk of legal challenge, both in terms of process (judicial review) and of the substantive decision. Depending on the nature of the OIC for Heritage there may also be perverse or unintended outcomes potentially resulting in an increased loss of heritage values.

Mechanisms to streamline resource consent processes

16. Paragraph 46 of the report to Council on 6 October 2010 outlined a broad framework of options for consideration in developing an OIC:
 1. *Enabling the Council to establish an independent panel of experts/Councillors/Commissioners to decide all matters concerning resource consent applications for change to heritage buildings resulting from earthquake damage.*
 2. *If the Panel decides to notify an application, the submission period is considerably shortened from the current minimum 20 working days required by the RMA.*
 3. *Only the applicant has a right of appeal. The Canterbury Earthquake (Historic Places Act) Order 2010 provided that the right of appeal against a decision concerning disturbance of an archaeological site is restricted to the applicant. This Order in Council would seek a similar provision.*
 4. *For demolition of Group 1 or 2 heritage buildings listed in the City Plan that cannot feasibly be saved, alter the activity status from non-complying to discretionary [note that the Council authorised further officer work on this for Group 2 buildings only]. Reason: the non-complying activity threshold test in the RMA may mean that resource consent for demolition cannot be granted.*
 5. *For restoration and reinstatement of Group 1-3 heritage buildings listed in the City Plan, alter the activity status from discretionary to controlled.*
 6. *Insert new assessment criteria in the relevant parts of the City Plan so that the decision making criteria include the impact of the earthquake in heritage buildings*
17. This broad framework was evaluated and informed the recommendations for the content to be sought in an OIC presented to the Regulatory and Planning Committee on 2 February. In summary, these were:
 - (a) Rights of Appeal: appeals to be limited to appeals to the High Court on points of law. The notification process and opportunity for public participation in the notified planning process would be unchanged.
 - (b) Assessment of the effects on the environment for decisions on public notification: Specific provision introduced to enable recognition of the adverse effects resulting from the earthquake and aftershocks.
 - (c) Activity status in the RMA for resource consent applications for heritage: For "alteration" (which by definition includes "partial demolition") of Group 4 earthquake damaged heritage buildings, a change in the activity status from controlled to restricted discretionary to reflect the amendment status of heritage as a matter of national importance in the Resource Management Act (RMA)
 - (d) Scope of Discretion for Restricted Discretionary Activities: increase the scope of discretion to include recognition of the effects of the Canterbury earthquake.

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18. The following is a brief summary of the advantages and disadvantages of each of these possible statutory changes listed above and the rationale why they may be advanced as part of a request for an OIC with respect to address issues of costs, time, certainty, transparency and good decision making:

Option	Advantage	Disadvantage	Rationale
Expert panel of highly qualified respected specialists (RMA, heritage, engineering)	Able to be established without OIC, but if required by statute may provide greater comfort to interested parties. Enhances the decision making process	Some costs associated with this	Transparency and robust decision making. Note: the establishment of an expert panel can be achieved via a Council resolution; no OIC is needed.
Shortened notification submission period	Reduces time of consent process to some extent	May impact on public participation	Reduced time in consent process
Limit appeals to the applicant	Reduces the timeframes for planning process	Limits public participation. Substantial departure from standard processes	Reduced costs Increased certainty
Discretionary status for demolition of Group 2 building (from non-complying)	Enhances ability to approve demolition of severely damaged building in this category	Diminished protection of heritage values May see perverse outcomes	Non-complying activity threshold test may mean that resource consent for demolition cannot be granted
Controlled activity status for repair and reinstatement of Group 1-3 heritage buildings listed in the City Plan (from discretionary)	Promotes repair of listed heritage buildings	Resource consents for repair are already progressing well under current provisions. Therefore no statutory change is considered necessary to address this.	Good heritage outcome facilitated
Insert new assessment criteria in the relevant parts of the City Plan so that the decision making criteria include the impact of the earthquake on heritage buildings	Improves ability to take the earthquake into account, in particular for notification decisions, which could assist in speeding up the process. Increased certainty for applicants on the outcomes of consent process. Reduced costs	May already be able to undertake in accordance with the RMA provisions (see below) Reduced public participation through a reduction in notification	Increased certainty Reduced costs
Right of Appeal: appeals to be limited to the High Court on matters or point of law	Reduces the timeframes for consent processes	Limits public participation. Substantial departure from standard processes.	Reduced costs Increased certainty

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Assessment of the effects on the environment for decisions on public notification	Improves ability to take the earthquake into account, in particular for notification decisions, which could assist in speeding up the process, and Increased certainty for applicants on the outcomes of consent process Reduced costs	Reduced public participation through a reduction in notification	Increased certainty Reduced costs
Restricted discretionary activity status for alterations and partial demolition of Group 4 listed buildings(from controlled)	Ensures the plan reflects RMA amendments. Reduces the risk or unintended loss of heritage values arising from a streamlined process for earthquake recovery.	Increases requirements for some building owners	Aligns the plan with RMA recognition of "national importance" of heritage

Other Agency and Stakeholders views***Christchurch Civic Trust***

19. In a deputation to the Regulatory and Planning Committee the Christchurch Civic Trust expressed a general opposition to the Proposed Draft OIC for Heritage on the basis that limitation on appeal rights are considered 'undemocratic', and limiting notified applications prevents public participation. The Trust also sought increased protection for unlisted buildings and the development of a heritage recovery plan.

New Zealand Historic Places Trust

20. In deputations to the Regulatory and Planning Committee the NZHPT expressed a general opposition to the Proposed Draft OIC for Heritage on the basis that it was an unjustified (over the top) approach and that a standard plan change approach would be a preferable way of achieving many of the outcomes sought. NZHPT considered that the Proposed Draft OIC for Heritage raised issues of transparency of decision making. NZHPT was of the view that the consideration of the effects of the earthquake in the assessment criteria for notification and the scope of discretion for restricted discretionary activities is already provided for in the RMA. They reiterated their concerns regarding the reduction in public participation in the resource consent process if non-notification became the norm. NZHPT also recommended that the Ministry of Justice could be requested to provide for an increased capacity or level of priority at the Courts to facilitate timely consideration of appeals on decisions related to earthquake damaged listed heritage buildings.
21. Officers have made enquiries of the Manager of the Environment Court in Christchurch. He has sought comment from Principal Environment Court Judge Thompson. No formal response has been received. However, it appears unlikely that the Environment Court will be able to guarantee extra judicial time to speed up the appeal process.
22. Following the Committee meeting NZHPT met with staff and discussed the alternative to an OIC for Heritage and reviewed the issues needing to be addresses through an OIC for Heritage. The results of that discussion have provided a basis for the preparation of this report.

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Ministry for the Environment

23. Following the Committee meeting of the 2 February, staff have sought clarification from officers of the Ministry for the Environment on their views on the Proposal Draft OIC for Heritage. Recent communication clarifies that while those officers are supportive of an OIC for Heritage in principle, they wish to further consider the details of the proposed statutory changes. The Ministry officers do not support a change of activity status (as described in 14 (c) above) as they consider that it is not consistent with the Canterbury Earthquake Response and Recovery Act 2010 (CERRA). Their opinion is also that an amendment to the Act to address the public notification matter (outlined in 14 (b) above) is also not appropriate as this matter that has arisen due to the drafting of the Christchurch City Plan.
24. Recent correspondence from MfE indicates the Ministry is still considering the appropriateness of limiting appeal rights to appeals on points of law to the High Court. However they also indicate that the Ministry's legal view of this may change as further advice and clarification is available.

Evaluation of Options

25. Consistent with the resolution of 6 October 2010 staff have provided advice on an order in Council specifically. A number of other mechanisms may be employed to resolve issues and achieve that stated objective that Council may wish to also consider either as an alternative to an OIC or alongside an OIC, for example
- (a) Actively make information regarding consents available to interested parties via the CCC website (enhanced transparency)
 - (b) Establish an Independent Hearing Panel of highly respected specialists with RMA, heritage and engineering expertise (including one councillor) (promote good decision making), linked to the panel having binding decision making powers and limited appeal rights against their decisions
 - (c) Flat fee structure for applicants (reduced costs to applicants through costs transferred to ratepayers)
 - (d) A change to the City Plan for assessment matters and the activity status for applications. (utilises standard processes, provides for public input though there are delays in achieving desired outcomes)
 - (e) Seek prioritised Environment Court consideration of any appeal and enhanced timeframes for decisions from the Court.
 - (f) The status quo. No statutory change through an OIC.

Conclusions

26. In evaluating the options for the components of an OIC for Heritage, consideration should also be given to the other mechanisms (see paragraph 23) that may contribute to reducing the impact of damaged heritage buildings. In addition where MfE officers have recommended against a particular mechanism for the OIC for heritage, staff would recommend that this option not be progressed any further. In summary, a recommended request to the MfE for an OIC for Heritage would be limited to seeking statutory change to the rights of appeal. That OIC would be supported through Council initiated mechanisms that are able to be implemented without the need for an OIC to enact them. NZHPT were not in support of limiting rights of appeal and advocated instead for the Environment Court in Christchurch to give priority to these appeals. The Environment Court has not yet indicated whether this is possible.

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27. Given the recent consultation with the MfE and NZHPT there appear to be difficulties with each of the four options proposed for the OIC for Heritage in the report considered by the Regulatory and Planning Committee on the 2 February 2011. Based on feedback from MfE, the proposals for changes to the assessment of effects on the environment for public notification, the change in planning activity status and the scope of discretion for restricted discretionary activities should not be further advanced as central government will not support them. Not progressing these aspects of the Proposed Draft OIC for Heritage would be supported by NZHPT who have also raised concerns with these proposals though for difference reasons.
28. Staff are investigating whether additional capacity could be provided at the Environment Court so that earthquake related appeals may be heard as a priority, or progressed in a more timely manner. While no formal response has been received from the Court, this seems an unlikely option, leaving the alternative to seek curtailment of appeal rights to some degree to manage this aspect of the process. This is not supported by the NZHPT, though a complement of non OIC mechanisms may allay some concerns regarding transparency of the decision making process and achieving good heritage outcomes for example, establishing a panel of experts linked to such limited appeal rights.

FINANCIAL IMPLICATIONS

29. There are no direct financial implications arising from requesting an OIC for Heritage. The resources necessary to deal with the consequences of the earthquake, which will include an increase in resource consent applications, are anticipated to be reduced overall if streamlined and improved processes are achieved.
30. Should Council consider the establishment of an expert panel of highly qualified respected specialists (RMA, heritage, engineering), there will be additional, unbudgeted costs associated with retaining and utilising these experts. If a flat fee option was introduced this would have some cost to Council, in terms of revenue foregone. (it is noted that the issue of fees in general around earthquake recovery is being separately addressed by the GM Regulation and Democracy.

Do the Recommendations of this Report Align with 2009-19 LTCCP budgets?

31. The Canterbury Earthquake was not anticipated by the 2009-19 LTCCP, however, there are no direct financial impacts from this proposed OIC for Heritage. Staff time in preparing and consulting on the OIC for Heritage proposal is within existing LTCCP budgets.

LEGAL CONSIDERATIONS

32. The CERRA enables the Governor-General, by Order in Council made on the recommendation of the Minister, to make any legislative change to the listed statutes as is reasonably necessary or expedient for the purpose of CERRA. The purpose of CERRA includes to facilitate the response to the Canterbury earthquake, and relaxing or suspending statutory provisions that are not reasonably capable of being complied with, or complied with fully, owing to circumstances resulting from the Canterbury earthquake. It is for the Minister to decide whether to promulgate an OIC for Heritage.
33. An OIC for Heritage to streamline the process for resource consent applications for listed/scheduled heritage buildings damaged as a result of the earthquake and aftershocks is consistent with the purposes of CERRA.
34. The OIC for Heritage process is one in which the legislative change results from a process including Canterbury Earthquake Recovery Commission input, Ministry for the Environment (MfE) officer input, Parliamentary Counsel Office drafting and Ministerial views. Drafting the OIC for Heritage will be the responsibility of the Parliamentary Counsel Office acting under the guidance of the MfE, and are not discussed in this report. If the Council wishes to progress that process, the next step is for the Council to ask the MfE to start its work on drafting recommendations to the Minister.

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Have you considered the legal implications of the issue under consideration?

35. Yes

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

36. The earthquake was not anticipated and therefore there is no specific provision for this initiative.

Do the recommendations of this report support a level of service or project in the 2009-19 LTCCP?

37. No

ALIGNMENT WITH STRATEGIES

38. The proposed OIC for Heritage to the extent that this achieves heritage protection, is aligned with the following strategies and policies:

- Heritage Conservation Policy, which in turn is relevant to:
- Greater Christchurch Urban Development Strategy (UDS)
- Central City Revitalisation Strategy
- New Zealand Urban Design Protocol

Do the recommendations align with the Council's strategies?

39. Yes, see above.

CONSULTATION FULFILMENT

40. Consultation with regard to seeking an OIC for Heritage has been carried out the with other affected Local Authorities (Selwyn and Waimakariri District Councils). At the time of writing this report the amended scope of the OIC for Heritage proposed in this Supplementary Committee Report has been discussed verbally with Waimakariri District Council who indicated that they are relaxed about scope of the OIC.. Selwyn District Council and the NZHPT have been contacted with an update but feedback has not yet been received.

41. Consultation with Central Government agencies has been continuing principally with the MfE as lead agency. The MfE are not in agreement with the approach proposed for the OIC for Heritage in the 2 February report and in correspondence on 14 March they state that they have not reached a consensus about the proposed limitation on the rights of appeal.

42. The New Zealand Historic Places Trust (NZHPT) were also consulted with on the previous draft OIC for Heritage as reported to the Committee on 2 February 2011 which covered:

1. Amending the RMA to consider exceptional circumstances
2. New Assessment Matter for District Plans which considers the effect of the earthquake
3. Improved protection for Group 4 buildings
4. Reduced time periods for processing notified consent applications
5. Reduced appeal rights

43. The NZHPT provided detailed comments. The NZHPT did not support the terms of the OIC for Heritage. Their concerns were that the scale of the problem did not necessarily justify an OIC for Heritage, and that in their view OIC's should focus on changes to District Plan Changes.

44. One of the options under consideration for streamlining the resource consent process, as noted in paragraph 27 above, is to investigate whether additional capacity could be provided at the Environment Court so that earthquake related appeals may be heard as a priority, or progressed in a more timely manner. Although no formal response has been received, informal approaches to the Manager of the Environment Court in Christchurch indicates it is highly unlikely additional capacity would be provided to speed up the Environment Court appeal process and there would be a high risk for Council to rely on this occurring.

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STAFF RECOMMENDATION

That the Committee recommend to the Council that it:

- (a) Note the contents of this report in deliberating whether to request an Order in Council for Heritage.
- (b) Direct staff to request the Ministry for the Environment to recommend to the Minister, and draft an Order in Council for heritage confined to limiting appeal rights.
- (c) Establish an expert panel of highly qualified specialists with Resource Management Act, Heritage and Engineering expertise to consider resource consent applications for demolition or partial demolition of heritage buildings, and recommend the composition of such a panel and a terms of reference for such a panel back to Council for its final determination.

And /or

- (d) Request the Ministry of Justice to establish a faster appeal process, for appeals on consents regarding heritage buildings arising from the earthquake and report their response to the Council and to the Ministry for the Environment.