

### 13. PROPOSED DRAFT FOR AN ORDER IN COUNCIL FOR HERITAGE

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#### PURPOSE OF REPORT

1. The purpose of this report is to provide a summary of proposed changes to the Resource Management Act, through an Order in Council for Heritage, consistent with the Canterbury Earthquake Response and Recovery Act (2010).

#### EXECUTIVE SUMMARY

2. Based on the assessments undertaken by Christchurch City Council approximately 400 heritage buildings are estimated to have damage of some form within Christchurch City and Banks Peninsula. Recent aftershocks have continued to cause damage to heritage buildings. Selwyn District Council have identified approximately 45 damaged heritage buildings, and Waimakariri District Council approximately 62 heritage buildings. The majority of these will require resource consents for repair, alteration or demolition.
3. A number of the current statutory processes under the Resource Management Act 1991 (RMA) do not adequately recognise the circumstances resulting from the Canterbury earthquake event. In response the Council resolved at the meeting of 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” with one further detailed amendment outlined in the Background section of this report.*

4. A more timely and effective response is required for the processing of resource consents for listed/scheduled heritage buildings which are a result of the earthquake on 4 September 2010 and subsequent aftershocks. It is crucial that local Districts and communities affected by the earthquake and subsequent aftershocks recover quickly economically and socially. The streamlining of planning processes will support recovery, while still ensuring equitable and appropriate outcomes for the affected communities.
5. The proposed Order in Council (OIC) for Heritage ) has focussed on the outcomes anticipated by the Canterbury Earthquake Response and Recovery Act 2010 (CERRA) which can be achieved through specific changes to the RMA. Internal and non-regulatory approaches to achieve improved processes do need to be considered as well as statutory and regulatory planning consent processes. The Council report of 6 October 2010 introduced measures achievable through both approaches. Where internal or existing powers may be appropriately used, it is proposed that these be dealt with outside the provisions of an OIC for Heritage. External measures include taking a pro-active approach with building owners for heritage retention, and consideration for Grant Funding assistance from the Canterbury Earthquake Heritage Fund. Internal measures could include the streamlining of consent procedures which are within the existing scope of Council authority.
6. An OIC for Heritage provides a statutory regulation consistent with the purpose of CERRA. An OIC for Heritage applies for a fixed period of time, applies only to affected Councils and may relate only to issues which arise in this instance because of the Canterbury earthquake.
7. The Territorial Authorities to which this OIC for Heritage would apply are the Christchurch City, Selwyn District and Waimakariri District Councils. In this instance the OIC for Heritage would apply to heritage buildings which are listed or scheduled in District Plans in the afore mentioned districts that have been affected by the earthquake of 4 September 2010 and the subsequent aftershocks. The time period that this proposed OIC for Heritage will be in force is until 1 April 2012.
8. The following changes to the RMA are proposed for an OIC for Heritage under CERRA in response to the Council resolution of 6 October 2010,

9. When the Council passed the resolution on 6 October 2010 a list of possible OIC provisions were noted. Discussions with staff from the relevant ministry, legal counsel, and further reflection by Council staff, has led to a smaller list being recommended for incorporation into an OIC and are noted in paragraph 10. The reasons for not including some previously identified provisions is outlined in the Background section of this report.
10. The proposed changes to the RMA provisions through an OIC for Heritage are summarised as follows:
  - (a) Rights of Appeal: appeals to be limited to the High Court on matters or points of law.
  - (b) Assessment of the effects on the environment for decisions on public notification: recognition of the adverse effects resulting from the earthquake and aftershocks.
  - (c) Planning Activity Standards for heritage: removal of controlled activities from heritage District Plan provisions and replacement with a restricted discretionary activity status.
  - (d) Scope of Discretion for Restricted Discretionary Activities: increase the scope of discretion to include recognition of the effects of the Canterbury earthquake.

Consultation has continued with the MfE, and Selwyn District and Waimakariri District Councils and broad agreement has been reached on the proposed scope of the draft OIC for Heritage. Consultation has been carried out with the NZHPT in relation to an earlier draft OIC proposal. The proposal before Council now addresses the major points raised by the NZHPT in relation to earlier draft proposals.

#### Explanation of proposed changes

11. The benefits of the proposed changes sought through the proposed OIC for Heritage include a range of more specific provisions than are currently provided for in the RMA. Whilst robust internal processes for assessing applications could deal with the matters identified in (b) and (d) the risk of appeal is greatly increased in these circumstances through the lack of testing through the Courts. The specific inclusion of statutory provisions through an OIC for Heritage will therefore increase the certainty and significantly reduce the risk of appeals, which may otherwise extend the time for planning processes. The matters identified in (c) and (d) could be addressed through changes to district plan provisions, however this would require a plan change by each local authority and would follow first schedule RMA processes for district plan changes and would not be certain or quick.

#### (a) Rights of Appeal

Appeals on publicly notified decisions will be limited to Declarations or Appeals to the High Court. These appeals will therefore be on points of law or legal process. Other RMA processes on notified heritage planning consent applications will be maintained including submissions on notified applications which will recognise and provide for the continuing opportunity for public input to notified planning processes.

Appeals to the Environment Court on substantive planning decisions can extend decision time frames to two years or more. It is considered that this aspect of the planning process may not facilitate or achieve optimal planning outcomes where effective and timely planning decisions are essential for meeting community and financial needs. The risk of legal challenge and any consequential extension of time frames for decisions is anticipated to be significantly reduced.

The proposed OIC for Heritage could achieve this through an amendment to Part 11 of the RMA which provides for Environment Court proceedings.

#### (b) Assessment of the Environment for decisions on public notification

The RMA assessment for adverse effects should recognise the change to the state of the environment as a consequence of the Canterbury earthquake. The RMA provides for public notification of an application if an assessment of the adverse effects of the activity are more than minor. The RMA through this process does not provide for assessments where there has been a substantive adverse effect on the environment other than those which may have been anticipated by a District Plan. The earthquake event of 4 September 2010 and subsequent aftershocks has in some cases damaged buildings to the extent that they are so compromised that the building would no longer have the heritage values that would support continued listing in the district plan. In these circumstances the assessment of adverse effects on the environment with respect to damaged heritage buildings is the additional adverse effects of demolition on heritage fabric and values.

It is not intended that adverse effects on heritage buildings should be exempted from notification where heritage fabric and values are largely recoverable, or where loss of fabric may be from other causes.

Public notification is a more extended planning process where decisions can be of 70 days working days or more in comparison with the 20 working days for non-notified applications. The earthquake and aftershocks have created circumstances where heritage buildings may be deemed to be unrecoverable to the extent that there may not be any continuing relevance in their inclusion in District Plan heritage listings and planning provisions. Where this circumstance arises these additional adverse effects should be regarded as minor or less than minor. The test for whether the adverse effects are not more than minor should recognise the consequence of the earthquake and aftershocks on heritage buildings in weighing up any lack of public and individual benefit from a notified planning process.

The proposed OIC for Heritage could achieve this through recognition in sections 95A – 95E RMA of the consequential adverse effects of the Canterbury earthquake on heritage buildings.

(c) Planning Activity Standards for Heritage

Heritage is a Matter of National Importance under section 6 of the RMA and controlled planning activity status could be removed through the OIC for Heritage and replaced with a restricted discretionary status to more appropriately reflect the recognition provided for heritage by the RMA.

The RMA when initially promulgated recognised heritage as “Matters to have regard” under s7 of Part II of the Act. Subsequently the status of heritage was recognised through the Resource Management Amendment Act (2003) as a section 6(f) “Matters of National Importance”.

Planning consent applications for controlled activities cannot be declined, but may only have conditions applied. District Plan Objectives, Policies and Rules for heritage retention do not anticipate the substantial scale of adverse effects on heritage buildings where these may be as severely compromised as a result of the Canterbury earthquake. Given the potential scale of adverse effects it is not considered appropriate that provision should be made for controlled heritage planning activities.

The Christchurch City Plan currently has a controlled activity status for alterations and partial demolition of Group 4 listed buildings.

The proposed OIC for Heritage could achieve the removal of controlled activities, in relation to heritage activities arising from the Canterbury earthquake, through an amendment to section 77A of the RMA. Controlled activities could then be dealt with as restricted discretionary activities under the provisions of the RMA.

(d) Scope of Discretion for Restricted Discretionary Activities

It is proposed to increase the scope of discretion to include recognition of the effects of the Canterbury earthquake when assessing restricted discretionary activities.

The scope of discretion provided through rules in District Plans relating to heritage does explicitly acknowledge the consequences of an event such as the Canterbury earthquake on heritage buildings. There is a need to make specific reference through the RMA to a wider discretion than may otherwise have effect through the District Plan rules to recognise the adverse effects of the earthquake on heritage buildings. Such a reference will provide greater certainty when assessing applications and consequently reduce the risk of legal challenge.

The proposed OIC for Heritage could achieve this through an amendment to section 77B of the RMA.

#### **FINANCIAL IMPLICATIONS**

12. There are no direct financial implications arising from the adoption of a 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.

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

13. 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 will be within existing LTCCP budgets.

#### **LEGAL CONSIDERATIONS**

14. 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..

Officers consider that the request for 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.

The options for the changes to the legislative framework to seek in an OIC for Heritage are numerous. The OIC for Heritage process is one in which the legislative change result from a process including Canterbury Earthquake Recovery Commission input, Ministry for the Environment (MfE) officer input, Parliamentary Counsel Office drafting and Ministerial views, and may be quite different from the OIC for Heritage sought by the Council. The full details of the OIC for Heritage drafting will be the responsibility of the Parliamentary Counsel Office acting under the guidance of the MfE, and are not discussed in this report

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

15. Yes.

## ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

16. The earthquake was not anticipated and therefore there is no specific provision for this initiative. Related Community Outcomes are *'An attractive and well-designed City'* (LTCCP 2009-19, page 50). 'Community Outcome 9. Development' provides for, among other things, ensuring *"our lifestyles and heritage are enhanced by our urban environment"* (page 54). One of the success measure is that *"Our heritage is protected for future generations"* (page 54). *"Progress will be measured using these headline indicators ... number of heritage buildings, sites and objects."* (page 54). Within the 'Activities and Services' section of the LTCCP, is 'City planning and development' which aims to help improve Christchurch's urban environment, among other things. One of the activities included in 'City planning and development' is 'Heritage protection'. *"A city's heritage helps to sustain a sense of community identity, provides links to the past, and helps to attract visitors. The Council is committed to protecting the heritage of our city and works with developers, landowners and other stakeholders to conserve heritage buildings, areas and other items"* (page 187).

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

17. No.

## ALIGNMENT WITH STRATEGIES

18. 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?

19. Yes, see above.

## CONSULTATION FULFILMENT

20. Consultation with regard to the draft OIC for Heritage has been carried out the with other affected Local Authorities (Selwyn and Waimakariri District Councils). These Councils are supportive of the scope of the proposed OIC for Heritage.

Consultation with Central Government agencies has been continuing principally with the MfE as lead agency. The MfE are in general agreement with the approach proposed for the OIC for Heritage and wish to progress the provisions of this OIC.

The New Zealand Historic Places Trust (NZHPT) were also consulted with on a previous draft OIC for Heritage 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

The NZHPT provided detailed comments. 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 legislation, in this case the RMA rather than District Plan Changes. The NZHPT's comments have been reviewed and the present draft OIC for Heritage provisions addresses items 1, 2, and 4. Further discussion is continuing with regard to items 3 and 5.

Following consideration by this Council the proposal will be used as the basis for drafting the OIC for Heritage which the Canterbury Earthquake Commission will be formally requested to advise on. Cabinet and the Executive will be required to recommend the OIC for Heritage to the Governor General for approval and gazettal.

Consultation has also occurred regarding the OIC for Heritage with Council's legal external advisors Simpson Grierson, Legal Services and the MfE's Senior Legal Advisor.

#### **STAFF RECOMMENDATION**

That the Committee recommend to the Council that it:

- (a) Endorses this report as the basis for pursuing a Order in Council for Heritage to facilitate the processing of resource consents for earthquake related activities on listed/scheduled heritage buildings through amendments to the Resource Management Act.
- (b) Instructs Council staff to:
  - (i) forward this report to the Ministry of the Environment so that the process of developing an Order in Council for Heritage can progress, and;
  - (ii) contribute advice and coordinate a timely response to the Ministry of the Environment as requested once the Order in Council for Heritage has been drafted by Parliamentary Counsel Office and is available for comment.
- (c) Consider the draft OIC once completed prior to making any recommendation on it to the Canterbury Earthquake Recovery Commission.

## BACKGROUND

### Scale of Impact

21. The Canterbury earthquake is regarded as the largest natural disaster in recent New Zealand history. This has resulted in significant and widespread damage throughout the region, including ground, infrastructure and building damage. This damage has had a significant negative impact on the functioning and well-being of local communities in the Canterbury region and in particular for greater Christchurch.
22. The Christchurch City Council has undertaken assessments of both heritage and other buildings in the commercial zones and assigned red, yellow, and green placards which indicate the scale of the damage. The placards were applied during an initial visual assessment on buildings within the City. Buildings assessed focussed on the central city and the main city thoroughfares and did not include all buildings potentially affected by the earthquake.
23. There are approximately 916 heritage items listed in the Christchurch City Plan and the Banks Peninsula District Plan. Based on the assessments undertaken approximately 400 heritage buildings were estimated to have damage of some form, approximately 40% of listed buildings. Additional damage continues to arise with frequent aftershocks. The majority of these will require resource consents for repair, alteration or demolition. Selwyn District Council have identified approximately 45 damaged heritage buildings, and Waimakariri District Council approximately 62 heritage buildings. However, it is not just the numbers of potential affected buildings but also the adverse effects on the heritage values of listed heritage buildings which need to be taken into account. It is considered that the 40% or greater of damaged heritage buildings in Christchurch constitutes a major threat to the heritage resource of the City.
24. Where buildings are considered to be an “immediate danger” to public safety a demolition warrant can be issued under section 129 of the Building Act for immediate demolition without resource consent. Only two such warrants have been issued to date by Christchurch City Council. The Councils have been mindful of not acting in haste where heritage buildings may have been substantially damaged, and applying section 129 of the Building Act only in exceptional circumstances for specific buildings. Where a damaged heritage building does not meet section 129 criteria a standard resource consent process would be required for any demolition, partial demolition or alteration.
25. Five listed heritage buildings have been demolished since 4 September 2010 (two were issued section 129 warrants due to the immediate danger they presented, one resource consent granted for demolition, and two demolished immediately following the earthquake). No other listed heritage buildings currently have consent for demolition although staff are currently processing consent applications. A number of character buildings have been demolished and these contribute to our sense of built ‘heritage’ although they have no protection through the Christchurch City Plan or Banks Peninsula District Plan.
26. To date the Christchurch City Council has received 24 applications for resource consents for heritage buildings related to demolition/partial demolition or alteration. These represent a very small proportion of expected applications based on the damage sustained and the number of pre-application discussions with building owners. It is expected that resource consent applications due to earthquake damage will be spread over a considerable time period and are expected to peak over the coming three to six months as owners work with their insurers and assessors to resolve claims.

### Council Resolution of 6 October 2010

27. As noted above the Council considered a report on 6.10.2010 with respect to pursuing an OIC for Heritage.

The Staff Recommendation for this meeting requested:-

*"... Council approval for seeking an OIC in accordance with the following broad framework:*

1. *Enabling the Council to establish an independent panel of experts 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. 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 on heritage buildings.*

These recommendations were approved but in addition the Council agreed that paragraph 46.1 of the staff report should be amended to read:

*"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".*

28. The following points have been considered in relation to this broad framework proposed in the report and the Council recommendations.

1. *Enabling the Council to establish an independent panel of experts to decide all matters concerning resource consent applications for change to heritage buildings resulting from earthquake damage.*

The Council already has the power to appoint appropriate Commissioners, and/or Hearings Panels for this purpose and no further statutory authority is required to respond to these requirements through an OIC for Heritage.

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*

There are current limits in the RMA on time periods for planning decision processes. Consideration of these individual time periods reflect a minimum workable time frame to adequately address information requests, assessments, submission periods, reporting and decision making. It is therefore not proposed to further limit the existing times periods as further restrictions would have very limited overall benefits and significant dis-benefits in ensuring appropriate planning outcomes.



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.*

The rights of appeal have been extensively discussed with the MfE Senior Legal Advisor, LSU and the NZHPT. The consensus is that there should be no rights of appeal to the Environment Court on substantive matters. There is a statutory right for appeal to the High Court, which is proposed to remain.

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. Reason: the non-complying activity threshold test in the RMA may mean that resource consent for demolition cannot be granted*

Non-complying activities may in particular circumstances be contemplated for approval as established through current case law. These circumstances are:

- that approval would not constitute an undermining of the Objectives and Policies of the Plan
- that there would not be a wider precedent created by the approval

It is considered that a non-complying activities are otherwise an appropriate status reflecting the intent of the Plan. It is not considered that these circumstance will generally arise.

5. *For restoration and reinstatement of Group 1-3 heritage buildings listed in the City Plan, alter the activity status from discretionary to controlled.*

Restoration and re-instatement are matters which require to be consistent with good heritage conservation practice such as promoted through the ICOMOS (NZ) Charter which is the nationally recognised Heritage Conservation Charter. Controlled activities are those which cannot be declined and are therefore contemplated as acceptable to a District Plan. Heritage retention as a Matter of National Importance under the RMA is seen to be inconsistent with this planning activity status if the application is inconsistent with good conservation practice. Further definitions would be required in District Plans and would still pose difficulties for appropriate management of controlled activities. Both 4) and 5) are also not recommended by the NZHPT.

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 on heritage buildings.*

The provision of an assessment matter relating specifically to the effects of the Canterbury earthquake for heritage activities is proposed for the OIC for Heritage.

### **Process for Developing an Order in Council**

29. Once the Council have endorsed this report outlining the components of an OIC for Heritage this will be forward to the Ministry of the Environment who are the lead central government agency on this matter. The Ministry for the Environment will the have the responsibility of briefing the Minister for the Environment who will consider whether the proposal requires Cabinet approval for the drafting of the OIC. The OIC for Heritage will be drafted by the Parliamentary Counsel Office (PCO) acting upon drafting instructions issued by the Ministry for the Environment.
30. Once a drafted OIC is available, there will be an opportunity for affected local authorities to comment on the draft and then advice will be formally sought from the Canterbury Earthquake Recovery Commission consistent with s. 10(a)(i) CERRA.

31. The draft OIC, a regulatory impact statement and accompanying Cabinet Paper will be considered by the Officials Cabinet Committee, before being endorsed by the Ad-hoc Committee for the Earthquake who authorise the item for consideration by Cabinet.
32. The Minister for the Environment recommends the OIC to Cabinet/Executive Counsel who in turn advise and consent that the Governor General act in accordance with the recommendation. The Governor General then formally makes the OIC and has it gazetted (which appears in the Gazette 28 days later). In practise the Governor General actions occur at the same time as the meeting of Cabinet/Executive Counsel.