

PROPOSED DISTRICT PLAN CHANGE 5 – PROSTITUTION REFORM ACT 2003

SECTION 32 REPORT

INTRODUCTION

1. Council considered a report (C2003/12/2(2)) which outlined changes that could be made to the District Plan to control the location of brothels and commercial sexual services. Subsequently a Discussion Document for public consultation on the location of brothels and commercial sexual services was prepared and consultation took place over February to April 2004.
2. This report outlines the proposed changes to be made to the District Plan and evaluates them. The effectiveness of alternatives and methods are also analysed and evaluated.

THE RELEVANT STATUTORY REGIME AND LEGAL FRAMEWORK

3. Section 32 contains direction that applies to the Council regarding considerations of alternatives, benefits, and costs. The Resource Management Amendment Act (No.2) repealed the existing section 32 and substituted a new section 32. The new section 32 states inter alia:

“32. Consideration of alternatives, benefits, and costs

(1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by-

(a)

(b)

(c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) of Part 2 of Schedule 1); or

(d)

(2) A further evaluation must also be made by-

- (a) *a local authority before making a decision under clause 10 or clause 29(4) of Schedule 1 ; and*
- (b) *....*
- (3) *An evaluation must examine-*
 - (a) *the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and*
 - (b) *whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives.*
- (4) *For the purpose of this examination, an evaluation must take into account-*
 - (a) *the benefits and costs of policies, rules or other methods; 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.*
- (5) *The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.*
- (6) *The report must be made available for public inspection at the same time as the document to which the report relates is publicly notified or the regulation is made.*

4. As pointed out above, while the Resource Management Amendment Act 2003 has substituted a new Section 32, it is considered that the following passage from the Planning Tribunal's decision in *Nugent v Auckland City Council* (1966, NZRMA 481) is generally still acceptable and summarises the requirements as follows:

"...a rule in a proposed district plan has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its functions of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have the purpose of achieving the objective and policies of the plan."

5. Part II of the Act is also relevant to any consideration. With regard to Part II, section 5 is of course fundamental to any assessment. The approach in section 5 is to weigh the matters in section 5(2) in order to reach a broad judgement as to whether a policy or rule would promote the sustainable management of natural and physical resources. The values in section 5 have been variously referred to as "indicators", "guidelines", "directions"

- or “touchstones” for promoting the goal of sustainable management. It is considered that the “enabling” and “management” functions of section 5(2) are of equal importance. The circumstances of each case determine the level of management that is required to promote sustainable management of natural and physical resources.
6. It is therefore considered that applying section 5 involves a broad overall judgement whether a proposal or provision in the Plan would promote the single purpose of the Act. This allows for balancing of conflicting considerations in terms of their respective significance or proportion in the final outcome.
 7. Environment is also defined to include social, economic, aesthetic and cultural considerations. Section 7 matters of relevance are:
 - (i) the efficient use and development of natural and physical resources – section 7(b); and
 - (ii) the maintenance and enhancement of the quality of the environment – section 7(f).
 8. In addition to the above provisions of the Resource Management Act 1991 the provisions of the Prostitution Reform Act 2003 are also relevant. The Prostitution Reform Act 2003 (PRA) was enacted in June 2003. It decriminalises prostitution and provides a framework that is concerned with safeguarding the human rights of sex workers and promotes their occupational health and safety.
 9. The key issues arising from PRA as it relates to Territorial Authorities (TAs) are specified in sections 12 to 15. They relate to the following matters:
 - TAs may make bylaws to control signage that advertise commercial sexual services (Section 12 of the PRA) and regulate the location of brothels of any scale but not extending to other businesses of prostitution (Section 14 of the PRA).
 - Section 15 provides that a TA, when considering whether to issue a resource consent for a business of prostitution (i.e. wider than brothels), must have regard to whether business is likely to cause a nuisance or serious offence to ordinary members of the public using the area in which the land is situated or is incompatible with the existing character or use of the area in which the land is situated.

10. The PRA 2003 therefore does provide for bylaws controlling the location of brothels but not the location of commercial sexual services. The PRA specifically recognises that the District Plan is capable of requiring resource consent for businesses of prostitution. In order to erase any statutory doubt about the scope of matters that could be taken into account in determining such resource consent, the PRA in Section 15 includes two statutory criteria that regard must be had to irrespective of the provisions of the District Plan. They are:

Whether the business of prostitution –

“(a) is likely to cause a nuisance or serious offence to ordinary members of the public using the area in which the land is situated; or

(b) is incompatible with the existing character or use of the area in which the land is situated.”

11. Therefore, the PRA allows the control and location of brothels either by means of a bylaw or by provisions in the District Plan. However, the control of commercial sexual services can only be achieved by District Plan rules. It should also be pointed out that a bylaw can be challenged at any stage (even after it is passed by Council) as to its validity on the grounds of unreasonableness and, if found unreasonable, it may be declared invalid by the Courts [see *Kruse v Johnson (1898) 2 QB 91; Bylaws Act 1990*]. By contrast a District Plan rule, once in force after the statutory process, cannot be challenged on the ground of unreasonableness and therefore is a more powerful and certain process. It should be pointed out that a District Plan rule would override a bylaw in the event of a conflict of interpretation. Thus, it is considered that it is more appropriate to use the District Plan to control the location of brothels and commercial sexual services.
12. One matter that needs to be considered is whether a city or district can prohibit “businesses of prostitution” entirely. Local Government New Zealand has prepared a “Prostitution Reform Act Guide” and this matter is discussed in the document. In essence Local Government New Zealand concludes that prohibiting brothels from all parts of the City or District is unlawful. The document states as follows:

“D THE PROSTITUTION REFORM ACT 2003

The PRA 2003 envisages that potential issues associated with the location of brothels and signage for any businesses of prostitution will be resolved by the

local authority. To this end the Act provides new by-law making powers. It also provides additional matters to be considered in relation to resource consents for businesses of prostitution. These tools are discussed in detail in Part 5 of this Guide.

The specific provisions are set out in ss 12, 13 and 14 of the PRA 2003.

Section 14 provides for TAs to make by-laws regulating the location of brothels of any scale, but not extending to other businesses of prostitution.

Local Government New Zealand sought a legal opinion to clarify the use of the term 'regulate' as used in s 12 and 'prohibit' or 'regulate' in s 14. The responses to the specific questions are summarised below.

BUSINESSES OF PROSTITUTION

We note that the bylaw-making power in PRA (section 14) is confined to regulating the location of "brothels", rather than the businesses of prostitution (both terms are defined in section 4 of the Act). Accordingly, a bylaw under section 14 of the PRA cannot cover businesses of prostitution other than brothels.

BROTHEL

A district-wide ban on "brothels" through bylaws made under the PRA would not be lawful. On the plain wording of section 14, a bylaw under that section may only regulate the location of brothels. "Regulation" in itself implies something short of prohibition. The juxtaposition of the words "prohibit" and "regulate" in section 12(1) also implies that regulation does not mean, and is something less than prohibition.

However, a bylaw could state that brothels may not be located in some parts of the district. How much of the district could be covered by a ban, and therefore how much or what parts of the district could be left "open" for brothels would ultimately be a question of "reasonableness" for the High Court to consider, if the bylaw was challenged.

A bylaw banning brothels in certain parts of the district and purporting to apply to existing establishments (discussed in detail below) would be at greater risk of being challenged and of being found by the High Court to be invalid, on the grounds of unreasonableness, than one which did not cover existing establishments."

13. Therefore taking the Local Government New Zealand Guide into account it is clear that a TA cannot prohibit or ban brothels from all parts of the

City. However, brothels and commercial sexual services can be excluded from certain parts of the City.

CURRENT PROVISIONS IN THE DISTRICT PLAN

14. Currently in the District Plan resource consents are required for brothels and commercial sexual services to establish in all Residential Activity Areas unless they fall within the ambit of home occupations as defined in the District Plan.
15. Brothels and commercial sexual services are Permitted Activities in the Central Commercial, Petone Commercial and Suburban Commercial Activity Areas but are not permitted in the Special Commercial Activity Area - Station Village.
16. In General and Special Business Activity Areas brothels and commercial sexual services are Permitted Activities. However, in the Avalon and Extraction Activity Areas they are not a Permitted Activity.
17. With regard to the other Activity Areas, brothels and commercial sexual services are not Permitted Activities in all Recreation Activity Areas.
18. However, it would appear that brothels and commercial sexual services are Permitted Activities in the General Rural and Rural Residential Activity Areas.
19. In the Community Health Activity Area brothels and commercial sexual services are not Permitted Activities unless they fall within the ambit of home occupations.
20. Brothels and commercial sexual services are not Permitted Activities in the Community Iwi Activity Areas except as a home occupation in the Community Iwi Activity Area 1 - Marae.

PROPOSED PLAN CHANGE AND EVALUATION

Location of Brothels and Commercial Sexual Services in All Activity Areas

21. **Central Commercial Activity Areas.** In the report to Strategy and Policy Committee (C2003/12/2(2)) and in the Discussion Document for public consultation it was recommended that in the Central Commercial Activity Area brothels and commercial sexual services should be excluded from the area shown in Appendix Central Commercial 6. Submissions received

generally supported that recommendation. Therefore in the proposed Plan Change brothels and commercial sexual services are Discretionary Activities in the area shown in Appendix Central Commercial 6.

23. The area shown in Appendix Central Commercial 6 includes part of High Street and Queens Drive between Laings Road and Margaret Street where buildings are required to be built to the front boundary and where display windows are compulsory. It is considered that brothels and commercial sexual services should be excluded from this area for the following reasons:
 - (a) The need to have display windows in this area is incompatible with the requirements of brothels and commercial sexual services. There would be adverse effects on the amenity values and character of this area if brothels and commercial sexual services were established.
 - (b) Some of the land use activities in the area are “family or children oriented” (such as the amusement parlour and Hoyts cinemas on High Street) and brothels and commercial sexual services would likely be offensive to ordinary members of the public using this area.
24. **Petone and Suburban Commercial Activity Areas.** In the Petone Commercial Activity Area 1 (both sides of Jackson Street generally bounded by Victoria and Cuba Streets) and the Suburban Commercial Activity Area, it is considered that brothels and commercial sexual services should be excluded from the ground floor as such areas require to have display windows and that brothels and commercial sexual services would adversely affect amenity values and compromise the character of these areas.
25. While it is recognised that excluding brothels and commercial sexual services from the ground floor might exclude in some cases the disabled using such services, it is considered on balance the amenity values and character of such areas are better protected while alternative arrangements can be made for the disabled.
26. The Petone Commercial Activity Area 2 is essentially an area for large-scale vehicular oriented retail activities. This Activity Area is also well separated from Residential Activity Areas. Taking these matters into account it is considered that brothels and commercial sexual services are

- compatible with the character of existing land use activities and amenity values will not be adversely affected.
27. It should be pointed out that most submissions received generally supported brothels and commercial sexual services being excluded from the ground floor of buildings in the Petone and Suburban Commercial Activity Areas.
28. Some submissions on the Discussion Document stated that there should be controls on brothels and commercial sexual services where they are in close proximity to schools, pre-schools facilities and churches/ other religious activities. It is considered that the concerns expressed by the submitters have merit and Council should seek to control the location of brothels and commercial sexual services in such situations. This being the case in the proposed Plan Change brothels and commercial sexual services are Discretionary Activities in the Central Commercial, Petone Commercial and Suburban Commercial Activity Areas where they abut, adjacent to or are on the opposite side of the road of schools, preschool facilities, churches and other religious establishments or a residential activity area. This will enable Council to exercise control over amenity values such as traffic generated, external appearance and design of buildings and structures, whether brothels and commercial sexual services are likely to cause a nuisance or serious offence to ordinary members of the public using the area, and whether brothels and commercial sexual services are incompatible with the existing character or use of the area.
29. **Special Commercial Activity Area.** The activities permitted in this Activity Area have deliberately been limited to activities that are compatible with adjoining areas and after considerable discussions with adjoining property owners. Taking these matters into account it is considered that brothels and commercial sexual services should be not permitted activities. No changes to the District Plan are required for the Special Commercial Activity Area – Station Village as brothels and commercial sexual services are already Non-Complying Activities. An amendment is made to the District Plan so that brothels and commercial sexual services are Discretionary Activities in the Special Commercial Activity Area – Boulcott Village, where brothels and commercial sexual services are on a site abutting, adjacent to or on the opposite side of a road from schools, pre-school facilities, churches and other similar religious establishments or a residential activity area.
30. **General Business and Special Business Activity Areas.** For the General Business and Special Business Activity Areas it was recommended in the Discussion Document that brothels and commercial sexual services should

- be Permitted Activities. Submissions received generally supported this approach but some submitters were concerned that brothels and commercial sexual services on sites in proximity to Residential Activity Areas should be excluded. Taking those submissions and amenity values into account, brothels and commercial sexual services abutting, adjacent to or on the opposite side of the road from schools, pre-school facilities, churches and other similar religious establishments or a residential activity area are Discretionary Activities.
31. **Avalon and Extraction Activity Areas.** These are specialised activity areas and brothels and commercial sexual services are incompatible with the objectives, policies and rules. Brothels and commercial sexual services are Discretionary Activities in these activity areas.
 32. **All Residential Activity Areas.** As pointed out above and in the Discussion Document at present resource consent is required for brothels and commercial sexual services to be established in all Residential Activity Areas unless they fall within the ambit of home occupation. No changes are proposed to be made to the District Plan as brothels and commercial sexual services operating outside the ambit of home occupations may have adverse effects on the amenity values of residential activity areas (such as traffic generated, noise, disturbance to the neighbourhood, and safety concerns). However, small-scale brothels operating from dwelling houses as home occupations, are unlikely to be noticeable from other types of home occupations and adverse effects are likely to be minor.
 33. **Rural Activity Areas.** Taking amenity value considerations into account, similar controls to Residential Activity Areas are proposed, i.e. permitted in terms of home occupations but Discretionary Activities otherwise.
 34. **Recreation Activity Areas.** Brothels and commercial sexual services are excluded from all Recreational Activity Areas as they would adversely affect amenity values, would be incompatible with permitted recreation activities and would cause serious nuisance and offence to members of the public.
 35. **Community Health Activity Areas.** No changes are proposed to the provisions of the District Plan and brothels and commercial sexual services are excluded unless they fall within the ambit of home occupation.
 36. **Community Iwi Activity Areas.** No changes to the District Plan are proposed and brothels and commercial sexual services are excluded

unless they fall within the ambit of home occupations in the Community Iwi Activity Area 1.

Signage

37. Explicit signs advertising brothels and commercial sexual services can have adverse effects on amenity values and be offensive to members of the public. Taking these matters into account, it is appropriate to control the design, location, size, and appearance of signs in all Activity Areas and signs advertising brothels and commercial sexual services are Restricted Discretionary Activities.

CONSIDERATION OF ALTERNATIVES

38. As discussed earlier in paragraphs 10 to 11 consideration was given as to whether brothels and commercial sexual services should be controlled by means of bylaws or provisions in the District Plan. For reasons given in paragraph 11 it was considered that provisions in the District Plan should control brothels and commercial sexual services.
39. As discussed in paragraphs 12 and 13, consideration was also given as to whether brothels and commercial sexual services can be excluded from all areas in the City. As explained in those paragraphs it is not legally possible to exclude brothels and commercial sexual services from all Activity Areas.

CONCLUSION

40. Overall after evaluating all matters it is considered that the Proposed Plan Change offers the most appropriate way of achieving the purpose and principles of the Resource Management Act 1991 and seeks to ensure that amenity values are protected.