

Under the Resource Management Act 1991

In the matter of hearings of submissions and further submissions on the Proposed Wellington City District Plan

By **Wellington's Character Charitable Trust Inc**
Submitter

**LEGAL SUBMISSIONS BY WELLINGTON'S CHARACTER CHARITABLE TRUST FOR
HEARING STREAM TWO
24 MARCH 2023**

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Introduction

1. These legal submissions are filed in advance of the Hearing Stream 2 hearings. Wellington's Character Charitable Trust (WCCT) is scheduled to make a presentation to the Panel on Thursday 30 March 2023 at 12pm.
2. WCCT has made submissions on two topics being addressed in Hearing Stream 1:
 - (a) The spatial extent of the character precincts; and
 - (b) The re-introduction of a rule requiring resource consent for demolition of any pre-1930 building or structure in areas currently identified as inner residential areas in the Operative District Plan.
3. These submissions expand WCCT's position on these two topics.
4. In the course of preparing for Hearing Stream 2, WCC has co-ordinated with another submitter, Mr Brett McKay. Mr McKay has provided a lay evidence statement on the content of the demolition controls and policy in MRZ-PREC01-P2 in the PDP. These submissions explain WCCT's agreement with Mr McKay on these demolition controls.

Spatial extent of the character precincts

5. WCCT's position is that it:
 - (a) Supports the character precincts identified in the PDP;
 - (b) Supports the expanded character precincts that are recommended by Council officers in the s 42A report; and
 - (c) Seeks that the character precincts are further expanded to cover all areas identified as having primary or contributory character streetscape values in either the Boffa Miskell "Pre-1930 Character Area Review" or Appendix 2 to Part 4 of the section 42A report.
6. The first and second points require a discussion of the correct approach to be taken in applying character as a qualifying matter to limit the intensification otherwise required by Policy 3 of the NPSUD and the MDRS provisions in the RMA.

Character as a qualifying matter

7. The approach to applying a qualifying matter is broadly the same between the NPSUD and the MDRS provisions inserted by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.
8. First, the territorial authority must:
 - (a) Identify by location the building heights and densities required by Policy 3 of the NPSUD (clause 3.31); and
 - (b) Have the MDRS incorporated into every relevant residential zone (section 77G(1)).
9. Secondly, the territorial authority may:
 - (a) Modify the building height or densities required by Policy 3 in order to provide for a qualifying matter, including by identifying where the qualifying matter applies and the alternate building heights and densities that are proposed (clause 3.31(2)); and
 - (b) Make the MDRS requirements in Schedule 3A less enabling of development to the extent necessary to accommodate 1 or more qualifying matters (sections 77H(4) and 77I).
10. When identifying or accommodating a qualifying matter, the territorial authority must comply with clause 3.32 and 3.33 of the NPSUD and sections 77I and 77L. The key features of these provisions are as follows:
 - (a) The qualifying matter must be in the list in clause 3.32 or section 77I as appropriate. The list of qualifying matters is the same in both (except section 77I refers to Waikato and Auckland specific aspects).
 - (b) Both lists of qualifying matters include "a matter of national importance that decision makers are required to recognise and provide for under section 6 of the RMA". The protection of historic heritage from inappropriate subdivision, use and development is one such matter of national importance (section 6(f)).
 - (c) Both lists of qualifying matters include a "catch all" for any other matter that makes higher density development inappropriate in

the area. If a “catch all” qualifying matter is to be accommodated, then there is an enhanced level of evaluation required — see below at (e) in this list.

- (d) If a qualifying matter is to apply, then the evaluation report must demonstrate why the area is subject to a qualifying matter and why that qualifying matter is incompatible with the level of development directed. The report must also assess the impact of limiting development capacity, building height or density on the provision of development capacity, and assess the costs and broader impacts of imposing those limits.
- (e) The enhanced evaluation for “catch all” qualifying matters involves the following three steps. First, identify the specific characteristic that makes the directed level of development inappropriate. Secondly, justify why that is inappropriate in light of the national significance of urban development and the NPSUD objectives. Thirdly, provide site specific analysis that identifies the site, evaluates the specific characteristics, and evaluates an “appropriate” range of options to achieve the greatest heights and densities while managing the specific characteristics.

The Council's approach to character as a qualifying matter

- 11. WCCT submits that the Council has complied with these legal requirements in accommodating character as a qualifying matter in the PDP. The Council has taken the following steps in its section 32 report.
- 12. First, it commissioned a comprehensive assessment from Boffa Miskell, on a site by site basis, which identified that 74% of buildings in the relevant areas were either primary or contributory in terms of their character.¹ It refined this analysis further by identifying streetscapes with concentrations of existing character.² These steps mean that the Council has identified the specific characteristic (concentrations of character values) that make development inappropriate, on a site-specific basis.

¹ Section 32 Evaluation Report “Part 2: Character Precincts and the Mt Victoria North Townscape Precinct” at 43

² Section 32 Evaluation Report “Part 2: Character Precincts and the Mt Victoria North Townscape Precinct” at 44.

13. Secondly, the Council has identified that the MDRS and Policy 3 requirements would result in an erosion of that character.³ The Council has separately provided a forecast of the impacts of limiting development capacity, which shows that the level of enabled capacity is sufficient to meet forecast demand.⁴ The Council has therefore justified why the concentrations of character in the precincts make development inappropriate in light of the national significance of urban development. The justification is that the PDP provides plenty of enabled capacity to advance the national importance of urban development.
14. Thirdly, the Council has identified the specific sites with the concentrations of character that form the basis of the qualifying matter, and has evaluated the character contribution of the buildings in these sites. This is inherent in the Boffa Miskell report, and the refinement of that by identifying specific townscapes from that report.
15. The final step in justifying a qualifying matter is for there to be a site-specific analysis that “evaluates an appropriate range of options to achieve the greatest heights and densities permitted by the MDRS ... or as provided for by policy 3 while managing the specific characteristics” (emphasis added).
16. There does not appear to be a specific discussion of this aspect of the test in the section 32 or section 42A reports. The section 32 report evaluated three reasonably practicable options:⁵
 - (a) the proposed provisions for character precincts in the medium density residential zone;
 - (b) the status quo provisions in the ODP, which protect pre 1930 buildings in the inner residential zone; and
 - (c) the complete removal of character protections and upzoning to the MDRS and NPSUD requirements.

³ Section 32 Evaluation Report “Part 2: Character Precincts and the Mt Victoria North Townscape Precinct” at 44.

⁴ Property Economics “Wellington City Qualifying Matters Capacity Assessment” (November 2022).

⁵ Section 32 Evaluation Report “Part 2: Character Precincts and the Mt Victoria North Townscape Precinct” at 56–62.

17. These three options represent a range of heights and densities, and the Council's assessment considers how each would manage the concentrations of character values.
18. WCCT submits that the evaluation of options did not need to go any further.
19. The key word in s 77L(c)(iii) and clause 3.33(3)(b)(iii) is "appropriate": the range of options that are evaluated must be appropriate. What is appropriate to evaluate will depend on the nature of the qualifying matter under consideration. The Council does not need to evaluate options that would obviously not manage the specific characteristic.
20. When considering character, WCCT submits that there is no "appropriate" range of options" for greater height and density that is relevant to the analysis. Character is a feature of the existing built form of the city's inner suburbs. It can only be accommodated by a demolition control and retaining discretion over any replacement structures, as the PDP proposes. The characteristic at issue cannot be managed by adjusting the enabled heights and densities.
21. As the section 32 report identifies, any removal of the character protections would lead to the irrevocable loss of the character of these areas over time.⁶
22. For other types of qualifying matter, such as viewshaft protections or natural hazards, it may well be that there is an "appropriate" range of height and density options that can be subject to evaluation. However, character by its very nature can only be managed through a suite of provisions that controls demolition and replacement structures.
23. Overall, the section 32 report provides a sufficient legal basis to apply character as a qualifying matter in at least the character precincts in the notified PDP.
24. The Council has taken a materially similar evaluative approach in the recommended extensions to the character precincts in the section 42A report. The Council refined its methodology to identify streetscapes with

⁶ Section 32 Evaluation Report "Part 2: Character Precincts and the Mt Victoria North Townscape Precinct" at 61.

concentrations of character, by reviewing its criteria, mapping and site visits.⁷ This led to identification of further character precincts. The Council commissioned an updated report from Property Economics to assess the impacts on development capacity of this increased area, and concluded that the additional proposed areas would not materially affect the ability of the PDP to meet expected demand.⁸ That analysis justifies the recognition of character as a qualifying matter in the additional areas.

25. WCCT agrees with the expert evidence of Mr Raymond for Heritage New Zealand Pouhere Taonga that all of the additional character precincts recommended in the s 42A report need to be in the medium density residential zone. The plan would otherwise be confusing and incoherent.⁹ The recommendation in the section 42A report that the zoning of all character precincts be amended to medium density residential should be accepted.¹⁰
26. Finally, WCCT submits that the Council's approach to identifying qualifying matters is aligned with Objective 1 of the NPSUD, which is that New Zealand has "well-functioning urban environments". A well-functioning urban environment is one in which areas of special character are managed in balance with the need to provide adequate development capacity.

Further expansion of the character precincts

27. WCCT considers that the Council can go further than the spatial extent of character precincts recommended by the s 42A report, and that it ought to do so to protect all areas in which primary and contributory character dwellings were identified as contributing to the character of the area, either in the Boffa Miskell 2019 report or Appendix 2 to Part 4 of the section 42A report.
28. This approach meets the qualifying matter test because:

⁷ Section 42A Report: Part 3 – Residential Zones: Part 4 – Character Precincts and Design Guides at [68] and [87] and Appendix 6.

⁸ Section 42A Report: Part 3 – Residential Zones: Part 4 – Character Precincts and Design Guides at [96]–[99].

⁹ Evidence of Dean Raymond for Heritage New Zealand Pouhere Taonga at [33]–[35].

¹⁰ Section 42A Report: Part 3 – Residential Zones: Part 4 – Character Precincts and Design Guides at [104].

- (a) Specific characteristics were identified by Boffa Miskell on a site by site basis;
 - (b) The characteristic — a primary or contributory contribution to the character of the area — would be eroded by NPSUD or MDRS-enabled intensification;
 - (c) Limiting the level of development would contribute to a well-functioning urban environment and still leave a sufficient level of plan enabled development capacity to meet forecast demand; and
 - (d) There are no greater heights or densities that would manage the specific characteristic and which are appropriate for evaluation, because character is a feature of the built environment.
29. This approach would also recognise and provide for the protection of historic heritage from inappropriate subdivision, use and development. This is a matter of national importance and therefore can be a qualifying matter without needing to pass through what I have called the “enhanced evaluation” test described above at paragraph 10(e). Although character is different from historic heritage, the two are related.
30. It is notable that this expanded spatial extent of character areas — as proposed by WCCT — would still involve a reduction from the area that receives equivalent protection in the operative district plan.

Retention of the demolition rule from the operative district plan

31. WCCT submits that that demolition of any building or structure built before 1930 should require resource consent as a restricted discretionary activity. It seeks as relief that there be a demolition control with similar wording to MRZ-PREC01-R4, but with application to a much wider area. Specifically, the demolition rule that WCCT seeks would apply to all inner residential areas currently identified in Chapter 5, Appendix 1 of the operative district plan (ie The Terrace (south), Thorndon, Mount Victoria, Aro Valley, Newtown, Mount Cook, and Berhampore).
32. WCCT considers that appropriate protection by demolition controls for pre-1930 buildings and structures is necessary to protect heritage buildings from inappropriate development. This is a matter of national importance.

33. The equivalent demolition controls in the ODP were introduced to address concerns and submissions about the loss of pre-1930 housing patterns and stock in Wellington's oldest inner city heritage suburbs, and to ensure sufficient protection of historic heritage.¹¹
34. The history and rationale for the demolition controls is detailed further in the statement from Brett McKay, a heritage historian and former Council planner. In short, the demolition controls in the ODP represent a balance of competing community interests that has been calibrated over a lengthy period. That calibration of competing interests is addressed by the policy provision that accompanies the demolition rule in the operative district plan.
35. In terms of procedure, this aspect of WCCT's submission for the ODP demolition rule to be reintroduced is advanced as a submission on the Part 1 Schedule 1 instrument. WCCT submits that the relief it seeks is within the scope of the notified Part 1 Schedule 1 instrument, for the reasons outlined in Mr Winchester's advice to the Panel.¹²

Amendments to demolition control in the PDP

36. Mr McKay's statement discusses the proposed demolition control for character precincts in the PDP, and identifies difficulties and inadequacies in the approach taken by those controls.
37. WCCT adopts Mr McKay's statement and his proposed amendments to the demolition policy in MRZ-PREC01-P2.

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¹¹ Section 32 Evaluation Report "Part 2: Character Precincts and the Mt Victoria North Townscape Precinct" at [5.1].

¹² Advice from James Winchester dated 8 March 2023 at [71]–[73].