

Decision No. W73/98

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of five references pursuant to clause 14
of the First Schedule of the Resource
Management Act 1991

BETWEEN

HELEN FOOT

(RMA 549/96)

AND

DENIS FOOT

(RMA 550/96)

AND

D RENDEL, A MALLINSON and
D COPPINS AND M COPPINS

(RMA 554/96)

AND

MICHAEL HORLOR

(RMA 555/96)

AND

D N WRIGHT and P A O'SULLIVAN

(RMA 562/96)

Appellants

AND

WELLINGTON CITY COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge S E Kenderdine presiding
Environment Commissioner R Bishop
Environment Commissioner J Rowan

HEARING at WELLINGTON on the 8th, 9th, 10th, 11th, 12th, and 17th days of June 1998

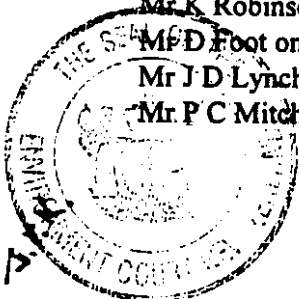
COUNSEL

Mr K Robinson for H Foot, D Rendel and Others and M Horlor

Mr D Foot on his own behalf

Mr J D Lynch for D N Wright and P A O'Sullivan

Mr P C Mitchell for the Wellington City Council



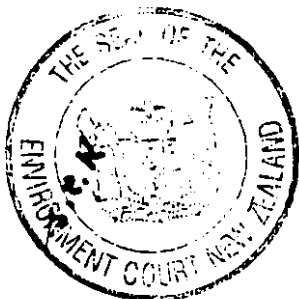
Mr J J M Wiltshire and Mr J Winchester for M J S Neal, M & L Park and Apex Properties Limited, s.274 parties

Mr H R Nicholls on his own behalf and on behalf of the owners of 228, 230, 232 and 234 Oriental Parade, s.274 parties

Ms S M Moran on her own behalf and on behalf of P H Moran and J A Moran, s.274 parties

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DECISION

Introduction

1. These appeals arise from references to the Court concerning the height limits in the Proposed Wellington District Plan ("the proposed plan") in relation to the Oriental Bay Height Area, ("the height area"). Height control is now the only real development control in the proposed plan for Oriental Parade although the proposed plan also includes recession sunlight access provisions.
2. For the purposes of this decision, where height limits in the height area are referred to, these measurements are above mean sea level, rather than building height. The height of the ground above mean sea level varies along Oriental Parade between 1.3 metres at 284 Oriental Parade to 3.5 metres above mean sea level at the street outside 80 Oriental Parade. We were advised that the rule of thumb that has been used in the past is that approximately 3 metres is taken off the various heights above ground when assessing height along Oriental Parade.
3. The height area in the proposed plan extends from (but not including) the Central Fire Station in the west to 350 Oriental Parade in the east. This area of Oriental Parade encompasses a number of distinct areas of development, subject to several different height limits ranging from 13 metres to 34 metres. A copy of Appendix 2 of Mr Daysh's evidence showing these height limits is attached to this decision marked Appendix A. The properties behind Oriental Parade are all within the Inner Residential Area, and are subject to separate rules, including a 10 metre height limit.

The Applicable Rules

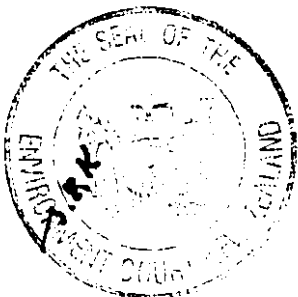
4. The Report of the Hearings Committee included the following:

"RECOMMENDATIONS

- (a) That the height limit relating to 282 - 300 Oriental Parade be increased from 13 metres to 19 metres above mean sea level so that height limits for the whole Oriental Bay Height Area accord with those in the Transitional District Plan.
- (b) That Appendix 4 relating to the Oriental Bay Height Area be amended to:-
 - i. include "Note: permitted height relates to height above mean sea level."
 - ii. delete the 14°6" (sic) sight line relating to properties 62 to 108 Oriental Parade from Appendix 4.
 - iii. change 5.1.3.5.2 to 5.1.3.5.3 in the "Boundary of the Oriental Bay Height Area" note on Appendix 4.
- (c) That in the definition of "height" the words "except in the Oriental Bay height area" be added within the brackets at the end of the first paragraph (Part 3.8 Definitions).
- (d) That a new provision 5.1.3.2.4 relating to front and side yards be included in the Plan as follows (NB some renumbering of Plan provisions will be required as a result of this change):

Side and Rear Yards

- 5.1.3.2.4 5.1.3.2.1 to 5.1.3.2.3 do not apply to the Oriental Bay Height Area (as shown in Appendix 4).



Front Yards

Inner Residential Area

- (i) a minimum of 1 metre except for the Oriental Bay Height Areas (as shown in Appendix 4) where there is no minimum front yard requirement; or
 - (e) That the submissions and further submissions relating to building height, the 14°6"(sic): site line provision, yards and discretionary activities be accepted or rejected to the extent that they accord with the recommendations (a) - (c) above.
 - (f) That the submissions requesting the application of sunlight access provisions relating to the Oriental Bay Height Area be rejected.
 - (g) That Rule 5.1.3.3 relating to site coverage for the Oriental Bay Height Area in to the Proposed District Plan remain unchanged and that the submissions requesting site coverage controls be rejected.
 - (h) That the Works and Environment Committee be requested to consider by way of District Plan Variation or Change, the promotion of an urban design assessment to assist in the formulation of a possible design guide for Oriental Bay to include reconsideration of existing height controls."
5. As outlined the evidence of Mr L Daysh, Policy Analyst in the Policy Unit of the council, the bulk and location rules which therefore apply to developments in the Oriental Bay area are as follows:

- A height limit which follows the heights in the transitional district plan;
- No front, side or rear yards;
- Sunlight Access provision where the Oriental Bay Height Area Boundary adjoins a property in the Inner Residential Area. This is based on a line rising vertically for 2.5 metres above ground level at the boundary and then incline inwards, at 90° to the boundary in plan, at an angle to the horizontal related to the orientation of the boundary and its bearing.

In the Inner Residential Area the inclination of the sunlight access control line to the horizontal shall be based upon the direction in which the boundary faces which is ascertained by the bearing of a line drawn outwards from the site at 90° to that boundary line, so that:-

- for a boundary that faces between 330° and 30°, the angle of inclination shall be 3 vertical to 1 horizontal (71° 30' approximately);
- for a boundary that faces between 270° and 330° or between 30° and 90°, the angle of inclination shall be 2 vertical to 1 horizontal (63° 30' approximately);
- for a boundary that faces between 90° and 150° or between 210° and 270°, the angle of inclination shall be 1.5 vertical to 1 horizontal (56° 20' approximately);
- for a boundary that faces between 150° and 210°, the angle of inclination shall be 1 vertical to 1 horizontal (45°)

The applicable sunlight access provision for 282 - 300 Oriental Parade is 2.5 metres/56° 20':

- no site coverage;
- no maximum numbers of units;
- one carparking space per unit."



6. The Proposed District Plan Discretionary (Restricted) Rule Residential Building Construction requires that when the conditions for permitted construction of residential buildings cannot be met, then any construction, alteration and addition to residential buildings are Discretionary (Restricted) Activities in respect of site coverage, building height and sunlight access.
7. Building Height may be exceeded by a maximum of 20% in all Residential Areas as a Discretionary (Restricted) Activity. Sunlight Access may be exceeded only by 3 metres. Buildings above the Discretionary Limits are non-complying activities.
8. In determining whether to grant consent and what conditions to apply to residential construction, the council will be guided by the following:-

Assessment Criteria

- 5.3.3.5 whether a better standard of development can be achieved by varying the specified conditions;
- 5.3.3.6 whether the topography of the site or the location of any built feature(s) on the site or other requirements such as easements or rights-of-way impose constraints that make compliance impracticable;
- 5.3.3.7 whether the form, scale and character of the new building is compatible with that of buildings in the immediate vicinity of the site, and streetscape amenities can be maintained. For multi-unit residential development Council will have regard to the Design Guide for Multi-unit Housing;
- 5.3.3.8 whether new building work will cause significant loss of sunlight, daylight or privacy to adjoining sites; and
- 5.3.3.9 the extent to which it can be demonstrated that buildings adjoining conservation sites will have no adverse effects on the ecological values of the conservation site.

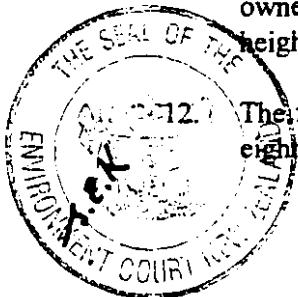
The conditions for permitted dwellinghouse activities, including accessory buildings, are designed to ensure that the visual amenities of both the Inner and Outer Residential Areas are generally maintained. However, because residential building development in the City is very diverse and Wellington's topography is rugged, conditions will need to be varied on occasion. Variations to the extent specified are flexible enough to allow the establishment of new residential development while maintaining general amenity standards.

9. Mr Daysh told the Court that even though the council agreed to a 12 metre height limit for 228 - 234 Oriental Parade, for the purposes of notification of the proposed district plan this was not followed through when the relevant map was printed. This, he stated, appeared to be an oversight.

The Appeals

10. In these appeals the Court considered two of the four categories of appeals against the proposed plan provisions setting building height limits on Oriental Parade. These two categories involved relatively small areas of Oriental Parade - numbers 228 - 234 Oriental Parade ("the Hay Street appeals") and 282 - 300 Oriental Parade ("the Grass Street appeals")
11. There are in effect two parties to the appeals. The first are the appellants, the owners of properties in Grass and Hay Streets situated behind numbers 228 - 234 Oriental Parade and 282 - 300 Oriental Parade. The second are those who appeared as s.274 parties, being the owners of the properties fronting directly onto Oriental Parade, and who seek to maintain the height controls in the proposed plan, and support the council.

The following appellants ("the Grass Street appeals") oppose the 19 metre height limit on the eight properties, 282 - 300 Oriental Parade.



A. *Denis Foot ('the Foot reference')*

13. The Foot reference seeks to:

- a. Set the height at 10 metres in place of 13 metres, for the properties 282 - 300 Oriental Parade, with the addition of the following clause:

Clause 5.3.3.9 in the Oriental Bay Height Area, on properties 282 - 300 Oriental Parade, where a hipped roof construction is used at right angles to Oriental Parade an additional height allowance of 2 metres will be permitted without adjoining owner consent;

- b. If relief a. is not granted then retain the 13 metre height maximum for the properties known as 282 - 300 Oriental Parade;
- c. Such further relief as the Tribunal sees fit;

14. Mr Foot with his family live at 13 Grass Street, a substantial property on a section slightly more elevated than 3, 5 and 7 Grass Street, and located 43 metres behind 284 Oriental Parade. The highest part of the roof is 21 metres above mean sea level. The Foot family members also own the two storey heritage property at 294 Oriental Parade - an 11 metre high property.

15. It was alleged that development to 19 metres (possibly 22.8 metres with the council's discretion, ie the 19 metres plus 20%) would significantly impair the amenities of the 13 Grass Street property. It was also alleged that the 19 metre height limit would be out of scale with and dominate the area, and what was termed an "ugly wall" of 19 metre buildings along the Parade frontage would obliterate public views of the attractive green hills with houses behind.

16. In regard to the relief Mr Foot stated that a major review of the height zone and its lack of rules and design guide is overdue. He concluded that until that work is completed the 13 metre height limit should remain.

B. *D Rendel, A Mallinson and D & M Coppins ('the Rendel reference')*

17. This appeal requests similar relief as that of the Foot reference with the addition of:

- c. Continue the yard provisions in Transitional District Plan.

18. This appeal relates to 1 Grass Street, where Mr and Mrs Coppins have their home, and to 5 and 7 Grass Street, the group of two-storey flats behind Olympus at 280 Oriental Parade, which until January 1998 had been the home for some years of Mr Rendel and Ms Mallinson. They have on sold more recently to Mr and Mrs G Young, and Ms S M Young and Mr R A Blundell, on whose behalf they gave evidence. These properties are two-storey dwellings and are set closer to the rear of the Oriental Parade properties than 13 Grass Street. 1 Grass Street is located behind 286 and 288 Oriental Parade. Access to this property and 3 Grass Street is via an accessway approximately 4.8 metres above mean sea level with its ground level being 2 metres above that of 286 Oriental Parade. The height of the 1 Grass Street building is approximately 11 metres above mean sea level. The forward most part of the house is 13 metres from the boundary of 286 Oriental Parade although the northwest corner is 8 metres. The buildings of 5 and 7 Grass Street are 13 metres above mean sea level.

19. Mrs M Coppins, an owner and occupier of 1 Grass Street, and Ms A Mallinson, as a former co-owner of 5A Grass Street and 7 Grass Street, both emphasised that the ever-changing view, including the greenbelt above the cityscape as well as the water and harbour, was an extremely important part of living in this area.

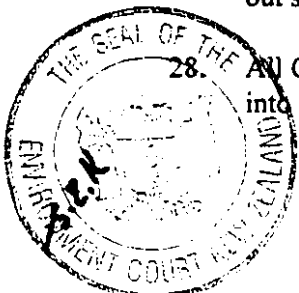


20. Mr R Blundell and his partner purchased 7 Grass Street and his partner's parents purchased 5A Grass Street at the same time. Mr Blundell presented diagrammatic and photographic evidence of the Grass Street areas affected, and the potential impact of development to the proposed height limits.
21. Mr J Williams gave evidence as a joint owner of 296 Oriental Parade, which is set back from the road, overlooking Inverleith to the north and Olympus to the south. He also was concerned that raising the height limit from 13 metres to 19 metres, (or more with the discretionary allowance) would seriously affect the views of the houses behind.

C. *DN Wright and P A O'Sullivan ('the Wright reference')*

22. This appeal seeks to:
- a. Retain the 13 metre height limit for the properties known as 282 - 300 Oriental Parade;
 - b. Delete the proposed new provision 5.1.3.2.4 relating to yard requirements;
 - c. Retain the yard requirements in the proposed district plan as publicly notified and add a 6 metre rear requirement;
 - d. Such further or consequential relief as the Court thinks fit.
23. These appellants own two properties, being 3 Grass Street and 15 Grass Street. Evidence was given by Ms P A O'Sullivan.
24. 3 Grass Street is a three-storey residence incorporating ground level garaging and two levels of living space above. It has flat drive on access. It is situated 15 metres above mean sea level, and is set back 12 metres from the boundary of 290 Oriental Parade. The principal living areas are on the first floor level and these face west with views directly over the Oriental Parade properties in front, across the bay to the city and the Brooklyn/Thorndon hills beyond. The residence has recently been renovated and is let out for \$1,000 per week.
25. It was alleged that if the Oriental Parade properties are redeveloped up to 19 metres then the residential qualities of 3 Grass Street will be substantially reduced. The occupants would lose their entire view of the central business area and the bay. There would be a dramatic loss of sunlight and the property would probably face a rear wall of high apartments which may have windows looking directly into 3 Grass Street thus being invasive of privacy.
26. The appellants' home is at 15 Grass Street which has legal frontage to Grass Street from which there is a long footpath with steps to the house. The principal access to their home is now along the drive to 3 Grass Street. At the end of the drive there is a single-storey double garage for 3 Grass Street and a cable car up to the house. 15 Grass Street has panoramic views of Oriental Bay and the city. The rear of the closest property, 282 Oriental Parade, on the Oriental Parade street frontage, is some 50 metres from the house. The highest part of the roof is 39 metres above mean sea level. It was alleged that redevelopment of the Parade to 19 metres would mean that the view of the coast itself would be lost, although views of the harbour and city would not be affected.
27. With regard to the further relief sought it was considered illogical for the buildings in the Inner Residential zone to be restricted to 10 metres when the buildings in front may be built to block out sun and views. It was considered development should follow the landform of the bay.

28. All Grass Street appellants were concerned with the impairment of views from Oriental Parade into Grass Street itself and the Wilkinson Street area beyond. The appellants also raised issues



of the wider public interest also such as urban form of the bay, streetscape and general amenities, wind effects, and the public significance of Oriental Parade.

D. Helen Foot and Michael Horlor ('the Hay Street references')

29. These appeals request that the proposed plan be amended as follows:

- a. Set the maximum building height at 12 metres;
- b. Provide for a hipped roof construction as used at right angles to Oriental Parade and additional height allowance of 2 metres be permitted without adjoining neighbour's consent;
- c. Reinstate the rear yard requirement in the transitional district plan (6 metres);
- d. Such further or other relief as the Court thinks fit.

30. Ms Foot owns the property at 2 Hay Street, which is a two-storey semi-detached dwelling, sharing a party wall with 4 Hay Street, with a ground floor level approximately 10 metres above mean sea level. It has seaward aspects and is constructed less than 1 metre from the front boundary. Both 2 and 4 Hay Street have small, westward facing enclosed outdoor living areas. Mr Horlor owns 6 Hay Street, a two-storey house with a rear extension accessed by an access leg to the south of 4 Hay Street. The height of 4 Hay Street is 18 metres above mean sea level and the ground level is approximately 6 metres higher than that at 228 - 232 Oriental Parade.

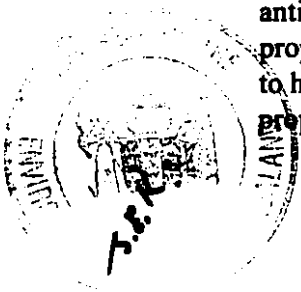
31. The Hay Street appellants raised very similar issues to those appellants from Grass Street, and were supported by a number of nearby residents. All believed that the height limit of 16 metres (discretionary to 19.2 metres for their area) would allow a solid wall of apartments along the Parade with serious adverse effects on views, privacy and sunlight.

Section 274 Parties

32. A number of parties appeared as s.274 parties, in support of the council's position on height limits as well as the sunlight access control, and yard requirements. These parties fall into two main groups. The first was made up of three property owners, being M & L Park, owners of 282 Oriental Parade, Apex Properties Ltd, owner of 284 Oriental Parade, and M J S Neal, trustee of the trust which owns 286 Oriental Parade. These three properties are located in front of the Grass Street properties identified earlier. Each of these parties was a submitter on the proposed plan in respect of height limits in the area. They were represented by Mr Wiltshire and Mr Winchester.

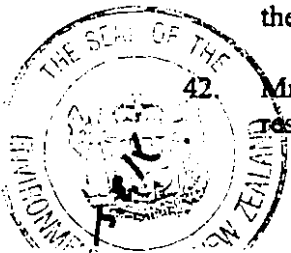
33. A main aspect of this group's case was that the 19 metre height limit had been in place since 1979 and the property owners had placed some reliance upon its existence. It was argued that the limit should not be altered in the absence of some compelling reason in the public interest. It was submitted that no public benefit would arise from a 13 metre height limit in this area, and it would only result in a transfer of value from the front properties along Oriental Parade to the rear properties in Grass Street.

34. It was also submitted that the longevity of a plan provision has the effect of signalling to parties, such as the appellants, that the type of development provided for by the rule must be anticipated as appropriate in terms of planning controls. Some of the appellants bought their properties in the knowledge that, as of right, a 19 metre development could occur. To now seek to have this limit reduced in order to protect private views at the expense of the Oriental Parade property owners is unjustifiable.



35. The properties at 282 - 286 Oriental Parade are seen to be 'underdeveloped' by the group, being relatively standard two storey residential buildings. We were told it is unrealistic to expect that Oriental Bay will not be further developed. It was submitted that there are no current plans or arrangements for a joint development on the three sites in the next two years at least. Development options for the three sites presented in evidence were indicative only, to show a worst case scenario under the two potential height limits.
36. An important aspect of the first group's case was that the 19 metre limit, in combination with the sunlight access controls, would ensure that any adverse effects on the amenity values of the neighbours and general area will be appropriately avoided, remedied or mitigated to the extent that circumstances justify. This could also be enhanced by an appropriate design guide. In particular, there was evidence to show that there is negligible difference in sunlight access between a 13 metre development and a 19 metre development.
37. It was also submitted that while the views from particular properties may enhance the amenity values of an area, there is no right to have such views protected by plan provisions. If an owner wishes to protect some particular view then this can, and sometimes is, achieved by private contract and the registration of restrictive covenants.
38. In respect of urban design considerations, the appellants' imagery of a "wall" of development along this part of the Parade was seen as being unlikely given the presence of the heritage buildings which are in the midst of the subject area. Further, evidence was presented that a 19 metre limit would have a positive impact on the streetscape of the area, being more in keeping with the character of the Parade.
39. It was submitted that there was no reason to require a 13 metre height limit either under the s.32 analysis or in considering Part II. With the possible exception of the absence of a design guide, the provisions of the plan as they currently stand are adequate, and the purpose of the Act would not be better served by any amendments as sought by the appellants.
40. The second group of s.274 parties was made up of property owners of 228 - 234 Oriental Parade, including Mr P McGaviston who owns The Grain of Salt at 232 Oriental Parade and Mr R Nicholls who has an interest in the property, Mr N Koss, who owns 228 Oriental Parade, and the Moran family, who jointly own 234 Oriental Parade and Messrs R H Miet and R S Anderson who own 230 Oriental Parade. These properties are generally situated in front of the Hay Street properties. Mr Nicholls made submissions on behalf of the group. Ms Moran made additional submissions on behalf of her own family.
41. These parties came late to the proceedings and did not provide any independent expert evidence. Mr Nicholls told us that the group he represented have owned their properties for 15 or more years in the expectation they have the right to build to 16 metres above mean sea level. We were told most bought them recognising that there was a premium above the normal commercial value of each building within the purchase price they paid, representing the potential to develop the sites to 16 metres. We were told the group has accepted the high rates set by the council in recognition that they have the potential capital gain from being able to develop to 16 metres. We were told too that the group bought their properties in the knowledge that a view for the rear neighbours was not guaranteed. It was stated that a reduction in the height limit to 12 metres will reduce the value of the group's properties by about 25%. Conversely the improvement of the Hay Street views would increase the value of the rear properties. Again it was alleged that this would result in transferring wealth from the group to their rear neighbours.

42. Mr Nicholls, Mr Koss and Ms Moran all gave evidence based on their status as owners and/ or residents on Oriental Parade. Mr Nicholls gave evidence as to height, rear yards and valuation.



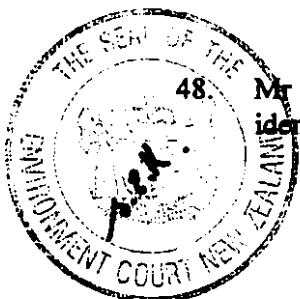
He also put forward a compromise proposal which would involve a collective redevelopment option for all properties in the area. Ms Moran and her family did not agree with this aspect of his evidence.

The Oriental Bay Environment

A. Oriental Bay as a whole

43. Ms D Popova, urban design consultant to a number of the appellants, encapsulated in her description the essence of existing character of Oriental Bay as we also perceived it - both from the evidence given at the hearing and from our site visit. Without a clear understanding of this character it is difficult to assess the impact the height limits will have on the Parade. The description that follows is largely drawn from Ms Popova's analysis.
44. Views to (from either the sea or the seaward side of the Parade) Oriental Bay integrate several layers, providing the foreground, the middle ground and the skyline of the views. The foreground is represented by the linear structure of the buildings along Oriental Parade, forming the "public face" of the street. The escarpment behind and associated buildings form the middle ground. The ridge of the town belt and the Roseneath northern slopes form the skyline of the views.
45. The character of buildings and their specific relationship to the land form, as well as the proportional balance between buildings and greenery, varies throughout the entire length of Oriental Bay. The variation of the topography and its relationship to built form determines two visually distinctive areas within the whole of the bay. These include the Clyde Quay part of Oriental Bay, west of Matai Moana at 178 Oriental Parade, with the more vertical escarpment beneath St Gerard's Monastery, and Oriental Bay proper to the east, which forms part of a natural amphitheatre.
46. The curvilinear layout of the foreshore within Oriental Bay proper defines a sequence of visually distinctive sections along Oriental Parade of similar length with most of the corners of these sections marked by high-rise buildings.
47. The key characteristic patterns of the Oriental Parade frontage include:
- (i) general rectangular sites with a limited range of dimensions
 - (ii) building depth and rear yards determined by the nature of the topography
 - (iii) the majority of the older buildings have narrower frontages compared to some of the more recent apartment blocks that are significantly wider - often the result of site amalgamation
 - (iv) variable building height. The predominant building height is three storeys with a number of medium and high-rise apartments with variable height and style. Terraced multi-unit development is not typical for the area - the most recent Donald Design town houses at Oriental Parade being unusual for the topography
 - (v) a range of public views, including the views from the city to the area and views from within the area to the city. The dynamic visual interaction between the area and the city is a characteristic ingredient of the Oriental Bay's identity.

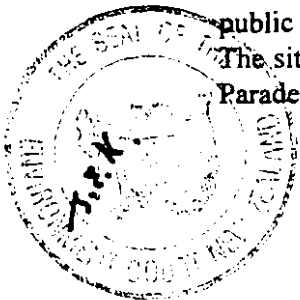
48. Mr G McIndoe, urban design consultant to the s.274 parties to the Grass Street references, identified other features of the bay which are significant to any general description of the site



area - namely the sandy beach, the row of mature regularly spaced Norfolk Island pines, the wide public promenade, and the central rotunda. Mr McIndoe described Oriental Parade as Wellington's "grand recreational boulevard", formal in character with a constructed sea edge.

B. 282 - 300 Oriental Bay Parade (the Grass Street Area)

49. There are eight properties at street level between 282 - 300 Oriental Parade, six of which are two-storey residences (282 - 290 and 294) and two are three-storey residences (298 and 300). Both of the three-storey residences have garages located at ground level with two levels of living space above. 292 Oriental Parade is a property located high on the hill behind 294 Oriental Parade directly to the north of 15 Grass Street, being a similar scale property to 15 Grass Street. 296 Oriental Parade is behind 298 Oriental Parade and is much lower down the hill than 292 Oriental Parade. The highest part of this structure is 28 metres above mean sea level. Both 294 and 300 Oriental Parade are included in the district plan's Heritage List.
50. At either end of 282 - 300 Oriental Bay there are existing apartment blocks: 280 Oriental Parade at the western end (the Olympus Flats, a four-storey apartment block which is 18.9 metres above mean sea level including the lift tower) and 306 at the eastern end (Inverleith, a five-storey apartment block approximately 19 metres above mean sea level). These apartments are outside the areas subject to the current references. On the western end of Grass Street fronting the corner of Oriental Parade and Grass Street is Wharenui, a very large and high apartment building of 39.6 metres above mean sea level. We were told a development of this kind would not be allowed in Oriental Bay today.
51. Mr A Aburn, planning consultant for the Wright Reference identified that the properties at 282 - 300 Oriental Parade constitute an identifiable collection of buildings which are recognisably lower than buildings immediately adjacent at either end. They generally have consistent character particularly the two-storey residences in the middle portion of the block. These range in height from 10 metres to 11.5 metres above mean sea level. Hip roof forms are evident and the impression is that of single identifiable buildings, clearly separated from each other by side yards and access paths. The three storey buildings are approximately 13 metres above mean sea level in height.
52. Mr Aburn identified too that for most of the length of Oriental Parade, an escarpment rises steeply and immediately behind the Oriental Parade properties. However, for the section from 282 - 290 Oriental Parade there is an area of flat land before the escarpment which results in Grass Street having its own unique topography. The lower part of the street has, for example, a large area of flat and gently sloping land. It is in this area that 1 and 3 Grass Street are located. The two residences are positioned at the base of the escarpment where the ground level is between 5.1 metres and 5.4 metres above mean sea level. The four other properties, 5, 7, 9 and 11 Grass Street are also located at the toe of the escarpment and front directly onto Grass Street.
- C. 228 - 234 Oriental Parade (the Hay Street Area)**
53. The section along 228 - 234 Oriental Parade is located west of the Hay Street corner and has a central location within the bay. This section of the bay includes six dwellings of diverse character and age with a mixture of building types, scales and architectural styles.
54. The street edge relevant to the Hay Street appeals is defined with buildings presenting a regular public "face" to the street, on rectangular sections, and having similar separation distances. The sites at both ends of the section are occupied by high rise apartment blocks:- 236 Oriental Parade (Kensington Apartments, an 11-storey apartment block which is approximately 37



metres above mean sea level) and 226 Oriental Parade (the Athfield building, a four storey apartment block which is approximately 16.6 metres above mean sea level).

55. Of the group of four properties 228 - 234 Oriental Parade, 228 is a two-storey residential building 9.5 metres above mean sea level. 230 is a single storey dwelling with driveway access to the rear. 232 is the recently renovated three-storey commercial building known as The Grain of Salt. This structure is 14.6 metres above the mean sea level and covers 100 percent of the site to the second level. At the boundary with 6 Hay Street the ground is the same height as the rear extension.
56. 234 Oriental Parade is a large high stud, two-storey residential building which has recently been substantially refurbished. Mr Daysh described it as one of Oriental Bay's finest older properties. It has eaves that are 12 metres above mean sea level and the apex of its hip roofs is 13.5 metres above mean sea level. It contains a rear yard of 11 metres to the boundary of 2 Hay Street. There is a 3 metre gap to the flank wall of Kensington.
57. At present the main structures of all buildings vary in respect of rear yard space but all have yards in excess of 8 metres, with the exception of accessory garages and in the case of 232 Oriental Parade which has a second floor addition up to its rear boundary. The width of the side yards vary but are generally in the order of 2 - 3 metres.

History of Planning Provisions in the Area

58. Oriental Bay has long been recognised as an area where medium to high density residential development should occur. The Scheme Statement for the first district plan made operative in 1972 outlined that there were four residential zones. The purpose of the zone for Oriental Bay was described as follows:

"(d) Oriental Bay is zoned as Residential "D". There are no predominant uses in this zone but the uses permitted will generally be the same as those for Residential "C" zones subject to the imposition of certain conditions, restrictions by the Council that are deemed necessary to preserve adequate sunlight, views and amenities and safety in the neighbourhood."

59. Residential C was primarily the same area as the current Inner Residential Area ie Thorndon, Mt Victoria, Newtown and Berhampore within the Inner Town Belt. The controls that applied to Residential C applied to Oriental Bay. In all cases there was no maximum height limit specified, with side yards being calculated on the basis of the Length (L) (related to yard under consideration) of the proposed building, plus the Height (H) of the building divided by 6:

$$\text{ie side yard} = \frac{L + H}{6}$$

60. Many of the higher buildings in Oriental Bay were built using this formula. The consequence of this was that the longer the site and the further away from the side boundaries, the higher the permitted height. We were advised the regime was more restrictive than in the remainder of the inner city, as while the same bulk and location controls were applied, all applications were considered as conditional uses. In respect of the conditions relating to conditional uses the following is stated:

"The Council shall, in exercising its powers to grant conditional uses, give special consideration to the preservation of adequate sunlight, views, amenities and safety in the neighbourhood."

61. The first official reference to a height control in Oriental Parade was the creation of a Residential D1 zone in the 1979 proposed district plan. This zone included a building height



limit (Appendix D) which affected all Oriental Parade properties. This proposed plan was confirmed in 1984 and is now the Wellington Transitional District Plan ("the transitional plan"). The Residential D1 zoning had differing height controls depending where a particular property was located.

62. Section 5 - General Residential Objective (8) of the transitional plan encouraged the retention of sunlight access to buildings by suitable bulk and location requirements. General Objective (9) records that "no property has a right to a view, but nonetheless the bulk and location requirements designed to encourage the retention of sunlight will give some protection of views".
63. The Residential D1 zone was referred to as "Oriental Bay/High-rise". In the Scheme Statement, at Clause 5.2(7), it was stated:

"This is a small but highly desirable area for residential development sandwiched between Oriental Parade and a steep cliff face.

It is proposed to encourage multi unit developments, but because of the position and nature of the zone a height limit for each site has been worked out. This height limit should prevent rear sites being built out and also retain some view from Oriental Bay and Oriental Parade of the hills and Inner Town Belt surrounding the bay. Front and side yards are not considered necessary but rear yards are needed to protect properties at the rear. ... No minimum site area limitation has been made because of the attractiveness of the zone for development, the lack of a need for a front yard and coverage restrictions, and the normally high height restriction ..."

64. Objectives 9H.1 for the zone include:

1. To encourage a high utilisation of the zone for residential purposes.
2. To prevent sites behind the zone having their view built out and to ensure the retention of the view from Oriental Parade of the hills and Inner Town Belt surrounding Oriental Bay.
- ...
6. To limit the uses almost entirely to residential ones.

65. Amongst the reasons given for the zone, Ordinance 9H.2 explained that:-

"The zone is small in area and with its crucial position is very attractive for residential development. For this reason other uses are strictly controlled as they would be better situated elsewhere.

Bulk and location controls are minimal because the sites are squeezed between the road and the cliff and few restrictions are needed. The main control is a special height control which has been worked out for each site so that building will not block views on top of the cliff. It also helps with the views of the Inner Town Belt when looking inland from Oriental Parade. These views are the major reasons for the desirability of the zone for living and Oriental Bay as a recreation area."

66. The cliff mentioned in this zone objective is only two to six metres high at the rear of 228 - 234 Oriental Parade.
67. The Residential D1 rules permit a range of residential buildings including apartments subject to the following development standards:

- Building height - according to limits prescribed for each site in specific parts of Oriental Bay in Appendix D of the Planning Maps;
- Yards - 6 metre rear yard with access to the rear yard required; (Ordinance 9H.6.2) and
- Vehicle Access and Parking - one vehicle access per site and one parking space per household unit, with access and parking designed according to standards.
- Coverage - there is no minimum site requirement.

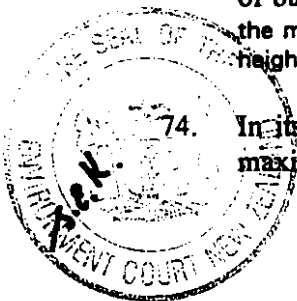


- . In addition, there are a number of specific development standards for a group housing schemes.
68. The land immediately to the rear of these properties was zoned Residential D2.
69. Under the transitional plan the Grass Street and Hay Street properties were included in the Residential D2 Zone ("Oriental Bay and Mt Cook Medium-Rise"). Ordinance 9J.2 explained that:
- "The areas overlook the Harbour, Oriental Bay and the City and are highly desirable residential areas. Within the Oriental Bay area access is poor with narrow steep roads, cul de sacs with difficult turning areas and many sections having foot access only. Within both areas, Council will encourage the retention of a height limit of 10 metres. This is considered necessary for those parts of the zone on the higher elevated ridges, since buildings exceeding this height would adversely affect the panoramic views of the harbour and city, and also encroach on the skyline. ..."
70. In addition to the 10 metre maximum height restriction, other bulk and location controls for the Residential D2 zone include:
- height control envelope
 - yards of minimum 1.5 metre depth
 - site coverage - maximum building coverage of 45% for sites exceeding 300 square metres
 - minimum useable open area of 20 square metres
 - positioning of main windows (privacy concerns)
 - restriction on continuous linear building
71. Objectives 9J of the transitional plan variously seek:-
- "8. To restrict the height of new development and respect the scale of existing development.
 - 9. To ensure that the fine views of the harbour and the city are not blocked by development and that buildings do not encroach excessively on the skyline."
72. Thus, unlike the Residential D1 zone, development in the Residential D2 zone was subject to a number of bulk and location controls.

Oriental Bay Environmental Study Group Report

73. In April 1986 the council undertook a community study involving the Oriental Bay Ratepayers and Residents Association, and the findings were published in a report. We were told by Mr P W Saxton, resource management consultant for some of the appellants, that at early meetings of the study group the anxiety of residents over current town planning requirements, particularly building heights, was expressed. Ms Helen Foot, who was on the Association at the time, thought the report was a whitewash - that the residents felt slightly paralysed at its outcome. The report explains that resident representatives were unclear as to the actual provisions of the height controls and considerable time was spent in explaining them, particularly the high-rise aspects of the Oriental Bay D1 zone. The special nature of some sites was recognised (beneath St Gerard's Monastery) where some flexibility could be introduced. This would allow a greater variety of building focus and avoid the creation of an "urban wall" of buildings which was to be considered in no-one's interest. It was stated "that in most cases the maximum permitted height for properties on the bay were similar or only slightly higher than the heights of existing buildings."

74. In its conclusion the report stated (apparently based on the sentence quoted above) that the maximum permitted heights seemed to have widespread acceptance; that there have been no



significant problems and the association representatives had had little or no complaints from residents.

75. In fact, as Mr Saxton observed, there are a number of locations where the height limit proposed is higher than the present height of existing buildings and this was clearly brought out in cross-examination by Mr Lynch for some of the appellants in the Grass Street appeals.

Submissions on Proposed Plan

76. In November 1993 the Environment Committee of the council gave consideration to the submissions from a number of Grass and Wilkinson and Hay residents on the existing height control limits. The outcome of these representations was a direction from the council (produced as Exhibit J to Mr Saxton's evidence for the Grass Street appeals) to the council officers drafting the proposed plan on 23 March 1994 and which required:

- (a) That Council reduce the height limits in the draft District Plan for those properties at 282 - 300 Oriental Parade to 13 metres.
- (b) That Council reduce the height limits in the draft District Plan for those properties at 228 to 234, where more than two sites are amalgamated into a single title; and
- (c) That Council instruct officers to look at the possibility of reducing heights all the way along Oriental Parade, and consider sideyards where construction is being planned on amalgamated sites. ...

77. In addition to the above, the introduction to the height rules in the s.32 analysis associated with the proposed plan includes the following:

"There is a specific height area for Oriental Bay (the Oriental Bay Height Area see Appendix 4 of Part V - Residential Area). The reason for the Oriental Bay limits is to maintain urban form, views and levels of sunlight."

78. Some of these considerations did not find their way through to the final decision. Ms H Foot told us that she and other Hay Street appellants were concerned that the council in its proposals for the district plan overlooked the recommendations of its own Committee. She concluded that it ignored the concerns of the residents and made the situation even worse for the properties immediately to the rear of 228 - 234 Oriental Parade by the deletion of the 6 metre rear yard requirement.

79. Mr Daysh told us that the council officers did not fully support altering the transitional plan height limits for Oriental Parade in a short report to the workshop. This is because it was felt it would remove a long standing development expectation for the owner of the subject sites, but would improve the situation for residents to the rear. The report noted some alteration of height may be warranted. Mr Daysh stated that this was all that was recorded by council officers about the council's decision.

Jurisdictional Issues

80. The jurisdictional issues raised at the hearing were:
- the ambit of the height controls for each area
 - the inclusion and scope of yard requirements

The ambit of height controls and inclusion of yard requirements

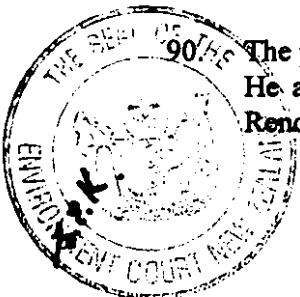
81. Mr Wiltshire set out the position of the s.274 (Grass Street) parties. He submitted the relief sought in the original submissions must determine the scope of relief sought in a reference.



The submissions of Wright/ O'Sullivan and Rendel and Others were (in effect) further submissions in opposition to submissions made by Neal/Apex/Parks.

82. Mr Foot's original submission on the proposed plan sought "a more sensitive approach" to height limits on the Oriental Parade frontage, and in the reference he seeks to reduce the limit to 10 metres. Mr Wiltshire submitted that there is no jurisdiction for seeking to reduce heights to 10 metres because there is no mention of a 10 metre height limit in Mr Foot's original submission or the submissions of Neal/Apex/Parks.
83. The jurisdiction to grant relief in respect of yard requirements was similarly questioned. Mr Neal's original submission sought reduced yard limits (to zero). In response, the Rendel's further submission sought to retain a yard requirement, possibly of one metre, and Wright/O'Sullivan sought to retain the yard requirements in the proposed plan as notified, and add a 6 metre yard requirement. It was submitted that the latter request is untenable.
84. Accordingly, it was submitted that the only issue for the Court (in respect of Grass Street) is whether the height should be 19 metres, or 13 metres or some figure in between. In terms of yard requirements it is submitted that the most that could be in issue is a one metre requirement at Grass Street (which would be of negligible value).
85. Counsel for the council submitted that the Court is constrained to choose one or other of the competing proposals or some intermediate position unless it is not satisfied that any of these positions is consistent with achieving the purpose of the Act. A submission on a plan must define the boundaries of the decision which can be made on a reference because the submission itself is notified and submitted on. A further submission cannot go beyond what is raised in the original submission, and the proposed plan. No-one requested a height lower than 13 metres in an original submission so there is no entitlement to make such a request before the Court.
86. Similarly in respect of yard requirements at Grass Street, the maximum rear yard that may be imposed is one metre, and the minimum sought was no requirement. The Court was reminded that the recession plane is an explicit substitute for a rear yard requirement.
87. The Wright/O'Sullivan position was addressed in Mr Lynch's submissions. In respect of the height limit, he accepted that the choice is between 19 metres and 13 metres. As to the yard requirement, Mr Lynch submitted Mr Neal's submission put both height and yard requirements in issue because the Wright/O'Sullivan cross submission opposed all of the Neal/ Apex/ Park submissions. Therefore, a yard requirement can be reinstated at least to the limited extent provided for in the proposed plan as notified (as submitted by Mr Wiltshire). If there is no jurisdiction to impose an extra 6 metres then, it was submitted, that is an additional reason why height should be reduced to 13 metres (as the 6 metre yard would reduce the dominating effect of a 19 metres building) - in combination with the sunlight access controls.
88. It was noted that the appellants Wright/O'Sullivan do not argue that there should be both a 6 metre rear yard requirement and a sunlight access control envelope, but they contend the rear yard requirement will give better protection to the amenities of the properties behind.
89. It was submitted that the Court does have the power under s.293 of the Act, to reinstate the 6 metre rear yard requirement. The bulk and location controls are clearly in issue, and it was submitted the Court should not feel constrained by the legal technicalities of documents filed almost 4 years ago amidst many documents.

The position of appellants Rendel, H Foot and Horlor was stated by their counsel Mr Robinson. He agreed with Mr Lynch that Mr Neal's submission put yard requirements in issue. The Rendels and Ms Coppins filed cross submissions opposing Mr Neal's submissions as a whole.

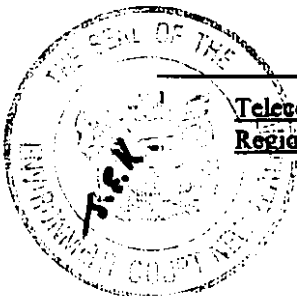


No specific relief was stated, as is the case for cross submissions. It was conceded that the submission could have been more clearly expressed.

91. This issue was not addressed by Mr Foot's submissions as it appeared he was no longer seeking a limit of 10 metres in the Grass Street area.

Evaluation

92. To summarise, in respect of the height limits at Grass Street, the proposed plan as notified set the limit at 13 metres which was opposed by the original submission of Mr Neal who sought an increase in the height limit to 19 metres. In response, the further Wright/O'Sullivan submission of opposed Mr Neal's submission, thus supporting a retention of the 13 metre height limit. The Rendels and Coppins filed similar cross submissions opposing the Neal submissions seeking to retain the buildings on Oriental Parade to the same or similar height as currently exists. We have taken that as the notified height ie 13 metres.
93. Therefore, it is clear that the range of 13 metres - 19 metres is the proper ambit for the Court's decision on this matter. We also need to consider the discretionary extra height limit (22.9 metres ie, 19 metres plus 20%).
94. The options in Hay Street are stated as 16 metres or 12 metres or an intermediate figure, and we would need to determine if height controls alone are sufficient or need other controls (such as a Design Guide) but need an interim height requirement in any event.
95. In respect of the yard requirements, we note that the issue was not addressed in respect of the Hay Street submissions at all. The relief requested by the appellants seeks the reinstatement of a 6 metre rear yard and there was no challenge to this as a jurisdictional issue by way of submission.
96. Further submissions (or cross submissions) are limited, pursuant to clause 8 of the First Schedule to the Act, to being in support of, or in opposition to, an original submission. As held in previous decisions of the Court¹, further submissions cannot provide the basis for a reference that seeks relief beyond what was fairly and reasonably raised in the original submission, or provided for in the proposed plan as notified. The legislation thus highlights the importance of original submissions in the preparation and change process for proposed plans.
97. As noted in Hilder v Otago Regional Council Decision No. C122/97, and by Mr Robinson, there is no provision on the further submissions form (being Form 3A) for any relief to be sought. The Wright/O'Sullivan reference is clearly seeking additional relief. Therefore, we find that the Court does not have the jurisdiction to direct that the council include an additional 6 metre yard requirement as relief for the Wright/O'Sullivan reference. Our jurisdiction is limited to reinstating the one metre yard requirement bearing in mind the sunlight recession plane is proposed as an explicit substitute for a rear yard requirement.
98. While the Court could avail itself of s.293 of the Act in order to include a 6 metre yard requirement in the proposed plan, such a step is not undertaken lightly in respect of the Grass Street references as it circumvents the public procedure for implementing such changes. There is an option to adjourn the matter to allow interested parties to be heard,



pursuant to s.293(2), but this was not proposed as a possible course of action by the parties before us.

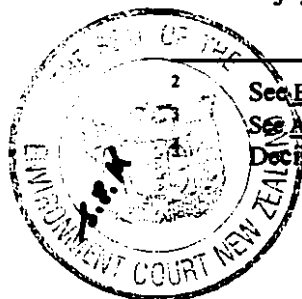
B. Legal Status of Private Views

99. Mr Mitchell for the council submitted there had long been a dichotomy in district planning between public and private views. While public views were capable of protection by height and other building controls,² private views, at least under the Town and Country Planning Act 1977 (the TCPA), were not protected by height controls.³
100. While the height limits around Oriental Parade have been set with some care (there are currently 10 different height limits ranging from 13 metres to 34 metres) to reflect existing built form, topography and the proximity of properties behind, Mr Mitchell submitted it would be an extraordinary and significant change to conclude that private views now deserve some specific protection under the Act. This is because such an exercise, if done comprehensively and justly, would be prohibitively complicated, and one would have to ask whether such a control would be primarily motivated by economic rather than environmental benefit.
101. Mr Mitchell submitted that the historical height limits in the area were not set to protect individual views. This would have been an untenable position under the legislation, and case law, at the time. Instead he acknowledged that although view protection in a general sense was seen as very important in the Oriental Bay area, it was never intended that height limits be fixed to preserve the view from every single rear property. Instead height controls were set having regard, in a general way, to particular parts of the area and the location of properties behind the Parade.
102. It was Mr Mitchell's submission that the s.31 functions of the territorial authority do not underwrite the protection of private views. The council must have regard not only to the range of amenity values currently enjoyed by various properties in Oriental Bay, but also to the economic sustainability of the area, and the public interest in the environment, such as urban design factors.
103. Mr Wiltshire for the s.274 (Grass Street) parties, also emphasised the position under the TCPA as to the protection of views. Reliance was placed on the Planning Tribunal decision, given under the TCPA, of Body Corporate 97010 & Ors v Auckland City Council⁴ where the Tribunal held that:

"Although in one sense the views which can be obtained from a residential property contribute to the amenities of the neighbourhood, it is long established in planning law that property owners are not entitled to have district scheme provisions made for the protection of views. See *Anderson v East Coast Bays City Council* (1981) 8 NZTPA 35 (HC); *AMP Society v Waitemata Harbour Maritime Planning Authority* [1982] 2 NZLR 448; and also *Ports of Auckland v America's Cup Planning Authority* Decision A100/91."

104. Mr Wiltshire submitted that in that case the Tribunal had acknowledged that at times a height restriction would be appropriate to protect an over-riding public benefit. Even in such cases, it is important to ensure that the burden on the private landowner is in proportion to the public benefit to be gained. Further, any restriction should not preclude the reasonable economic use of the land. It was acknowledged that the pleasantness of an outlook contributes to the amenity enjoyed on that property, but this does not mean there is any right to a view. The specific view

² See *BOMA v Wellington City Council* 14 NZTPA 289.
³ See *Anderson v East Coast Bays City* 8 NZTPA 35 (HC).
 Decision No. A30/92, pages 8-9.



of a private resident could however be protected through private contract, and the registration of restrictive covenants.

105. It was also noted that there are no public viewshafts which would be affected by the imposition of a 19 metre height limit in the Grass Street area.
106. Mr Lynch, for the Wright appellants, submitted that views are clearly within the definition of amenity values in s.2 of the Act, and there is no statutory reason to exclude views from amenity values:

"Amenity values" means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes:

107. Mr Lynch referred to Khyber Properties Ltd v Auckland City Council (A12/97), a case relied on by Mr Wiltshire, and stated that this case confirmed that outlook/ view is part of the amenity values of an area. This submission was based on the passage from the decision at page 4 where the Court stated:

"In particular the buildings would diminish the sunlight, daylight and outlook enjoyed by those occupants. That those are relevant concerns under the Isthmus district plan in general is confirmed by one of the objectives in the Business 8 zone."

108. In respect of the position under the TCPA Mr Lynch referred to a passage from Ports of Auckland Limited v The America's Cup Planning Authority (A100/91) where the Tribunal considered the relevance of the effects on views in the area:

"The appellant submitted that effects on views from private properties should not be considered, relying on Anderson v East Coast Bays City (1981) 8 NZTPA 35; and AMP Society and Travelodge v Waitemata Harbour Maritime Planning Authority Decision A 84/82. However the criteria in the maritime planning scheme which are to be applied in judging this application clearly require consideration of impacts on the amenities of adjoining land, and in many provisions recognise the value of the visual appearance of the harbour.

We hold that we ought to consider those effects, giving attention to the general impacts on the residents of the area, rather than to the specific impacts on the occupiers of any individual dwelling."

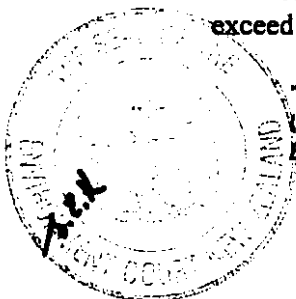
109. Mr Lynch then referred to the passage already quoted from Body Corporate (supra). He also referred to a further quotation from page 10 of that decision:

"A view shaft through the Residential zone from the main road would provide an opportunity for the terrace houses to be seen by the public. Although we do not consider that such a view shaft would be justified only to preserve harbour views from the terrace houses, if that is an incidental benefit of such a view shaft, well and good."

110. On this basis Mr Lynch submitted that the TCPA decisions establish that views are a component of amenity values and regard should be had to views in terms of the general amenities of the area. But if variations in topography mean that a particular property loses its view when the general provisions are applied then that particular view is not protected.

111. Mr Lynch next considered Chen v Christchurch City Council (C102/97) in which the Environment Court considered an appeal from a resource consent to allow a house roof to exceed the permitted maximum height. The Court stated that:

"While the objectives show that the district plan considers it desirable to protect views (and we add that whether or not it was valid to do so under the TCPA - Anderson v East Coast Bays City (1981) 8 NZTPA 35 (HC) - it is certainly proper under the RMA)



the rules give effect to that by permitting building up to a maximum height of 9 metres."

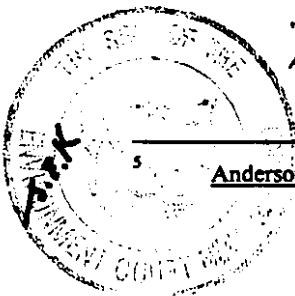
112. The Court considered that while the TCPA sought to control development with general zoning provisions based on a prescriptive approach, the RMA is permissive and is based on avoiding, remedying or mitigating adverse effects. On the basis of the provisions of the RMA and the Chen decision, Mr Lynch submitted that it is proper to take into account the effect a proposed development will have on a particular view.
113. It was Mr Lynch's further contention that the loss of private views is clearly an adverse effect on the amenities of a residential property, particularly in an area like Oriental Bay. Therefore, the rules of the district plan should ensure the views of particular properties are protected. Not to do so would be unrealistic and would ignore a principal component of the amenities of the properties.
114. On this basis it was submitted that there should be at least a uniform height to promote the amenities of properties in Oriental Bay generally, unless there is a particular topographical feature which means a different height can apply. It was submitted that 10 metres would be an appropriate height, given that this is the height applied in the adjoining Inner Residential zone, however, the appellants have sought a more generous 13 metre limit. Further, the 13 metre limit approximately equates to the 10 metre level for the slightly elevated rear properties.
115. Mr Robinson submitted that while in some circumstances it may be true that the law does not protect private views, the RMA places considerable emphasis on amenity values, and it cannot be suggested that the views to and from this area are anything other than prized amenities. Whatever the position elsewhere, it was submitted that in the Oriental Bay area the amenities of view are significant and are recognised as being worthy of protection. The impairment of views is one factor which contributes to the impairment of the ability of a portion of the community to provide for their social and economic well-being.
116. Mr Robinson also submitted that the TCPA of 1929 and 1953 were interpreted narrowly, as they represented an intrusion on common law rights of property. By contrast, the RMA represents a broader view where environmental interests are protected more as "public property".
117. Mr Foot submitted that the provisions of the Act focus on effects, and the avoidance, remedying or mitigation of adverse effects. In this context, the protection of neighbourhood amenities is given important emphasis. He submitted that there are special circumstances in this case that warrant a direction from the Court that the views from Oriental Bay are an extremely important part of the pleasantness, character and amenities of living there, and that the public views are very important.

Evaluation

118. The parties were more or less in agreement as to the position under the TCPA in respect of the treatment of views in plans. Basically they were regarded as an aspect of amenity values for a general area, but there was no right to protect a particular private view. This position is summarised in a passage from Anderson (supra) where His Honour Justice Speight stated:⁵

"Views, of course, will be taken into account in such determinations as, for example, in *Attorney-General v Mt Roskill Borough* [1971] NZLR 1030, but in my opinion the

⁵ Anderson v East Coast Bays City 8 NZTPA 35, 37 (HC).

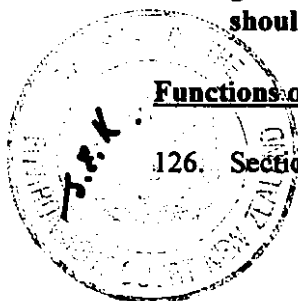


Tribunal was not in error in law in holding that there is no absolute right in an owner to the preservation of view - either at common law or in planning law."

119. With respect, Mr Lynch's contention to protect individual views with a height control would require that each site have its own height limit. As submitted by Mr Mitchell, this would be a prohibitively complicated task, and beyond what is required in a planning instrument.
120. While there is no doubt that the Act requires an effects based approach, the Act also provides for two distinct levels of assessment, at the planning and the resource consent stage. Site specific considerations are appropriate at the time a resource consent application is assessed, but not at the district plan stage.
121. Mr Lynch's reliance on the passage from Chen (supra) goes beyond what we understand the Court to have conveyed in that instance with its comment as to validity of protecting views under the RMA. We understand that the matter at issue was the suitability of a particular height in relation to a resource consent for a discretionary activity, rather than the suitability of general height controls (albeit in a localised area) in a district plan.
122. The Court held that the protection of views was given effect to by the rule that sets the height limit at 9 metres (a height which obviously does not preserve everyone's individual view, hence the objection by the neighbours). We read this to mean that the Court was referring to views as a general amenity of the area, to be protected, rather than individual views, to be protected.
123. The Court had then considered the impact on the view from the neighbour's property, an individual view, because one of the criterion in the plan for assessing discretionary activities was "the extent to which the increased building height will result in decreased opportunities for views from properties in the vicinity". However, even at this point, the individual view is not to be given full protection but instead is a factor to be weighed against others in the consideration. In that case the Court found that the decrease in opportunity for views would be minor in extent.
124. The Act contemplates that a plan may contain provisions which ensure that views are a factor to be considered in respect of proposed development and use of land. The method used in the Proposed Christchurch City District Plan appears to be a good example of this. Nevertheless, if a building height control which determines what will generally be appropriate in an area is to be used, then the height would be established with only general views from the area in mind, as one aspect of amenity values to be protected. If individual views had been protected at the point of setting the height control then the criteria relating to impact on views of neighbouring properties would be redundant in the assessment.
125. We note in a critical part of his cross-examination Mr Daysh acknowledged to Mr Lynch that the views of the residents of Grass Street are an important aspect of the pleasantness, coherence and amenity of the sites they occupy. We conclude from this and the submissions of counsel for the appellants that private views are a legitimate aspect of amenity values, to be evaluated along with other factors such as sunlight, privacy, and wind effects when setting height controls in a district plan. However, when setting a general control such as a height limit in an area, the views from individual properties should not necessarily be protected from all obstruction.

Functions of the Council: s.31

126. Section 31 specifies as follows:



"Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

- (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
- (b) The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:
...."

127. In these proceedings therefore we note that it is our task to assess whether the council achieves the integrated management of and control of the effects of the use, development or protection of land and other resources in Oriental Bay in its review of the objectives, policies of the district plan and its implementation of new objectives, policies and methods in the proposed plan. As Mr Aburn stated, it is the (perceived) effects of the proposed use and development which are to be managed, not the use or development itself (which more properly relates to any resource consent process). When looking at a plan change, less weight is placed on effects which would be specific to a proposal, especially where there is no evidence from those directly affected: see Queenstown Property Holdings Limited v Queenstown-Lakes District Council C 11/98. In this case we have had detailed evidence of the effects of the proposed Oriental Bay Height Area Rules on the residents and public and proceed to assess them accordingly.

Effects on Amenity Values

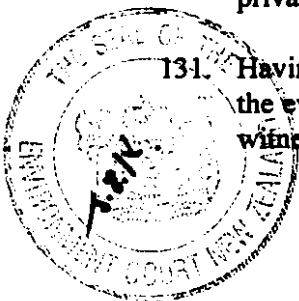
128. As noted the council has the function of controlling any actual or potential effects of the use, development or protection of land. In these appeals the main effects of the proposed height rules are those on amenity values. Mr R Schofield, planning witness for the s.274 parties to the Grass Street references set out the purpose of height controls in the proposed plan, namely:

1. To promote in conjunction with other controls the protection of the amenity values of properties within an area. In this respect the purpose of height limits, along with other development controls such as recession planes, is to promote the maintenance of a minimum standard of amenity values within properties across an area without undue preference to any particular property(ies).
2. To protect overall amenity values in terms of the local townscape and streetscape. In this respect the purpose of height limits is to ensure the buildings are compatible with the scale, harmony, coherence and character of a vicinity.

129. It was Ms Popova's evidence that residential amenity values have various dimensions. These range from private amenity values (such as access to sunlight, views and privacy) associated with the residential quality of individual buildings, to amenity values with more public interest such as neighbourhood character, streetscape quality and impact on public space.

130. The principal issues raised under the heading Amenity Values in the summary of the council's s.32 analysis put in evidence, appear to echo this opinion for they raise issues of loss of privacy, shadowing, views and character.

131. Having also considered the definition of amenity values in s.2 of the Act, we intend to review the evidence in the context of the aspects of amenity values identified by the council and other witnesses. We note at the outset that we do not accept the notion that height limits and



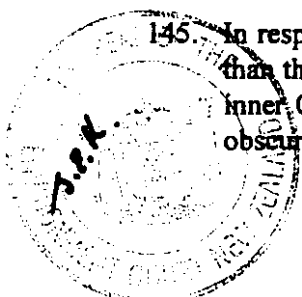
recession planes should promote "a minimum standard" of amenity values querying whether this is what the RMA requires under Part II of the Act.

A. Private views

132. A number of witnesses gave evidence on the potential effects on private views of development up to, and beyond, the 19 metre height limit in the 282 - 300 Oriental Parade area. These included expert witnesses and residents who would be personally affected. They provided evidence in the form of photographs, computer models and cross section diagrams.
133. Mr Daysh for the council considered that the 19 metre limit would have some impact on residential amenity and that there would be some loss of views enjoyed by 1, 3 and 13 Grass Street. However he saw these views as being in the category of private views and therefore not legally sanctioned by the provisions of the Act.
134. Mr P W Saxton, resource management consultant, for both the Grass Street and Hay Street appellants, and Mr K Collins, a consultant architect for Mr and Mrs Park, Apex Properties and Mr Neal, both noted that if all the properties from 282 - 300 Oriental Parade were developed to just 13 metres, there would be a complete loss of views of the Bay and cityscape from properties at 1, 3 (still have upstairs view), 5, 5A, 7, 7A, 6, 8, 9, 9A, 11, and 11A Grass Street. Mr Saxton stated that the properties at 13 and 17 Grass Street, 2A Wilkinson Street, and 296 Oriental Parade would suffer a partial loss of view with a 13 metre development.
135. With a 19 metre development from 282 - 300 Oriental Parade, Mr Collins emphasised there would be no additional adverse effects on views for those properties significantly affected by the 13 metre development. He stated that only 13 Grass Street would be affected by the 19 metre development and not by the 13 metre development.
136. In contrast, Mr Saxton stated that the 19 metre would further restrict views from 13, 15, and 17 Grass Street as well as upstairs at 3 Grass Street, and would also reduce the visual amenities of a number of Wilkinson Street dwellings. He also stated that although a 10 metre limit with a 2 metre allowance for hipped roof construction would block some of the views presently enjoyed from lower Grass Street dwellings, the gaps between buildings and roofs would allow some opportunity for a more pleasant living environment.
137. However, it should be noted that these two witnesses approached the evidence with quite different briefs. Mr Saxton considered development on every site from 282 - 300 Oriental Parade, whereas Mr Collins focused on the impact of development at 282 - 286 Oriental Parade, these being the properties of the s.274 parties he represented.
138. It was Mr Daysh's opinion that for various reasons 294, 298 or 300 Oriental Parade are not likely to develop in the immediate future. But the other five properties fronting Grass Street are more likely to be redeveloped within the life of the proposed district plan because the buildings are smaller and the sites could accommodate larger buildings under the proposed rules. He stated that in the worst case, all five could have their titles amalgamated and one building constructed of five-storeys in height for the full depth of the property. There would be no side yards and building coverage would be 100% of the site. There would be a 56%/20% height control plane or sunlight recession plane starting at the rear of the boundary. He stated however that such a development was unlikely because there is a need for natural light for the buildings so development to the full depth of the property is unlikely. Secondly, there is likelihood that the properties will be developed initially in groups of two or three. Thirdly, there is a need for outdoor space usually in the form of a deck as well as some outdoor circulation space.

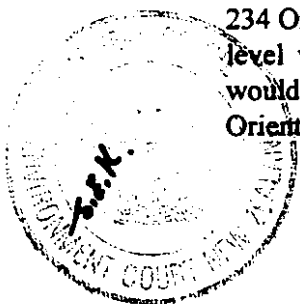


139. Under cross-examination Mr Collins' assessment of little effect on views was questioned. Where the sea view was lost, this was regarded as little effect because the foreground and background (skyline) were not affected. In a question from the Court as to the impact of development on views, particularly when people live there to enjoy this amenity, Mr Collins stated that views are always difficult to retain. Account must be taken of the actual and potential surroundings. He stated that the appreciation of a view was personal to the viewer. He also gave as an example of where he was involved as an architect in designing a house to maximise the view, but then a neighbouring development took it away anyway.
140. In cross examination by Mr Mitchell, Ms O'Sullivan acknowledged that 3 Grass Street was not far behind 294 Oriental Parade, which is listed as a heritage building so redevelopment was unlikely, meaning some view would be retained. However, she maintained the building could be burnt down or removed.
141. Mr Roger Walker, a consultant architect, gave evidence on behalf of appellants Wright/O'Sullivan and included some comments on the impact on the view from 3 and 15 Grass Street, as well as presenting some photographs illustrating the impact potential development would have on views from these properties. He stated that two areas of Oriental Parade create "inlets", one being Grass Street, and that these are critical geographical and amenity aspects of the bay which are not appropriate 'to bury' under the height effects of high rise buildings on the frontage. He argued for stepped buildings following the form of the terrain. He stated that a great number of those who live in Oriental Parade do so for the views, and that it is not sound planning to simply give these away to even taller buildings on the frontage. He cited Monaco as an example of a city where low rise buildings are sited closer to the coastal fringe and the higher ones stepped up the hills for those behind to take advantage of the views. Queenstown was given as another example with its relatively small buildings grouped close to the lake allowing views from properties behind.
142. Mrs Aylene Drewitt gave evidence as the owner/occupier of 2A Wilkinson Street. She stated that most of her outlook had been obliterated by Wharenui, and the main remaining outlook is to the north over the properties between Olympus and Inverleith. Therefore, a high wall of redevelopment along that area would adversely impact the remaining views, and have a serious effect on the properties behind. Even the 13 metre limit would affect many of the Wilkinson Street dwellings. Mrs Drewitt also presented in support letters from two of her neighbours who were unable to attend the hearing.
143. Mr Foot stated that the views from 13 Grass Street would be seriously affected by a 19 metre development (or 22.8 metres under the council's discretion), and the views from 17 Grass Street would also be affected. He stated that:
- "The height zone has virtually no planning controls. It allows 100% coverage, therefore no private open space. There is no control on amalgamation. There is a discretion to go from 19 metres to 22.8 metres. There are no side yards, there are no rear yards, there are no design controls. The rules for the height zone would appear to be more liberal than for the office areas in the CBD."
144. The 16 metre height limit has been in existence in the Hay Street area of Oriental Parade since the transitional plan was first notified in 1979. But the 6 metre rear yard provision has now been deleted and a sunlight access provision only introduced where sites adjoin properties such as 2 and 6 Hay Street.
145. In respect of views the bulk of the evidence for the Hay Street area was from residents, rather than the experts. Mr Daysh, for the council acknowledged that 2 Hay Street would lose current inner Oriental Bay views from the rear of the property, but stated its existing view is already obscured to a degree. He stated the loss of the existing view from 6 Hay Street would be more



noticeable as the house currently looks out over 230 Oriental Parade, the existing structure with the lowest height.

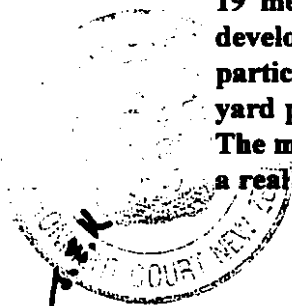
146. Ms Helen Foot, the owner and occupier of 2 Hay Street, stated that her property currently has from the lower floor, view shafts to the harbour and city between existing properties; and from the upper level, views of the harbour and city above the roofs. It was alleged that development to 16 metres would obliterate the view of the water currently available above the existing properties, and would remove the current feeling of open space.
147. In Ms Foot's opinion, views are the most important factor to consider when setting height controls because it is the major reason why people want to live in the area. She stated that she had spoken to the owners of other Hay Street properties and they were also concerned about the proposed height limit for the area.
148. In response to a question from the Court Ms Foot acknowledged that raising the Moran house at 234 Oriental Parade by around one metre to accommodate garages underneath as proposed would be acceptable to her. She acknowledged also that the two properties next to the Athfield building had less impact on her property, her major concern being what might happen to the Grain of Salt and the Moran sites, both of which are already over 13 metres in height.
149. Mr C Blair, an occupant and co-owner of 5A Hay Street, stated that the wonderful view across the harbour to the north, and the attractive if somewhat restricted view of the city across roof tops were some of the unique attributes of his property. He presented in evidence a photograph taken from the window in the front room of the property. While it is only a viewshaft to the city, he regarded it as important to retain given that Kensington Apartments blocked the majority of the views.
150. From the indicatory lines drawn on the Blair photograph, development up to a 16 metre limit would block out the views of the bay now available, and development up to 19.2 metres (with the 20% discretionary addition) would block out all of the view of the CBD. Mr Blair also commented that the situation was even worse for his downstairs neighbour, who was currently in poor health and did not give evidence on her own behalf. In Mr Blair's opinion a design guide as suggested by the s.274 parties would do little to improve this view of the rear of a large building.
151. Mr C Lambert, joint owner of 8 Hay Street, included two photographs to illustrate how the view from his property would be affected. He considered the imposition of the service areas of buildings would be a serious contamination of the view, even if he could still see over the top of the buildings. If any buildings went to 19.2 metres he would lose all view of the harbour. In cross examination he acknowledged that the photographs were taken from above the 16 metre level, and that if all the properties were developed to the 12 metre limit then the view of the Parade itself would be blocked anyway.
152. Mr Saxton stated that any increase in height above normal third floor level will reduce the visual amenity presently enjoyed from dwellings situated in lower Hay Street. He acknowledged that the cliff rising along the rear boundary of the Oriental Bay Height Area makes it possible to have taller buildings on the western sites, those being 228 and 230 Oriental Parade, provided there is a minimum rear yard to ensure reasonable sunlight, and some form of side yard set back at second floor level to allow sun through the gaps in winter, and provide relief from an otherwise stark outlook. However, he considered this does not apply to 232 or 234 Oriental Parade as 2 Hay Street is at a lower level, and any increase from the current height level will substantially reduce visual amenity. In cross examination he confirmed that he would want the height limit to mirror the topography of the hill behind the buildings on Oriental Parade.



153. With respect to the issue of raising the Moran property to incorporate the garages, Mr Saxton stated that to raise it one metre would be acceptable because there would still be the view to the sides of the property, but raising it any higher would be a problem. Ms Moran told the Court that her family had no plans for developing their property apart from relocating the garages.
154. In response to a question from the Court Mr Saxton stated that the extension to the Kensington Apartments, which is lower than the 37 metre height of the main building was not designed to accommodate views. It does little for sunlight and nothing for the views.
155. Mr Nicholls, as an owner of one of the Oriental Parade properties in front of Hay Street, confirmed Mr Daysh's evidence that he did not see much development occurring in the Hay Street area of Oriental Parade for 10 years. He considered something wonderful could be done with this part of the Parade and that the owners need to come together and to see that each party's amenities are properly protected. He stated that as the rear sites are very steep, frontage developments could be stepped back directly from the front sites.
156. Mr Nicholls acknowledged to Mr Robinson the importance to the views from 2 Hay Street of the side yards between the houses on Oriental Parade, but maintained this was an issue on any future development which could be satisfactorily addressed at the time of resource consent applications. He also acknowledged however that 2 Hay Street was better off overall with a 6 metre yard provision than otherwise (he pointed out it is actually 8 metres), but he went on to say that a lot of areas would be disadvantaged with a 6 metre yard overall.

Evaluation

157. Mr Schofield, for the s.274 parties, stated that, in his opinion height controls may legitimately be used to protect views that are generally obtained from an area. Such controls are imposed, he stated, not to guarantee views from any one individual property, but to generally protect and enhance vistas obtained from a large number of properties in an area.
158. We were told by the council's witness and counsel that the underlying basis for the height limits was historical under the transitional plan. We were told that it was thought particularly desirable for the properties on the frontage to develop their full potential because of owners' development expectations, as well as a considerable doubt (in council's mind) as to what would be the appropriate level of development for a residential site in this area. We were told that under the proposed plan the height limits had been determined by questions of urban form and owners' expectations! In the light of the references in the previous plans to the need for views protection (see pps 12-14 of this decision) we concluded this was a limited opinion. Given that views have been so historically important in Oriental Bay we find the lack of continuing recognition of their significance a matter of concern. Particularly so, when under the RMA so much emphasis is placed on amenities of which the experts agree views are a part.
159. With such issues in mind, we considered Mr Daysh's statements regarding the potential for development in the next planning period very carefully, but concluded that we cannot guess what might or might not be under threat of immediate development. Endorsing a 19 metre height limit (with a discretion to go higher) means anyone may potentially develop to that height without notice. We cannot afford to leave the issue as it is, particularly as the appellants in the Grass Street references are unable to win relief on the yard provisions due to the lack of the Court's jurisdiction to consider the matter further. The maximum rear yard that may be imposed in this location is 1 metre. Because there is a real risk of potential title amalgamation, for there is more capital gain in doing so, a 13



metre height limit would assist in retaining the buildings as separate entities. This would ensure view shafts were retained as well as providing for some of the views of those behind to be retained. We note that Mr Daysh acknowledged to Mr Lynch that the 6 metre rear yard requirement was deleted because a number of properties along Oriental Parade backed to a hillside or escarpment - but that he acknowledged too that is not the case with 282-300 Oriental Parade.

160. Mr Daysh in fact acknowledged to Mr Lynch that height is the main determinant of the amenities of the Grass Street residents. He acknowledged that a 13 metre development in that location on Oriental Parade is virtually the same height as a 10 metre building to the rear. And he agreed that a 13 metre development would have far less effect on the amenities of those to the rear than would a five and half storey building (19 metres). He agreed there would be a degree of over-dominance of the properties behind from a five storey building at close range. We consider a building with only a one metre rear yard to be at close range so there would be a degree of over dominance. Mr Daysh acknowledged too that the properties on Grass Street where it merges into Wilkinson Street would lose some of their (visual) aspect also.
161. The most significant point about Mr Collins' evidence for the s.274 parties was that it did not include an assessment of the effects on the Grass Street properties which would result if a 19 metre development continued from 288 - 300 Oriental Parade as he had not been asked to look at this area. Mr Collins pointed out that the listed heritage houses were unlikely to develop to that level, that the CBD views were lost either way, but then conceded there would be an extremely dramatic loss of views to 3 Grass Street and a significant loss to 7 Grass Street if such a development occurred - at 19 metres. Similarly, if the 19 metre development were extended along this section of Oriental Parade then 15 Grass Street would lose its view of the Parade and shoreline, and Mr Collins acknowledged this would be a complete loss of view of that area. As to the effects of a 19 metre or 13 metre development on views from the seaward side of Oriental Bay, he stated these would be dramatic and houses in the middle distance would be substantially removed from sight. But we reminded ourselves that if developments went only to 13 metres then the side yards would be more likely to remain, providing the glimpse views of the lower slopes for which this part of Oriental Parade is so renowned.
162. Some of the witnesses stated that the height limits in the Oriental Bay Height Area vary considerably and in some cases have been very carefully assessed. For example, the properties between Baring and Hay Streets have been set at 13 metres to accommodate the amenities of the rear properties. Mr Foot gave an example of a 13 metre development at 326 - 338 Oriental Parade which at least in terms of size and scale does not affect the views from the properties behind.
163. We were puzzled why Grass Street had not also been assessed so carefully, for it is evident that the Grass Street/Oriental Parade interface is quite different geographically from that of Hay Street and also from much of the rest of the Parade area. It is our conclusion that the sunlight recession plane does not adequately protect views in this area and nor does the 19 metre height limit.
164. Because of the Grass Street topography, (the difference in ground level between that and Oriental Parade is only 2 metres) the potential for this area to become a dark cold largely viewless ghetto if 19 metre developments proceed, is, we fear, a reality. The total lack of planning controls apart from the 19 metre height limit and the sunlight recession plane in the area is therefore considerable cause for reflection.



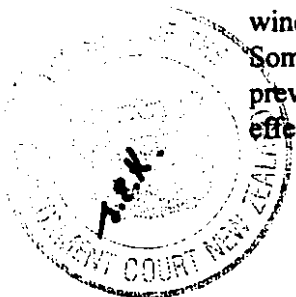
165. The lower Grass Street properties represent a significant physical resource (as do those in Wilkinson Street). In our opinion under the RMA it is not good enough to conclude that because many of them already have their views impaired by existing high rise development, then its acceptable if their residents incur further disruption to those views. This is a limited response to an area which offers extraordinarily beautiful views to its residents. Views should not only be the prerogative of those who live on the frontage.
166. We concluded that not enough attention has been paid by the council to the concerns of the residents about their outward views in those locations which would largely be obliterated by a 19 - 22.8 metre development. We considered whether any proposed design guide provisions would assist in the reduction of bulk but Ms Popova also saw Grass Street as different from Hay Street because of the low lying buildings behind the height area. In that context, she stated, any proposed design guide could only be "helpful". In our view therefore, the actual solution to this problem area rests with a more restricted height limit in the Grass Street area of Oriental Parade.
167. We understood Mr Aburn to say, as an experienced Wellington city planner, that whilst the Grass Street appeals create their own unique problems in respect of the need for rear yards, elsewhere (i.e. Hay Street) the provision of rear yards is not really an issue because the rear properties are located at a significantly higher level.
168. The Grain of Salt at 232 Oriental Parade has the potential to construct one additional floor. Mr Daysh doubted whether demolition would occur and a full depth structure constructed as the building already has a rear extension. He considered 228 and 230 Oriental Parade are much more realistic options for redevelopment within the plan period. And as we understand the evidence it was these buildings which Mr Nicholls stated did not affect rear properties, because there was no-one immediately behind them.
169. It was Mr Saxton's opinion on being questioned and after hearing all the evidence that 228 and 230 Oriental Parade could take slightly higher height limits than would be suitable at the Moran property and the Grain of Salt. The issues in respect of Hay Street are therefore finely balanced. Ms Foot's views will remain intact as long as the Moran property stays with the family, but we cannot rule out that in the long term the owners of The Grain of Salt and 228 and 230 Oriental Parade could amalgamate their titles to form one large block like Kensington. We consider that this would have adverse effects on the properties to the rear which could be more than minor without some further form of amelioration such as could be provided for in a design guide.
170. We perceive one of the problems with a 12 metre limit is that the apex of the hip roofs of the Moran property is already 13.5 metres above mean sea level and the maximum height of the Grain of Salt is approximately 14.6 metres above mean sea level. At this stage of our deliberation the appropriate height controls and the question of rear yards and hipped roof construction for the Hay Street/Oriental Parade frontage remained uncertain as we turned to other aspects of amenity and the question of the proposed design guide.

B. Wind effects

171. Evidence on the wind effects created by buildings was presented, on behalf of the Wright/O'Sullivan appeal, primarily by Mr Michael Donn, a senior lecturer in Building Science at the School of Architecture, Victoria University of Wellington. The issue was also noted to a limited degree by Mr Roger Walker, architect. None of the other parties called evidence on the wind effects of buildings along the Parade.



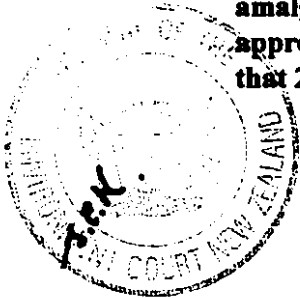
172. Mr Donn stated that Oriental Parade faces directly into the prevailing strong wind, being the northerly, and the direction of the wind is affected by Mt Victoria, which can increase wind flow, or create pockets of calm. From Hay Street to Grass Street the Parade runs east-west, directly across the principal wind direction.
173. The evidence established that Oriental Parade is one of Wellington's most used pedestrian thoroughfares and in Mr Donn's opinion, while maintaining the natural exposure of the beach front to the wind, the council should aim at maintaining as pleasant a wind environment in the area as possible. In his view, none of the buildings on the land side of Oriental Parade seem to have been designed with a quality wind environment in mind. It was his view that the taller buildings will have made wind conditions on the footpath much worse, and in this respect he considered it is fortunate that the main promenade is on the seaward side of the Parade.
174. The witness stated that the council currently requires wind tunnel tests for any building over four storeys high within the CBD. The three principal reasons for this (beyond the obvious point that poorly designed tall buildings will worsen the wind environment) are:
- the pedestrian environment in the CBD is intensely populated so there is a major public benefit from design for wind in this area;
 - most CBD buildings are of a design where they may have an extreme wind effect in their vicinity;
 - while any building may have adverse wind effects, the cost of wind tunnel testing is such (costing between \$10,000 and \$15,000) that it is economically prohibitive to test buildings four storeys, or lower.
175. The aim of the performance criteria in relation to wind effects is to avoid danger and to ensure that over time the trend is towards an improvement in the wind environment. The most stringent criteria are applied to parks and highly populated public areas.
176. Mr Donn stated a 19 metre limit as proposed in the Grass Street appeals, equates to almost six storeys above mean sea level, whilst the 13 metre limit equates to four storeys above mean sea level. Mr Walker stated that while Oriental Parade is outside the CBD, it has the same wind environment and similar building heights. "In fact the degree of direct exposure to the prevailing winds makes the wind effect in Oriental Bay even more critical than the relatively enclosed CBD." He was unchallenged on this statement.
177. Mr Donn stated that if each proposal along Oriental Parade was tested for wind effects then design modifications could be made. Such modifications could include restricting heights to only 10 metres, or allowing a building up to 25 metres with the appropriate design features (he acknowledged that other factors would influence the appropriateness of a 25 metre building such as solar access and views).
178. It was also Mr Donn's evidence that if there were no gaps between buildings, then the wind would be worse as it rolls down the walls and generates more wind down low (where the pedestrians are situated). The buildings behind would receive some degree of shelter but it would depend on the distance between the buildings. Similarly, the seawall offered no protection from the wind - it was just as if the buildings were located on a podium.
179. Aspects of Mr Donn's evidence in this regard were confirmed by Mrs Drewitt who lives in Wilkinson Street, an extension beyond Grass Street. She stated that on very windy days the wind hits Wharenui (39.6 metres high), rolls down the walls and funnels into Wilkinson Street. Sometimes on windy days it is very difficult to exit her front door. The Drewitts had previously obtained expert advice on what could be done to mitigate against such adverse effects but were advised there was no remedy to these difficult circumstances.



180. If the wind environment on Oriental Parade were to worsen, Mr Donn considered it is likely that the present positive public perception of the area would deteriorate. The most environmentally responsible action on the part of the council would be to require wind tunnel testing of any building over four storeys (or 13 metres) in height along all of Oriental Parade (consistent with CBD requirements). In response to a question from the Court Mr Donn acknowledged he would like to have wind effects recognised in a design guide for the Oriental Bay area.

Evaluation

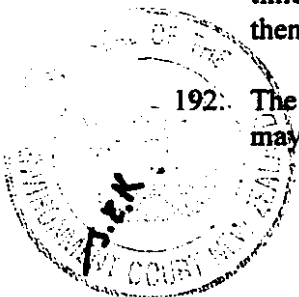
181. We found the issue of wind on Oriental Parade was one that apparently had not been taken into account in setting the proposed height limits and it had potentially serious implications for residents and pedestrians alike. Mr Donn concluded that the effect of the wind from the tall buildings proposed in the Oriental Bay Height Area was such that modifications could include restricting height limits. Mr Donn's evidence was unopposed and not effectively challenged in any cross-examination. The critical mass to attract wind measurement is a four-storey development, (or 13 metres above mean sea level), two measurements which were used inter-changeably. Adverse wind effects are likely to be increased if there are no side yards.
182. Mr Daysh stated in cross-examination that the height limit will not be revisited by the review proposed by council once it has been decided upon by the Court because any review will relate to design only. Whilst wind modelling should be able to be integrated as a requirement into the proposed design guide for a building over four storeys, we are very uncertain as to the legal implications of such a guide which appears not to be prescriptive. We asked the question that if a certain height limit is allowed as of right, what prevents development legally occurring to that height, even if wind modelling results suggest otherwise? We heard nothing in the evidence which would allow the council to lower the proposed height limits in response to such effects. We concluded there is an inherent dichotomy in what the council appears to be seeking to achieve through the application of the principles of any design guide in controlling height limits, but we may be wrong in this. We return to this aspect again elsewhere in this decision.
183. The question for the Court therefore is whether to set conservative height limits in the circumstances of the potential adverse effects of wind on Oriental Parade. Our dilemma too in respect of all the appeals, is that if we do not approve a lesser height limit, the 19 or 16 metre limits in the proposed plan will remain, with no yard restrictions at all other than (now) a one metre rear yard in respect of Grass Street and possibly 6 metres at Hay Street. In wind terms overall, these heights are likely to have worse adverse wind effects than lesser developments. On this aspect we conclude there was much to be said for limiting development to 13 metres on the Grass Street appeals to address the adverse wind effects. And a 13 metre height limit on these sites will effectively ensure side yards remain which will be beneficial to the wind environment.
184. We observe at this point too that if the wind effects of a four storey or 13 metre height limit (with no yard provisions) should attract wind measurements, the same is likely to occur with the proposed 16 metre development for 228 - 234 Oriental Parade. Such a development is likely to create a worse wind environment there also, particularly if title amalgamation takes place. At this stage a lower height limit began to identify itself as appropriate for part of the Hay Street environment at least - Mr Saxton having identified that 228 and 230 Oriental Bay could take slightly higher height limits.



185. Given the public importance of Oriental Parade as a pedestrian promenade and given the northwesterly winds which appear to generally prevail in the area we have concluded that a 13-16 metre height limit is a more reasonable limit until the issue of wind on the Parade could be properly accounted for in the provisions of the Oriental Bay Height Area rules.
186. In this regard we note that the relief sought for some of the Grass Street references and the Hay Street references seeks such further or other relief as the Court thinks fit. We note too from Mr Schofield's evidence that in the proposed plan a 20% discretion above the maximum building height or an encroachment of more than three metres above the sunlight access plane is a non-complying activity for the Oriental Bay Height Area. Such a process in respect of height limits above the 13 metres at Grass Street and 14 or above metres at Hay Street would not unduly deny developer expectations for the area and would also properly inform the residents and public alike of the potential effects of the various issues (such as wind) which could then be properly accounted for through the planning process. We considered at this point in the case that setting a maximum building height and requiring non-complying status to be accorded to any applications above the limits specified, might be an appropriate resolution of the difficulties we perceive in this area.

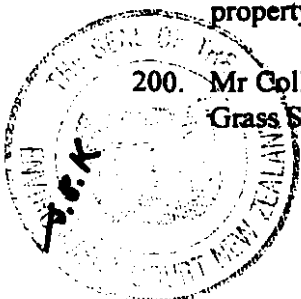
C. Sunlight

187. Two expert witnesses were called to present evidence on the potential effect on sunlight access from potential development under the height controls. Mr Collins as noted earlier, was called on behalf of the submitters Park/ Neal/ Apex. Mr H L Moody, a registered surveyor, was called in respect of the appellants Wright/ O'Sullivan reference.
188. The witnesses each used a different method to evaluate the effects, so their results are not directly comparable. Mr Collins used computer modelling techniques which allowed the consideration of the effects on all parts of the area surveyed at a discrete point in time. He confirmed to the Court he was familiar with the computer system and the appropriate comparison with reality. Mr Moody used a point specific method whereby he used Sunlight Transit Charts to assess the passage of the sun over time from a particular surveyed location. Both witnesses defended the system they had chosen, and both accepted the accuracy of the other method while pointing out its limitations.
189. While Mr Collins' model allowed an assessment of the effect on every point in the area modelled, it was only accurate for the point in time when it was assessed. Although he took an assessment at 7 points in time, at two hour intervals between 7am and 7pm on the 21st day of every second month, this does not provide a measure of the duration of the sunlight exposure foregone.
190. By contrast, Mr Moody's survey technique allowed for an assessment of the duration of sunlight exposure (or loss) but only for a particular point on a site. Mr Moody assessed two different viewpoints on the 3 Grass Street property, and these were carefully and rationally selected. However, it is clear that the sunlight exposure will be different even a metre away from the exact point where it was assessed.
191. In cross examination Mr Collins acknowledged that the duration of sunlight loss was an important factor to consider because a loss for a certain time will have a greater effect during a time when there is limited available sun. He also stated that when there is less available sun then the buildings will block fewer sunlight hours.
192. The two witnesses also considered different areas of development and different areas which may be affected. Mr Collins focused on the effects on the properties at 1, 3, 5, 7, 9, 11, 13, 15,



and 17 Grass Street, and only considered potential development of 282 - 286 Oriental Parade, Mr Moody focused solely on the effects on 3 Grass Street, but took account of potential development from 282 - 300 Oriental Parade. He stated in evidence that this did not mean there were no shading effects on other Grass Street properties, just that he had focused on one property.

193. Both witnesses assumed that where development did occur it would be of the maximum bulk allowed in the proposed plan, given the height limit of either 13 metres or 19 metres, and taking into account sunlight access controls.
194. Mr Collins' study assumed full sunlight, and ignored any shading effects from vegetation and landscaping (eg fences). He noted that the incidence of overcast days in Wellington will generally halve the real impact of shading created by a building as calculated in the sunlight study. Mr Collins also took daylight saving into account, whereas Mr Moody did not. It was also noted by Mr Collins that in his opinion the effect of a difference in shading on the face of a building of less than 10 % will be difficult to perceive, and could not be considered as even a minimal effect on sunlight.
195. In cross examination Mr Collins stated that the model focused on the effects of the development and not the effect of the adjacent hill which gave considerable shading especially to 3 Grass Street. In a letter included in Mr Collins' evidence from 3D CAD Works, which confirms the product used for the modelling and the assumptions made, it is stated that there will be some inaccuracy in the shading in early morning and late afternoon due to the eastern and western hills of Wellington being omitted from the model. The impact of the hills would reduce the impact of shading from any development, by reducing the sun available in any event. In cross-examination it was established that only 24 of the 84 samples gave an accurate indication of shading.
196. In his summary, as to the difference in effect on sunlight access between a 13 metre and 19 metre development Mr Collins considered the effect on 1 and 3 Grass Street would be minimal, with some evening shading on the west face in summer. This was mainly due to the impact that a 13 metre development would have on these properties in any event and the fact that the sunlight access of 1 and 3 Grass Street would be more affected by properties north of 286 Oriental Parade (ie 288-300 Oriental Parade).
197. Mr Collins considered the effect on 5, 7, 9, 11, and 13 Grass Street would be little or very little, with some mid afternoon shading during winter. In his assessment there would be no effect on the sunlight access for 15 and 17 Grass Street from a 19 metre development on 282 - 286 Oriental Parade.
198. Mr Collins stated that some shading of properties by neighbouring properties is almost inevitable in any closely settled urban situation. It will be a question of fact and degree whether shading is excessive in any particular situation. In his view the shading on the properties in Grass Street from development of up to 19 metres would not be excessive, and certainly not significantly worse than that which would occur with a 13 metre development.
199. Mr Collins concluded that the sunlight access controls are an effective method of maintaining the amenity values of properties behind the Parade, and any reduction in height limits is consequently not justified. He concluded there is no public benefit in terms of amenity values derived from reducing the height limits and it is primarily for the benefit of a few private property owners.
200. Mr Collins acknowledged in cross examination that there would be a shading effect on 1 and 3 Grass Street if 288 - 300 Oriental Parade were developed to the maximum area a 19 metre limit



would allow. He also acknowledged that shading effects on, for example, the driveway of 3 Grass Street were not assessed as the faces of buildings are the easiest way to measure the loss of sunlight. However, he noted that a 13 metre development will shade as much as a 19 metre development at the boundary, and it is only at a distance from the boundary that the difference will appear, so the fact the results do not include shading of the ground does not impact on the conclusion to any great extent.

201. Mr Moody chose two viewpoints from which to assess the duration of sunlight lost by the development of the properties between 282 - 300 Oriental Parade to either 13 metres or 19 metres. Viewpoint 1 was selected to represent the effects on sunlight in the vicinity of the outdoor deck at first floor level on the western side of 3 Grass Street. This is the principal useable open space for the occupants of the site. Viewpoint 2 was selected to represent the ground level area on the driveway outside the garages, as the area is frequently used by the occupants for vehicle maintenance and general recreation (a fact confirmed by Ms O'Sullivan).
202. Mr Moody acknowledged that Mt Victoria already blocks a significant portion of early morning sunlight to 3 Grass Street. Viewpoint 1 does not receive direct sunlight before 10am throughout the year. That is an existing daily loss of some 3 hours in winter and 5 hours in summer.
203. The witness considered sun loss in three ways, firstly as the difference between the amount lost under a 13 metre development, and under a 19 metre development, secondly as a percentage of sunlight lost from a 13 metre limit, and thirdly as a percentage of sunlight lost from a 19 metre limit.
204. Importantly, the comparisons made by Mr Moody, in the text of his evidence and in the tables of results on the drawings produced, were between the current state of development (less than 13 metres) and the 19 metre potential. This differs from Mr Collins who compared the two potential development options.
205. The most dramatic loss of sun from Viewpoint 1 is during the winter solstice (June 21), when the site, as currently developed, receives 5 hours and 30 minutes of direct sun, and would receive 4 hours and 45 minutes sun with a 13 metre development, but only 20 minutes sun with a 19 metre development. At the summer solstice, a 13 metre development would involve no loss of sun and a 19 metre development would cause a 35 minute loss of sun.
206. From Viewpoint 2 on the driveway outside the garages an area frequently used by the occupants for vehicle maintenance and general recreation, according to Mr Moody, there is a loss difference of 3 hours 35 minutes between the 19 metre and the 13 metre height limits on 1 May and 2 hours 20 minutes for the 1 April. These are significant differences in our opinion.
207. It was Mr Moody's view that direct sunlight was even more important to amenity values during the bleaker winter months because it reduces dampness and improves the general health of individuals.
208. In cross examination Mr Moody acknowledged that the bulk of the shading effects on 3 Grass Street would arise from development of 286 - 294 Oriental Parade and mainly the middle of those properties, being 286 - 290 Oriental Parade.
209. In respect of 2 and 6 Hay Street Mr Daysh considered that a reasonable amount of daylight and some direct sunlight would still be able to be achieved within the 16 metre limit, because, he stated, both of the properties are at a higher level and both have windows which face to the east and west and provide light. He concluded that the potential for loss of sunlight is not to an extent which could justify a height reduction, particularly due to the change in elevation



between Hay Street and Oriental Parade. He also did not believe a 16 metre development was realistic in the planning period.

210. For the Hay Street appellants Mr Saxton explained that to ensure some mitigation could occur to overcome adverse situations, the sunlight access is based on a control line rising vertically 2.5 metres from the natural ground level at the boundary and then inwards at a prescribed angle. The angle of an inclination for the properties at 228 - 234 Oriental Parade is 45° although he stated there is some difficulty stated in ascertaining natural ground levels in this area due to various property improvements over time.
211. Mr Saxton took the average natural ground level adjacent to 2 Hay Street as 7.0 metres (that is slightly higher than that shown on the development plan of a new development at Oriental Parade) and the natural ground level adjacent to the structure on 6 Hay Street as 9.5 metres. He confirmed these heights from aerial photography taken in 1972 to establish contour levels in the Oriental Bay area. He applied the sunlight access rules on that basis and on the premise of buildings being developed without a break to a 16 metre above mean sea level height limit to ascertain the effects on 2 and 6 Hay Street.
212. He concluded that a 16 metre development would not affect sunlight to the upper windows of 2 and 6 Hay Street. However, there would be some loss of sunlight to the lower rooms, and this would be particularly apparent in winter (May to August). Mr Saxton also stated that to retain current sun levels to lower rooms then the maximum height of buildings at 228 - 234 Oriental Parade should be 14 metres above mean sea level.
213. Mr Horlor who lives at 6 Hay Street stated that in his opinion the removal of the rear yard requirement with a graduated height restriction does not do anything to protect or retain acceptable levels of sunlight on his property, particularly during the winter period when the sun is low in the sky from the north/west and west aspect.

Evaluation

214. Mr Schofield for the s.274 parties agreed that sunlight access was a major component of amenity values. Ms Popova also stated from an urban design perspective, views and sunlight are the essential ingredients of the residential character of the area and the important qualities of this existing character should be reflected in any new development. We therefore began our evaluation of sunlight/shading from this collective basis.
215. In respect of the Grass Street references, Mr Moody produced an exhibit (Exhibit H) which indicated that only one of Mr Collins' sun samples fell within the critical area for assessing the loss of sun to 3 Grass Street. It seems this is primarily because Mr Collins' study only took into account the effects from 282 - 286 Oriental Parade, which have minimal effect on 3 Grass Street.
216. We also note that on Mr Collins' summary of sunlight effects for 9 Grass Street, there would be 80% additional shading at mid-afternoon on both the north and west face of the building in winter (June), yet this is characterised by Mr Collins as being of little effect. Similarly, for 7 Grass Street the north face would have additional shading of 80%, 40% and 70% at mid afternoon for April, June and August respectively. Again this was characterised by Mr Collins as being of little effect.
217. We had considerable difficulty with accepting Mr Collins' conclusions. He did not quantify the duration of the sunlight loss. We concluded that a 19 metre height limit at Oriental Parade will have major adverse effects on the sunlight amenity of a number of the Grass Street residents. If set at 13 metres these effects would not be so major.



218. Mr Nicholls stated that whilst the rear yard requirement on the properties fronting Hay Street was a vertical 6 metres, it is now angled to allow better sunlight coverage into rear properties. In the opinion of the s.274 parties this change is an improvement for the rear sites whilst limiting the ability of the developers to construct to their fullest extent the top level of any buildings. There will, it was stated, be smaller top floors as a result of the requirement. Nevertheless, Mr Daysh acknowledged, a 16 metre height limit meant there would be a loss of sunlight and daylight to the Hay Street houses behind the Parade. We note in this respect that he acknowledged to Mr Robinson that residents can survive quite properly in a property which gets adequate sunlight and daylight (even if views are restricted).
219. It was Mr Saxton's conclusion that a reasonable amount of sunlight would be four hours of direct sunlight into main living spaces per day 10 months of the year. To achieve this at Hay Street a height limit of 14 metres would need to be set. Mr Saxton's finding on the effects of sunlight on the rear sections of Hay Street were challenged to the extent that he acknowledged that Mr Nicholls' figures would allow slightly better sunlight access to 2 and 6 Hay Street than he had first thought.
220. But Mr Saxton's conclusion overall appeared to have merit for it would be compatible with the existing height of the Moran property and the Grain of Salt as well as allowing a reasonable amount of sunlight to the rear. On the other hand he stated that tall buildings have their place but not where they would have houses behind them - and this is just the case with 228 and 230 Oriental Parade.

D. Privacy

221. Privacy was a further amenity value which would potentially be affected by the height controls, and the evidence related to both Grass and Hay Streets. It was noted by Mr Doherty, a registered valuer giving evidence on behalf of some of the s.274 parties, that very few properties in inner residential areas have privacy from adjacent properties. The topography and intensity of development means the outdoor environment is often overlooked by others. This view was shared by Ms Popova and Mr Saxton who also gave evidence on privacy. However, Mr Saxton said the situation was improved by requiring space between buildings, especially yard requirements. A remaining problem with apartment blocks is adjacent windows facing each other, and elevated courtyards. Ms Popova said such issues must be dealt with, and were a suitable topic for a design guide.
222. The residents also expressed their concern over the potential intrusion into their privacy if apartment blocks were established along the frontage. In particular Ms Foot stated that there are already windows in the Kensington apartments which look directly into hers.
223. Mr Schofield, on behalf of some of the s.274 parties, stated that the building setback required by the sunlight recession planes would limit the adverse effects on privacy of high development. However, Mr Saxton was adamant that an additional adequate rear yard provision was required.

Evaluation

224. Mr Daysh told us that the decision was made to delete the rear yard requirement as a number of properties along Oriental Parade back onto hill or escarpment resulting in the waste of scarce land. We however note the value of the existing rear yard provisions as a control on adverse effects on privacy in such areas as Grass Street, and part of Hay Street, where the height differential is as little as two metres. But we also agree with Ms

Popova that protection of privacy in this area may best be dealt with by a design guide. This issue is addressed further in a later part of this decision.

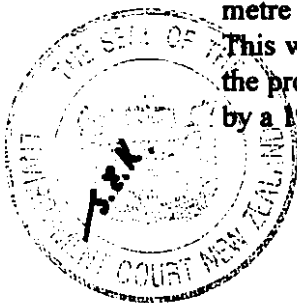
225. We accept too that within an intensively developed inner residential area, the degree to which privacy can be protected by bulk and location controls will be increasingly limited. Hence we do not find protection of privacy to be a pivotal factor at this stage in respect of determining the appropriate height given the range we are working within. The potential for overlooking of outdoor living areas or of windows would not significantly change from a 13, 14, 16 or 19 metre development, in either Grass or Hay Street.

Conclusion on Effects on Amenity Values

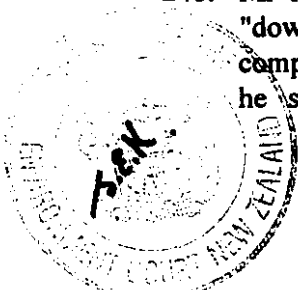
226. In the preceding pages we have set out our evaluation on the various aspects of the amenity values identified by the witnesses. When each of these is placed together to form a generality of amenities, we find the adverse effects of the proposed provisions for the Oriental Bay Height Area to be more than minor, both in their impact on the natural and physical resources of the Grass Street area, and on this part of Oriental Bay as a whole.
227. Hay Street provides a more complex situation because of its very different topography. All the evidence indicated that 228 and 230 could comfortably develop to 16 metres without adversely affecting the properties behind. However, 232 and 234 Oriental Parade would have adverse effects on the visual and sunlight amenities of 2 and 6 Hay Street if developed beyond 14 metres. The impact on the wind environment is also a concern if development is beyond 13 metres.
228. To go beyond 14 or 16 metres in this area could increase the adverse effects on the amenity values of the rear properties, which means the 20% discretionary limit may not be appropriate for this area either because the council would process any applications on a restricted basis.

Development expectations/ transfer of value

229. "Roadside" valuation evidence was given on the basis that it illustrated the potential loss of value to the properties on Oriental Parade and Grass Street by the change of height limit with the setting of any height limit. This was perceived by the council and the s.274 parties overall as being a transfer of value from one set of properties to another, to the detriment of those on Oriental Parade.
230. Mr H Doherty, a registered valuer, gave evidence on behalf of Apex Properties Ltd/ Park/ Neal. The focus of his evidence was to demonstrate the redevelopment potential of properties at 282 - 286 Oriental Parade under either the 13 or 19 metre limit. His figures showed that with current land values and the market for residential apartments, a 19 metre development would be marginal, and a 13 metre development would be clearly uneconomic, realising less than the current combined property values. If profit factors were taken into account, the 19 metre development would give a profit close to \$4 million whilst the 13 metre development would give a profit factor of only \$2.5 million.
231. Mr Doherty also considered the impact on the value of the rear Grass Street properties of the potential height limits. He concluded that the only property to be adversely affected by a 19 metre limit would be 13 Grass Street, with the estimated reduction in value around \$75,000. This was based on the fact that a 13 metre development would also impact on the views from the property and the fact that none of the other amenities of the property would be impacted on by a 19 metre development.



232. Mr Kirkcaldie, a registered valuer, gave evidence on behalf of appellants Wright/ O'Sullivan, on the impact a 19 metre development of 282 - 300 Oriental Parade would have on 3 and 15 Grass Street. Based on the evidence of Messrs Aburn and Moody, and Ms O'Sullivan, Mr Kirkcaldie concluded that a 19 metre development would impact on 3 Grass Street by causing a significant loss of sunlight during winter afternoons, an absolute loss of aspect to the immediate waterfront, harbour, city and city backdrop, and an unquantified loss of privacy. The impact of a 19 metre development on 15 Grass Street would be a slight loss of sunlight to the front of the site, a partial loss of aspect to the promenade and foreshore, and an unquantified loss of privacy - to a lesser extent than 3 Grass Street.
233. These impacts were quantified in terms of the six factors which Mr Kirkcaldie regarded as being the only factors which would affect land value. These factors, which had a maximum discount value, were: location (10%), access (15%), contour (20%), views (25%), sunlight (20%), and privacy (10%).
234. In his opinion, a 19 metre development would impact on locality, views, sunlight and privacy. He also considered that the impact would be most severe on 3 Grass Street. He estimated that under a 19 metre limit the value of the property would be discounted by \$220,000, a 26% reduction in the total value. He estimated that the value of 15 Grass Street would be discounted by \$80,000 with a 19 metre limit, which represented an 8% reduction in the total value.
235. In respect of the Hay Street references, Mr Nicholls gave evidence that the group of Oriental Parade property owners he represented have accepted (i.e. not challenged) the high rates levied by the council and continue to accept that their buildings are rated on the development potential of each site, not on the existing building.
236. It was his evidence that the reduction of height limit from 16 to 12 metres on that area of the Parade would reduce the value of the properties by 25% because it would reduce development by one floor in four. The value he calculated as on commercial incomes from ground floors balancing the values associated with views from the upper level apartments. Mr Nicholls also stated that if Hay Street residents were successful in reducing the height limits, they would succeed in transferring wealth from their neighbours to themselves because this would increase their property values due to the improvement in their views. Their benefit would be major - though not as much as the loss to the group he represented.
237. A number of witnesses provided evidence as to the rates applying to their properties which was questioned as being inaccurate or incomplete. In order to remove any dispute, the council was requested by the Court to provide the rating information for the past 13 years for the properties in issue on Oriental Parade, and Grass and Hay Streets.
238. In comparing the 1997/1998 year for all the relevant properties, 1, 3, 13 and 15 Grass Street, and 2, 6 and 8 Hay Street, and 286, 288, 290 and 294 Oriental Parade had rates at the lower end of the spectrum (\$1,300-\$2,900), with 5 Grass Street and 228, 230, 282 and 284 Oriental Parade, in the middle range (\$3,000-\$4,000), and 234, 298 and 300 Oriental Parade having higher range rates (\$4,000 +), with 232 Oriental Parade, a commercial property, having a different rating structure.
239. A related issue raised in submissions was the existence of a legitimate expectation in respect of retaining certain plan provisions unless there is a compelling public reason to change.
240. Mr Mitchell submitted that under the TCPA the Planning Tribunal had been reluctant to "downzone" in the face of longstanding development expectations unless there was a compelling reason to do so (without quoting any case law). Consistency had some importance he submitted, beyond equity, in order to maintain conditions to promote sustainable

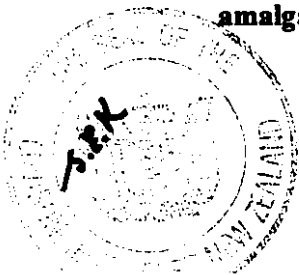


management and the economic wellbeing of the people and communities. Continuity is to be reflected in maintaining social and economic conditions rather than retaining specific plan provisions.

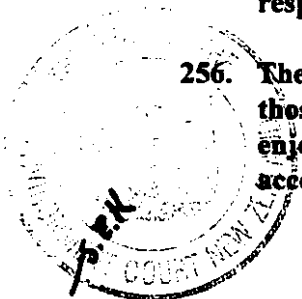
241. In closing submissions Mr Mitchell submitted that there had to be a solid s.32 analysis to establish a need for a change before it would be appropriate; that it is not up to the Court to "pick a winner", in terms of transferring value. In his submission it is the rear property owners who were being speculative in buying properties when the Oriental Parade height limit is high, in the hope of either no development to impinge on amenities, or a change in plan provisions.
242. Mr Wiltshire submitted that the parties had a legitimate expectation that the plan provisions would not be changed without a compelling public interest requiring the change. In respect of those he represented the 19 metre limit had been in place for many years, and they had placed some reliance on the control's existence.
243. While the longevity of a provision does not necessarily justify its retention, Mr Wiltshire submitted that it could give rise to a legitimate expectation that development can proceed to the extent allowed by the rule except for some compelling public interest. Expectation should not be destroyed to provide a private benefit to the rear property owners, it can only be done to preserve/provide a public benefit. Where the existing controls satisfy Part II of the Act, and the section 32 analysis, there is no reason to change them.
244. It was also submitted that the longevity of the provision signals to parties the type of development to be anticipated, and the development potential should be taken into account for valuation of both front and rear properties.
245. Mr Lynch submitted there were public interest factors in the wind effects, urban design and public views to justify a change to the plan provisions. The 19 metre limit was regarded as a 'mistake' as it does not comply with requirements. He submitted there was no right to retain the height control at 19 metres because it had been wrongly set in the first place (although we note it was not appealed while it was in the transitional plan!). The opportunity to review the situation means there is a full reconsideration of all plan provisions, under the RMA, and it is not fettered by past considerations.
246. Mr Robinson submitted that any right to develop is always subject to the council's statutory power to change or review a plan without compensation. There had never been a right to the limit, just an ability to take advantage of it while it existed. However, he acknowledged there is an expectation that plan provisions will not change arbitrarily.
247. Mr Foot submitted that the review is the appropriate time to correct past mistakes and "downzoning" is appropriate where it is done in the public interest, as in this case.

Evaluation

248. We had no evidence to support the council's attitude that the property owners at the rear of Oriental Parade were being speculative in buying their properties. In fact in some cases that assumption was patently wrong on the facts, so we put the submission to one side. In any event, Mr Robinson made the point that under the 1972 planning scheme it was only if a developer owned a site or sites large enough that there could be said to have been any expectation of large scale development. So it seems the potential for large scale developments on the sites in question in these appeals stems from the site coverage and amalgamation provisions in the proposed plan - which are a very new phenomena.



249. Based on the figures provided by both Mr Doherty and Mr Kirkcaldie, it is clear that if a 19 metre limit is imposed then the value of the rear properties in Grass Street will reduce, and if a 13 metre limit is imposed the value of the front properties will reduce. To say one is a greater loss than the other however is fraught with some difficulty, not the least of which being the nature of valuation evidence, based on estimations, albeit expert opinion.
250. Mr Doherty stated (basing his evidence on two hypothetical developments) that if the height limit is set at 13 metres at 282 - 286 Oriental Parade, the reduced redevelopment value of that site will flow on to all other properties within the immediate vicinity. We took this to be not only adjacent properties on Oriental Parade but on Grass and Wilkinson Streets as well. But in answering a question from Mr Robinson, Mr Doherty stated that in his opinion there would be no additional adverse effects on 1 and 3 Grass Street from a 19 metre development as opposed to a 13 metre one.
251. Mr Aburn was asked how, as a planner, he reconciled the transfer of value with the definition of sustainable management in respect of economic well being. He stated that there would be a transfer of amenities if the 19 metre limit were allowed so this balances the ledger. It was his evidence that sustainable management includes all resources, not just those buildings at the front of the Parade the subject of the height limit.
252. Mr Lynch submitted that the valuation evidence shows that the 19 metre limit does not allow for sustainable management of the properties at 3 and 15 Grass Street.
253. Mr Mitchell stated that there would be no redevelopment of 282 - 286 Oriental Parade if the limit were 13 metres, but Mr Aburn replied that examples of development at such a height were 160 and 340 Oriental Parade, plus there were the refurbishment options of existing residences (some substantial ones towards the Roseneath end of the Parade were cited). Mr Doherty confirmed this opinion stating that in his opinion there were equal opportunities for both kinds of re-development to occur. We agree.
254. Mr Mitchell submitted that the impact on property values was not to be considered as an effect in itself because property values are a reflection of all effects on the property. Mr Lynch brought the Court's attention to a passage in Chen v Christchurch City Council (supra) where His Honour Judge Jackson enunciated this concept at pages 18-19:
- "[Valuation evidence as to the reduction in property values because of interference with views] needs to be carefully used because it can lead to "double-weighting". A valuation is simply another expert opinion of the adverse effect (loss) being assessed by the Council or Commissioner (or Court) (see *Goldfinch v Auckland City Council* A 66/95), whereas the Commissioner "also" took into account "a potential diminution in value to the Ireland's property". Such a valuation can be used to confirm the Council's opinion of the scale of an effect but not as an additional or separate factor."
255. In respect of the Chen decision, we respectfully adopt this assessment of the use of valuation evidence. The relevance of the valuation evidence given by both Messrs Doherty and Kirkcaldie as to the reduction in value of certain rear properties is the quantification of the adverse effects on certain amenity values due to the 19 metre development. This was clearly acknowledged in Mr Kirkcaldie's methodology. The adverse effects have all been considered in detail earlier in the decision, and as stated by His Honour Judge Jackson to place separate weight on the valuation evidence in this respect would be to "double-weigh" these factors.
256. The reduction in the value of the rear properties is not so much an economic effect on those property owners, as a quantification of the effects on the amenity values currently enjoyed. In this respect, the price paid for the property (which would have taken into account the height limit, as discussed below) is also of lesser relevance. Therefore, the



valuation evidence provided as to the reduction in value of certain Grass Street properties is not a relevant consideration, having already assessed the impact on amenity values such as views, privacy and sunlight.

257. We accept that the valuation of a property will generally reflect the impact of current relevant plan provisions, and a prudent buyer will always consider what may be built around the area when assessing an appropriate price for a property. Therefore, to some extent the impact on the amenities of the rear properties will have been accounted for in the purchase price. To now reduce the limit to 13 metres will directly increase the value of the rear properties by removing the potential for an adverse impact on the amenity values and this must be acknowledged.
258. We accept it would be improper to lower the height limit for the sole purpose of taking into account the impact on those amenities when the impact has already been provided for. This would be equivalent to an applicant compensating an objector to obtain his/her consent, and then the decision maker continuing to take account of the objection.
259. In the case of a proposed plan, it is appropriate nevertheless to start with a 'clean slate' when considering proposed plan provisions for first time under the RMA: see North Shore City Council v Auckland Regional Council [1997] NZRMA 59, 73-75. However, one must also bear in mind the effects of the longevity of the provision, and any reliance on it, as discussed above. While it is not appropriate to amend a provision in order to bestow private benefits on one party, at the cost of another, this is not the case where there are public as well as private interests at stake. Planning controls under the Resource Management Act 1991 do not exist to create vested property rights. They exist to promote the sustainable management of resources in terms of s.5 of the Act.
260. In these appeals there are matters of public interest to consider, such as wind effects, urban design issues, and public views. If an adequate s.32 analysis demonstrates that the rule is not appropriate or necessary then it should not be retained, irrespective of any private reliance upon its existence. The economic impact on individuals, and on the area at large, is but one factor to be considered within that analysis, but there should be no predetermined preference for an existing provision.
261. In respect of the redevelopment value of the property having a direct influence on the sustainable management of that resource in terms of provision for economic well being, and the efficient use of the resource, we acknowledge that the resources along Oriental Parade should not to be regarded in isolation, and in particular, not without consideration of any detriment to the resources at the rear of Oriental Parade, including properties in both Grass and Hay Streets.
317. As to rating issues, the s.274 parties as represented to us did not all buy their properties in the knowledge that a view for the rear neighbours was not guaranteed (in the light of the provisions of the district plan) and that buildings could be constructed to 19 or 16 metres above mean sea level as of right. The Miet property, for example, at 230 Oriental Parade was bought in 1969, the Moran property in 1951. So these parties, at least, would have had no expectations until 1979 that they could develop to, in their case, 16 metres.
262. And as to the significance of rating values, Mrs Drewitt who lives at the Oriental Bay end of Wilkinson Street, stated the Neal Trust property at 286 Oriental Parade actually had a rating value less than hers. She stated that all landowners in that particular area pay high rates - in her case for 35 years. Other evidence demonstrated that rates along the frontage have declined in recent years.



263. Clearly the properties on Oriental Parade do not necessarily pay more in rates as there is significant variation in land and capital value amongst them. This variation is also apparent amongst the rear properties. In this situation we find the valuation evidence is not determinative, and it is very important for a thorough s.32 analysis to be made.
264. Some of the s.274 parties appear in part to approach the Oriental Bay height provisions in terms only of potential financial gain to the owners of the Parade properties in question. We consider this is only one small part of what is at stake in these references. It is clear that the Oriental Bay environment is a dynamic one and unique in terms of the amenities it offers, not only to its residents, but also to the public.

Urban Form/Landscape

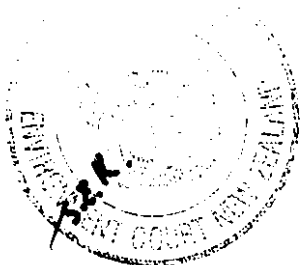
265. It was the opinion of the s.274 parties to the Grass Street appeal, expressed through their consultant urban designer, Mr G McIndoe, that intensive low height development along Oriental Parade, while appropriate for the ordinary streets of the residential suburbs, is inappropriate as the definer to one of Wellington's central and signature open spaces. This view was adopted by the council. It was emphasised that here are the walls of one of Wellington's most important streets, public promenades and public spaces. Mr McIndoe considered that three storey developments which might occur under the proposed 13 metre limit of the Grass Street area are manifestly inappropriate, more closely associated with suburban environments and as a consequence would fail to give appropriate spatial definition to the Parade. He considered the 19 metre limit reinforces the identity of Wellington City which is based upon the concentration of high buildings, occupation and activity of its centre. In his view the 19 metre limit benefits both the quality and sustainability of the city.
266. The witness stated that not only is the average height of the tall buildings 25 metres above mean sea level but also that they constitute the overwhelming majority of the area of the "street wall" facing the Parade. This led him to the conclusion that although Oriental Bay consists of a variety of low and high buildings, the character of the street edge is predominantly determined by the high buildings. He also stated that the proposed plan provides for potential to construct a greater number of high buildings, particularly in the central part of the Parade so that expected pattern of high building may be expected to strengthen and become more dominant over time. He concluded as a result that development to 13 metres would become more and more out of character with the bay as a whole.
267. Specifically, Mr McIndoe's evidence focused on the 42 buildings between Inverleith at 304 Oriental Parade and Matai Moana at 178 Oriental Parade in forming the conclusion as to the average height of all buildings in the area. In respect of height alone he noted in that location: that 31% of the total number of existing buildings rise 16 metres above mean sea level: that 69% of all buildings were lower than 16 metres: that in respect of building frontage width, buildings lower than 16 metres above the mean sea level occupied 56% of the frontage and buildings higher than 16 metres 44%: that in respect of the street facade area, he found that those lower than 16 metres above mean sea level represented 34% of the Parade, whilst buildings above 16 metres represented 66%. He measured the facade area of those buildings which establishes their relative visual weight or the predominance of the two building types. It was his third measure that led Mr McIndoe to arrive at his conclusion that it is the tall buildings that constitute the overwhelming pattern of the total area of the street wall.
268. Mr McIndoe also gave brief evidence on the issue of scale relationship to listed heritage buildings (a 1920s house at 294 Oriental Bay and the 1929-30's apartment building at 300 Oriental Bay). He considered that in relation to these, the 19 metre height limit is insignificant in the context of the Bay as a whole and could be resolved by design measures other than height limitation. Even if only viewed in the context of 294 Oriental Parade, he considered the



result would not be of great significance because of the variety of building types and scales that already share this frontage.

269. It was Mr McIndoe's conclusion on the question of urban design that development to 19 metres offers significant character and urban form benefits whilst having no significant adverse effects. He considered it maintains and reinforces the predominant pattern of development of Oriental Parade, therefore reinforcing the identity of the bay: it allows an appropriate intensification of development at the city centre which reinforces the identity and legibility of the city and is in line with council's urban containment policy: it has a positive effect on the spatial definition of the Parade and on the relationship of building to existing higher development along its edge: it provides the potential to increase the aesthetic coherence of the Parade edge by reducing the visual disorder of the existing variety of heights and visual transition between high and lower buildings. Overall, Mr McIndoe considered allowing development to less than 19 metres in the Grass Street area would detract from the character of the bay.
270. In respect of landscape Mr McIndoe stated that the mass of Mt Victoria is so significant and the green belt so dominant that the 19 metre limit would not obscure the public's perception of those landscapes from the seaward side of the Parade, stating that the ordinary person has only a snapshot of views in any event.
271. Mr Aburn for the Grass Street appellants identified that the important elements of the existing public amenity values of the full length of Oriental Parade are outlook/views and visual amenity, sunlight/shade, streetscape (including heritage values and notwithstanding its variability) landscape amenity, particularly of the escarpment and views of the Town Belt, vegetation and the presence and influence of the harbour.
272. Whilst he acknowledged that some of the greenery perceived from the public spaces is privately owned (so there is no guarantee that it will remain) he introduced in evidence Photo 6 which demonstrated very graphically the inner views of the town belt from the pedestrian area on the sea frontage which would be lost from a 19 metre development at the Grass Street end of the Parade. Other evidence indicated this also.
273. Mr Aburn also challenged the statistical basis for Mr McIndoe's conclusion about tall buildings dominating the frontage of Oriental Parade pointing out that his urban design intention should have been to look at the Oriental Bay Height Area as a whole - the "intention" being represented by the proportionate length frontage that was in each of the height areas depicted in Appendix 4 of the proposed plan, that is, the total frontage from 40 Oriental Parade to 352 Oriental Parade.
274. By applying and detracting 282 - 300 Oriental Parade into both the 13 metre and 19 metre height areas, it was Mr Aburn's conclusion that from a planning viewpoint, the resource management intention of the council, as identified in Appendix 4, is the expectation that buildings of less than 16 metres will take up at least half (ie 51.9%) of the total frontage. If the area 282 - 300 Oriental Parade is neutralised (ie taken out of the equation altogether), the percentage of frontage where buildings of less than 16 metres above mean sea level should prevail is 55%.
275. Mr Saxton for the appellants said this:

"The unique character of the Oriental Bay amphitheatre is one of a range of medium to high rise concrete apartment buildings interspersed with small groups of low mostly wooden residential buildings. The character of the Bay also relies heavily on the older low level wooden houses which range up the small valleys behind Oriental Parade and this total scene being framed by the green areas of the town belt.



It is this variation of height along the Parade, together with views of hillside dwellings and the green belt which is the strength of the townscape. By permitting sets of structures of similar height along the Parade, a solid facade will be formed with the loss of much of the presently visible housing which one presently sees not only from across the harbour, but also as one walks along the much admired pedestrian promenade along the Parade. To lose this variety of housing types would, in my opinion, defeat the urban design form presently admired by citizens and tourists."

276. Mr Walker for the appellants also stated that one of the interesting things about Oriental Parade is the glimpse views of the houses scattered over the hillsides through the gaps between the buildings. He considered the 13 metre scale is appropriate for enhancing such views, for the reality of the situation is that 13 metre buildings would be developed on a site by site basis allowing for the gaps between to remain. Mr Walker considered these glimpse views are part of the Oriental Bay experience and without them there would be a diminution of the quality of the bay - that one looks at the natural aspects such as the water, the beach and the greenery in relation to the built form. And in his opinion a wall of high rise buildings fronting the Parade would diminish the quality of the landform behind.
277. The witness stated that any city is a "library of its buildings" and as such these are part of the richness of the public's perception of an area. He disagreed with Mr McIndoe's reasons for supporting the 19 metre limit at 282 - 300 Oriental Parade stating that it is simplistic to think the edge of the Parade can be controlled through natural forces and that this has been largely successful to date. He disagreed too with Mr McIndoe's conclusion that there is a dominance of large buildings along the bay, considering certain areas of the Parade (such as that proximate to Grass Street) are quite different.
278. Mr Walker also stated that if the current height is effectively increased by six metres, significant change to the scale of the frontage will result in an undesirable change to the visual "comfort" pedestrians currently enjoy. The wall of buildings will be too high in relation to the width of the street and the interesting variations of height setbacks and gaps between buildings will be lost.
279. Mr Lambert, for the Hay Street residents, stated that a major part of Oriental Bay's charm is the relationship between the natural landscape and the built environment, such as the wonderful harbour views juxtaposed with views of charming wooden houses perched on the hillside and the green backdrop of the town belt. He considered that creating a wall of concrete at the proposed level would destroy that relationship as well as adversely impacting on views, sunlight, privacy and outlook - creating a ghetto effect.
280. Ms Popova stated that height limits determine only one dimension of a building's overall bulk and scale. In the context of 100% site coverage, and with the possibility of site amalgamation, she stated height limits alone can do little for streetscape quality. All of these factors in the absence of a design guide could potentially create an uninterrupted sequence of building that might affect the horizontal scale of the street.

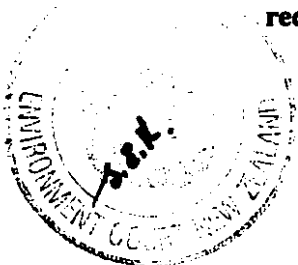
Evaluation

281. There was some disagreement between the expert witnesses as to whether Oriental Bay was (or should be) closely linked in visual and spatial terms to the urban forms of the central city (which is predominantly high rise). There appears to be some move to create such a link by approving higher height limits along the whole of the Oriental Bay frontage. Mr McIndoe as witness for the s.274 parties indeed took the issue of urban form wider than just the Grass Street area but particularly he focused on the urban form of the central curvature of the bay from the headland enclosing its city end at Matai Moana up to the promontory which heads off to the sea beyond. On his argument that two thirds of



this part of the bay is made of high buildings, the height limits should be allowed to 19 metres as a consequence (not the 28 metres allowed in the proposed plan overall) as a result. What he actually measured was the square area of the vertical face of the buildings, some of which are built boundary to boundary with no space around them. He conceded that in his quantitative assessments however that low rise buildings currently predominate.

282. Whilst in urban design terms for a streetscape, we accept that it may be correct to measure in spatial terms what actually exists, this should incorporate the fact that for a proposed character area such as Oriental Bay, (see section 1.9 Evaluation of the District Plan), the majority of the buildings along the frontage of this central area are variable in height and are defined by yards. Because of this fact, they provide for the visual richness which is part of the Oriental Bay landscape. If universal height limits remain as prescribed and without appropriate design guides, the current streetscape quality with its constant expectation of difference will probably be replaced with the blandness of recent comparable developments and with the resulting adverse effect on the environment (a point made by Mr Walker). Currently the gaps between the buildings filter perceptions of what goes on behind the variety of building sizes and architecture on the Parade itself. This may not be so significant in other parts of Oriental Bay but it is our conclusion it is important in this central position. And in this regard we particularly noted Mr Aburn's evidence that it was possibly the council's intention not to provide for a wall of buildings along the Oriental Bay frontage (see Appendix A) but rather to retain a variety of height limits.
283. Mr McIndoe acknowledged that a 19 metre height limit is exceptionally high for an inner residential area. He added however that the Oriental Bay frontage is a special site with quite different characteristics from other inner residential areas (and the council has recognised it as such). He then conceded there is a different character to the land eastwards of Grass Street (he saw a similar local difference under St Gerard's between Brooklyn House and Matai Moana). He acknowledged to Mr Lynch that whilst it is important from an urban design point of view to focus on maximising the quality of the public environment of Oriental Bay and the spacial definition to achieve that quality, it was equally appropriate to look at it in terms of the residential amenities of the people living there. He conceded too that on his analysis the character of the bay was defined by buildings like Wharenui, Oriana and Kensington - which Mr Daysh had acknowledged would not be allowed in the area today. We consider Mr McIndoe's acknowledgements to be appropriately made.
284. We also conclude, as did Mr Walker, that the 19 metre and possibly higher height limits at 282 - 300 Oriental Bay will create a townscape diminution in the legibility of hill, harbour and built forms. The sense of enclosure along the landward side of the Bay which provides Oriental Bay's "strong sense of place" is determined by the buildings and landform on one side, and the harbour's edge on the other. It is not only determined by high rise buildings at the frontage. The visual diversity of the buildings and their relation to the landform constitutes an integral part of the collective character of the area. This should be reinforced and not truncated - as it would be by allowing a wall of buildings along the Oriental Bay Height Area. The natural resources of Oriental Bay should be much more integrated than the lines on the map (see Appendix A) currently allow.
285. In respect of the visual comfort of pedestrians, there is no modulation of building facades to offset this. Design guide principles may offset this but in the meantime they are not required in the proposed plan.



286. Looking at the present inconsistency of building height along 222 - 234 Oriental Parade as well as the significantly greater height of both Kensington and Broadwater apartments blocks, Ms Popova considered that the 16 metre height limit was generally acceptable as it would improve a sense of visual consistency and create an appropriate transition between two recognisably different scales. But in an oral addition to her evidence-in-chief she stated "However the potential building bulk from such a height limit in the absence of appropriate height controls could comprise both the residential amenities of the buildings behind as well as the street scale quality." (our emphasis) Thus the correct identification of the amenities of Hay Street remains critical to our analysis.

Integrated Management

287. Having considered the council's function of controlling adverse effects, we are also required to assess its other relevant function, being the integrated management of the effects of use, development or protection of land and associated resources. The council is required to establish objectives, policies and other methods to achieve this integrated management. It is appropriate to begin by considering the relevant provisions currently in the proposed plan.

A. Objectives and Policies in the Proposed Plan

288. The proposed plan replaces the sixteen different residential zones under the transitional plan with two broad residential areas - the Inner Residential Area and the Outer Residential Area.

289. Most of the Oriental Parade properties, which have frontage on the Parade, are included in the Oriental Bay Height Area. The properties at 292 and 286 Oriental Parade and all other residential properties behind, including those in Grass and Hay Streets are within the Inner Residential Area. In addition to the maximum height of 10 metres above ground level, the Inner Residential Area is subject to a number of other proposed rules including:

- sunlight access control on all boundaries, except on any boundary fronting a road
- front yard of 1 metre
- site coverage of 50% maximum.

290. The structure of the proposed plan is that it takes its colour of right from the identification of qualities and values and specific issues that are regarded as being the significant resource management issues for Wellington. Sustainable management is promoted through a series of General District Plan Objectives such as:-

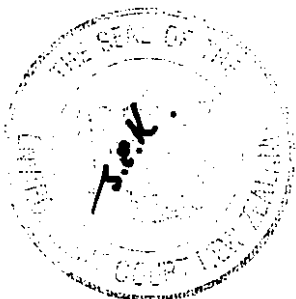
- to maintain and enhance the amenity values of the City.
- to maintain and enhance the physical character of Wellington and in particular of identified areas of special streetscape or townscape character.
- to promote the efficient use of natural and physical resources within Wellington.

291. In relation to these appeals Qualities and Values issues identified as significant matters in the proposed plan are as follows:-

Q1 Efficient City:

"Efficiency is a measure of how resources are allocated or used.

In a city many types of natural and physical resources are used and many types of demands are placed on them. A city can be said to be efficient if its resources are used in such a way that environmental effects are minimised, it functions effectively and it achieves its goals with a minimum of wasted effort, including reducing the unnecessary use of energy and resources."



Q2 Amenity

"Amenity is an important City issue, and the Plan's rules are aimed to protecting amenity values. Amenity values are formally defined in the Resource Management Act. Amenity is an expression of how people value the environment that they live in. Conditions within the City can be positive or negative influences. The success of a City relates largely to whether its inhabitants enjoy living within it.

...

Quality of life involves a range of emotions we have about the place we live in. People will have different perceptions based on their experience and attitudes.

...

A feeling of belonging is encouraged when new development respects places with special character ..."

Specific Issues include:

S1 Containing Urban Development

"The Plan works toward general containment of city expansion and the intensification of development within the existing urban boundaries ..."

S4 Maintaining the Quality of Living Environments

"The residential areas of the city are where the majority of people spend most of their time. The public expectation is that these areas will remain primarily for residential purposes and that existing amenity values will be maintained ..."

S6 Maintaining and Enhancing the Quality of the Built Environment

"The quality of the built environment contributes to the way people relate to and feel about their city. Controls on urban design implications of new building are therefore central to improving the quality of the urban environment. It is also important to protect areas of special character and heritage conservation."

292. The relevant Residential Objectives and Policies are as follows:-

Objective 4.2.1: To promote the efficient use and development of natural and physical resources in Residential Areas.

Policy 4.2.1.1: Encourage new urban development to locate within the established urban area.

Objective 4.4.2: To maintain and enhance the amenity values of Residential Areas.

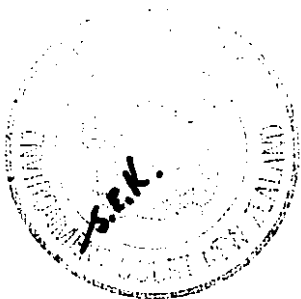
Policy 4.2.2.1: Control the potential adverse effects of residential activities.

293. In the explanation to Policy 4.2.2.1, it is stated, inter alia, that:

"People expect that the amenity standards of the residential areas of the city where most people live will be maintained to a level that sustains people's enjoyment of their suburb. For this reason District Plan rules have been imposed.

...

The sunlight access rules are intended to protect people's access to a reasonable amount of direct sunlight. It is accepted that because of Wellington's hilly topography and form of development, full sunlight in all cases is not possible.



The environmental result will be the maintenance of reasonable amenity standards for residents."

294. **Objective 4.2.3:** To maintain and enhance the physical character of Residential Areas and identified areas of special streetscape or townscape character.

295. To achieve this council will:

- Policy 4.2.3.1:** Control the siting, scale and intensity of new residential buildings to reflect the differences between older and more recent suburban residential areas.

In the explanation to the Policy 4.2.3.1 it is stated, inter alia,

"... The Inner Residential rules are more lenient and acknowledge that development in these areas is more compact and intensive. In both the inner and outer areas the way the rules are applied will permit develop in a manner that affects their general characters. The rules include variations aimed at accommodating different development forms in localised areas such as Oriental Bay.

The environmental result will be the continued development of housing which generally reflects the siting, scale and intensity of the areas."

296. **Policy 4.2.3.2:** Maintain the special character of identified residential character areas.

The explanation to Policy 4.2.3.2 states as follows:

"Within suburban (Residential Areas) particular neighbourhoods have an identifiable or distinct character. Wellington examples include Thorndon and the north end of Mt Victoria around the St Gerard's Monastery. It is Council's view that these character areas should be more fully protected from inappropriate or unsympathetic development. To promote this through education and persuasion, Design Guides are incorporated as part of this Plan. The Guides are also used as criteria for the control of new building.

The benefits of protecting the special character of these areas, which contribute much to the qualities of the city, outweigh the costs of administering and complying with such rules.

The environmental result will be the ongoing development of identified areas in a manner that will maintain their character."

297. **Policy 4.2.3.3:** Control the potential adverse effects of multi-unit residential development.

Methods:

- Rules
- Design Guide (Multi Unit Housing)

In the explanation of Policy 4.2.3.3 it is stated that:

"... Multi-unit housing can significantly alter neighbourhood amenities, particularly where small sites are amalgamated and established development patterns are changed. Council seeks to promote excellence in the design of multi-unit residential developments. To ensure that all multi-units are designed to be compatible with existing residential development and to maintain local amenities, proposals will be assessed against the appropriate Design Guide. The Design Guide identifies various design principles to be followed but does not seek to impose aesthetic control."

298. Although the Multi-unit Housing Design Guide does not apply in the Oriental Bay Height Area (Residential Rule 5.1.3.1), it identifies matters such as:

- ensuring that Multi-unit development fits into an existing neighbourhood in a way that maintains reasonable standards of privacy and daylight for neighbours



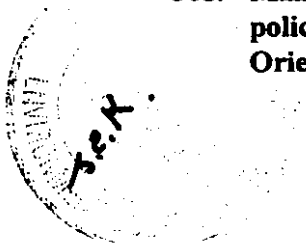
- encouraging responsiveness to the character of each particular site, including consideration of the physical and visual qualities of the street and immediate area
- encouraging good-quality, cost effective design

as resource management issues that need to be addressed.

299. In section 1.9 Evolution of the District Plan, the development of an Oriental Bay Character Area Design Guide has been identified as a special area for further investigation, however this work has not yet been undertaken. The same section records that this plan is the first to be produced by the council under the RMA and provides an opportunity to initiate a new era in planning for the city's health and vitality.

Evaluation

300. After some opposition, but eventually by consent, these appeals were heard together. We have concluded that it was appropriate they were for we do not consider the two areas identified in these appeals should be necessarily considered in isolation either from each other or from the general part of the bay in which they are located, and the evidence raised issues which pertain to the whole of the central area of Oriental Bay. It is not commensurate with the principles of sustainable management that the issues raised are constrained to either just Hay Street or just Grass Street and their immediate frontage.
301. The issue of integrated management envisages that the council should bring together all separate but similar parts of the plan to form a consistent whole to ensure the sustainable management of its physical and natural resources - in this case of Oriental Bay, of which the frontage is only a small part - see Wellington International Airport Ltd v Wellington City Council W 102/97, page 48.
302. In our view with its narrow focus on developers' expectations and urban form, the council does not achieve integrated management of Oriental Bay's resources in the context of 282 - 300 Oriental Parade and 228 - 234 Oriental Parade through the provisions it requires for the Oriental Bay Height Area. When measured against the Qualities and Values tests in the proposed plan set out above (viz Efficient City: Amenity: Maintaining the Quality of Living Environments: Maintaining and Enhancing the Quality of the Built Environment (set out above)), the height control limits and sunlight access provisions for the areas identified, do not achieve overall what the plan in effect sets out to do either for the residents or the public.
303. Nor do the identified provisions accord with either Policy 4.2.2.1 or achieve Objectives 4.2.1, 4.2.3, 4.4.2 and 4.4.3 and they do not meet the standards of control set out in Policy 4.2.3.1. Nor do they effectively address the first part of Objective 4.2.3.
304. As to the provisions relating to urban containment and density - Containing Urban Development and Policy 4.2.1.1, Mr Daysh stated that the council is committed to a policy of urban containment and promotion, where appropriate, of residential infill in the existing urbanised area of which Oriental Bay is a part. He stated that maximising development potential along the frontage in Oriental Bay will assist in achieving these urban containment objectives.
305. Maximising development potential in the Oriental Bay Height Area does assist council's policy of urban containment, although, as Mr Foot pointed out, the conversion of the Oriental Bay frontage to luxury apartment blocks really benefits the few. Nevertheless,



we consider intensifying the development potential along Oriental Parade is justifiable but in a more controlled and careful manner.

306. **We consider that what might allow for greater intensification of the area are more closely integrated developments which follow the geographical contours of the hillsides behind the frontage. This in turn may allow some of those buildings along the Oriental Bay frontage to develop somewhat higher if both public and private amenities are more adequately provided for.**
307. **Mr Mitchell for the council acknowledged in his closing submissions that the effect of testing the evidence in this case means that there is probably an acceptance, particularly in relation to the Grass Street area, that the controls on the rear properties may be unduly restrictive. We agree, but this issue was not directly before us which has created something of a dilemma. None of the Grass or Hay Street appellants thought to appeal the 10 metre height limit set for the Inner Residential zoning of their properties - a point properly made by the council's counsel and Mr Daysh.**

B. Another Method to Achieve Integrated Management

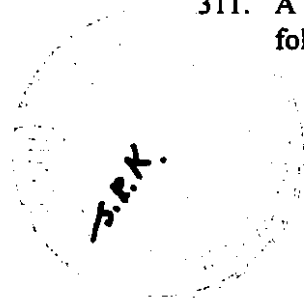
A Design Guide?

308. **The Hearings Committee on these appeals recommended at (h) that the Works and Environment Committee of the council be requested to consider by way of variation or change, the promotion of an urban design assessment to assist in the formulation of a possible design guide for Oriental Bay and to include reconsideration of the existing height controls that became the issue in these appeals.**
309. **It is inevitable therefore that some of the evidence at the hearing was directed at the useful function of a design guide for Oriental Bay despite its not being the subject of the references. Mr Mitchell in his closing submissions also affirmed the council's intended endorsement of a design guide for Oriental Bay in the future and even more recently, this intention has been publicly recorded in a consent order relating to other Oriental Bay Height references: see Mount Victoria Resident's Association v Wellington City Council Decision W 74/98 at pages 3-4.**
310. **Ms Popova pointed out Oriental Bay has a public as well as private dimension both as an important public destination and as a distinct residential environment. As a result the public quality of Oriental Bay and the amenity values of its private residential component are strongly interrelated. She stated:-**

"Oriental Parade plays an important part in defining the spacial quality of the street. In this context building character along Oriental Parade becomes a cause for concern, as it can influence both the character and amenity values of the residential environment as well as the quality and public meaning of the area.

Residential amenity values have various dimensions. These can range from private amenity values (such as access to sunlight, views and privacy) that are associated with the residential quality of individual buildings, to amenity values with more public character such as neighbourhood streetscape quality and impact on public space. Residential intensification has a direct influence on neighbourhood character and streetscape quality."

311. **A key statement made by Ms Popova on the issue of urban design in Oriental Bay was as follows:**



"The quality of the public domain is a major focus of urban design being influenced by the architectural integrity of individual buildings but most of all by the quality of their integration with each other and to the public space they define."

312. It was acknowledged by some of the expert witnesses that publicly significant areas such as Oriental Parade limited only to height and access planes provide insufficient terms of reference by which to maintain amenity values of the area and the public quality of Oriental Parade streetscape. These issues we understand have become a serious cause for concern in the absence of additional design controls. Mr Daysh for the council acknowledged that the blunt controls of a height limit and sunlight access plane need to be tempered through assessment against good design principles. Ms Popova made the interesting observation that whilst the proposed planning controls for 222 - 234 Oriental Parade provide for future intensified potential, the main urban design issue is not the proposed height in itself, but rather the lack of comprehensive framework of appropriate planning and design controls - in addition to the height limits proposed and sunlight access provisions. We return to this point below.
313. Nevertheless it was essentially the evidence of all the experts that the application of multi-unit design guides demonstrates they can facilitate multi-unit development that satisfies both private as well as public concerns. Mr McIndoe gave specific evidence on the effectiveness of the Multi-Unit Design Guide when applied to the city's multi-unit apartments outside the Oriental Bay Height Area. And in supplementary evidence he identified the applicability of some of the Central Area Design Guide provisions to the Oriental Bay Height Area. Ms Popova identified that the Design Guide for Multi-Unit Housing provides qualitative performance based criteria which work in tandem with the relevant bulk and location requirements of the proposed plan. She stated the value of urban design principles for the wellbeing of cities has been widely recognised, acknowledging as it does that the collective form of the city is more important than its individual components.
314. Mr Daysh acknowledged to Mr Robinson that the visual dynamics between the Oriental Parade Height Area and the surrounding Inner Residential Area are very important. He acknowledged they could be addressed by way of design controls for those buildings which front Oriental Parade.
315. Ms Popova explained that sun access planes while critical for monitoring amenity standards do little for the architectural quality of the rear parts of buildings. A building bulk shaped by sun access planes can create unusual forms that compromise the quality of interior spaces (partly alluded to by Mr Nicholls) while contributing little to the architectural integrity of a building's exterior. Building form and location, building scale and relationship between buildings and their surroundings are also important design issues. Mr McIndoe made the point that the height and sunlight access rules do not deal well with the aesthetic coherence of buildings in an area and that what design guide principles allow for is the modulation of building facades and generic design principles relating to neighbourhood context. Mr Mitchell also acknowledged that there was general acceptance that the imposition of design controls for higher buildings on Oriental Parade would be beneficial, not only in the public aspects, but (for Hay Street at least) for private owners as well.

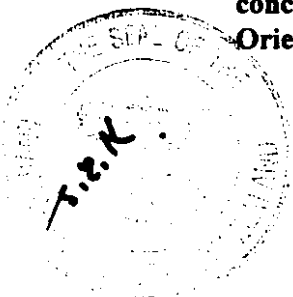
Evaluation

316. We concluded that height limits and sunlight access planes alone have restricted ability to control streetscape and residential amenity qualities. These qualities, as stated by Ms Popova, are determined (in part) by the way individual buildings address key urban design issues. These may possibly include building bulk and form, location, scale relationship to context, overall building composition, visual complexity and the design of building tops. With no restriction on site coverage the building footprint of each new development could occupy the entire site. This, together with the 19 or 16 metres height

316.

limits, could significantly increase the building bulk of individual developments. In the absence of side yard rules and any design guidance for modelling the building bulk, this could potentially result in the creation of a continuous, uninterrupted sequence of visually unrelated buildings. This is critical if site amalgamation occurs especially where there are no existing pedestrian rights of way to rear properties to ensure a gap between buildings.

317. In respect of side yards, there was no provision in the transitional plan for side yards and this has been carried through by the decision of council. It was stated by the council's witness that side yards in this location would have the effect of reducing the available land for only limited environmental enhancement; that whilst there is a need to provide access through the property to the rear this can usually be achieved internally. In any event a small side yard will often be provided to assist in flank wall maintenance. Mr Daysh agreed that a side yard can create gaps between buildings which allow a shaft of view for properties behind and in some cases, this can also allow a small amount of additional light, but maintained that the overall benefits of a side yard are limited.
318. We are not altogether in agreement with that conclusion for the areas in question and from having the evidence in this case. This is not the CBD. It is essentially a residential environment with beautiful views which are enjoyed by the residents and public alike the potential for adverse wind and amenity effects of tall buildings on those behind should be to the forefront for those drawing up provisions for this area. The potential to retain view shafts with side yards in some areas should be a consideration. In the meantime it seems those view shafts can only be preserved by a lower height limit of 13-14 metres.
319. As to rear yards, as noted, the decision to delete these was made because a number of properties along Oriental Parade backed onto a hillside or escarpment resulting often in the waste of scarce land. The sunlight access provisions were established in their place to achieve a similar function. But at the Grass Street interface with the Oriental Bay frontage this is not the case. And in spite of the sunlight access provisions in respect of Hay Street, both Messrs Saxton and Daysh seem to accept that there would be a loss of sunlight to the properties behind and we consider this to be unreasonable. The transitional plan required a 6 metre rear yard - (see Ordinance 9H.6.2 (2)) which, in view of the stated intent in the transitional plan to give more than passing recognition to amenities, is an indication of the council's intent at that time to afford a measure of protection from those amenities.
320. We consider that until this whole area has been re-evaluated, the 6 metre rear yard in respect of the Hay Street references should remain at least in respect of 232 and 234 Oriental Parade because it affords some measure of protection to those behind. Meanwhile we consider the 1 metre rear yard now available as a result of this decision at the Grass Street/Oriental Bay interface is an absolute minimum at this stage in the planning process.
321. Overall significantly increasing building bulk to the heights proposed will compromise important qualities of the streetscape relating to scale, separation distances, silhouette lines, visual coherence and building relationships to street as well as the natural form behind. It is inappropriate in this unique area that the height limits proposed provide insufficient terms of reference in regard to the streetscape and character values. As Ms Popova stated, good urban design is about quality development concerned with regard to its context and achieved within a broad relationship between public and private use. We concluded the design guide is another appropriate method to reinforce the values of Oriental Bay, but it has to be integrated with more specific planning controls.



322. We consider that any such design guidelines should be based on what Ms Popova described as an urban evaluation of the area as a whole, including a thorough and comprehensive analysis of the built form and the natural landform and their relationship to each other. These issues should then be related to kinds of site specific issues identified in these appeals with a recognition of the residential and public amenities of Oriental Parade. We agree (for example) with witnesses like Mr Walker and Ms Popova that more integrated development may be appropriate in some areas (both the Grass Street and the Hay Street areas comes to mind). As all the witnesses and their counsel identified that Oriental Bay has a special character then it should be a basic principle that this character is protected and that its amenity values should be maintained and enhanced.
323. A design guide however would address only issues such as context, scale, visual complexity and form and location. Such a guide relates to issues such as the design of building tops in the foreground of the harbour views from properties to the rear: to guidelines on how to prevent new buildings from visually overwhelming their surroundings: to guidelines for the design of fronts and backs of buildings: and to issues of scale.
324. Mr McIndoe acknowledged to Mr Robinson that a design guide is not necessarily going to provide any interruption to the Grass Street residents' view of a 19 metre development along their boundary and in Ms Popova's opinion (and Mr Walker's) the effect of such a development may create scale issues and adversely affect some of the established qualities of the Oriental Parade streetscape. It could also impact on views to the Town Belt and residences in upper Wilkinson Street from the harbour side opposite 280 - 300 Oriental Parade and elsewhere.
325. Although she was speaking in the context of the appropriateness of a design guide Ms Popova stated that additional measures of control, such as reduced building bulk above a certain height, gaps between buildings, set backs and rear yards in response to the specifics of a particular area could be more effective ways in achieving the desired result of preserving the amenities of Oriental Bay. For in the context of residential intensification, these issues will have direct influence on the character and amenity values of the area. Ms Popova told Mr Mitchell that if lower buildings are allowed there wouldn't be issues of bulk, (but such buildings would create streetscape issues).
326. Whilst we readily acknowledge a need for a design guide for Oriental Bay and appreciate the considerable work that has gone into those that already exist, in its absence we are not dissuaded from our conclusion that height and plot ratios currently remain the principal determinants for the protection of amenity values at Grass Street and Hay Street. The 100% site coverage provision and the absence of yards requires that height limits be reduced and in order to control adverse effects. We note too that the design guide provisions are not prescriptive and are only guidelines.
327. It is our conclusion that Oriental Parade requires a balanced relationship between the benefits of private developments and the quality of the public environment without compromising its established and valued character patterns. New buildings should be designed as integral elements of the collective public frontage which respects the character of their unique setting of Oriental Parade forming the foreground of prominent public views. The height limits and sun access provisions are clearly not the only issue. What is, is the lack of a comprehensive framework of appropriate planning and design controls to ensure that intensified urban development of this area would enhance the public and private quality and overall character of the area - the point made clearly by Ms Popova. On these aspects we accept the appellants' case (and we might add that



relevant part of Mr Nicholl's case and those he represents) that the Oriental Parade frontage should be more closely integrated with the land and buildings behind.

328. We consider we heard enough evidence of the negative aspects of high rise development on the Oriental Bay frontage on both public and private views, on sunlight and on wind effects and the interface between the public and private domain for us to be able to indicate to council that it could be appropriate to review the planning controls for this part of Oriental Bay by way of further study in order to reconsider some of the aspects raised by the appellants as funds become available. Higher height limits for the rear sites would allow for more integrated development envisaged as being more appropriate for amenity retention by some of the witnesses. Only in this way may the area's unique resources be sustainably utilised into the foreseeable future.
329. Meanwhile we concluded that it was important for us to set height limits for the areas in question in order to provide the parties with some certainty. We do not know when the council may be able to undertake a further study of the issues or how long it may be before a variation might be proposed. But there is no doubt at all about the council's commitment to do so.

Duties to consider alternatives, assess benefits and costs: s.32

330. Section 32(1) gives an indication of what is expected of rules in district plans. Two questions (not necessarily in the order given in the provision) in particular arise:-
- Are they the most appropriate means of exercising the council's functions having regard to its efficiency and effectiveness relative to other means?
 - Are the height rules and the other provisions proposed for the Oriental Bay Height Area necessary to achieve the purpose of the Act?
331. In terms of "efficiency" defined in the proposed plan O1 Efficient City (see post at page 46) the proposed Oriental Bay Height Area Rules do not meet the terms of the definition. They are effective only for the owners of the actual sites to which they apply and generally ineffective in relation to the surrounding residents or to the streetscape. They cannot in those terms be "the most appropriate means" of exercising the council's functions. As to their effectiveness relative to other means, clearly even at the height limits proposed, they are not effective without closer integration with a design guide.
332. We accept that until a full review of the Oriental Bay area is carried out, height controls are necessary along the frontage. We do not accept that the maintenance of a minimum standard of amenity values is acceptable in this area. A number of the properties both in Hay Street and Grass Street and the public in general enjoy numerous amenities which would disappear with height controls proposed. Further, as a blanket proposal, the height limits do not ensure that potential buildings will necessarily be compatible with the scale, harmony, coherence and character of the area, nor its natural and physical resources.
333. The RMA requires that amenity values are an issue to which the council is required to give particular regard: s.7(c). Amenities as defined in s.2 are those natural or physical qualities and characteristics of an area that contribute to peoples' appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes. Oriental Bay encompasses all these aspects of amenity in a way that appears to be unique. But in our view the rules for the Oriental Bay Height area do not adequately provide for them. We accept that height limits should not be fixed to guarantee to every single rear property a continuation of its existing amenities. But there should be a generality of effectiveness.



334. Another issue to which the council is required to pay particular regard is the efficient use and development of natural and physical resources (see s.7(b)). As stated the proposed height limits are not efficient in terms of the definition provided for in the proposed plan. Mr Schofield stated that basing his evidence on what Messrs Collins and McIndoe had to say (about amenity values and urban form) the economic cost of a change in policy would be relevant to the benefits that are being sought by the appellants. He stated that they are seeking a transfer of economic benefit from those who live on the Oriental Parade frontage to themselves. As to the economics of the use Mr Mitchell queried how the height controls which have the effect of so significantly devaluing eight properties can be seen as an economically efficient way of protecting or enhancing the properties' amenities.
335. We reject both points of view in the light of what we have said on valuation issues earlier in this decision. No proper costs and benefits analysis was undertaken by the council in respect of these references of which we were aware. If it had been, dollar values might have had to be placed on some of the intangibles Oriental Bay provides.
336. When placed in the context of s.5 of the Act, we find that the proposal does not enable the people of Oriental Bay and the community at large to achieve the objects of sustainable management without avoiding an accumulation of adverse effects which are more than minor.

Determination of the Relief Sought

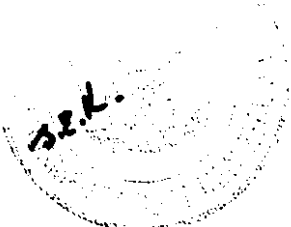
337. We note in this regard the provisions of the Consent Order set out in Decision No. W74/98 (supra). We have deliberately adopted some of the wording of that order so that there is some consistency in this, another related resolution of the Oriental Bay Height references.

Grass Street

338. Having considered all the issues raised:
- (a) the 19 height limit above mean sea level for 282 - 300 Oriental Bay should be replaced with 13 metres above mean sea level.
 - (b) a one metre rear yard is required.
 - (c) any variation above the maximum building height for this part of the Oriental Parade frontage is a non-complying activity.

Hay Street

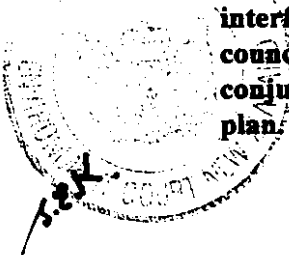
339. Having considered all the issues raised:
- (a) the 16 metre height limit above mean sea level for 232 - 234 Oriental Parade should be replaced with 14 metres above mean sea level. The height limit for 228 - 230 Oriental Parade should remain at 16 metres above mean sea level.
 - (b) a 6 metre rear yard is required at 232 - 234 Oriental Parade.
 - (c) any variation above the maximum building height for this part of the frontage is a non-complying activity.



340. For both Grass Street and Hay Street we require the alteration of the standards and terms so that there is no discretionary activity status for building above the height limits. All such applications will be non-complying activities.
341. We make no findings in respect of hip roofs as sought noting that any design guide will address such issues in the future.
342. We endorse a statement in the residential policy chapter about visual importance of Oriental Bay and a statement that council will undertake an urban design assessment for the whole of the bay with the purpose of including a design guide and a reconsideration of existing development controls. We note the statement in the proposed plan recognises that this work will not be done until the proposed plan is made operative and that it is dependant on annual plan funding.

Conclusion

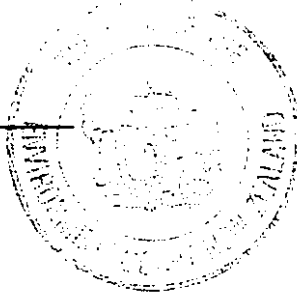
343. This decision is much longer than we intended, as it reflects a great deal of the particulars of the evidence given. We considered the issues raised were of importance to the future development of the resources of Oriental Bay.
344. We are conscious too that there are other references relating to Oriental Bay which are at various stages of settlement and reconsideration. They raise similar issues, albeit in different locations, and we trust some of our findings in respect of these appeals may be helpful in the determination of those.
345. Oriental Bay is a unique area of Wellington with a special character and high land and amenity value. The public significance of the area, as well as the special character of its residential environment needs very special consideration.
346. Some of the most spectacular views of the city and harbour are attained not only from those properties on Oriental Bay frontage, but from some of those located behind. More integrated management of land and buildings in this area is required to achieve a reasonable standard of amenity for both the residents and public alike.
347. Oriental Bay is the only residential area of the city remaining that allows medium to high rise development.
348. Oriental Bay is the most unregulated piece of residential property in the city, especially in respect of design controls and the way the frontage is related to the hills and escarpments behind.
349. In terms of s.31(a) and (b) the effects of the use and development of the land on the Oriental Bay frontage are such that it should be managed on an integrated basis with the physical and natural resources surrounding it. The 19 metre and 16 metre high limits and sunlight access provisions as proposed for the areas of Oriental Parade in question are, on their own, insufficient to achieve this.
350. We accept that in terms of s.32, height rules, in the absence of a more comprehensive analysis of what Oriental Bay requires, are necessary to achieve the purposes of the Act but not to the limits proposed at the Grass Street interface and partly at the Hay Street interface with Oriental Parade. They are an appropriate means of exercising the council's functions to achieve the purpose of the Act, but in this sensitive area only in conjunction with a number of other controls which need to be integrated into the district plan.



- 351. We note in this regard that the transitional plan had a number of provisions which related to the amenities of Oriental Bay. We consider they should be revisited when the council re-evaluates the area.
- 352. In this regard we fully endorse the integration of a design guide with the provisions for the proposed Oriental Bay Character Area noting that its provisions are only prescriptive.
- 353. There will be no issue as to costs as these appeals relate to references to the proposed district plan.

DATED at WELLINGTON this *2nd* day of *September* 1998

S.E. Kenderdine
S E Kenderdine
Environment Judge



rm549-96.doc (nr)

14 m Permitted Height of buildings on site (above mean sea level).

3.2* Spot height (approx.) in metres, - ground level (above mean sea level).

32.3* Spot height (approx.) in metres, - highest point of building (above mean sea level).

ORIENTAL PARADE HEIGHT AREA

Height Legend	
	13 m
	16 m
	18 m
	22 m
	24 m
	26 m
	28 m
	32 m
	34 m

Notes

1 Place names, property numbers and Approximate spot heights are for guidance only. They do not form part of the District Plan.

2 Permitted heights relate to Mean Sea Level.

