

PROPOSED PLAN CHANGE 2 – BUILDING HEIGHT ON SLOPING SITES

QUEENSTOWN-LAKES DISTRICT COUNCIL PARTIALLY OPERATIVE DISTRICT PLAN

EXECUTIVE SUMMARY

A Section 32 report was produced to assess the effectiveness, costs and benefits, efficiency and appropriateness of a range of options for the removal of an anomaly from the residential and township rules relating to height on sloping sites. The allows for the development of a building that would have more than minor adverse effects on the environment in terms of height. The Section 32 has been informed by consultation with Council (on behalf of the community) and the Ministry for the Environment, and relevant statutory and non-statutory documents.

The assessment concludes that the most appropriate means of removing the anomaly from the Plan is to insert a provision into the relevant rules. In essence, the proposed change clarifies and ensures that buildings and structures built on a sloping building platform are assessed against sloping site rules, and buildings built on a flat building platform are assessed against flat site rules. The proposed change is not intended to change the interpretation of the existing rules in any way or manner.

While the Section 32 report considers options such as taking no action and undertaking a complete review and rewriting the rules in their entirety, it concludes that the addition of a provision as a 'stop-gap' measure is the effective and appropriate option, with minimum costs to the community in terms of implementation but quantifiable in results. On the other hand, to take no action or do nothing was considered to be neglecting the Council's obligations under the Act and to rewrite the rules was considered an overly ambitious answer to a simple problem.

The proposed Plan Change, which effects Rule 7.5.5.2(iv)(b), Rule 7.5.6.2(iii)(b), and Rule 9.2.5.2(ii), is summarised as follows (changes underlined):

*"Sloping sites where the slope is greater than 6 degrees
ie greater than 1 in 9.5*

Ground slope in relation to building height shall be determined by measurement over the extremities of each building elevation. Where any elevation indicates a ground slope of greater than 6 degrees (approximately 1:9.5) no part of any building shall protrude through a surface drawn parallel to and 7.0m vertically above the ground.

Where all elevations indicate a ground slope of less than 6 degrees (approximately 1:9.5), then rule xxxxx (x), which relates to flat sites, shall apply."

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Introduction

This Plan Change to the Partially Operative District Plan has been prepared as a means of achieving the purpose of the Resource Management Act (RMA) which is expressed in Section 5 as follows:

“(1) The purpose of this Act is to promote the sustainable management of natural and physical resources”.

Section 31 sets out the functions of territorial authorities. This Plan Change relates to Council's functions under 31(a) and (b) which require –

“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; and

The control of any actual or potential effects of the use, development, or protection of land...”

Section 74 of the Act requires that the Plan Change be in accordance with the Council's functions under Section 31, the provisions of Part II, its duty under Section 32 and any other regulations. In addition regard must be given to:

- Otago Regional Policy Statement (May 2002)

Section 75 of the Act requires the Plan not to be inconsistent with the Regional Policy Statement (RPS) or any Regional Plan. Part 9 '*Built Environment*' of the RPS considers issues such as the quality and amenity of the built environment. This Plan Change is consistent with the RPS as it aims to ensure that urban development does not adversely effect the quality of the built environment (including amenity values) and the use and enjoyment of natural and physical resources.

Terms of reference

This report relates to a Section 32 analysis of the provisions in Part 7 *Residential Areas* and Part 9 *Township Zones* as they relate to height of buildings within residential and township areas throughout the District.

Section 32

Section 32 *Consideration of alternatives, benefits, and costs* states that in achieving the purpose of the Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified an evaluation must be carried out by must be carried out by the appropriate authority.

That evaluation must examine the extent to which each objective is the most appropriate way to achieve the purpose of the Act and whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives. For the purpose of the examination, the evaluation must take into account the benefits and costs of pollices, rules, or other methods, and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

SECTION 32 REPORT

PROPOSED PLAN CHANGE 2 – BUILDING HEIGHT ON SLOPING SITES

QUEENSTOWN-LAKES PARTIALLY OPERATIVE DISTRICT PLAN

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1. Introduction – Proposed Plan Change

This report accompanies Plan Change 2 *Building Height on Sloping Sites* to the Queenstown Lakes Partially Operative District Plan (PODP, the Plan). The Plan Change seeks to remove an anomaly within the Residential and Township Zone rules of the Plan relating to building height on sloping sites. It provides a record of the fulfilment of the Queenstown Lakes District Council's duties provided for in Section 32 of the RMA. These duties include an assessment of alternative measures to the option contained within the proposed Plan Change.

2. Background

Potential problems associated with the implementation of the height rules came to light in a recent resource consent case. As a result of the resource consent, a legal opinion was requested from Council's solicitor, Graeme Todd. Following further discussion between Mr Todd and CivicCorp consents and compliance staff, further anomalies within the Residential and Township Zone height rules were identified. The most crucial of the anomalies is described in a legal opinion from Mr Todd as follows:

"... notwithstanding a site at first glance may appear to be a sloping site where the slope is greater than 6 degrees, if there is in fact a flat area within the site which comprises the area over which the building is to be constructed, then the definition provides that the ground slope is to be measured over the extremities of each building elevation.

In theory the slope of the land immediately below the proposed building could be less than 6 degrees which would then appear to disqualify the site as being a sloping site. Notwithstanding this, the overall slope of the site may be greater than 6 degrees and therefore you may have a situation where a site does not qualify as either a flat site or a sloping site."

The result of Council's legal advice is that, on certain sites, it could be argued that there are no height rules and an owner/ developer could build as high as they wish.

In terms of attempting to enforce height rules upon a building which is in fact a permitted activity (even where this is not the intention of the Plan rules), case law shows that Council does not have the ability to do so. In particular it is stated in case law that the *adverse effects of the height, bulk and location of a building which is a permitted activity are to be taken as having been recognised by the Council in approving its district Plan*. Thus, in the case of an inappropriate development, an enforcement order under s17 (3) of the Act is not available and the Council is left with its hands tied. (See *Cooke v Auckland C.C. & Goldfinch A063/96 2 ELRNZ 271*).

Based on the above findings, Council requested that further consideration be given to the options available to rectify the anomaly. Accordingly, and pursuant to the provisions of the RMA, this section 32 analysis has been carried out and the resultant recommendations put forward to Council for their consideration.

3. Purpose of the Plan Change

The purpose of the proposed Plan Change is to:

Remove an anomaly from the Residential and Township Zone rules relating to building height on sloping sites. The removal of the anomaly will assist in ensuring that development in Residential and Township Zones does not result in more than minor adverse effects on the built and natural environment.

Necessity in Achieving the Purpose of Act

The purpose of the Act is to promote the sustainable management of natural and physical resources.

With particular relevance to the proposed Plan Change, Section 5 of the Act states that:

“sustainable management” means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while -

...

- c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

Further, Section 7 of the Act states:

“In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to -

...

- c) *The efficient use and development of natural and physical resources:*
- d) *The maintenance and enhancement of amenity values”*

It is considered that the purpose of the proposed Plan Change would assist in achieving the purpose of the Act. The change would ensure that people and communities would continue to be able to provide for their wellbeing (through the use of buildings and structures for living, recreation and working purposes) while ensuring that Council has a mechanism in place to avoid potential adverse effects on the environment.

The existing rules relating to building height in residential and township areas, along with the proposed plan change, would continue to provide people and communities with the opportunity to undertake efficient development and use of the land resource while ensuring that such development and use does not result in the erosion of amenity values.

4. Process Used in the Development of the Plan Change, including Public Consultation Undertaken

The First Schedule of the Resource Management Act 1991 requires the Council to consult with the following parties during the preparation of a proposed plan change:

- The Minister for the Environment;
- Those other Ministers of the Crown who may be affected by the plan change;
- Local authorities who may be so affected; and
- The tangata whenua of the area who may be so affected.

With regard to the above parties, it has been deemed necessary to undertake consultation with the Minister for the Environment only, as the other parties are not considered to be significantly affected by the proposed plan change. A representative of the Ministry for the Environment has advised in writing that the Ministry has no comment to make at this time.

With regard to the community, no person is deemed to be affected by the proposed plan change as it is generally understood by the community that the maximum permissible height on sloping sites within residential and township zones is 7.0m, and that where a site is deemed to be flat, an 8m height limit will apply.

Notwithstanding the above, any person would be entitled to make a submission on the proposed plan change if and when it is notified.

5. Analysis: Assessment of Principal Alternative Methods

The following alternatives for achieving the purpose of the proposed Plan Change are considered in the subsequent section:

- 5.1 Status Quo
- 5.2 Take no action
- 5.3 Rewrite the Height Rules
- 5.4 Initiate a Plan Change as a 'Stop-Gap'

5.1 Status Quo

In this case, 'status quo' means leaving the provisions relating to height of buildings in residential and township zones as they are and taking no further action. As stated in section 1 of this report, the current rules would allow development to occur on some sloping sites in residential and township areas without any control of height.

Necessity

As discussed in Section 2 of this report, the Act requires persons exercising functions and powers under it to have particular regard to the maintenance and enhancement of amenity values. Due to the existing anomaly contained within the Plan provisions, the rules relating to height in residential and township areas currently allow for a level of development that would have an adverse effect on amenity values, particularly as they relate to built form.

It is necessary to amend the Plan to ensure that the Council meets its obligations under the Act and that development is consistent with the objectives and policies of the Plan.

Effectiveness

Retaining the status quo would not remove the anomaly in the height rules from the Plan and therefore has no effect in achieving the requirements of the Act or the objectives and policies of the Plan.

Environmental Costs

Environmental costs of retaining the status quo include, but are not limited to:

- Adverse visual effects relating to the bulk and height of buildings and structures;

- Reduction in residential amenity values;
- Reduction in sunlight and increased shading to properties neighbouring buildings in excess of the current height restrictions; and
- Loss in privacy to properties neighbouring buildings in excess of the current height restrictions.

Environmental Benefits

There are no perceivable environmental benefits associated with retaining the status quo.

Incidental Benefits

Landowners and developers would potentially be able to develop sites with significant monetary gains. However, such a benefit is considered to be far outweighed by the potential environmental costs.

Incidental Costs

Should the Council decide to retain the status quo, it is likely that they would incur significant costs through the possible Environment Court appeals and likely orders that would result. For example, in the Hinsen case (Environment Court Decision A150/2003), even though the Council was successful in its appeal, the costs of litigation by far outweighed the award of costs received. As long as the provisions of the Plan remain uncertain, Council would continue to face potential claims relating to the interpretation of rules.

Appropriateness

Having regard to the above discussion, it is considered inappropriate to retain the residential and township rules relating to building height on sloping sites in their current form. Such an approach is likely to lead to more than minor adverse effects on the environment and as such is an inappropriate approach to resource management.

Recommendation

It is recommended that this option be discarded.

5.2 Take no action

Take no action means deleting the existing relevant provisions from the Plan and making no further amendments. Such an approach would allow buildings in residential and township areas to be built without any restriction in terms of height.

Necessity

As discussed in Section 2 of this report, the Act requires persons exercising functions and powers under it to have particular regard to the maintenance and enhancement of amenity values. To remove the rules relating to height in residential and township zones would allow for a level of development that would have an adverse effect on amenity values, particularly as they relate to built form. Such an approach to development would neither achieve the Council's obligations under the Act or the objectives and policies of the Plan.

Appropriateness

It is considered inappropriate to adopt a method that does not achieve the Council's obligations under the Act or the objectives and policies of the Plan.

Recommendation

It is recommended that this option be discarded.

5.3 Rewrite the Height Rules

Given that the existing rules contain an anomaly, consideration can be given to redrafting the rules in their entirety. Such an approach would take considerable research and consultation prior to any proposed plan change being notified and is likely to attract submissions from a variety of interested parties. A potential outcome of this option is a set of height rules and related provisions for the residential and township areas that are very different from the existing provisions.

Necessity

Rewriting the height rules for residential and township areas in their entirety is essentially an overly ambitious answer to a simple problem. While rewriting the rules may have beneficial outcomes, to achieve the purpose of the Act and the objectives and policies of the Plan it is only necessary to amend the provisions to such an extent that any anomalies are removed from the height rules. In other words, with the exception of the anomaly that the proposed plan change seeks to remove, the existing provisions are considered to achieve the purpose of the Act.

Effectiveness

It is considered that rewriting the rules relating to height of buildings in residential and township areas would be an effective mechanism removing the anomaly that currently exists in the height rules.

Environmental Costs

It is likely that the any new provisions evolving out of this option would take some time to come into effect (i.e. to be prepared and notified and to pass through the submission and hearing process). Prior to notification of any proposed changes (which is likely to take some time) there is significant potential for development to occur under the existing rules, which could result in any of the following adverse effects:

- Adverse visual effects relating to the bulk and height of buildings and structures;
- Reduction in residential amenity values;
- Reduction in sunlight and increased shading to properties neighbouring buildings in excess of the current height restrictions; and
- Loss in privacy to properties neighbouring buildings in excess of the current height restrictions.

Notwithstanding the above, if rewriting the height rules was carried out in a timely manner, the potential for adverse effects to occur would be minimised.

Environmental Benefits

Where the rewriting of height rules was carried out in a timely manner and no person was given the opportunity to take advantage of the existing anomaly, environmental benefits would include:

- Retention and enhancement of amenity values; and
- Retention and enhancement of privacy.

Removing the existing anomaly from the height rules relating to residential and township zones would not so much result in environmental benefits as it would ensure that adverse environmental effects do not occur through inappropriate development. The intent of having standards relating to height is to ensure that any development over and above those standards is appropriately assessed in terms of potential effects prior to any consent being granted.

Incidental Benefits

It is considered that the only incidental benefit of this option is that all issues relating to height can effectively be captured in one plan change, therefore saving the Council and community additional costs that could occur through the preparation of multiple plan changes.

Incidental Costs

Redrafting the rules would require significant time in terms of consultation and research (therefore extending the window of opportunity for someone to take advantage of the anomaly) and would likely open up the provisions of the Plan to debate. When considering the purpose of the proposed plan change, this is considered to be a significant cost.

Plan changes by their nature involve a monetary cost to the Council and community.

Appropriateness

The provisions of the Plan relating to height in residential and township zones have already been through a convoluted process that is still, in part, to be resolved. The intention of this proposed Plan Change is not to create a new forum for debate but rather to ensure that the intention of the Plan provisions achieved.

Furthermore, the Council is currently in the process of researching height issues and analysing the height rules of the residential areas as part of a study commissioned in regard to residential issues. Therefore, the Council will be in a better position later in the year to suggest any changes to the existing intent of the rules, should they be necessary. For these reasons and others outlined above, this option is not considered an appropriate method of achieving the purpose of the proposed Plan Change.

Recommendation

It is recommended that this option be discarded.

5.4 Initiate a Plan Change to remove the anomaly from the existing rules without altering their intent

It is possible to remove the anomaly from the residential and township height rules through the inclusion of a simple 'stop-gap' provision. The essence of that provision is to refer plan users to the relevant height rules for flat sites when developing on a flat area of a sloping site.

The proposed provision (refer Appendix A) does not change the intent of the Plan rules in any way, but rather ensures that an anomaly is removed and that the rules can continue to be interpreted in the same manner as they have been over the past six years.

Necessity

As it stands, on certain sites in the Queenstown Lakes District, it could be argued that there are no height rules and an owner/ developer could build as high as they wish to. As noted earlier in this report, Council would have no ability to require a restriction on building height. The proposed Plan Change would remove the anomaly from the height rules, allowing Council to assess development that infringes the height rule. Accordingly, this option is considered an appropriate means of achieving the purpose of the Act and the objectives and policies of the Plan while also assisting in maintaining the integrity of the Plan.

Effectiveness

Rewriting the rules relating to height of buildings in residential and township areas would be an effective mechanism of achieving the purpose of the proposed Plan Change as it would remove the anomaly that currently exists in the height rules.

Environmental Costs

There are no perceived environmental costs associated with this option.

Environmental Benefits

Provided that the proposed 'stop-gap' is implemented in a timely manner, environmental benefits would include, but not be limited to:

- Retention and enhancement of visual and residential amenity values; and
- Retention and enhancement of privacy.

Removing the existing anomaly from the height rules relating to residential and township zones would not so much result in environmental benefits as it would ensure that adverse environmental effects do not occur through inappropriate development. The intent of having standards relating to height is to ensure that any development over and above those standards is appropriately assessed in terms of potential effects prior to any consent being granted.

Incidental Benefits

The primary benefit of such an approach is that the new 'stop-gap' rule would have immediate effect and therefore Council is less likely to face potential monetary costs attempting to protect the environment from inappropriate development, particularly in terms of height.

The plan change process would also allow for public input through the submission process.

Incidental Costs

Plan changes by their nature involve a monetary cost to the Council and community. A plan change such as the one proposed through this option is unlikely to result in total costs greater than \$10,000.

Appropriateness

The environmental and incidental benefits clearly outweigh the environmental and incidental costs. In addition this option is considered an appropriate cost effective method of achieving the purpose of the Act and the objectives and policies of the Plan.

Recommendation

For the reasons outlined above, it is recommended that this option be adopted.

In making this recommendation it is noted that the Council has commissioned a study of residential issues that will include consideration of height matters. It is expected that the results of this study will be available latter in the year, at which time the Council will be in a better position to consider options such as rewriting the rules in their entirety.

6. Conclusion

With regard to the above analysis of principal alternative options it is evident that in order to achieve the purpose of the RMA and the objectives of the Plan, it is necessary to initiate a plan change to act as a 'stop-gap', thus removing the existing anomaly from the Plan rules relating to height in residential and township areas.

The final outcome would be one that is effective and appropriate, with minimum costs to the community in terms of implementation but quantifiable in results.

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Appendix A – Proposed Amendments

The Amendments

“7.5 Low Density and High Density Residential Zone Rules

...

7.5.5 Standards – Residential Activities

...

7.5.5.2 Zone Standards – Residential Activities and Visitor Accommodation in the High Density Residential Zone

...

iv Building Height

...

**(b) Sloping sites where the slope is greater than 6 degrees
i.e greater than 1 in 9.5**

Ground slope in relation to building height shall be determined by measurement over the extremities of each building elevation. Where any elevation indicates a ground slope of greater than 6° (approximately 1:9.5) no part of any building shall protrude through a surface drawn parallel to and 7.0m vertically above the ground.

Where all elevations indicate a ground slope of less than 6 degrees (approximately 1:9.5), then rule 7.5.5.2(iv)(a), which relates to flat sites, shall apply.

Except:

...

7.5.6 Standards – Non-Residential Activities (other than Visitor Accommodation in the High Density Residential Zone)

...

7.5.6.2 Zone Standards – Non-Residential Activities (other than Visitor Accommodation in the High Density Residential Zone)

...

(iii) Building Height

...

**(b) Sloping sites where the slope is greater than 6 degrees
i.e greater than 1 in 9.5**

Ground slope in relation to building height shall be determined by measurement over the extremities of each building elevation. Where any elevation indicates a ground slope of

greater than 6° (approximately 1:9.5) no part of any building shall protrude through a surface drawn parallel to and 7.0m vertically above the ground.

Where all elevations indicate a ground slope of less than 6 degrees (approximately 1:9.5), then rule 7.5.6.2(iii)(a), which relates to flat sites, shall apply.

Except:

...

9.2 Townships Zone Rules

...

9.2.5 Standards

...

9.2.5.2 Zone Standards

...

(ii) Building Height

...

**Sloping sites where the slope is greater than 6 degrees
i.e greater than 1 in 9.5**

Ground slope in relation to building height shall be determined by measurement over the extremities of each building elevation. Where any elevation indicates a ground slope of greater than 6° (approximately 1:9.5) no part of any building shall protrude through a surface drawn parallel to and 7.0m vertically above the ground.

Where all elevations indicate a ground slope of less than 6 degrees (approximately 1:9.5), then rule 9.2.5.2(ii), as it relates to flat sites, shall apply.

Except:

..."