

**CONFIDENTIAL**

30 August 2006

The Chairman and Councillors  
Environment Committee

**PLAN CHANGE 06/02 - 44 TRAFALGAR STREET**

**1. Reason for report**

- 1.1 To obtain confirmation from the Committee that in preparing the Plan Change to rezone the property at 44 Trafalgar Street from 'Open Space Recreation' to 'Residential (Higher Density)', due attention has been given to the consideration of alternative benefits and costs pursuant to Section 32 of the Resource Management Act 1991, and that it is satisfied that the proposed change is the most appropriate way to achieve the purpose of the Act.

**2. Background**

- 2.1. The rezoning of the property at 44 Trafalgar Street, owned by Women in Nelson (WIN), was initially discussed at Committee meetings on 21 June and 3 August 2005, and then formally considered at the 4 October 2005 meeting, where it was resolved that a Residential zoning was appropriate and that the Nelson Resource Management Plan should be changed to give effect to this amended zoning. (A copy of the previous report [6793] is appended as Attachment 1).
- 2.2 Due to a procedural error by staff, the Committee resolution was taken as an instruction to proceed with notification of the proposed change, notwithstanding the fact that the Committee had not formally adopted the s32 analysis. The Proposed Change was publicly notified on 5 August 2006. Two submissions have been received to date, one in support and one in opposition. Because it is recognised that a legal challenge might be successful in overturning a decision to rezone the land, it is considered prudent for the Committee to revisit the Section 32 report and then readvertise the Plan Change.
- 2.3 The matters raised in the Section 32 analysis are straightforward. There are limited options open to the Council in redressing issues of the past. The Committee has accepted that it has a moral obligation to ensure that the appropriate zoning is reinstated, recognised the risks of a potential Environment Court challenge if the zoning is left unaltered, and accepted the costs of a plan change. Given the above factors, a Plan Change is the only effective option open to the Council.

**3. Consultation**

- 3.1 No new consultation has been undertaken

**4. Funding**

- 4.1 Plan Changes are funded from the Environmental Policy Business Unit budget.



**5. Views and preferences of interested or affected persons**

5.1 Women in Nelson (WIN) own the property and have an interest in the zoning of the property.

**6. Significance of Decision**

6.1 This is not a significant decision in terms of the Council's Significance Policy.

**7. Relevant Council policies**

7.1 Nelson Resource Management Plan.

**8. Options**

8.1 The Committee has no option but to withdraw Proposed Change 06/02 as advertised, adopt the proposed change and s32 report as attached, and re-notify the proposed change.

**9. Staff recommendation**

9.1 That the Committee record that it is satisfied that Proposed Plan Change 06/02 has been prepared in accordance with the statutory procedures set down in the Resource Management Act 1991, including the requirements of Section 32 of the Act.

**10. Delegations Register reference**

10.1 *Clause 92: Power to ...Confirm for public notification and submission ... plan changes.*

**11. Recommendation**

***THAT the Committee resolve to:***

- i. Withdraw Plan Change 06/02 as notified on 5 August 2006.***
- ii. Adopt Plan Change 06/02 as attached (Attachment 2 to Report 7022).***
- iii) Adopt the s32 report for Plan Change 06/02 (Attachment 3 to Report 7022).***
- iv) Confirm that Plan Change 06/02 has been prepared in accordance with the statutory procedures set down in Part One of the First Schedule to the Resource Management Act 1991.***

***AND THAT Proposed Plan Change 06/02 be adopted and publicly notified.***

***AND THAT in accordance with Clause 16B(2) of the First Schedule of the Resource Management Act 1991 the provisions of Proposed Change 06/02 have effect from the date of public notification***

*VR Altmants*

V R Altmants  
Chief Executive  
JP:



**CONFIDENTIAL**

4 October 2005

The Chairman and Councillors  
Environment Committee**ZONING: 44 TRAFALGAR ST****1. Reason for report**

To consider the appropriate zoning of 44 Trafalgar Street, Nelson and if a rezoning is considered necessary, to recommend the necessary plan change.

**2. Confidential**

2.1. To protect the privacy of natural persons.

**3. Background**

3.1 The zoning of 44 Trafalgar Street was discussed by the Committee at its meeting on 21 June and 3 August 2005. The issue was whether it should retain its present Open Space and Recreation Zone or be zoned Residential (Higher Density) in the Nelson Resource Management Plan (NRMP).

3.2 Relevant Council records relate to the sale of Lot 1 DP 18211, CT 11C/1244 (44 Trafalgar Street) (Attachment 1), which was subdivided from Lt 6 DP 93, CT99/82.

3.2.1 The house was originally the house for the caretaker of Trafalgar Park.

3.2.2 A valuation report in March 1995 noted the house occupied part of a site zoned Residential C under the then operative City Plan.

3.2.2 An exchange of letters in May 1995 between Women in Nelson (WIN) and the Council about zoning and permitted activities led the Council to confirm "*The present zoning of the property is Residential C. Your proposed use as offices would be a non-complying activity and a resource consent would be necessary.*" (Letter of 3 May 1995)

3.2.3 WIN occupied the property from July 1995 on a rental basis.

3.2.4 The Administration Committee at its meeting on 9 May 1996 resolved to sell the property to WIN. This agreement was subject to a subdivision to cut the house off the balance of the lot, and for WIN to occupy an area outside the title but within the existing fences.

3.2.5 The Council confirmed the sale at its meeting on 9 May 1996.

3.2.6 The land was subdivided by the Council and new titles were issued in December 1996 with the new rear lot vesting as Recreation Reserve in the Council, and the front lot being freehold title and containing the house sold to WIN.

3.3 The recent zoning history of the site can be tracked through Council files for the NRMP.

3.3.1 Under the Proposed District Plan notified on 25 October 1996 the site was zoned Residential (Higher Density) (Attachment 2).



- 3.3.2 A late submission lodged on 21 February 1997 by the Council's Parks and Recreation Department requested this site and a number of other sites adjoining Trafalgar Park be rezoned Open Space and Recreation Zone and that they be included in the schedule for regional reserve RR3 Trafalgar Park (OSs.4). This submission attracted a further submission in support of the rezoning and a further submission in opposition.
- 3.3.3 The Council in its decisions on submissions upheld the submission and rezoned the land as Open Space and Recreation.
- 3.3.4 The Planning Maps as amended by Council decisions in December 1998 showed the site as Open Space and Recreation (Attachment 3).
- 3.4 Several issues arise from this history
- 3.4.1 WIN negotiated a sale and purchase agreement over an extended period on the understanding that the zoning was Residential as confirmed by the exchange of letters in 1995. It did not lodge submissions in response to the Council submission and on the face of it seemed not to have known of the proposal to rezone.
- 3.4.2 The creation of new titles late in 1996 occurred close to the notification of the Proposed NRMP and staff interestingly used an old legal description in the Council submission. The NRMP as Operative in part at 1 September 2004 also fails to use the new legal descriptions for 44 Trafalgar Street even though it purports to give effect to the Council decision on submissions. It could be argued that the schedule at OSs.4 p11-8 is in conflict with the planning map 10 in that the planning map includes land not identified in the schedule.
- 3.4.3 The effect of rezoning freehold title to Open Space and Recreation Zone is to create a situation wherein an otherwise unencumbered title is restricted in the potential use and development of the land to an extent not shared by otherwise similar land on Trafalgar Street, and land within the Residential (Higher Density) Zone. The range of permitted activities in the Open Space and Recreation Zone reflects the zone's purpose being service buildings, aeries, play equipment, and activities permitted by a management plan and the like.
- 3.4.4 There is a potential issue in that the Council, having accepted, heard and upheld a submission lodged by itself, has potentially protected its own interests as the owner of Trafalgar Park when the landowner of a private title was not consulted directly on the matter. This is compounded by the submission being a late submission. On the face of it there has not been a clear separation of Council roles here.
- 3.4.5 WIN has the ability under s85 of the Resource Management Act 1991 to challenge any provision in a plan that renders an interest in land incapable of reasonable use through an application to change the NRMP. The general thrust of the Act is to enable people to make use of their land in a reasonable manner. The identity or characteristics of the landowner are not relevant; it is the potential use of the land that is the issue. The consent process should not be used to address a circumstance where reasonable use is limited or fettered by the NRMP.

#### **4. Consultation**

- 4.1. No new consultation has been undertaken.
- 4.2. Submissions were received on the zoning when the NRMP was publicly notified in 1996.

#### **5. Funding**

- 5.1 Plan changes are funded from the Environmental Policy Business Unit



**6. Views and preferences of interested or affected persons**

- 6.1. Women in Nelson own the property and have an interest in the zoning of the property.

**7. Significance of Decision**

- 7.1 This is not a significant decision in terms of the Council's Significance Policy.  
7.2 The zoning is an important issue for the landowner as it affects the development potential of the land, and affects the standards shaping the permitted use of the site.

**8. Relevant Council policies**

- 8.1. Nelson Resource Management Plan.

**9. Options**

- 9.1. The Committee has the options of confirming the zoning as Open Space and Recreation, or requesting that a plan change be prepared to amend the zoning to Residential (Higher Density) Zone.

**10. Staff recommendation**

- 10.1. That the zoning of 44 Trafalgar Street, Nelson be Residential and that the necessary amendments to the NRMP be brought back to the Committee as a change to the NRMP.

**11. Delegations Register reference**

- 11.1. 92. Power to .... Confirm for public notification and submission ... plan changes

**12. Recommendation**

***THAT the Committee confirm that the appropriate zoning of the property at 44 Trafalgar Street, Nelson (Lot 1 DP 18211) is Residential (Higher Density).***

***AND THAT the Committee resolve to amend the Nelson Resource Management Plan to give effect to this amended zoning for Lot 1 DP 18211.***

V R Altmans  
Chief Executive  
RJ:



**Plan Change 06/02**

**To Rezone 44 Trafalgar Street from 'Open Space Recreation' to 'Residential (Higher Density Area)'**

**NELSON CITY COUNCIL**

**5 September 2006**



## **Proposed Amendments to Nelson Resource Management Plan:**

- 1. Rezone 44 Trafalgar Street (Lot 1 DP18211 NL 11c/1244) from 'Open Space Recreation' to 'Residential (Higher Density Area)'.**
- 2. Amend Planning Map 10 to reflect amended zoning (Refer Map 10 as attached )**

### **Reasons for the Proposed Plan Change:**

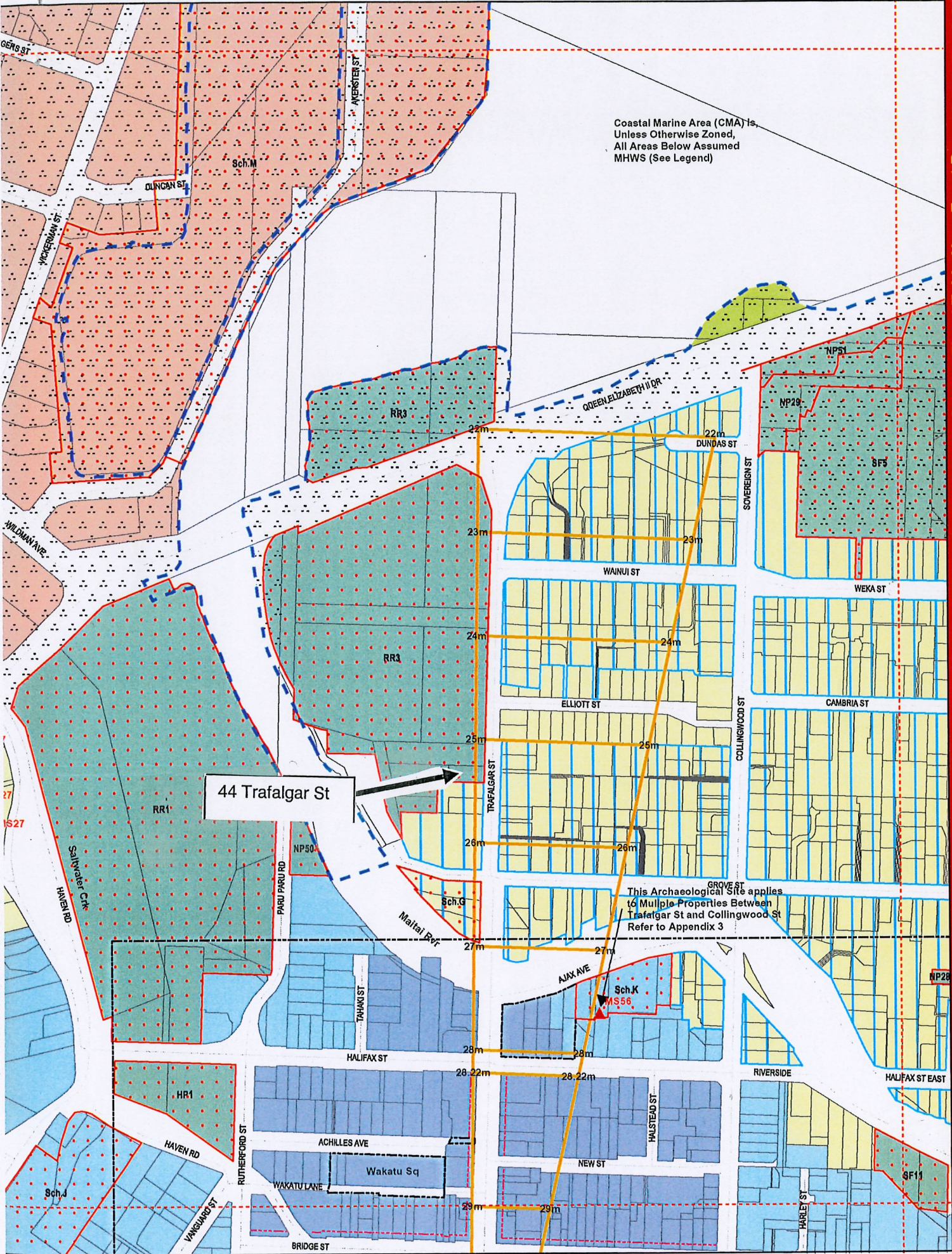
1. The property at 44 Trafalgar Street was originally owned by the Nelson City Council and utilised as a residence for the caretaker of Trafalgar Park.
2. In 1996 the Council sold the property to 'Women in Nelson' (WIN) after subdividing the house lot from the balance of the land. New titles were issued in December 1996, with the new rear lot vesting as Recreation Reserve in the Council, and the front lot becoming freehold title with a 'Residential (Higher Density Area)' zoning. The issue of these new titles occurred close to the date of notification of the Proposed Nelson Resource Management Plan (NRMP).
3. A late submission to the Nelson Resource Management Plan from the Council's Parks and Recreation Department requested that this and other sites adjoining Trafalgar Park be rezoned as 'Open Space Recreation'. This submission attracted two 'further submissions', one in support and one in opposition. The Council upheld the submission and rezoned the land as 'Open Space Recreation'. WIN did not lodge a submission in response to the Council submission, and there is no evidence to suggest that it knew of the proposal to rezone.
4. The effect of the rezoning is that WIN has title to a property with a very restrictive zoning. This is despite the fact it negotiated a sale and purchase agreement on the understanding, confirmed by an exchange of letters in 1995, that the property had a residential zoning.
5. The Council recognises that, by accepting, hearing, and upholding a late submission from itself without consulting the owner of the property, it was leaving itself open to potential claims of acting inappropriately.
6. In order to remedy this situation, the Council has resolved to amend the Nelson Resource Management Plan by way of a plan change, in order that the appropriate zoning for 44 Trafalgar Street i.e. 'Residential (Higher Density)' is applied to this property. ( Environment Committee Resolution of 5 September 2006)



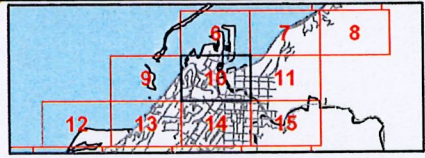
## **Submissions:**

1. Any person may make a submission on the proposed change. You may do so by sending a written submission to the Nelson City Council, addressed to:  
'Plan Change 06/02', Nelson City Council, PO Box 645, NELSON.  
The submission should be either on one of the forms available at the Nelson City Council Planning counter, or in a similar format.
2. The closing date for submissions is **Friday 6 October 2006.**





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**MAP 10**



**Plan Change 06/02**

**To Rezone 44 Trafalgar Street from 'Open Space Recreation' to 'Residential (Higher Density Area)'**

**Section 32 Evaluation Report**

**NELSON CITY COUNCIL**

**5 September 2006**



## **PART 1 – BACKGROUND**

### **1. *What is Section 32?***

Section 32 of the Resource Management Act 1991 imposes a duty on Councils to follow a defined process when preparing, or making changes to, a resource management plan. This process involves the consideration of various options and the appropriateness of any provisions intended for inclusion in the plan.

### **2. *The Components of a Section 32 Analysis***

An evaluation under Section 32 must examine:

- a) the extent to which each objective is the most appropriate way to achieve the purpose of the Act, and
- b) whether the policies, rules or other methods to be used are the most appropriate for achieving the objectives, having regard to:
  - their effectiveness, and
  - their efficiency.

The above evaluation must take account of:

- the benefits and costs of policies, rules, or other methods, and
- uncertainty – the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or methods.

The evaluation must be summarised in a report (referred to here as a Section 32 report) and that report has to be available for public inspection when the plan change is publicly notified.

### **3. *Background to the Plan Change***

#### **a) The Site**

The site is fee simple freehold land contained in Lot 1 DP 18211 NL 11c/1244 comprising 638 square metres.

#### **b) Site History**

The property at 44 Trafalgar Street was originally the Trafalgar Park Caretaker's house, and was later used as staff rental housing by the Council. More recently, it has been occupied by 'Women in Nelson' (WIN), initially on a rental basis, and subsequently as owners of the property. The sale followed a resolution of the Council's Administration Committee (9 May 1996) to sell them the property, subject to the house being subdivided off from the balance of the lot. The record shows the Council to be a willing seller and that it had determined that the dwelling was no longer required by the Council.



The Council had previously confirmed by letter (3 May 1996) that the (then) current zoning of the property was 'Residential C'. Later that same year when the Nelson Resource Management Plan was notified (25 October 1996) the site was given a 'Residential (Higher Density)' zoning.

A late submission on the Plan from the Council's Parks and Recreation Department, received after the formal closing date for submissions, requested that this site, together with a number of other sites adjoining Trafalgar Park, be rezoned 'Open Space and Recreation'. Two 'further submissions' were received; one in support, one in opposition to this submission. In its decision on submissions the Council upheld the Parks & Recreation Department submission and rezoned the land accordingly. WIN did not lodge a submission, and there is no evidence on file that it was aware of the proposal to rezone.

In its dealings with this property, the Council has erred in several respects, from the use of incorrect legal descriptions, to failing to make a clear separation between its different roles as Plan maker, and asset manager. In this case the matter should have been considered and determined by a commissioner. Having become aware of the situation in 2005, and recognising that the owners of 44 Trafalgar Street are currently restricted in the potential use and development of their land, the Council has resolved to amend the Nelson Resource Management Plan by way of Plan Change and confirm the appropriate zoning of this property as 'Residential (Higher Density)' (Resolution of Environment Committee 5 September, 2006).

## **PART 2 – EVALUATION**

### ***4. Description and Assessment of the Proposed Plan Change***

The proposed plan change rezones the property at 44 Trafalgar Street from 'Open Space Recreation' to 'Residential (Higher Density)'.

The proposed change seeks to rectify an error made by the Council in the zoning of this land. The background details are set out in section 3 of this report.

While the actual change to the NRMP is a minor one, it has major significance for the owners of the property. The present zoning recognises the property as part of a regional reserve (Trafalgar Park) and, as one might expect, the permitted activities are those normally associated with parks and reserves, including activities such as public performances, bazaars, exhibitions, the sale of refreshments or souvenirs. These activities may be considered quite inappropriate in a residential zone.

Section 85 of the Resource Management Act 1991 provides that any person having an interest in land, and who considers that a provision of a Plan renders that interest incapable of reasonable use, is entitled to challenge that provision. On application, the Environment Court may direct a Council to modify, delete, or replace the provision which is under challenge.



In this case there is little doubt that the NRMP restricts the owners' ability to make reasonable use of their property by failing to give the property a residential zoning. It would be inappropriate to use the resource consent process to rectify the problem. As the issue is the result of a Council decision, it is only appropriate that the Council should remedy it. The only appropriate way to do so is by way of plan change.

## **5. Relationships between the Plan Change and the RM Plan Objectives**

Section 32 of the Act requires that an evaluation be carried out to "examine the extent to which each objective is the most appropriate way to achieve the purpose of (the) Act."

The Plan Change does not affect any of the Plan objectives. For this reason, no further assessment is considered necessary.

## **6. Likely costs and benefits**

The costs associated with the Plan Change are those which will be incurred through the advertising, processing, and hearing of any submissions, amendments to the planning maps, and any challenges to the Council decision.

Other than the knowledge that it has acted appropriately to redress an injustice caused by the inappropriate zoning of this property, any benefits will accrue to the owner of the property.

## **7. Assessing efficiency and effectiveness**

In view of the history of this property, the Council is morally obliged to ensure that the appropriate zoning is reinstated as quickly as possible. In taking this decision, the Council also accepts the costs associated with rezoning.

Given the situation which exists, the efficiency (i.e. the overall benefits less the costs) of undertaking a plan change is considered to be high, as there is no realistic alternative process.

The effectiveness of the change, or measure of whether it will achieve what is intended of it, is expected to be high.

## **8. Risks**

Where there is any uncertainty, or insufficient information, section 32 requires the Council to consider the risks of acting or not acting.



In the case of 44 Trafalgar Street the issue is clear. The Council accepts that an incorrect decision was made and wishes to rectify the situation. If the Council had not resolved to undertake this plan change, it would, in all likelihood, be perceived as being morally at fault. Furthermore, the potential of an adverse judgment, possibly accompanied by costs, would be a realistic possibility if it were to be challenged before the Environment Court.

## **9. *Appropriateness and alternatives***

Section 32 requires the Council to consider if the proposed plan change is the most appropriate way to achieve the relevant objectives.

The Plan Change does not involve changes to existing NRMP objectives. In the sense that the Council's objective is to change the zoning of the land, then a Plan Change is the most appropriate way to achieve this end.