

Western Bay of Plenty District Council

Change to the District Plan – First Review

Plan Change 76 Floodable Areas & Coastal Inundation Areas - Various

Section 32 Report

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1.0 Introduction

1.1. General Introduction and Background

The purpose of this report is to consider four minor changes to the Natural Hazard section of the Operative District Plan. These changes address:

- a. The potential to amend the permitted activity rule (Rule 8.3.1(c)(iii)) for uninhabited farm buildings in Floodable Areas to replace the requirement to attach a s73 notice to the Certificate of Title with a requirement to enter into another type of agreement;
- b. The potential to allow non-habitable buildings within Floodable Areas and Coastal Inundation Areas without requiring minimum finished floor levels (e.g. allow buildings at ground level) to avoid effects associated with inundation;
- c. The inclusion of matters of assessment for resource consents for subdivision within Floodable Areas and Coastal Inundation Areas; and
- d. The potential for earthworks, closed board fences, retaining walls, raised gardens and concrete and block walls to be exempt from requiring resource consent within Floodable Areas if it is established that these activities are located clear of, or are not affected by the floodable area.

2.0 Resource Management Act 1991

2.1. Section 32

Before a proposed plan change can be publicly notified the Council is required under section 32 ("s.32") of the Act to carry out an evaluation of alternatives, costs and benefits of the proposed review. With regard to the Council's assessment of the proposed plan change s.32 requires the following:

- 1) *An evaluation report required under this Act must—*
 - (a) *examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and*
 - (b) *examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—*
 - (i) *identifying other reasonably practicable options for achieving the objectives; and*
 - (ii) *assessing the efficiency and effectiveness of the provisions in achieving the objectives; and*
 - (iii) *summarising the reasons for deciding on the provisions; and*
 - (c) *contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.*
- 2) *An assessment under subsection (1)(b)(ii) must—*
 - (a) *identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—*
 - (i) *economic growth that are anticipated to be provided or reduced; and*
 - (ii) *employment that are anticipated to be provided or reduced; and*
 - (b) *if practicable, quantify the benefits and costs referred to in paragraph (a); and*

- (c) *assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.*
- 3) *If the proposal (an amending proposal) will amend a standard, statement, regulation, plan, or change that is already proposed or that already exists (an existing proposal), the examination under subsection (1)(b) must relate to—*
- (a) the provisions and objectives of the amending proposal; and*
 - (b) the objectives of the existing proposal to the extent that those objectives—*
 - (i) are relevant to the objectives of the amending proposal; and*
 - (ii) would remain if the amending proposal were to take effect.*
- 4) *If the proposal will impose a greater prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.*

2.2. Section 74

In accordance with Section 74(2A) of the Act, Council must take into account any relevant planning document recognised by an iwi authority lodged with Council.

None of the iwi/hapu management plans lodged with Council raise any issues of particular relevance to this Plan Change.

3.0 Consultation

Due to the minor and technical nature of this proposed plan change, there has been no consultation with the public. Internal consultation has been undertaken with the Council's Consents Team, Compliance Officers and Council's Development Engineers.

4.0 Issue 1 – Reference to s73 of the Building Act in permitted activity Rule 8.3.1(c)(iii) for uninhabited farm buildings

A previous plan change (Plan Change 35 - Natural Hazards – Where the Hazard Does Not Exist) gave consideration to a rule which would exempt uninhabited carports, implement sheds and similar buildings (in all zones) from requiring resource consent. Following the submission process, Plan Change 35 resulted (amongst other things) in the addition of a new rule (Rule 8.3.1(c)(iii)), which permits uninhabited farm buildings and structures within Floodable Areas without the need for resource consent where a notice under s.73 of the Building Act 2004 has been attached to the Certificate of Title advising owners of the hazard.

The rule was included in response to a submission by Federated Farmers which suggested uninhabited farm buildings within Floodable Areas should be permitted without the need for resource consent. Concern was expressed in the Planner's Report that a permitted activity rule would result in liability issues

for Council if damage occurred to buildings allowed to locate in Floodable Areas without an assessment of potential flooding effects on the building.

At the time, it was thought that a notice under s73 of the Building Act attached to the Certificate of Title for the land in question would limit Council’s risk against damage to buildings. Rule 8.3.1(c)(iii) was recommended and adopted on this basis.

It has recently been identified, however, that assessments under s72 of the Building Act, which give rise to notices under s73, are not concerned with the building itself, but rather the effects on the land or other property.

As a consequence, Rule 8.3.1(c)(iii) does not limit Council’s risk as intended and an amendment is required to ensure property owners and consent applicants accept the risks of developing uninhabited farm buildings within Floodable Areas, without risk to Council if the buildings and their contents are damaged as a result of inundation from flooding.

4.1. Option 1 – Status Quo – Retain reference to s73 of the Building Act in Rule 8.3.1(c)(iii)

Costs	<ul style="list-style-type: none"> ▪ Results in potential risk for Council if building consents are granted for uninhabited farm buildings in Floodable Areas and those buildings are damaged. ▪ Does not clearly identify the potential risks for the community, property owners, and consent applicants.
Benefits	<ul style="list-style-type: none"> ▪ No identified benefits.
Effectiveness/ Efficiency	<ul style="list-style-type: none"> ▪ Not efficient or effective in addressing the issue that has been identified.
Risks of Acting/ Not Acting if there is uncertain or insufficient information about the subject matter	<ul style="list-style-type: none"> ▪ N/A – Sufficient information is available.

4.2. Option 2 – Amend Rule 8.3.1(c)(iii) to require property owners to enter into an agreement with Council accepting the risks associated with inundation from flooding

Costs	<ul style="list-style-type: none"> ▪ Results in time delays and financial cost associated with the preparation and administration of agreements between property owners and Council. It is anticipated, however, that a standardised agreement could be developed and administered through the building consent process to mitigate this issue.
Benefits	<ul style="list-style-type: none"> ▪ Enables uninhabited farm buildings without the need for resource consent and reduces time delays and additional costs associated with the preparation and processing of resource consent applications. ▪ Reduces potential risk for Council where building

	<p>consents are granted for uninhabited farm buildings in Floodable Areas without an assessment of flooding effects through the resource consent process.</p> <ul style="list-style-type: none"> ▪ Makes it clear to the community and property owners that there are risks associated with the development of uninhabited farm buildings within floodable areas and that property owners are required to accept those risks (if they chose to locate these buildings in areas at risk of flooding). ▪ Provides certainty for the community that farm buildings can be established without the need for resource consent.
Effectiveness/ Efficiency	<ul style="list-style-type: none"> ▪ Efficient and effective in addressing the identified issue and the relevant objectives of the District Plan.
Risks of Acting/ Not Acting if there is uncertain or insufficient information about the subject matter	<ul style="list-style-type: none"> ▪ N/A – Sufficient information is available.

4.3. Preferred Option

The preferred option is:

Option 2 – Amend sub-clause (iii) of Rule 8.3.1(c) (as set out below) to require property owners to enter into an agreement with Council to confirm they accept the risks associated with inundation from flooding:

(iii) Uninhabited farm buildings including, but not limited to, pump sheds, implement sheds and storage sheds, provided ~~that an appropriate notice under s73 of the Building Act has been attached to the title~~ the property owner(s) enter into an agreement with the Council confirming that they:

- acknowledge the property is subject to the risk of inundation from flooding;*
- accept the risks of any damage to the building and/or its contents arising from that hazard; and*
- undertake not to take any action (legal or otherwise) against the Council in relation to any damage to the building and/or its contents as a result of the location of the building within the Floodable Area.*

4.4. Reasons

The preferred option addresses the key issue that s73 of the Building Act does not limit Council's risk in terms of providing for uninhabited farm buildings as permitted activities within Floodable Areas. The preferred option also provides a simple, effective and efficient alternative to the s73 notice, which reduces the risks for the Council, while still enabling uninhabited farm buildings without the need for resource consent.

5.0 Issue 2 – Non-habitable buildings within Floodable Areas & Coastal Inundation Areas

Council has received complaints that, through resource consent processes, non-habitable buildings within Floodable Areas (identified on the Planning Maps) are required to provide finished floor levels at a height to avoid the risk of inundation. The key issue identified is the practicality of achieving the required floor level. In practice, the required finished floor level for non-habitable building is the projected flood level, plus 200mm freeboard. For habitable buildings, the freeboard requirement is 500mm. In this context, freeboard is an allowance added to the flood level as a factor of safety to ensure buildings are adequately protected from flooding.

In some cases properties are well below the identified flood level and some property owners are willing to accept the risks of inundation to non-habitable buildings, and their contents instead of providing the required minimum floor level. Those not willing to accept risks associated flooding are likely to either provide floor levels to avoid the risk, or will decide not to proceed with the development at all.

This issue is also relevant for Coastal Inundation Areas, which were recently introduced into the District Plan through Plan Change 74.

Carports, garages and other non-habitable structures within Floodable Areas and Coastal Inundation Areas currently require resource consent as a restricted discretionary activity in accordance with Rule 8.3.3(c)(i) of the District Plan.

Matters over which the Council has restricted its discretion (in accordance with Rule 8.5.1.3) are:

- a. *The effect of the proposed activity (including its location and design) on the capacity of ponding areas and function of overland flow paths;*
- b. *The appropriate minimum finished floor level of the proposed building/structure.*

Explanatory Notes:

This is the combination of the flood level plus an additional freeboard height as stipulated in Council's Development Code.

Council can provide specific flood levels for all Coastal Inundation Areas and for some but not all of the Floodable Areas.

For Waihi Beach Floodable Areas (Planning Maps A03 and U01-U04) this shall be based on the 2% AEP (inclusive of climate change).

- c. *Verifiable new information which demonstrates that the subject site is not in fact under threat from the identified hazard.*

The relevant District Plan objectives are:

1. *Minimisation of the risk of natural hazards to human life and the natural and built environment.*
2. *Protection of the existing natural character of the coastal environment and other natural features having recognised ecological, landscape or other significance to the District.*

5.1. Option 1 – Status Quo – Retain restricted discretionary rule (Rule 8.3.3(c)(i)) and associated matters of discretion (Rule 8.5.1.3(b)) without change

<p>Costs</p>	<ul style="list-style-type: none"> ▪ The 'appropriate minimum floor level' for garages and carports is the identified flood level plus 200mm, which could require elevated buildings which are impractical for their intended purpose (particularly where ground levels are well below the identified flood/inundation levels). ▪ Potentially results in unnecessary construction and resource consent costs for the property owner in situations where the owner may be willing to accept the risks of providing floor levels lower than usually required to avoid the flooding/inundation hazard. ▪ Results in financial costs for the Council, community and property owners with respect to dealing with enquiries and resolving disputes regarding appropriate finished floor levels. ▪ Additional financial costs for Council in terms of processing resource consent applications that may not be necessary.
<p>Benefits</p>	<ul style="list-style-type: none"> ▪ Allows Council to consider effects and assess the risk of inundation on a case by case basis. ▪ Allows Council to consider appropriate floor levels for structures based on the specific circumstances. ▪ Allows Council to consider other relevant matters of discretion, including impact on ponding areas and overland flow paths, as well as specific design features that potentially increase or mitigate the risk of inundation.
<p>Effectiveness/ Efficiency</p>	<ul style="list-style-type: none"> ▪ The current rule and matters of discretion are effective in achieving the objectives of the District Plan, however, the status quo does not address the identified issue that the required minimum floor level may not be practical in all circumstances. ▪ Retaining the current rule and matters of discretion without change is inefficient as it results in unnecessary time and cost associated with responding to enquiries and resolving disputes regarding appropriate finished floor levels.
<p>Risks of Acting/ Not Acting if there is uncertain or insufficient information about the subject matter</p>	<ul style="list-style-type: none"> ▪ N/A – Sufficient information is available.

5.2. Option 2 – Amend Rule 8.3.1 to include all non-habitable residential garages and carports within Floodable Areas as permitted activities

Costs	<ul style="list-style-type: none"> ▪ Providing a generic exemption would prevent Council from assessing potential effects associated with the capacity of ponding areas, overland flow paths, and the impact of the design of the building. This could result in unintended adverse effects associated with flooding, particularly within urban areas where there is less land available for flood storage and overland flow paths. ▪ There is potential Council could be liable for the risk of inundation and potential damage to property.
Benefits	<ul style="list-style-type: none"> ▪ Providing an exemption would result in fewer resource consents and associated financial costs for Council, the community and property owners. ▪ Provides certainty for the community and property owners that they will be able to proceed with their development, subject only to building consent requirements.
Effectiveness/ Efficiency	<ul style="list-style-type: none"> ▪ The inclusion of a permitted activity rule would not be effective in achieving the objectives of the District Plan as the relevant effects of the building on the natural and built environment would not be assessed (particularly in terms of the capacity of ponding areas and function of overland flow paths).
Risks of Acting/ Not Acting if there is uncertain or insufficient information about the subject matter	<ul style="list-style-type: none"> ▪ N/A – Sufficient information is available.

5.3. Option 3 – Retain the requirement for resource consent and amend the explanatory note to the matter of discretion within Rule 8.5.1.3(b) to identify that Council may grant resource consents for non-habitable buildings without achieving the required minimum finished floor level, subject to the owner accepting the risks associated with inundation

Costs	<ul style="list-style-type: none"> ▪ Results in time delays and financial cost associated with the preparation and administration of agreements between property owners and Council. It is anticipated, however, that a standardised agreement could be developed and administered through the resource consent process to mitigate this issue.
Benefits	<ul style="list-style-type: none"> ▪ Makes it clear that Council will consider granting resource consent for non-habitable buildings without the required minimum finished floor level, where the property owner accepts the associated risks. ▪ Reduces potential risk for Council if resource consents are granted and buildings and/or their contents are damaged due to inundation.

	<ul style="list-style-type: none"> ▪ Makes it clear to the community and property owners that there are risks associated with establishing buildings with finished floor levels lower than usually required, but recognises there are some circumstances where it may be impractical to achieve minimum finished floor levels. ▪ Allows Council to consider effects and assess the risk of inundation on a case by case basis. ▪ Allows Council to consider other relevant matters, including the impact on ponding areas and overland flow paths, as well as specific design features that potentially increase or mitigate the risk of inundation. ▪ Allows resource consent applicants to reduce the required finished floor levels to ensure buildings are able to be used for their intended purpose. This may also mean that property owners proceed with their development proposals instead of abandoning them due to the existing finished floor level requirements.
Effectiveness/ Efficiency	<ul style="list-style-type: none"> ▪ Amending the explanatory note to the matters of discretion is an efficient and effective method to achieve the relevant District Plan objectives and addresses the identified issue.
Risks of Acting/ Not Acting if there is uncertain or insufficient information about the subject matter	<ul style="list-style-type: none"> ▪ N/A – Sufficient information is available.

5.4. Preferred Option

The preferred option is:

Option 3 – Retain the requirement for resource consent and amend the explanatory note to the matter of discretion within Rule 8.5.1.3(b) to identify that Council may grant resource consents for non-habitable buildings without the required minimum finished floor level if the property owner enters into an agreement with the Council confirming they accept the risks associated with inundation as follows:

(b) The appropriate minimum finished floor level of the proposed building/structure.

Explanatory Notes:

This is the combination of the flood level plus an additional freeboard height as stipulated in Council's Development Code.

Council will consider granting consent for sheds and garages (used for non-habitable purposes) without meeting minimum finished floor levels provided the property owner of the property and building enters into an agreement with the Council confirming the owner:

- acknowledges that the property is subject to the risk of inundation from flooding or coastal inundation;
- accepts the risks of any damage to the building and/or its contents arising from that hazard; and
- undertakes not to take any action (legal or otherwise) against the Council in relation to the issue of a resource consent without imposing the required minimum finished floor levels.

Council can provide specific flood levels for all Coastal Inundation Areas and for some but not all of the Floodable Areas.

For Waihi Beach Floodable Areas (Planning Maps A03 and U01-U04) this shall be based on the 2% AEP (inclusive of climate change).

5.5. Reasons

The preferred option addresses the key issue regarding the practicality of achieving minimum finished floor levels, and makes it clear for the community, consent applicants and Council that the minimum finished floor level does not need to be met, if the property owner accepts the risks of providing lower floor levels than is normally required. The preferred option also ensures that Council, through the resource consent process, retains the ability to assess other relevant effects associated with buildings within Floodable Areas and Coastal Inundation Areas (including the potential for buildings to impact on ponding areas and overland flows).

6.0 Issue 3 – Lack of Matters to Guide Assessment of Discretionary Activity Subdivisions in Floodable Areas and Coastal Inundation Areas

As a general principle, the District Plan includes matters to be considered in the assessment of resource consent applications for discretionary activities. Although not entirely necessary (given the Council retains discretion to consider any matter it considers relevant), such matters are helpful in guiding the community, consent applicants and Council in the preparation and assessment of resource consent applications.

Rule 8.3.4(c)(i) of the District Plan states that subdivision is a discretionary activity within Floodable Areas and Coastal Inundation Areas, however, there are no matters of assessment identified within section 8.5.2. Without identified matters of assessment there has been some recent confusion and debate regarding the matters to be considered in the assessment of subdivision applications within Floodable Areas. This is also relevant for the Coastal Inundation Areas which were recently introduced through Plan Change 74.

6.1. Option 1 – Status Quo – Retain Natural Hazards section without matters of assessment for discretionary subdivisions

Costs	<ul style="list-style-type: none"> ▪ Creates inconsistency within the District Plan as there are matters of assessment for other discretionary activities, but not subdivisions within Floodable Areas and Coastal Inundation Areas. ▪ Does not provide sufficient guidance to the community, consent applicants and Council in terms of the matters to be addressed within subdivision applications.
Benefits	<ul style="list-style-type: none"> ▪ Council retains the ability to consider any relevant matter.
Effectiveness/ Efficiency	<ul style="list-style-type: none"> ▪ Not effective in addressing the identified issue. ▪ Creates confusion and inefficient consent processes due to lack of clarity. This results to additional financial costs for the community, consent applicants and the Council.
Risks of Acting/ Not Acting if there is uncertain or insufficient information about the subject matter	<ul style="list-style-type: none"> ▪ N/A – Sufficient information is available.

6.2. Option 2 – Include matters of assessment for subdivisions within Floodable Areas and Coastal Inundation Areas (new section 8.5.2(c))

Costs	<ul style="list-style-type: none"> ▪ No costs identified.
Benefits	<ul style="list-style-type: none"> ▪ Provides clear guidance for the community, consent applicants and Council regarding matters to be addressed within subdivision applications. ▪ Reduces financial costs associated with the preparation and processing of resource consent applications.
Effectiveness/ Efficiency	<ul style="list-style-type: none"> ▪ Effective in addressing the identified issue. ▪ Efficient as it draws on existing, related provisions of the District Plan and provides clear guidance which is in the best interests of the community. ▪ Efficient and effective in terms of reducing confusion and addressing the current lack of guidance for resource consent applications.
Risks of Acting/ Not Acting if there is uncertain or insufficient information about the subject matter	<ul style="list-style-type: none"> ▪ N/A – Sufficient information is available.

6.3. Preferred Option

The preferred option is:

Option 2 – Include matters of assessment for subdivisions within Floodable Areas and Coastal Inundation Areas (new section 8.5.2(c)) as follows:

8.5.2 Discretionary / Non Complying Activities

The matters in 8.4.1 and 8.5.1 and the following matters shall be used as a guide for assessing Discretionary Activities and Non-Complying Activities:

...

(c) Floodable Areas & Coastal Inundation Areas

- (i) The effect of the proposed subdivision (including, but not limited to any building site, building/structure, or earthworks) on the capacity of ponding areas and function of overland flow paths.*
- (ii) The provision of finished site levels to mitigate adverse effects associated with inundation. For Waihi Beach (Planning Maps A03 and U01-U04) the flood level shall be based on the 2% AEP (inclusive of climate change).*
- (iii) In the case of Floodable Areas, any verifiable new information which demonstrates that the subject site is not in fact under threat from flooding.*

6.4. Reasons

The proposed matters of assessment draw on existing District Plan provisions and ensure consistency within the District Plan. They also provide direction and reduce costs associated with the preparation and processing of resource consent applications.

7.0 Issue 4 – Resource consent requirements for earthworks, closed board fences, retaining walls, raised gardens and concrete and block walls regardless of whether the land is actually floodable or not

Rule 8.3.1 (c)(i) allows for buildings and structures within Floodable Areas without the need to obtain resource consent if:

- a. Evidence is provided that establishes the building or structure will be located outside of the floodable area (irrespective of the extent of the Floodable Area shown on the Planning Maps); or
- b. Where there is evidence that the building or structure will not be affected by the floodable area.

It has been identified that there is a discrepancy within the permitted activity rule, as it relates only to buildings and structures, and does not extend to other structures and works that require resource consent within Floodable Areas. For

example, resource consent is required for earthworks greater than 5m³, closed board fences, retaining walls, raised gardens and concrete and block walls, however, there is no ability for property owners and consent applicants to avoid the need for consent if it can be proven those work/structures are not affected by the Floodable Area.

This issue with this is that resource consents are required when they are not necessary to manage effects associated with flooding. This results in unnecessary time delays and financial costs for the community, consent applicants and the Council.

7.1. Option 1 – Status Quo – Retain requirement for resource consent for all earthworks exceeding 5m³, closed board fences, and other similar structures

Costs	<ul style="list-style-type: none"> Requires resource consents when they are not necessary to manage effects associated with flooding. This, in turn, results in unnecessary time delays and financial costs for the community, consent applicants and the Council.
Benefits	<ul style="list-style-type: none"> No identified benefits.
Effectiveness/ Efficiency	<ul style="list-style-type: none"> Not effective in addressing the identified issue.
Risks of Acting/ Not Acting if there is uncertain or insufficient information about the subject matter	<ul style="list-style-type: none"> N/A – Sufficient information is available.

7.2. Option 2 – Include for earthworks, closed board fences, retaining walls, raised gardens and concrete and block walls within permitted activity Rule 8.3.1(c)(i)

Costs	<ul style="list-style-type: none"> Property owners will need to provide evidence to demonstrate the works and/or structures are not within a Floodable Area, or will not be affected by the hazard. Researching and obtaining this information has potential to result in financial costs and time delays for property owners.
Benefits	<ul style="list-style-type: none"> Removes the need for unnecessary resource consents and reduces time delays and financial costs for the community, consent applicants and Council.
Effectiveness/ Efficiency	<ul style="list-style-type: none"> Effective in addressing the identified issue. Efficient as it draws on existing, related provisions of the District Plan.
Risks of Acting/ Not Acting if there is uncertain or insufficient information about the subject matter	<ul style="list-style-type: none"> N/A – Sufficient information is available.

7.3. Preferred Option

The preferred option is:

Option 2 – Include for earthworks, closed board fences, retaining walls, raised gardens and concrete and block walls within permitted activity Rule 8.3.1(c)(i) as follows:

- (i) *Buildings/Structures, earthworks, closed board fences, retaining walls, raised gardens and concrete and block walls where evidence establishes:*
- *The activity A-building/structure will be located clear of the floodable area irrespective of the extent of the floodable area shown by the Planning Maps; or*
 - *The activity A-building/structure will not be affected by the floodable area.*

7.4. Reasons

The proposed amendment to Rule 8.3.1(c)(i) ensures consistency within the District Plan between buildings/structures, and other types of activities and removes the need for unnecessary resource consents. This results in less time and financial costs associated with the preparation and processing of resource consent applications. The proposed change also addresses the identified issue and better reflects the intention of the rule.