

Planning Report

Plan Change 39 – Protection Lot Rule

1.0 Introduction

- 1.1** The purpose of this report is to provide recommendations on submissions and further submissions to Plan Change 39 – Protection Lot Rule.
- 1.2** Plan Change 39 relates to the Protection Lot rule of the District Plan (rule 18.4.2(h)), the purpose and intent of the Change being to:
- Rationalise some of the existing wording in the rule so as to remove ambiguities and uncertainties which currently create problems of interpretation;
 - Add non-scheduled cultural heritage items to the features which qualify to be considered for the creation of additional lots under the rule;
 - Change the activity status of a complying subdivision under the rule from “discretionary” to “restricted discretionary”.
- 1.3** For a full background to the Plan Change and the proposed provisions please refer to the Section 32 Report. For a list of the proposed provisions only, please refer to the document titled ‘Proposed Plan Change Combined Notification Document’.
- 1.4** Any recommended amendments to rules in this report will be shown as follows; existing District Plan text in black, proposed changes as included in the Section 32 Report in red, and recommendations as a result of this report in blue.

2.0 Topic 1: Expansion of scope of Protection Lot rule to extend qualifying features and introduce more enabling provisions

2.1. Overview of submissions received

Nine principal submissions and two further submissions were received on Plan Change 39, requesting that the scope of the Protection Lot rule be expanded through the inclusion of additional qualifying features as well as what are referred to as more enabling provisions. In particular, the submissions request: “More enabling provisions” to be included in the District Plan;

- Provision for a “tiered approach” in respect of non-compliance with qualifying standards;
- Provision for non-notification of complying applications;

- Making the activity status of a non-complying application under the rule (including the creation of more than five additional lots) “discretionary”, rather than the current default status of “non-complying”;
- General broadening of the scope of the rule provisions so as to “encourage ecological restoration”, including areas extending below MHWS.
- Deletion of the existing certification and management plan provisions in respect of features scheduled in Appendix 3 of the District Plan;
- Deletion of the minimums relating to land for the expansion of and provision of access to reserves;
- Inclusion of Wairoa River esplanades (as proposed in Plan Change 33) as qualifying features under the rule.

2.2. Discussion

2.2.1 Overview

Submission 28 (D155 Ltd) requests a general broadening of the scope of the Protection Lot rule through the inclusion of more “enabling” provisions. Many of the particular amendments requested relate to matters not specifically addressed by the Plan Change as notified, the intended purpose of which is set out in paragraph 1.2 of this report. The request in submission 25 (Graham & Hanvey) to include Wairoa River esplanades as features qualifying for a Protection Lot subdivision is also such a matter. Notwithstanding the foregoing, the respective merits or otherwise of the requested amendments are discussed below.

2.2.2 Expand scope of qualifying features

The submissions request the following additions to the features currently qualifying for a Protection Lot subdivision:

- “large-scale restoration projects” such as those involving harbour and river margins, including areas which extend below the mark of mean high water springs (MHWS);
- Wairoa River esplanades (as proposed under Plan Change 33);
- deletion of the stipulated minimum standards for subdivisions based on the expansion of or provision of access to reserves;

While the first two of the above requests may have some merit, further investigative work would be required before a decision on expanding the Protection Lot rule to incorporate the areas referred to could be made. Such further work would need to include consideration of any District-wide implications of such additions while the suggested inclusion of areas below MHWS would require wider consultation than that undertaken for the current Plan Change, including with Bay of Plenty Regional Council, Department of Conservation, iwi authorities and community stakeholder groups.

2.2.3 Activity status

Through the current Plan Change, it is proposed to alter the activity status of subdivision under the Protection Lot rule from "full" discretionary to "restricted discretionary". Non-compliance with one or more of the stipulated Protection Lot subdivision standards remains a non-complying activity.

Submission 28 requests that the proposed change in activity status be extended so as to provide a "tiered approach" in respect of proposals which do not comply with a stipulated standard. It is not entirely clear how such an approach would be actually provided for, but the submission includes a request that the "default" status of an application involving any non-compliance with the usual standards would be that of a discretionary rather than a non-complying activity.

Under other District Plan rural subdivision rules, the following are currently provided for as controlled activities:

- general farming lots;
- transferable rural lots;
- transferable amalgamation lots;
- additional dwelling lots;
- separation lots;
- the creation of two Protection Lots under rule 18.4.2(h)(ii).

Pursuant to District Plan rule 18.3.3(a), any of the foregoing (except the creation of two Protection Lots) become a restricted discretionary activity in respect of any non-compliance with a controlled activity standard. Under rule 18.3.4(q), the status of a two-lot Protection Lot subdivision which fails to comply with rule 18.4.2(h)(ii) is a "full" discretionary activity.

Essentially, the current District Plan approach to rural subdivision is that where quantifiable standards can be met and there is confidence that subject to such compliance any adverse environmental effects will be less than minor, the activity status of a subdivision can be "controlled". Some discretion (including the ability to refuse consent) is appropriate where non-compliance with a quantifiable standard, or by its nature the subdivision itself, has the potential to create adverse off-site effects which may affect other persons.

In the case of Rural Production Lots, wider discretion (ie that provided under "full" discretionary status) is retained for non-compliance with the standards relating to the physical characteristics of the land and to expert report requirements. Any non-compliance with the minimum lot size requirements is however a non-complying activity.

The District Plan approach to Rural Production Lots and to Protection Lots is similar. Notwithstanding compliance with the applicable standards, any subdivision under these rules has the potential to create adverse effects above the "less than minor" threshold and therefore retaining sufficient discretion to refuse

consent to an otherwise complying application is appropriate. The wider discretion available under "full" discretionary activity status is appropriate where there is potential for non-compliance to raise District Plan policy issues.

Non-complying activity status is therefore appropriate where the nature and degree of non-compliance is such as to go below the "bottom lines" set in the District Plan. In the case of a Rural Production Lot subdivision, this is non-compliance with the minimum lot sizes and in the Protection Lot rule it is non-compliance with the specified standards relating to such matters as minimum feature size and the quality of the feature itself.

Overall, it is considered that where non-compliance has the potential to dilute the purpose of the rule in question to such an extent that the integrity of the rule itself as well as that of the wider District Plan rural subdivision strategy, then non-complying activity status is appropriate.

On the basis of the foregoing, it is considered that Protection Lot subdivisions which fail to comply with the restricted discretionary activity standards should default to non-complying activity status rather than "full" discretionary.

2.2.4 Notification

District Plan rules should override the usual notification and affected persons provisions of the RMA only where there is confidence that adverse effects (including those affecting other persons) will not be above the "less than minor" threshold. While this may be the case in respect of Protection Lot subdivisions complying with District Plan rule 18.4.2(h)(ii), which already has controlled activity status, it is not necessarily so with other subdivisions under the Protection Lot rule.

2.2.4 Certification/management plan requirements

It is considered that the certification and management plan requirements for features scheduled in Appendix 3 of the District Plan should remain because since a feature was originally listed in the District Plan it may have deteriorated naturally or may have been damaged in the intervening period. Certification that it retains the values from when it was originally listed, and the ability to require on-going management so as to ensure such values are maintained over time is considered appropriate.

2.3. Recommendation

That requested amendments be rejected.

2.4. The following submissions are therefore:

Rejected

Submission	Point Number	Name
28	1, 2, 3, 4, 5, 6	D155 Limited
FS72	1, 2	D155 Limited
25	2	Maxine Graham and Robin Harvey

2.5. Reasons

Expansion of qualifying features

While in some cases not without potential merit, the implications of the requested changes warrant further research and investigation and their introduction at this stage is therefore premature.

Activity status

The existing and proposed "tiered approach" to activity status is appropriate given the scope of available discretion necessary to achieve the desired environmental outcomes and maintain the integrity of the District Plan approach to rural subdivision.

Notification

The potential for adverse effects to be created by a Protection Lot subdivision to be beyond the "less than minor" threshold is such as to preclude the introduction of District Plan rules which dispense with the usual notification and affected persons provisions of the RMA.

Certification/management plan requirements

Because of the potential for changes to the values of a scheduled feature to have occurred over time and/or to occur in the future, the existing certification and management plan requirements of the Protection Lot rules should continue to apply.

3.0 Topic 2: Cultural Heritage Features

3.1 Submissions received

The New Zealand Historic Places Trust has lodged a submission in general support of Plan Change 39, but which also requests clarification of the meaning of the term "cultural heritage feature" which is not specifically defined in the District Plan.

3.2 Discussion

3.2.1 Appendix 3 of the District Plan contains a schedule of "Historic Heritage" features which is broken down into items of:

- Cultural heritage;
- Built heritage:
- Trees.

3.2.2 The terms "built heritage" and "trees" are self-explanatory but the term "cultural heritage" may not be, notwithstanding that all of the current listings under this category are items relating to Maori history and culture.

3.2.3 The term "historic heritage" is defined in section 2 of the RMA and includes resources of cultural quality as well as sites of significance to Maori.

3.3 Recommendation

That the following text (coloured blue) be added to rule 18.4.2(h)(i)(2):

2. Other cultural heritage or ecological features subject to clause (iv) of this rule. In the case of ecological features, this may include previously degraded ecological sites that through enhancement or restoration can at the time of application be proven to meet the requirements of clause (iv). In the case of cultural heritage features, these are items of historic heritage (as defined in section 2 of the Act) which are of cultural significance to Maori, including wahi tapu.

3.4 The following submission is therefore:

Accepted

Submission	Point Number	Name
16	7, 8	NZ Historic Places Trust

3.5 Reason

The additional wording is required to clarify the meaning of the term "cultural heritage feature".

4.0 Plan Change 39 - Recommended Changes to the District Plan First Review

4.1 The purpose of this part of the report is to show the Proposed Plan Change in full including any recommended changes in response to the submissions and further submissions.

4.2 Recommended changes to the District Plan First review are shown as follows; existing District Plan text in black, proposed changes as included in the Section 32 Report in red, and recommendations as a result of this report in blue.

4.3 **That Discretionary Activity 18.3.4 (m) is deleted and a new Restricted Discretionary 18.3.3(c) of the same wording is created as follows;**

18.3.3 Restricted Discretionary Activities

(c) Subdivision specified in Rule 18.4.2(h) Protection Lot Subdivision, excluding Matakana Island.

18.3.4 Discretionary Activities

~~(m) Subdivision specified in Rule 18.4.2 (h) Protection Lot Subdivision, excluding Matakana Island.~~

4.4 **That the protection lot rules in 18.4.2 (h) are amended as shown in Attachment A.**

(h) Protection lots

In exchange for the protection of an *Identified Significant Feature* as defined in this District Plan or other existing features of value to the community additional *lots* over and above what other rural subdivision rules provide for may be created.

(i) Application

Additional *lots* or Transferable Protection Lot credits may be created from a qualifying existing *lot* within the Rural Zone in conjunction with the legal protection in perpetuity of a significant natural or other existing feature of value to the community as follows:

- On-site Protection Lots within the Rural Zone – maximum of 5 additional *lots*. The feature to be protected must be within the land being subdivided.
- One or more Transferable Protection Lot credits to be used in conjunction with the subdivision of land within the Lifestyle Zone, subject to compliance with the requirements for subdivision in that Zone (refer Section 17) are subject to clause (vi) of this rule.

In both the foregoing clauses, clause (vi) of this rule shall apply where the additional *lots* or credits are being created in conjunction with the protection of an ecological feature.

In ~~this the~~ context of this rule a “feature of value to the community” is deemed to be:

1. An *Identified Significant Feature* as specified in the District Plan (see Appendices 1, 2, and 3).
2. Other cultural heritage or ecological features subject to clause (iv) of this rule. In the case of ecological features, this may include previously degraded ecological sites that through enhancement or restoration can at the time of application be proven to meet the requirements of clause (iv). In the case of cultural heritage features, these are items of historic heritage (as defined in section 2 of the Act) which are of cultural significance to Maori, including wahi tapu.

3. Land for expansion of, or access to, reserves.

Explanatory Note:

Enhancement means improving the existing qualities and values of an area that are ecological, cultural, and/or related to amenity. Restoration will have a corresponding meaning.

~~In the context terms of a protection lot,~~ Enhancement or restoration means improvement to a level which meets the qualifying criteria for ecological features set out in section 18.4.2(h)(iv) ~~2 1 (b)~~.

(ii) Qualifying standards for controlled onsite protection lot subdivision

Up to two additional lots may be created through an on-site Protection Lot subdivision within the Rural Zone, subject to each lot complying with the following:

1. Vehicle access shall be to an existing sealed road, excluding a State Highway;

2. Maximum lot size shall be 1ha.

~~1. To qualify for an onsite protection lot subdivision, the lot to be created shall meet the following criteria:~~

~~(i) Up to two additional lots on a sealed road;~~

~~(ii) Rural Zone be a maximum of 1ha;~~

~~(iii) Does not gain access directly to a State Highway.~~

~~2. The Transferable Protection Lot Credit may only be transferred into the Lifestyle Zone~~

(iii) Qualifying features

1. This rule shall apply to features according to their respective lot boundaries as existed at 1 August 1992.

2. Within the subject title, where ~~the~~ an ecological feature ~~concerned~~ exceeds the size criteria in (iv) ~~2 1 (b)~~ or (vi) below then

the entire feature shall be protected under this rule.

3. Where the feature being protected is capable of realising more than one protection lot, credits will be given for additional *lots*. These credits are able to be used in the Lifestyle Zone only.

- (a) For credits created on or after 30 January 2010, the credits will expire five years from the date of issue of the consent or five years after the date that the Minden Lifestyle Zone Structure Plan becomes operative, whichever is the later

- (b) For credits created prior to 30 January 2010 the following applies:

- (i) The credit will expire ten years from the date of the Minden Lifestyle Zone Structure Plan being made operative (16 June 2012).

- (ii) Thirty percent of the total credits (calculated per donor lot) may be used in conjunction with Rule 18.4.2(f).

- (iv) Certification

1. Ecological Features

~~(a)~~ ~~1-~~ In the case of those *Identified Significant Ecological Features* referred to in Appendix 1 of the District Plan or of other ecological features, certification from an appropriately qualified independent person that the feature in question meets the criteria in ~~2-~~ 1 (b) below shall be submitted with the application for subdivision consent.

~~(i)~~ ~~In the case of Viewshafts referred to in Appendix 2 and Identified Significant Historic Heritage Features referred to in~~

~~Appendix 3 certification from an appropriately qualified independent person that the feature in question still exists in terms of the description as provided in the respective Appendix shall be submitted with the application for subdivision consent.~~

~~(ii) In the case of features of community benefit, certification from an appropriately qualified independent person that the feature in question meets the criteria in 3. below shall be submitted with the application for subdivision consent.~~

~~(iii)~~

Such certification shall be accompanied by a report prepared by the certifier detailing the attributes of the feature recommended for preservation and include a management plan specifying any protective or enhancement measures deemed necessary.

~~(b) 2:~~ Criteria for ecological features

The feature must be assessed in the context of the relevant ecological district, bioclimatic zone and landform type. Each feature is required to rank highly on three or more of the following criteria:

- (i) Representativeness - the extent to which an area is characteristic or representative of natural diversity;
- (ii) Diversity and pattern - the diversity of species and community types;
- (iii) Shape - larger areas with a compact shape are more likely to be ecologically viable;
- (iv) Ecological viability and sustainability - the likelihood of an area remaining ecologically viable and the management

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input necessary for long term sustainability;

- (v) Naturalness - degree of modification as compared with likely original unmodified character.
- (vi) Rarity and special features - presence of rare community types, species or other rare features;
- (vii) Fragility and threat - threat processes or agents (actual or potential) that are likely to destroy or substantially modify the feature, and the vulnerability of the feature to damage;
- (viii) Ecological context – the extent to which an area is buffered from modifying influences, or provides a key buffer for other ecological areas, or the connectivity role that site provides for the wider landscape;
- (ix) Long term viability – the extent to which the features of the area will maintain themselves in the long term.

Explanatory Note:

Riparian areas only need to meet criteria (v) and (ix) above to quality.

The following table shows minimum feature size dependant on whether the feature is listed in the District Plan as significant or whether it can be identified as an 'other feature' subject to 18.4.2(h), (i) and (iv).

Features smaller than the minimums below ~~can~~ **shall** be considered as Non-Complying Activities:

Habitat Type	Minimum Size for significant ecological features	Minimum size for 'other features'
<i>Tall Forest</i>	3ha	5ha
<i>Regenerating Forest</i>	4ha	8ha
<i>Secondary Shrub Land</i>	5ha	10ha
<i>Riparian margins</i>	500m in length and 20m wide	

(above <i>MHWS</i>)	
<i>Wetlands</i> (above <i>MHWS</i>)	0.5ha surrounded by a 10m indigenous buffer

Explanatory Note:

Riparian areas are measured from 20m landward of the stream edge on one side. When a stream is wholly contained within one title this can be measured on each side.

~~3. Criteria for features of community benefit~~

~~(i) The feature must provide for expansion of an existing reserve, or access (not otherwise shown in the District Plan) to an existing or proposed reserve or esplanade reserve. The acceptance of such applications is at Council's sole discretion.~~

~~(ii) The minimum size and multiple lot entitlement is the same as for the following ecological features:~~

- ~~Access equates to *Riparian Margins*~~
- ~~Expansion of reserves equates to *Wetlands*.~~

2. Viewshafts

(a) In the case of *Viewshafts* referred to in Appendix 2 certification from an appropriately qualified independent person that the feature in question still exists in terms of the description as provided in Appendix 3 shall be submitted with the application for subdivision consent.

3. Cultural Heritage Features

(a) In the case of Identified Significant Historic Heritage Features referred to in Appendix 3 certification from an appropriately qualified independent person that the feature in question still exists in terms of the description as provided in Appendix 3 shall be submitted with the application for subdivision consent.

(b) With respect to cultural heritage features not listed in Appendix 3, the feature in question shall be certified by an appropriately qualified and experienced independent person as being of such cultural or archaeological significance to the wider community as to warrant preservation in perpetuity. Such certification shall be accompanied by a report prepared by the certifier detailing the attributes of the feature recommended for preservation and shall include:

- (i) Endorsement from an authorised representative of the recognised tangata whenua for the area in question;
- (ii) A management plan specifying any protective or enhancement measures deemed necessary.

4. Land for expansion of, or access to, reserves

(a) In the case of land for expansion of, or access to, reserves, certification from an appropriately qualified independent person that the feature in question meets the criteria below shall be submitted with the application for subdivision consent.

- (i) The land must provide for expansion of an existing reserve, or access (not otherwise shown in the District Plan) to an existing or proposed reserve or esplanade reserve. The acceptance of such applications is at Council's sole discretion.
- (ii) The minimum size and multiple lot entitlement is the same as for the following ecological features:

- Access equates to *Riparian Margins*
- Expansion of reserves equates to *Wetlands*.

- (v) Buffering on Wetlands
- (i) *Wetlands* less than 2ha require a minimum of 10m indigenous buffer (larger areas may be required where topography dictates). This buffer must be established prior to being eligible for a protection *lot*;
- (ii) *Wetlands* greater than or equal to 2ha require a buffer area of a suitable width prescribed by the certifying ecologist and must be established prior to obtaining Section 224 consent.

- (vi) Number of lots

One *lot* for every separate feature type as set out in clauses (i) and (iv) of this rule. Multiple *lots* will be allowed based on feature type, whether the feature is listed as significant or as an 'other feature', and the feature size. The following tables show the feature sizes required in hectares and the total number of corresponding multiple protection *lots* that can be obtained.

Multiple Lots Features listed as significant in the District Plan:

Feature Type	Feature Size Requirement per <i>lot</i>
<i>Tall Forest</i>	6ha
<i>Regenerating Forest</i>	8ha
<i>Secondary Shrubland</i>	10ha
<i>Riparian Margins</i>	1km
<i>Wetlands</i>	1ha

Multiple Lots for Features not listed as significant in the District Plan:

Feature Type	Feature Size Requirement per <i>lot</i>
<i>Tall Forest</i>	10ha
<i>Regenerating Forest</i>	16ha
<i>Secondary Shrubland</i>	20ha
<i>Riparian Margins</i>	1km
<i>Wetlands</i>	1ha

- (vii) Legal protection

Legal protection of the feature shall be achieved by way of a condition imposed on the subdivision consent requiring a Consent Notice, Memorandum of

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Encumbrance or similar legal instrument to the satisfaction of the *Council* to be registered on the title of the land containing the feature to be protected. All costs associated with compliance with this requirement shall be met by the applicant;

(viii) Exclusions

This rule shall not apply to any land that has been designated in the District Plan (for any purpose), or is classified under the Reserves Act 1997, or is subject to the Conservation Act 1987.