
DESIGN GUIDES - A WELLINGTON REPRISE

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In the August/September edition of *Resource Management News*, Chris Mitchell and Sally Brown offer an able defence of design guides, with particular reference to the Wellington City Council's proposed plan. However, their commentary does not give full reign to the concerns which have led to the large number of strong

objections to the Wellington Design Guides. A reply to their article is particularly appropriate insofar as their views come from their position as legal advisors to the Council and insofar as hearings are approaching.

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design guides of all plans notified in New Zealand to date."

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In line with a disturbing trend in district planning, the Wellington Design Guides are large enough to warrant their own separate volume. Design guides are but one example of a number of new or retrofitted-Town and Country Planning Act techniques which are leading to significantly greater regulation (as well as verbosity and excessive detail) at district level under legislation which was specifically designed to avoid this. By way of example, the proposed Dunedin City District Plan contains layers of controls on matters such as heritage, "townscape", trees and areas of significant conservation value on top of tight development controls. The proposed Christchurch and Manukau equivalents are similarly dense, and so large and expensive that an offer of "a free wheelbarrow with every plan purchase" would not be inappropriate. In respect of Christchurch, the much-heralded effects-based technique contains so many controls that the question must be "where's the crisis?" or "what's different to the old way?".

There should be no doubt that the Wellington Design Guides amount to significant new regulation. The relevant Volume comprises a series of design guides dealing with the whole of the Central Area, as well as design guides for multi-unit housing, subdivision, various "character areas", institutional precincts and "non-statutory design guides" for wind and "design against crime". This article focuses principally on the general

design guides for the Central Area.

Whilst commendably embracing a range of new ideas and techniques associated with effects-based district planning, Wellington City's approach to its Central Area (like Christchurch City's) can aptly be described as "giving with one hand, and taking with the other." Whilst permitted activities in the Central Area essentially include "any activity" and "construction of any building" subject to certain criteria, the design and external appearance of all new buildings and alterations to existing buildings require assessment against the Design Guides. The initial impression in the permitted activity rules for the Central Area of a permissive, effects - based approach is deceptive, insofar as all new development will require resource consent from the Council, at least as a controlled activity. The term "Guides" must accordingly be somewhat misleading.

Fundamental questions may be asked as to where the Council derives its mandate from. Most transitional plans (including Wellington's) contain significantly lesser controls. Although Wellington (like all cities) has examples of less than ideal design, the writers are aware of no substantive issues giving rise to the Central Area Design Guides, nor any substantive section 32 analysis which justify the extent of changes proposed. The strong suspicion is that Wellington City's admirable enthusiasm for "good" design has found a poorly justified outlet in its Design Guides. Similar problems have been evident in other proposed Wellington plan strategies. In particular, the heritage listing provisions of the proposed plan have increased five fold from those in the transitional plan and are also the subject of major attack by submitters on the basis that the major new regulation proposed has not been consulted on; will be expensive and counterproductive for heritage protection; and is otherwise not properly justified, including in terms of section 32.

Mitchell and Brown seek to suggest that design guides are "not only a correct but the essential response to

urban design issues." One wonders how life, society and the economy survived (let alone how the existing vibrant Wellington City Centre developed) before the extensive Wellington Design Guides came into being. Again, whilst accepting that promoting "good" design is an admirable goal, and accepting also that design in the past has not always achieved this goal, where is the necessity for such extensive intervention? The reality of CBD land use and development is that it is a milieu comprising of a range of creative and often conflicting forces. It will throw up both "good" design and "bad" design. The Council should no more demand its version of "good" design for the whole CBD through the plan than it should demand good business or good manners.

The fact that references to "good" and "bad" design must be referred to in quotation marks reflects the critical issue that these are subjective, value-laden concepts which change over time. Are we to take the Design Guides as a *diktat* that the Council will now determine this issue in accordance with Council's preferred design solutions (or that of its consultants)? Interestingly, a number of Wellington's most important buildings are valued because they breach existing design preferences, and their modern equivalents would probably not now be built as they would be unlikely to meet Council's approval.

As Mitchell and Brown point out, the RMA does not, like the former TCPA, make express provision for control of building design and external appearance (in contrast, for example, to heritage matters). As they also rightly point out, the RMA leaves "broad scope for appropriate techniques and solutions to be developed to address the Council's functions." However, there is a big jump from the general powers and functions of the Council to the kind of detailed regulation proposed in the Wellington Design Guides. A critical feature of key decisions under the RMA, including the recent Court of Appeal declaration cases, is a careful grounding of proposed plan measures in the Act,

particularly Council functions (in this case, section 31), relevant provisions of Part II and the Second Schedule. In this case, there simply is no substantive mandate for a City Council to take to itself regulation of the design and external appearance of all new development in the CBD. Resort would need to be had to indirect sources such as "social and economic wellbeing" in section 5, and "amenity values" in the definition of "environment."

Such extensive regulation also cannot be supported in terms of the RMA approach to planning. The RMA takes an essentially permissive approach to land use planning, underpinned by section 32. Put simply, the land owner and developer have rights to use and develop their land as they see fit, subject to justifiable controls, principally on environmental effects. At one end of the scale, it is accepted that the substantive form of development (height, bulk and location, etc) can appropriately be controlled to protect amenity and other environmental values. At the other end of the scale, there are matters which are normally the prerogative of the land owner, such as the colour of buildings (excepting unusual situations such as the Michael Hill house at Arrowtown or the "Pink Bush Houses" of Waitakere City), the size and shape of windows and doors, and the nature of cladding and decoration. A number of the latter categories are to be controlled by the Wellington Central Area Design Guides.

Further, the Design Guides for the Central City purport to extend not just to design detail but also control over bulk and location. The latter is also covered by development controls. A critical concern of submitters is lack of certainty when there is no basic "right" given to develop to a certain point. For example, a maximum height control normally entails a right to build up to that height, provided other controls are met (such as plot ratio or height in relation to boundary controls). It appears that the Wellington Design Guides effectively remove such "rights" in respect of the Central Area by making key development

parameters discretionary.

Mitchell and Brown refer to historical concerns that TCPA approaches to development control were arbitrary and did not address urban quality issues. The Council is certainly to be commended for looking to address this and for promoting new techniques. However, traditional Central Area development controls (such as plot ratios) have been removed and "the gap plugged" by the Design Guides. This appears to create greater development potential, but makes this subject to new discretionary control of an essentially uncertain nature. The response in submissions was indeed surprising at first glance, but amounts to "give us back our development rights." The real commercial imperatives underlining new development demand this and are inconsistent with a broad discretionary design control overlay.

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adjudicate on whether the design of all new development is acceptable or appropriate. A single Council officer with no design training may also be delegated to make the decision. It is the subjectivity of this process which again gives rise to the substantial uncertainty to which Mitchell and Brown refer.

Presentations by the Council have suggested a "trust us" attitude, indicating that the Council may adopt a light-handed approach to implementation of its Design Guides. This does not avoid the need to get the relevant provisions right at the outset and to make controls clear, "above board" and objective. In particular, in the absence of key basic standards defining development "rights", certainly is lost and issues will inevitably arise in respect of equality of administration.

Another suggestion is that a light-handed approach has been taken insofar as the Council will not have powers to refuse consent, but merely to impose conditions. This also does not address the issue of principle, nor the costs and delays associated with applications. Further, it gives great scope for dispute over the nature and extent of conditions which can be imposed. For example, if a developer proposes a mirror glass tower (a particular bugbear of the authors of the Design Guides) can the Council grant consent subject to a condition that no mirror glass be used, or even that the building be clad in artificial brick, or be redesigned in Stalinist or Spanish rococo style, if this was the preference of the Environment Committee or delegated decision maker? Although we can at least be thankful that the Wellington Design Guides do not promote the latter solutions, there is nothing to stop the Committee exercising its discretion in this way.

Again, what about limiting the scale of development to promote Design Guide aims by a condition requiring the height of development to be reduced to 8 metres, in a zone which has a maximum height of 10 metres? It is highly likely that the condition would be invalid, insofar as maximum height controls imply permission to

build up to 10 metres as of right. But what if only part of the development was required to be reduced in height? Issues as to the extent of controlled activity conditions have attracted little judicial consideration to date and could easily lead to substantive dispute if developers and their architectural advisors are asked to redesign proposals to meet Council conditions of consent.

Insofar as new Central Area development is a controlled activity, the Design Guides must, as Mitchell and Brown point out, provide "standards and terms specified" and "matters the consent authority has reserved control over". The former refers to definite controls, such as those in permitted activity development controls. The latter are taken to allow councils an element of discretion. The Wellington Design Guides clearly fall within the latter. Mitchell and Brown confuse this somewhat by going on to distinguish "prescriptive" and "advisory" controls. Although the Design Guides are written in non-prescriptive language ("should" is a common word), the effect is undoubtedly prescriptive not advisory. Put simply, the Council can prescribe its preferred design solution by conditions of consent. The suggestion they are advisory merely compounds the potentially misleading use of the term "Guides."

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Mitchell and Brown refer to a study of design guides undertaken by a student of the Wellington School of

Architecture. The suggestion is that "good" architecture can be equated with design guides and there is at least an implication that architects will accordingly be in support of the Wellington Design Guides. Two points need to be made. Firstly, the ability of the Wellington Design Guides and the Council's Environment Committee to require and determine "good" design must be questioned.

Secondly, the majority view of architects and planners emerging in Wellington City is one of opposition to the Wellington Design Guides. This was demonstrated at a workshop convened by the Wellington Committee of the RMLA specifically to consider design guides, at which one of the authors was a speaker. The principal concern is that the Council, in pursuing its freedom to develop solutions to resource management issues, has chosen to limit the freedom of architects and other designers to develop creative design, by subjecting design (and creativity) to approval by the Council. This concern could not be overcome even by some broad acceptance of Council's preferred design solutions (which acceptance is, in any case, not achievable, being the very reason design guides are promoted). Other concerns are equity, equality, certainty and cost.

In conclusion, neither the broad powers and functions of the Council, nor the principles of planning and design, in any way demand the kind of extensive regulation now proposed in the Wellington Design Guides. Like the Wellington City's extensive new heritage provisions, they have yet to be carefully justified, both in terms of the RMA itself and fundamental planning principles. Put simply, the word "Guides" is a euphemism in light of the new level of intervention proposed.

Having said that, the concept of design guides has some merit in providing a forum for consideration of design issues and guidance as to "good" design. They will potentially be more appropriate in some situations than others, where there are particular issues or values involved. The comments in this article have focused on Design Guide controls on all

Wellington Central Area development. Different justifications might be made for other Wellington Design Guides for particular "Character Areas" such as Courtenay Place, Cuba Mall or Thorndon. The values and activities associated with these areas are different in many cases to the main CBD. Further, the extensiveness of the Wellington Design Guides potentially has the virtue of putting at least some design parameters forward to guide public thinking on development and provide some limit on Council's decision parameters. This has potential advantages over blunt reservation of control over design and external appearance in some plans, with little or no criteria attached.

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There is nothing wrong with the Council promoting "good" design. Whether or not the district plan review process is the best forum for encouraging or achieving expert or public consensus on this, is debatable. However, making "good" design (or the Council's version of it) compulsory is quite another matter. The Wellington Design Guides should at least be scaled down so that they do no more than provide guidance within an equitable and clear framework of development rights and responsibilities, rather than imposing major new, vague and potentially inequitable resource consent requirements for all new inner city development.

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