

ORIGINAL

Decision No. A 69 /2007

IN THE MATTER of the Resource Management Act 1991 (**the Act**)

AND

IN THE MATTER of an appeal pursuant to Clause 14 of the First Schedule of the Act

BETWEEN ABRAHAM HOLDINGS LIMITED

(ENV-2006-AKL-912)

Appellant

AND

NORTH SHORE CITY COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith (presiding)  
Environment Commissioner C E Manning  
Environment Commissioner S J Watson

Hearing at Auckland on 28-31 May and 1 June 2007

Appearances

Mr P Cavanagh QC for Abraham Holdings Limited (**Abraham Holdings**)  
Mr W J Loutit and Mr K A Eskerie for the North Shore City Council (**the City Council**)  
Mr G Milne for Airboards Asia Pacific (**Airboards**)  
Mr C Scott for himself  
Mr P White for himself and Mr D Brook  
Ms A Wright for Friends of Birkenhead Library (**the Friends**)  
Ms J Kirk for herself

**DECISION**



### *Introduction*

[1] This case concerns a change to the North Shore City Plan (**Plan Change 14**) to facilitate the building of a library and other civic facilities on an area known as the Nell Fisher Reserve, situated on the corner of Hinemoa Street and Rawene Road in Birkenhead in North Shore City.

[2] The land consists of five parcels held in three titles. These parcels were referred to in evidence as areas A, B, C, D and E, and are shown on a plan which we attach to this decision as attachment "1". Only area D of these parcels is held as a reserve under the Reserves Act. The remainder of the land is held by the Council in fee simple.

[3] Area D is 862 m<sup>2</sup> in size and is gazetted as a Local Purpose Reserve (Municipal Offices and Library). The North Shore City Plan, prior to the promulgation of the Change, applied a Recreation 2 zoning to areas A, B, C and D. Area E, which is 1,051 m<sup>2</sup> in size and is located in the south of the reserve, is zoned Business 2. Although not all the land is gazetted for reserve purposes, for the sake of convenience, when referring to the area as a whole we shall use the term **Nell Fisher Reserve**.

### *The Nell Fisher Reserve*

[4] Nell Fisher Reserve as a whole comprises a quadrilateral of approximately 3,415 m<sup>2</sup>, the two southern sides of which join at an obtuse angle; the north-western and north-eastern sides are longer. The area of Council land known as the Nell Fisher Reserve is bounded by Rawene Road and Hinemoa Streets in the centre of Highbury. It derives its name from the first head of the library which operated on the site for many decades. Near the street edges towards the northern part of the site, the land is heavily treed, and a number of established trees provide a continuous canopy. In the south about 1,000 m<sup>2</sup> of the site falls reasonably steeply to the south-eastern and south-western boundaries. In the south-western area there is a parking area and the south-eastern area is empty where the previous library building once stood.



[5] Land adjoining the reserve on Hinemoa Street and Rawene Road, and on the other side of Rawene Road, is zoned Business 2 as is the land along Birkenhead Avenue and Mokoia Road where those roads join the intersection of Rawene Road and Hinemoa Streets.

[6] Until May 2005 two buildings stood on the Nell Fisher Reserve. One of them, covering much of area D and extending onto a small part of area C, housed the Birkenhead Library and North Shore City Area Office, the Citizens' Advice Bureau, the Community Co-ordinator, and the Community Board Rooms. A second building, located on area C, accommodated Plunket Rooms.

*The rebuilding proposal*

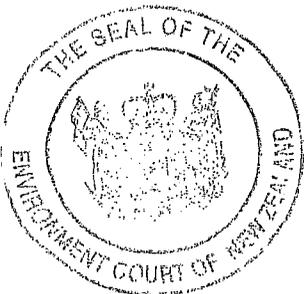
[7] The Council considered that these buildings were inadequate, and commissioned designs for a new building which were drawn up during 2004. Having applied for a resource consent for this building, but prior to the hearing of the application, the Council commenced demolition of the buildings in May 2005. The process was well advanced by 8 July of that year when the Commissioners appointed to hear the resource consent application refused consent, noting among their reasons:

5. *The proposal is contrary to the objectives and policies of the Recreation 2 zone of the District Plan. In particular, this proposal does not provide for open space as set out in the Objective, and it is not a low-key activity as required by the zone policy. The range of activities is also significantly wider than anticipated by the zone policy.*

[8] On receipt of the Commissioners' decision, and after consideration of the options open to it, the Council notified a change to its District Plan (**Plan Change 14**) on 17 November 2005. The land has remained empty in the meantime.

*Plan Change 14*

[9] As notified, Plan Change 14 proposed to retain a Recreational 2 zoning over areas A and B, an area of 472 m<sup>2</sup>, and to rezone the remaining land from Recreation 2



and Business 2 to Special Purpose 9. The Council considered this zoning would enable the construction of a suitable library and civic centre building.

[10] The Commissioners appointed to hear submissions and make the primary decision on Plan Change 14 determined that Plan Change 14 be upheld. They required an amendment locating the boundary of the Recreation 2 and Special Purpose 9 Zones further south on the reserve. The result was that a further 256 m<sup>2</sup>, all from area C, was included in the Recreation 2 zoned land.

[11] Abraham Holdings appealed against this decision to the Environment Court, seeking that Plan Change 14 should be withdrawn or cancelled or, alternatively, that only area D be rezoned Special Purpose 9, with a height limit of 8 metres imposed. Mr D E Brook, Mr P White, Mr G A Milne and Mr C H Scott joined the proceedings as section 274 parties in support of Abraham Holdings. We gather from their evidence and submissions that these parties favoured the first form of relief sought by Abraham Holdings. The Friends of the Birkenhead Library and Ms J Kirk appeared as section 274 parties in support of Plan Change 14.

### *The issue*

[12] The Council submitted that the central issue in this case was whether the Nell Fisher Reserve should remain as it is at the moment, free of buildings, an outcome which would result from the refusal of the Plan Change, or whether it should accommodate a new building which would include a library, Plunket office, Citizens' Advice Bureau, and other community facilities which the Plan Change would enable.

[13] Although that was the way in which much of the evidence was couched, it became clear as the hearing progressed that the real issue was much more confined. To the extent that that is an option legally open to us, the maintenance of the zoning as it existed before Plan Change 14 would allow a variety of buildings to be erected on the site. One issue is whether the ultimate form of zoning should permit a series of separate unco-ordinated developments, or should facilitate integrated management of the whole reserve and any buildings that may be built on it.



*The legal framework*

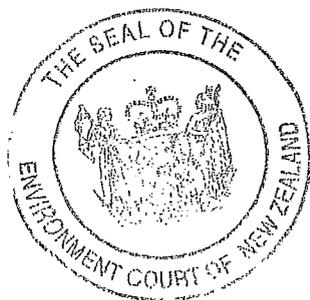
[14] It is common ground that, as Plan Change 14 was notified in November 2005, the provisions of the Act as amended in 2005 apply. Section 74(1) of the Act provides:

*A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, [a direction given under section 25A(2),] its duty under section 32, and any regulations.*

[15] The relevant question under section 31 in this case is: which of the proposed sets of plan provisions better achieves integrated management of the use, development and protection of the land and associated natural and physical resources of the district, and which of them best controls the actual or potential effects of the use of the land?

[16] On a plan change section 32 requires a local authority to examine the extent to which each objective is the most appropriate way to achieve the purpose of the Act. This includes whether the policies, rules, or other methods are the most appropriate for achieving the objectives. The Environment Court in *Eldamos Investments Limited v Gisborne District Council*<sup>1</sup> summarised the tests as follows:

- B. *A policy, rule, or other method in a district plan is to be evaluated by whether:*
- 1 *it is the most appropriate way to achieve the objectives of the plan (s32(3)(b)); and*
  - 2 *it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s72);*
  - 3 *it is in accordance with the provisions of Part 2 (s74(1)); and*
  - 4 *(if a rule) it achieves the objectives and policies of the plan (s76(1)(b)).*



<sup>1</sup> W47/2005 at para 128.

The Court went on to say<sup>2</sup>:

*Finally we address Mr Whata's submission that in considering whether a policy, rule or other method achieves the purpose of the Act, that purpose is to be found in the objectives and policies of the plan. Counsel relied on Environment Court decisions in Warehouse v Dunedin City Council<sup>3</sup> and Progressive Enterprises v Christchurch City Council<sup>4</sup>, and referred to Shaw v Selwyn District Council<sup>5</sup>.*

*We accept counsel's proposition in general, but not as having universal application. One obvious class of exception is where the relevant objectives and policies are also challenged ...*

We consider that the words *most appropriate*, when used in the context of a limited range of options open to the decision-maker may be construed as meaning *better* or *best*, in the same way as the Environment Court in *Suburban Estates v Christchurch City Council*<sup>6</sup> interpreted the word *necessary* in a previous form of this section. No counsel demurred from this approach to our task.

[17] Applying the reasoning in *Eldamos* to this case, it is clear that the higher order objectives and policies may be taken as embodying the purpose of the Act. Part of the Court's enquiry in this case is to determine which of a number of zones best meets the purpose of the Act and the objectives of the Plan. In the case of the Nell Fisher Reserve, the Court must determine which of the possible zones better meets the general objectives and policies of the Plan. The objectives and policies of the Recreational 2 and Special Purpose 9 Zones describe those zones. We must therefore look to other provisions of the Plan for any guidance as to which zone might best fit this site. We cannot assume that either the Recreational 2 or Special Purpose 9 Zone already applies to the site. Thus the objectives, policies and other provisions of the Recreational 2 and Special Purpose 9 Zones demonstrate the shape and character of the options for zoning available to the Court. They do not form part of the criteria which the provisions adopted must meet.

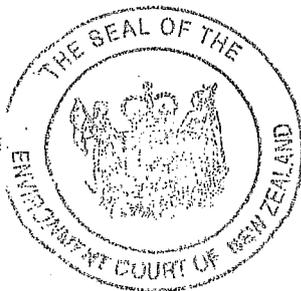
<sup>2</sup> W47/2005 at para 130-131.

<sup>3</sup> C101/2000.

<sup>4</sup> C98/2003.

<sup>5</sup> [2001] NZRMA 399 (HC).

<sup>6</sup> C217/2001.



[18]. The parties also accepted that section 32 does not contemplate that the determination of a site specific proposed plan change will involve a comparison with alternative sites. Mr Loutit for the Council cited *Brown v Dunedin City Council*<sup>7</sup> in support of that proposition. Although the form of section 32 has been amended since the issue of that decision, we accept that the principle still applies.

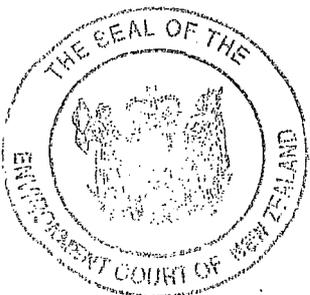
### *The Recreation 2 Zone*

[19] The Recreational 2 Zone prior to Plan Change 14 applied to areas A, B, C and D, an area of around 2,360 m<sup>2</sup>. This zone has the objective (19.4.2) of providing for open spaces throughout the residential areas of the City to serve the needs of local residents for recreation and community activities and visual amenity. It does so by three policies, only two of which (19.4.2.1 and 19.4.2.2) are relevant to this proceeding which we paraphrase:

- (1) recognising land so zoned as a recreational resource for low-key every day recreation and community activities;
- (2) restricting the range of activities and development associated with them to those which allow recreation and community use of the open space, and retain its visual amenity and compatibility with neighbouring residential development.

The explanation and reasons for the objectives and policies identifies that the zone applies to open space which provides for the amenity of residential areas because of its open space character and its capacity to accommodate local recreational and community activities. It further notes that the zone also applies to open space which provides pleasant, park-like environments within intensely developed commercial centres.

[20] Rules arise from these policies are as follows:



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<sup>7</sup> [2003] NZRMA 420.

- (a) development controls limit the height of buildings to 8 metres, require front, side and rear yards of 5 metres, and control height in relation to boundary;
- (b) the maximum building coverage allowed for permitted and controlled activities is 10% as permitted or controlled and 15% as a limited discretionary activity;
- (c) relevant permitted activities include activities associated with a listed building or structure, cycleways, jogging tracks and fitness trails, landscape areas including park furniture and sculpture, picnic and barbeque areas, structures ancillary to and used in conjunction with sports fields, walking trails, and maintenance of open space;
- (d) the range of controlled activities is somewhat wider, including:
  - (i) accessory buildings where the prime use of the site is permitted or controlled;
  - (ii) car parks necessary for the use of the reserve land;
  - (iii) children's play areas and play equipment;
  - (iv) extensions to existing buildings provided they do not exceed 50 metres or 50% of the floor area of the building as it existed at the time of public notification of the plan;
  - (v) grazing, horticulture and forestry, and buildings associated with them;
  - (vi) storage and implement sheds, toilets and shelters.

[21] We can readily understand why the Council's Commissioners at a resource consent hearing considered that these provisions did not favour a library and civic centre and the accompanying intensity of activity that the North Shore City Council proposed. In particular the area of Recreational 2 zoned land occupied by the proposed building footprint would be around 1,000 m<sup>2</sup> of 2,360 m<sup>2</sup> or over 40%. This is well in excess of the 15% or 350 m<sup>2</sup> contemplated as restricted discretionary use.

### *The Business 2 Zone*

[22] The 1,051 m<sup>2</sup> area E is currently zoned Business 2 and is designated for car parking purposes. Buildings could be erected to a height of 9 metres as a permitted and



11 metres as a limited discretionary activity. The only requirement for yards appears to be for a 3 metre landscape amenity yard where a site abuts, as this site does, residentially zoned land. Otherwise there is no limit on building coverage. As the explanation and reasons for the objective and policies for the zone indicate:

*The zone is designed primarily for business activities with a high intensity of operation.*

It has policies of retaining a substantial shopping role in suburban centres and enabling a wide range of business activities to establish in suburban centres (15.4.2.1 and 15.4.2.2). Accordingly a building meeting the designation (parking) and complying with the permitted criteria could be constructed as of right. Accordingly the original consent proposed was unlikely to cause much concern in terms of either its building footprint or height.

#### ***Special Purpose 9 Zone***

[23] Plan Change 14 as amended by the Commissioners proposes for part of area C, area D, and area E of the Nell Fisher Reserve to be zoned for community uses. The introductory statement begins as follows:

*This zone applies to a wide range of community activities and facilities spread throughout North Shore City. It includes a number of community centres, libraries, Council offices, community halls and other community buildings and facilities used for recreational, educational and community purposes such as Civil Defence and Plunket, and similar activities.*

[24] The zone's objective is to enable the continued operation and development of various community facilities in a manner which encourages community use of the facilities and land in the zone while avoiding or mitigating effects (we presume adverse effects) on the environment and the surrounding neighbourhood. Relevant policies are:



- (a) provision for a wide range of activities of benefit to the community, including civil defence facilities, Plunket rooms and childcare, educational, recreational and leisure facilities; and
- (b) to include rules to control the height, bulk and location of additional development.

[Objective 20.9.1, policies 20.9.1.1 and 20.9.1.4].

[25] The explanation and reasons section states that in the case of existing community facilities such as libraries and community centres the provisions of the zone are designed to cater for the continued operation of these facilities including some upgrading and development.

[26] The rules for the Special Purpose 9 Zone as proposed for the Nell Fisher Reserve provide for Civil Defence bases, information centres, childcare centres for under ten children, senior citizens' clubs, Plunket rooms, public toilets, community welfare centres, community workshops, community buildings and facilities, reception lounges, Council administrative offices, car parking areas and car parking buildings as controlled activities, along with any accessory buildings associated with any of these activities if it is the principal activity on the site. There is a proviso that any of these activities which does not require buildings or other development works is a permitted activity. Buildings for these activities are to be allowed to a height of 9 metres as a controlled activity, and have limited discretionary status up to 11 metres. Yards of 5 metres are required as a controlled activity for the front yard, or 1.5 metres as a restricted discretionary activity. The respective dimensions for rear yards are 3 metres and 1.5 metres, and for side yards 1.2 metres as a controlled activity without provision for restricted discretionary activity status. An addition to the explanation and reasons for height control standards explains that the height limits are more generous than in most other parts of the zone to reflect the intended community and civic purposes use of the zone, and its location within the Business 2 area of the Highbury business centre.

[27] The Plan provides a series of matters which are to be considered in assessing applications for controlled and discretionary activities in the various Special Purpose



Zones. The Plan Change, if adopted, would provide an additional two assessment matters specific to this site:

*h) General Layout*

...

*In the Special Purpose 9 zone at the proposed Birkenhead library and civic centre site, the building or buildings should achieve physical and visual integration with the adjoining Recreation 2 zoned land. Development should ensure that the design and operation of new buildings compliments and encourages use of the adjoining recreation zoned land.*

*i) Open Space*

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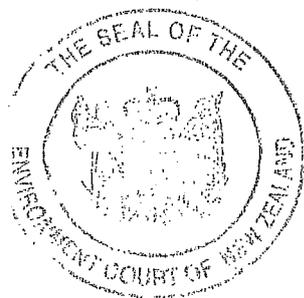
*Development in the Special Purpose 9 zone at the proposed Birkenhead library and civic centre site should not diminish the pleasant open space character of the adjoining Recreation 2 zoned land.*

***Which zoning provisions better achieve the purpose of the Act and the objectives and policies of the Plan?***

[28] The Plan Change as presented to the Court would rezone three land parcels in the area known as the Nell Fisher Reserve, part of area C and the whole of area D from Recreational 2 to Special Purpose 9, and area E from Business 2 to Special Purpose 9. We find it convenient to consider area D first.

*Area D*

[29] Area D is the only block of land on Nell Fisher Reserve that is gazetted as a reserve for a specific purpose, namely for municipal offices and a library. Abraham Holdings in submissions accepted, rightly in our view, that the Reserves Act classification affecting this area contemplates municipal offices and a library on that part of the site and it therefore did not oppose the continued use of that area for community buildings. The section 274 parties accepted that position, albeit somewhat regretfully on the part of Mr Scott.



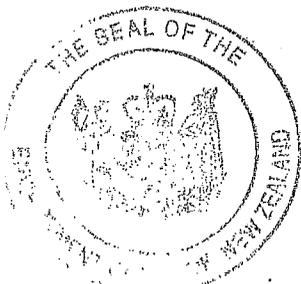
[30] Area D can only be used for those purposes for which it was gazetted under the Reserves Act. To apply a zoning which would frustrate that use cannot possibly be the most appropriate way to achieve the objectives of the Plan, nor assist the territorial authority to carry out its functions to achieve the purpose of the Act. Nor could it represent sustainable management as defined in Part 2 of the Act.

[31] The Council's Commissioners who considered the resource consent application for a building for a library and civic purposes held that such a building was contrary to the objectives and policies of the Recreational 2 Zone. The consultant planner called by the Council, Mr J R Hughes, was of the opinion that a proposal for such a building, even if modified, carried a substantial risk of consent being declined in the Recreation 2 Zone. We conclude that it could not possibly be appropriate to retain a Recreational 2 zoning on area D given that would frustrate the reserves purpose for which the land is held.

[32] By contrast the provisions of Plan Change 14 apply a zoning which specifically contemplates the uses for which the area was set aside, and has made specific amendments to the zone standards which apply to and cater for the requirements of this specific site. We conclude that area D is better zoned as Special Purpose 9.

#### *Area E*

[33] In the case of area E, the Court has two alternatives: Business 2 or Special Purpose 9. A Recreational 2 Zone is not an option open to us jurisdictionally. As we have set out earlier, the Business 2 Zone has an objective of recognising the shopping role that suburban centres serve or could serve. The policies enable the retention of a substantial shopping role and enable a wide range of business activities to establish. The planner called by Abraham Holdings, Mr B W Putt, had written in supplementary evidence dated 30 May 2007 that if the rules of the Business 2 Zone are applied "there is no permitted activity on the site because of the buffer zone control". However, after consultation with Mr Hughes he revised this opinion and suggested that it would be



possible to construct a building with a 300 to 400 m<sup>2</sup> footprint, and with a second level over part of that area skewed towards the recreation zone<sup>8</sup>.

[34] We conclude that if area E were left with its current zoning, it would be possible that in addition to a library and municipal building on area D, a further building of some size could be built on area E, incorporating public parking. These need not be connected to the area D building and there need not be any necessary design compatibility. We leave consideration of the alternative scenario which would apply if the Plan Change is upheld until we have also considered area C.

#### *Area C*

[35] The alternative zones for area C are Recreational 2 or Special Purpose 9. If we were to decline to rezone area C, there would be three contiguous areas totalling just under 1,500 m<sup>2</sup> zoned Recreational 2. This would not be a no-build area. Ten percent of it could be occupied as of right, either in a concentrated area, or by buildings scattered over all three blocks of land. We do not consider it fanciful that this area might accommodate a toilet block and a shelter, and possibly even structures associated with a sporting activity. This could occur if the limits to the use of part of the area for library and municipal functions are too stringent to allow adequate provision of toilet and shelter functions within a building serving those purposes. Even more likely is a separate Plunket building (up to 150 m<sup>2</sup>) if there is not sufficient room in the new building. We heard evidence as to the serious situation that has developed for Plunket since its former separate building was demolished on area C. If the zone does not provide suitable Plunket accommodation within a new civic building, it is almost inevitable they will seek to re-establish on area C.

#### *The options*

[36] We consider that there are several alternatives open to us:

- (a) Option 2:

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<sup>8</sup> Transcript p. 446.



- zone area D alone as Special Purpose 9. That leaves open the possibility that the area now known as the Nell Fisher Reserve would be occupied by a building for library and municipal purposes in area D;
  - retain Business 2 on area E. The possible consequence is a 300 to 400 m<sup>2</sup> building, partly two storied, developed for commercial purposes on area E;
  - if Recreational 2 remained over areas A, B and C assorted other structures could occupy 150 m<sup>2</sup> on these areas as permitted activities;
- (b) Option 2:
- zone areas D, E and part of C as Special Purpose 9. This would leave areas A, B and part of C as Recreational 2. This would adopt Plan Change 14 as appealed to this Court;
- (c) Option 3:
- zone areas D, E and part of C as Special Purpose 9 but impose some further controls such as:
    - (a) building envelope;
    - (b) concept landscape plan;
    - (c) further assessment criteria relating to:
      - (i) physical and visual integration of Recreational 2 and Special Purpose 9 zoned land;
      - (ii) whether the design and operation of new buildings complements and encourages the use of that land; and
      - (iii) whether development in the Special Purpose 9 Zone diminishes the pleasant open space characteristics of the adjoining Recreational 2 land.

[37] We conclude the third option gives the prospect of better achievement of the objectives and policies of the Plan as to community use of this publicly-owned land. The more specific provisions of the Special Purpose 9 Zone give the Court an opportunity to tailor the Plan provisions to the particular site.



[38] We conclude that to uphold Plan Change 14 would better enable the Council to carry out its function of achieving integrated management of the use, development and protection of the land known as the Nell Fisher Reserve. Mr Putt appeared to agree, in discussion with the bench, that the haphazard development of three separately zoned areas could produce worse environmental results than an integrated development, particularly if the rezoning were strengthened by the incorporation into it of a concept plan<sup>9</sup>.

[39] We conclude that Plan Change 14 with modification (Option 3) better gives effect to the unchallenged objectives and policies of the Plan, and by doing so better achieves the purpose of the Act.

### *Open space*

[40] We note that a number of parties opposed to the rezoning gave their evidence on the (incorrect) assumption that the retention of the existing zoning would ensure the preservation of the Nell Fisher Reserve as open space. We acknowledge that there are unchallenged objectives and policies of the Plan at a high level which are concerned with adequate provision of open space and access to recreation. For example, in the chapter on urban growth and development issues, one of the issues (6.2.1) states:

*Growth raises the following issues ...*

- *A need for more parks, reserves and green space to cater for an increasing population*
- ...

There are also policies to provide for enhanced accessibility to recreation (6.4.4) and of ensuring the reserve network meets the needs of the community (6.4.8). However we accept Mr Hughes' evidence that no hierarchy exists in the Plan chapter 6 which elevates a need for reserve land and open space above other needs. We note that the issues section also states that growth raises the issue of access to community facilities

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<sup>9</sup> Transcript pp 460-461.



(6.2.4), and that community facilities are linked with recreation in a list of opportunities to which the Council has a policy (6.4.4) of providing enhanced access.

[41] The Recreation Zone policies in chapter 19, cited to us by opponents of the rezoning, cannot determine the outcome in this case, since the issue before us, among others, is whether those policies or the policies of the Special Purpose 9 Zone and the Recreation Zone should apply to this land.

[42] The Court had before it evidence from Mr M J Van Jaarsfeld, the Strategy and Planning Manager, Community Services at North Shore City Council, a qualified planner with experience in open space planning. The evidence was that, in its current vacant state:

- (a) the Nell Fisher Reserve was little used;
- (b) it was currently not well integrated with surrounding land uses; and
- (c) the amount of parkland within the Highbury centre was relatively high in comparison with other areas in North Shore City. Mr Van Jaarsfeld was of the opinion that the development of a building well integrated with the Nell Fisher Reserve would enhance the functionality of the park.

[43] Mr Van Jaarsfeld accepted in cross-examination that his sporadic recording of numbers present on Nell Fisher Reserve did not constitute a statistically accurate survey of park usage, and that not all reserve land in the vicinity of Highbury Centre was easily accessible. But the only other evidence of park usage, from lay witnesses, tended to confirm Mr Van Jaarsfeld's picture. Further, Mr Van Jaarsfeld was not shaken in his central thesis; that the construction of a library building would enhance the functionality of the reserve.

### ***Conclusion***

[44] We conclude that a zoning which:

- (a) precluded the development of a library and civic building on the site; and
- (b) resulted in it being left largely vacant



would provide at best limited implementation of those policies relating to accessibility to recreation and the reserves network to which we have referred. The rezoning proposed would satisfy the policy of providing access to community facilities. It would go at least as far as the present zoning in satisfying the policies on reserves and recreation. As required by section 32, we exercise a judgement on which of the alternatives better implements the unchallenged policies of the Plan. We conclude that zoning along the lines proposed in Option 3 better achieves the objectives and policies of the Plan.

[45] Section 74(1) also directs our attention to Part 2. We accept that there will be some adverse effects on the environment which will not be totally avoided, remedied or mitigated if the proposed Plan Change is upheld. We accept that Abraham Holdings will suffer some loss of view from the building it owns at 15 Rawene Road. However, that loss may occur from a development on the Business 2 land. We must also factor in some loss of open space currently existing on the reserve (even though we consider the reserve in its present form has limitations on its usefulness). Against that we must weigh the degree of enablement afforded by the Plan Change to the North Shore City Council and the community of Birkenhead to provide for their social and cultural welfare in the form of a library and civic buildings, and to provide a more useable open space area on the remainder of the site. We conclude that the proposed Plan Change would enable a more efficient use of a natural resource than the existing provisions of the Plan (section 7(b)) and that with the changes we intend to make, better maintain and enhance amenity values and the quality of the environment (section 7(c) and (f)).

#### *Detailed amendments to Plan Change 14*

[46] During the course of the hearing, two matters concerned the Court particularly:

- (1) both the Commissioners at the first instance hearing, and the witnesses before us, were concerned that the library and civic building on the Special Purpose Zone land, and the Recreation 2 open space land should be developed in a complementary and integrated fashion; and



- (2) Plan Change 14 currently would require a building in the form considered most appropriate by the Council architect, Mr B J Rawson, to obtain resource consent as a limited discretionary activity. A further resource consent process could delay a project that has already suffered lengthy and unforeseen delays as a result of the first resource consent application being declined.

[47] During the course of the hearing, the Court explored with a number of witnesses the possibility of attaching to Plan Change 14 some form of building envelope and concept plan. This could outline the area capable of occupation by buildings, and show their relationship to the surrounding open space. This found favour with a number of witnesses called by the Council and with Mr Putt, the only professional witness called by the parties opposing the Plan Change.

[48] At the conclusion of the hearing the Court requested that the Council file within 20 working days revised Special Purpose 9 Zone provisions. The Council subsequently submitted a memorandum outlining its proposed amendments to the Plan Change, including changes to the text, and a conceptual landscape plan which we attach as "2", and two further plans numbered 20F (attached as "3") and 20G (attached as "4") which show the zonings proposed together with the building envelope and the height restrictions relating to it. It is intended that these plans be incorporated into the provisions of the Plan Change and that they serve to place restrictions on the footprint of building, ensure minimum yard set-backs and maximum building heights over various parts of the building. We attach a copy of the amended zone provisions to be incorporated into Plan Change 14 as "5".

[49] The memorandum of counsel for the Council notes that a schematic redesign of the proposal has been prepared, confirming that a workable building meeting the Council's brief could be accommodated in a smaller envelope than that suggested to the Court at the hearing. That may explain why within the envelope the maximum height available for permitted activity status is 9 metres even over area D, and that 11 metres as a limited discretionary activity is available only over roughly two-thirds of the building envelope in the north-east (in area D). The building envelope in the north-east is



parallel to and set back 1.5 metres from Hinemoa Street, and runs back at a width of 22 metres in a south-westerly direction. Set-backs of 3 metres are provided from properties in Hinemoa Street and the neighbouring Residential Zone to the south.

[50] We note that the proposed building envelope covers 210.70 m<sup>2</sup> of land in area C or approximately 14% of the total land in areas A, B and C. Thus although the Recreation 2 land would be only around 728 m<sup>2</sup> the usable open space in areas A, B and C is some 1290 m<sup>2</sup>.

[51] These revisions have been approved by the appropriate Council committees and are supported by those parties which appeared at the hearing in support of the proposed Plan Change.

[52] The section 274 parties who appeared in support of Abraham Holdings did not support the Council's concept plan, but submitted a proposal of their own. It proposed a building limited to the area of the old library building (618.4 m<sup>2</sup>) plus 15% of the remainder of the site including area E (330.45 m<sup>2</sup>). It restricted building to 9 metres height as a permitted activity with no provision for limited discretionary status for building above that height. There is a considerably greater set-back from Hinemoa Street. The parties in opposition suggest that their proposal will provide a total floor area over two levels of 1,887.7 m<sup>2</sup> and provide a third basement level, presumably excavated, for car parking and other activities such as storage.

[53] We presume that these opposing parties have, understandably, not undertaken any study of the functionalities of such a building. They do not indicate that they have, but their memorandum states:

*This area will satisfy current LIANZA guidelines (1590 m<sup>2</sup> for 28,000 population), while also accommodating some other services as well. These can be moved out progressively (as envisaged by Mr Chamberlain) as the library is required to expand to meet future population increases.*

[54] These parties also seek that all land outside the building envelope be formally gazetted as reserve. Such a step is outside our jurisdiction.



*Form of Plan Change 14*

[55] We have already concluded a form of Plan Change 14 will better achieve and implement the objectives and policies of the Plan and Act. We now consider which of three possibilities:

- (a) Plan Change 14 as initially put to the Court;
- (b) Plan Change 14 as amended by the Council's subsequent memorandum; or
- (c) Plan Change 14 as put forward by the section 274 parties opposed to the Council

better achieves the purpose of the Act and the policies and objectives of the Plan. We note that other than a description of their proposed amendments, neither party advanced much in the way of argument for any option.

[56] We conclude the Council's revised proposal does have a number of clear advantages over that initially presented. Mr Rawson presented to the Court at the hearing a schematic floor plan. This was indicative only and was not part of the zone requirements. The building envelope submitted in the revised proposal reduces the part of area C occupied by buildings from a potential 351 m<sup>2</sup> to 210.70 m<sup>2</sup>. In addition to the reduced part of area C occupied it has the advantage of offering greater certainty to the parties and the local community as to the land on the areas A, B and C that is to remain free of buildings. Further, the extent of potential development to a height of 11 metres is reduced and located towards Hinemoa Street. Essentially it allows for an increase to 11 metres only in area D. The Council indicates that this area will be sufficient for a functional building. It has provided a conceptual landscaping plan showing the use of hard surfacing, grass terraces and native planting to integrate the building with the open space of the Recreation 2 Zone. The revised plan appears to us to provide a larger continuous area of recreational space than the plan originally presented to us.

[57] For these reasons we accept that the proposals submitted by the Council after the conclusion of the hearing achieve the objectives and policies of the Plan better than those originally presented. That is particularly the case in respect of those policies



relating to provision for enhanced accessibility to recreation, and ensuring that the reserve network meets the needs of the community. In so doing the revised proposals also better achieve the purpose of the Act than those initially put before the Court.

[58] As the building envelope put forward by the various section 274 parties is less than that proposed by the Council, it might be thought that such a proposal better achieves the policies of the Plan on accessibility of recreation and adequacy of reserve land that we have described. However, there is no evidence that the Council's needs for a library and civic building would be met by providing the required 1,890 m<sup>2</sup> floor area evenly split over two floors. In other words, the building envelope proposed by these parties may not enable the Council to achieve those policies relating to access to community facilities. Nor is there any evidence that excavation to provide parking and other space beneath the building is a practical option.

[59] Further, the plans submitted by the opposing parties do not show a significant saving of land currently zoned Recreation 2 from the building envelope. The reduced building envelope is achieved principally by excluding from it land zoned Business 2. This land currently permits the most liberal development. Moreover no convincing reasoning is advanced for the formula by which the proposed area of the building envelope is derived. Why, when 862 m<sup>2</sup> is gazetted for library and municipal office purposes, should the 618 m<sup>2</sup> occupied by the previous building have any particular significance? Why, when a building of 300 m<sup>2</sup> – 400 m<sup>2</sup> could be built on area E, should the maximum area of the whole reserve occupied be restricted to 330 m<sup>2</sup> in addition to the area occupied by the previous building?

[60] This proposal may better protect the views of occupiers of Rawene Road buildings and allow a more open frontage for other owners and occupiers on Rawene Road. However, this is on the basis of a considerable reduction of the activities permitted on formerly Business 2 zoned land. This restriction is borne by the ratepayers as a whole. Our conclusion is that the public interest in providing flexibility in the construction of a public library significantly outweighs the private interests affected. The Plan does not guarantee occupiers protection of views currently enjoyed when new development of land occurs.



[61] We conclude that with one exception we should uphold the provisions of Plan Change 14 in the form submitted after the hearing by counsel for the Council.

*Heights of building envelope*

[62] The exception relates to height limit. In the proposals brought to the Court during the hearing, building to a height of 11 metres was to be a restricted discretionary activity over the whole zone. As we indicated during the hearing, and earlier in the decision, we would prefer to give certainty to all parties by approving zone rules which would allow the Council to construct a suitable building for library and municipal purposes without the need for a resource consent possibly involving notification and a further hearing. As we understand the situation, that would require any building to 11 metres to be a permitted or controlled activity over that part of the building envelope when Plan Change 14 shows it as a limited discretionary activity.

[63] We have earnestly considered whether this is within the scope of the Plan Change as notified, or at least represents such a *de minimis* change that it should be allowed. We note the comments of the High Court in *Royal Forest and Bird Protection Society v Southland District Council*<sup>10</sup> that questions of scope *should be approached in a realistic workable fashion, rather than from the perspective of legal nicety*. The question is, in our view, finely balanced. The scope for a potential building to 11 metres is much reduced by the revised version of Plan Change 14. This reduction in area could be matched by a change of status to controlled over the smaller area D where a building height to 11 metres may be required.

[64] It is certainly within scope for us to approve a rule which provides for building to a height of 11 metres as a restricted discretionary activity over the whole building platform. The Council and Abraham Holdings are now agreed that 9 metres over the building envelope area should be permitted. They also agreed that 11 metres should be restricted discretionary over area D. Plan Change 14 envisaged a building to 11 metres as restricted discretionary over area E and part of area C. The Council proposal now excludes all of area E and area C from a height over 9 metres. Some parties oppose

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<sup>10</sup> [1997] NZRMA 408 at p. 413.



even this reduced proposal. We would be minded to make 11 metres restricted discretionary over all the building envelope. Given however the Council submission seeking that area D only have 11 metres height envelope we reluctantly conclude that 11 metres over the lesser area D should be included in the Plan Change.

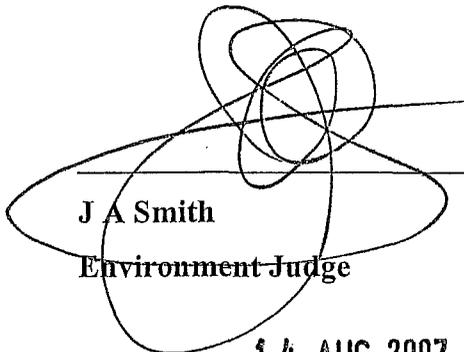
***Outcome***

[65] The outcome is that Plan Change 14 in the form submitted by counsel for the Council and attached to this decision is upheld. The Court concludes that the most appropriate way of achieving the objectives and policies of the Plan and the purpose of the Act is to retain a rule providing for a building height to 11 metres as a limited discretionary activity over area D envelope for the reasons given.

[66] We understand that no issues as to costs are outstanding.

**DATED** at CHRISTCHURCH this 13<sup>th</sup> day of August 2007

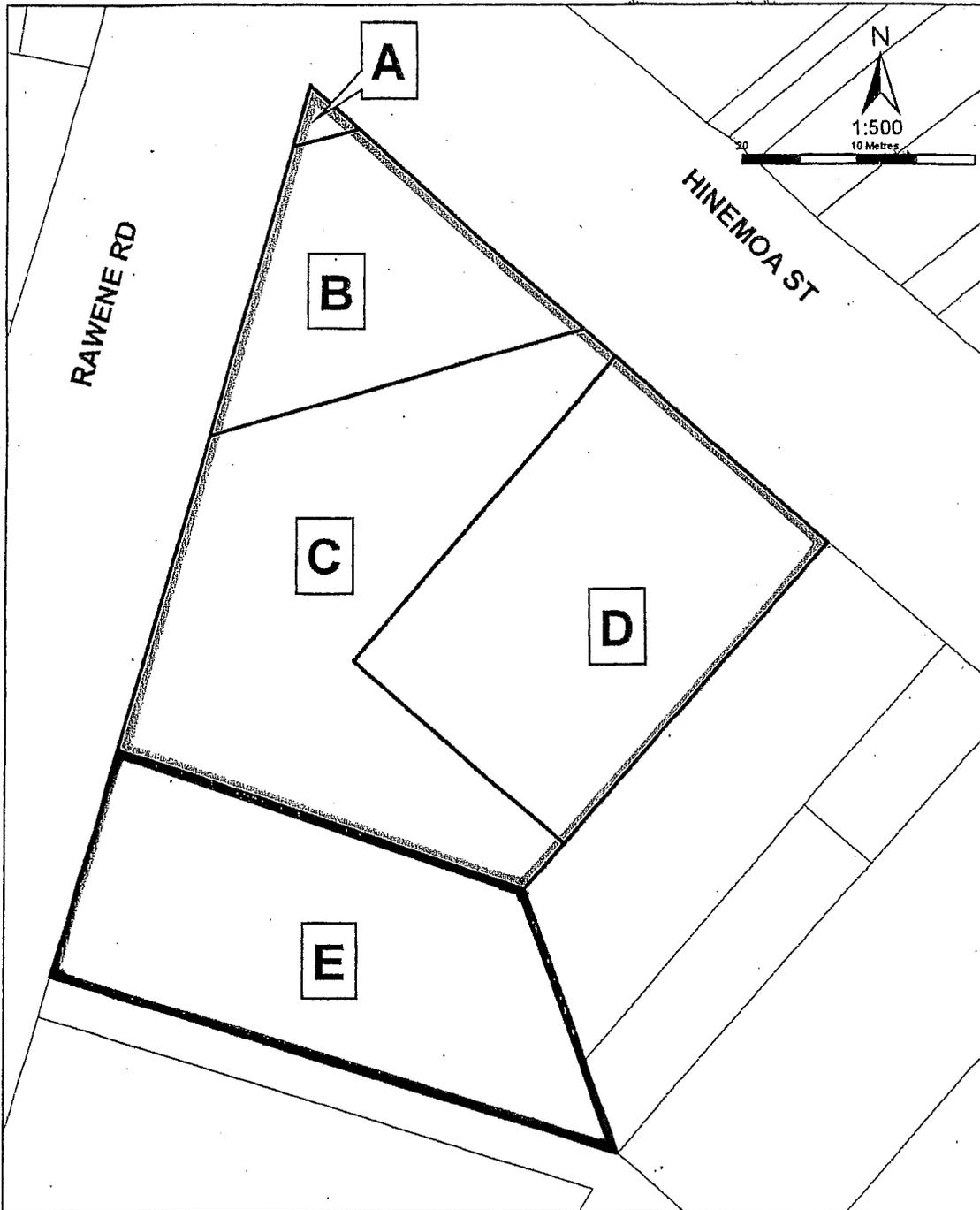
For the Court:

  
 J A Smith  
 Environment Judge



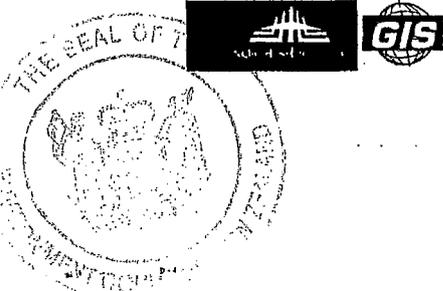
Issued<sup>11</sup>: 14 AUG 2007

Legal description and status of parcels  
at Nell Fisher Reserve and 2 Rawene Road



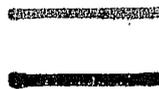
Legend

- |  |   |
|--|---|
| <p><b>A</b> Excluded from plan change<br/>Pt Lot 1 DP 2922 (15m<sup>2</sup>)<br/>Fee simple land</p> <p><b>B</b> Excluded from plan change<br/>Lot 1 DP 220559 (457m<sup>2</sup>)<br/>Fee simple land<br/>Caveat protects War Memorial</p> | <p><b>C</b> Included in plan change<br/>Pt Lot 1 DP 2922 (1080m<sup>2</sup>)<br/>Fee simple land</p> <p><b>D</b> Included in plan change<br/>Lot 1 DP 58992 (860m<sup>2</sup>)<br/>Reserved under the Reserves Act<br/>Gazetted for local purpose (municipal office and library)</p> <p><b>E</b> Included in plan change<br/>Lot 34 DP 2922 (1051m<sup>2</sup>)<br/>Fee simple land</p> |
|--|---|



Recreation 2

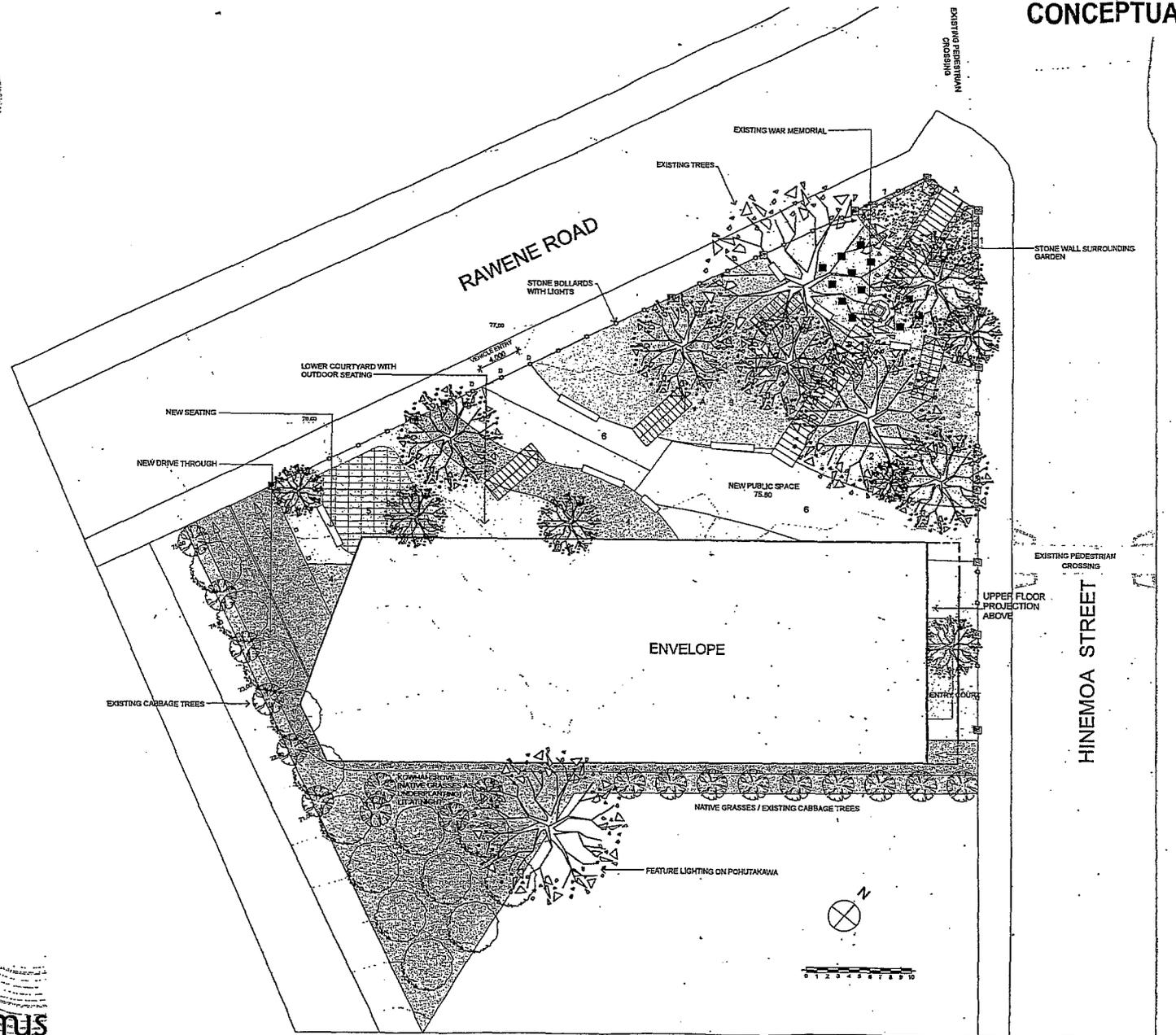
Business 2



**(Zone Configuration  
pre-Plan Change 14)**



# CONCEPTUAL LANDSCAPING PLAN



## LANDSCAPING PLAN

- LEGEND**
- 1. RAISED PLANTER MEMORIAL GARDEN
  - 2. PERMEABLE HARD SURFACE WITH BENCH SEATING TO SUIT TYPOGRAPHY
  - 3. GRASS TERRACE
  - 4. NATIVE PLANTED STRIP
  - 5. PLAY AREA WITH PLAY EQUIPMENT
  - 6. PERMEABLE HARD PAVING - CONCRETE OR WOODEN
  - A. STEEL RAMP WITH DECORATIVE CONCRETE PAVING
  - B. MEMORIAL PLAQUES / STONE PLINths
  - C. STONE BOLLARDS / LIGHTS
  - D. REMOVABLE STEEL BOLLARDS
  - E. BOLLARDS ON TERRACE EDGES



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Rev	Date	Description	By
1	18.05.07	INFORMATION ISSUE	AP

**CONFIDENTIAL**

Client: NORTH SHORE CITY COUNCIL  
 Project: **BIRKENHEAD LIBRARY**  
 CRN HINEMOA ST & RAWENE RD  
 BIRKENHEAD  
 NORTH SHORE CITY  
 AUCKLAND

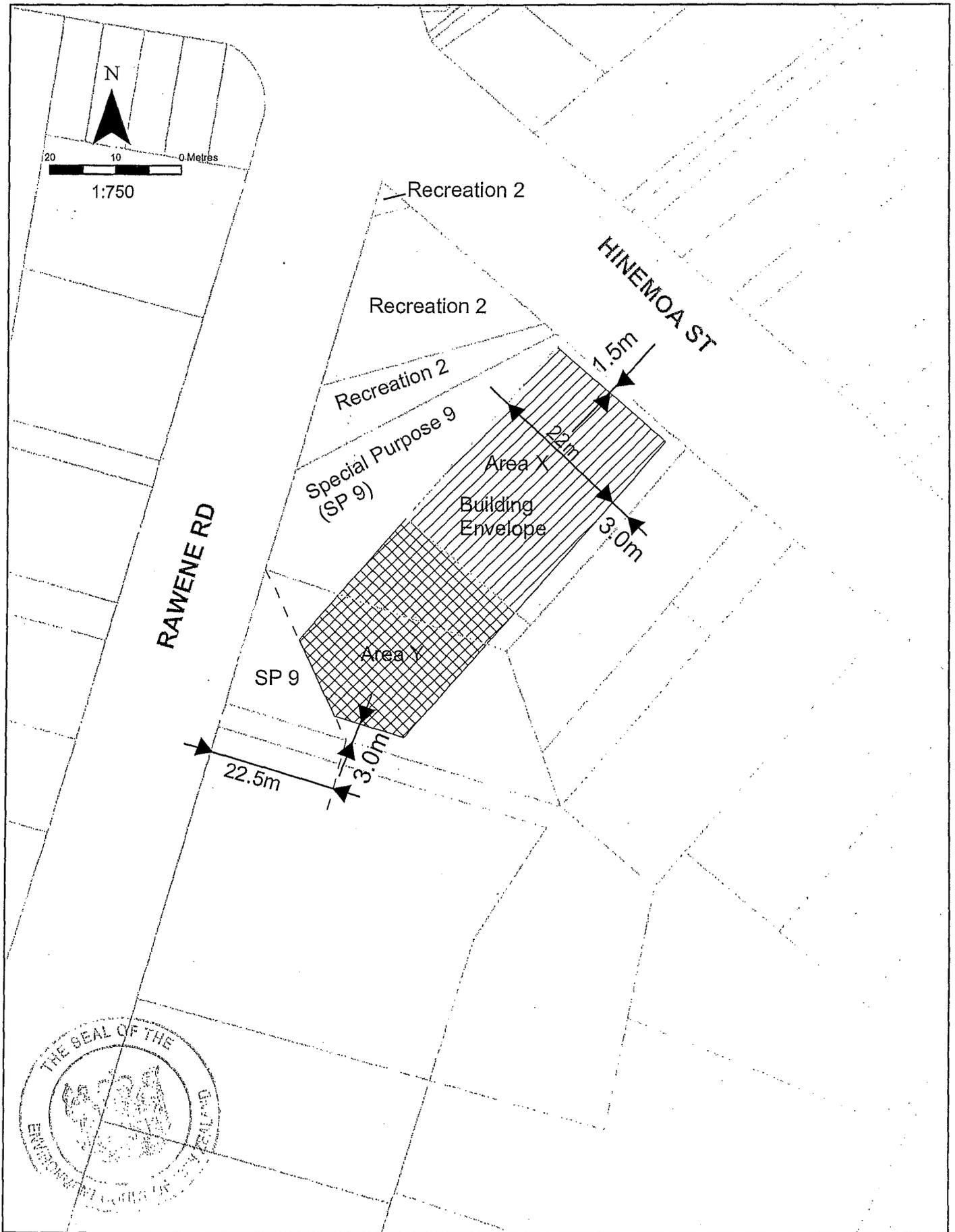
Title: **ENVELOPE LANDSCAPE PLAN**

Drawn: AP  
 Project Architect: EJR  
 Print Date: Thursday, 21 June 2007 1:59 p.m.  
 CAD File: P:\architect\Projects\2006106-39\Birkenhead Library (a) Envelope\CAD\02-FEN1 ArchCAD Files\Kopya Books\PD LAYOUT\BOOK.dwg

Scale: 1:200 @ A1 / 1:400 @ A3  
 Issue status: **PRELIMINARY**  
 Drawing number: **PD - 26**

Job No.: 06-039  
 Rev: 1

APPENDIX 20F

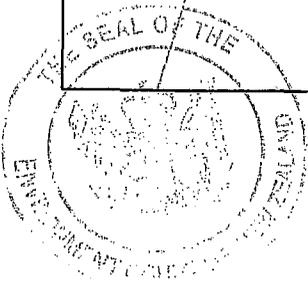
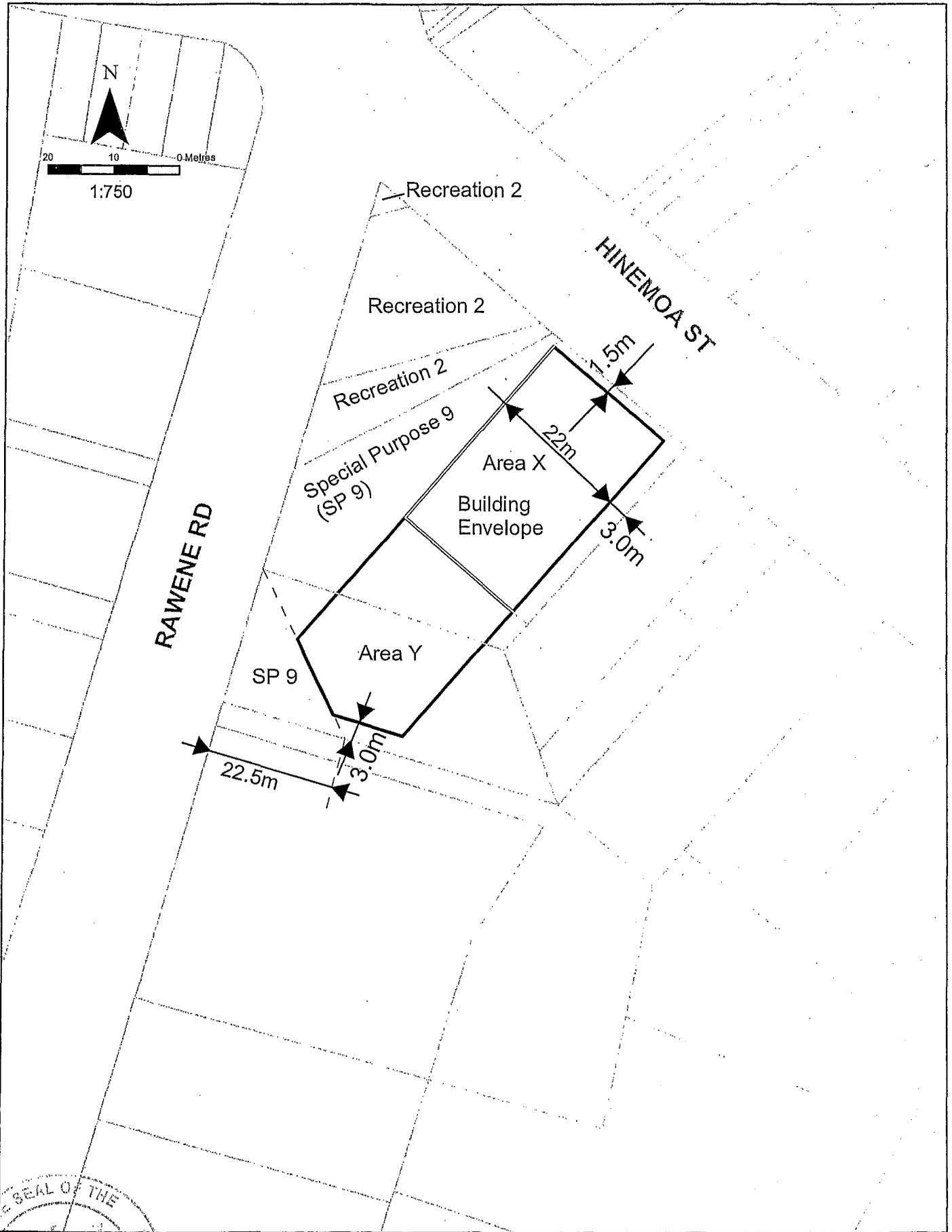


Legend

-  Area X - Maximum permitted height limit 9m plus 2m by limited discretionary activity
-  Area Y - Maximum permitted height limit 9m. No control flexibility



APPENDIX 20G



## PLAN CHANGE 14

1. Amend **Section 20.9 Special Purpose 9 Zone: Community Uses** introductory statement as follows:

".....It also includes the site of the proposed North Shore Theatre and Conference Centre located on The Promenade in Takapuna, and the land at the corner of Rawene Road and Hinemoa Street, Birkenhead."

2. Amend **Section 20.9.2 Rules: Activities** and **Table 20.1 Activities** as follows:

- (a) Amend the description of activities listed in (a) in Table 20.1 as follows:

a) Activities for All Sites Except the North Shore Theatre and Conference Centre Site and the Corner Rawene Road and Hinemoa Street

- (b) Amend the description of activities listed in (b) in Table 20.1 as follows:

b) Activities for All Sites except the corner Rawene Road and Hinemoa Street

- (c) Insert a new (d) in Table 20.1 as follows:

<u>d) Activities for the Corner Rawene Road and Hinemoa Street</u>	<u>Special Purpose 9 Zone</u>
<u>Any controlled activity listed below which does not involve the erection of buildings or any other development works</u>	<u>P</u>
<u>Civil Defence bases</u>	<u>C</u>
<u>Information centres</u>	<u>C</u>
<u>Childcare centres for 1-5 children</u>	<u>C</u>
<u>Childcare centres for 6-10 children</u>	<u>C</u>
<u>Childcare centres not otherwise permitted</u>	<u>D</u>
<u>Senior citizens clubs</u>	<u>C</u>
<u>Plunket rooms</u>	<u>C</u>
<u>Public toilets</u>	<u>C</u>
<u>Community welfare centres</u>	<u>C</u>
<u>Community buildings and facilities</u>	<u>C</u>
<u>Community workshops</u>	<u>C</u>
<u>Reception lounges</u>	<u>C</u>
<u>Administration offices of the Council</u>	<u>C</u>
<u>Accessory buildings have the same activity status as the prime activity on the site</u>	<u>=</u>
<u>Car parking areas</u>	<u>C</u>
<u>Car parking buildings</u>	<u>C</u>
<u>Subdivision</u>	<u>D</u>
<u>Any activity not listed as a Permitted or Controlled activity but which can demonstrate that it is of benefit to</u>	<u>D</u>



the local community	
---------------------	--

3. Amend Section 20.14 Rules: Controls for All Special Purpose Zones and Table 20.3 Height and Yard Controls for All Special Purpose Zones and Table 20.4 Other Controls for All Special Purpose Zones as follows:

- (a) Amend Table 20.3 Height and Yard Controls for All Special Purpose Zones by inserting the following into the row of the table applicable to the Special Purpose 9 zone, between the "Theatre and Conference Centre Site (T&CC)" and the "Rest of zone" entries:

9	Corner Rawene Road and Hinemoa Street	(Mean Frontage Level) 9m/11m, as defined on Appendix 20F	As defined on Appendix 20F
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- (b) Amend Table 20.4 Other Controls for All Special Purpose Zones as follows:

All Special Purpose zones except Special Purpose 13 zone <u>and the Special Purpose 9 zoned land at Corner Rawene Road and Hinemoa Street</u>	...
Special Purpose 1, 8 and 9 zones (excluding the North Shore Theatre and Conference Centre Site <u>and Corner Rawene Road and Hinemoa Street</u> )	...
<u>Special Purpose 9 zone at Corner Rawene Road and Hinemoa Street</u>	<p>Maximum Permitted Coverage 35%</p> <p><u>Under control flexibility, coverage may be increased to 40%</u></p> <p><u>Provided that the building is within the area identified on Appendix 20G</u></p>

- (c) Amend the Explanation and Reasons for Height Control as follows:

"h) *With the North Shore Theatre and Conference Centre there is a need, because of auditoriums and such like, for the complex to be as high as 18 metres. The site for the proposed Birkenhead Library and Civic Centre development is located within the Business 2 zone of the Highbury Business Centre and while its inclusion in the Special Purpose 9: Community Uses zone reflects its intended community and civic purposes, the height limit applying within*



the Business 2 zone (9m with an additional 2m under Control Flexibility) is appropriate to the site which is located in a commercial centre. Elsewhere..."

- (d) Amend the **Explanation and Reasons for Coverage Control** as follows:

(c) An additional restriction on the location of the building footprint within the site has been applied at the corner of Rawene Road and Hinemoa Street to ensure the building does not diminish the pleasant open space character of the adjoining recreation zoned land."

4. Amend **Section 20.15.1 Assessment Criteria** for all **Controlled and Discretionary Activities** and **Table 20.5 General Matters Applying to Each Special Purpose Zone** as follows:

- (a) Amend **Table 20.5** by inserting a "X" in the box that corresponds with the "Open Space" row and the "Special Purpose 9" column.

5. Amend **Section 20.15.2 General Matters to be Addressed** as follows:

- (a) Insert a new paragraph in **(h) General Layout**:

"In the Special Purpose 9 zone at the proposed Birkenhead library and civic centre site, the building or buildings should achieve physical and visual integration with the adjoining Recreation 2 zoned land. Development should ensure that the design and operation of new buildings compliments and encourages use of the adjoining recreation zoned land."

- (b) Insert a new paragraph in **(l) Open Space**:

"Development in the Special Purpose 9 zone at the proposed Birkenhead library and civic centre site should not diminish the pleasant open space character of the adjoining Recreation 2 zoned land."

