



**ADDERLEY
HEAD**

ENVIRONMENTAL LAW SPECIALISTS

Memo

DATE: 7 October 2020
TO: Jocelyn Lewes
FROM: Paul Rogers
CLIENT: Selwyn District Council
SUBJECT: **RELEVANCE OF PROPOSED DISTRICT PLAN TO DECISION ON PC62**

Executive summary

- 1 The Operative Selwyn District Plan (ODP) has been fully operative since May 2016. Plan Change 62 (**PC62**) is a private plan change that seeks to amend the ODP by rezoning 60 ha of land at Leeston from Living 1 (Deferred), Living 2 (Deferred) and Rural (Outer Plains) to Living 1 and Living 2 to facilitate the future development of approximately 410 residential sites.
- 2 The Selwyn District Council notified its Proposed Selwyn District Plan (**PDP**) on 5 October 2020. At this time, the hearing for PC62 is in the very final stages. The formal in-person hearing has concluded, with all substantive evidence presented and now under consideration by the Commissioner.
- 3 You have asked us whether:
 - (a) while considering PC62, can the Commissioner legally also consider the provisions in the PDP; and if so
 - (b) what weight should be given to the provisions in the PDP; and
 - (c) what process should be followed to bring the PDP provisions into consideration.
- 4 In summary, our view is that because section 74 provides for consideration of a wide scope of factors, and is not an exhaustive list a commissioner is legally able to consider provisions of a proposed district plan in this context.
- 5 However, notwithstanding that we consider there is legal ability to consider a proposed district plan, in reality it will be uncommon that the provisions of a proposed district plan introduce a new and highly relevant issue, which is not already "live" and therefore already under consideration in the plan change hearing.
- 6 Even if able to be considered, in most cases a proposed district plan will carry little or no weight in comparison to the operative plan that the plan change seeks to amend. The operative plan is the primary focus in this context.
- 7 We understand in this particular circumstance that there are no issues of relevance raised by the proposed district plan that are not either already in consideration for the hearing of PC62, or that would dramatically influence the outcome of PC62. Therefore, this circumstance is not one of those limited times

where it is necessary to consider the PDP because there is no overwhelming need to have recourse to the provisions in the PDP.

Can the Commissioner for the PC62 hearing legally consider the provisions in the PDP?

The scope of consideration in a plan change hearing

8 We will start by looking to the relevant sections of the Resource Management Act 1991 (RMA), and will then interpret and apply these relevant sections. We will also isolate and consider any court decisions that have considered the relevant sections.

9 Section 74 sets out the matters to be considered by a territorial authority in the context of a plan change:

74 Matters to be considered by territorial authority

(1) A territorial authority must prepare and change its district plan in accordance with—

- (a) its functions under [section 31](#); and*
- (b) the provisions of [Part 2](#); and*
- (c) a direction given under [section 25A\(2\)](#); and*
- (d) its obligation (if any) to prepare an evaluation report in accordance with [section 32](#); and*
- (e) its obligation to have particular regard to an evaluation report prepared in accordance with [section 32](#); and*
- (ea) a national policy statement, a New Zealand coastal policy statement, and a national planning standard; and*
- (f) any regulations.*

(2) In addition to the requirements of [section 75\(3\) and \(4\)](#), when preparing or changing a district plan, a territorial authority shall have regard to—

- (a) any—*
 - (i) proposed regional policy statement; or*
 - (ii) proposed regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under [Part 4](#); and*
- (b) any—*
 - (i) management plans and strategies prepared under other Acts; and*
 - (ii) [Repealed]*
 - (iia) relevant entry on the New Zealand Heritage List/Rārangī Kōrero required by the [Heritage New Zealand Pouhere Taonga Act 2014](#); and*
 - (iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Māori customary fishing); and*
 - (iv) relevant project area and project objectives (as those terms are defined in [section 9](#) of the Urban Development Act 2020), if [section 98](#) of that Act applies, —*
to the extent that their content has a bearing on resource management issues of the district; and
- (c) the extent to which the district plan needs to be consistent with the plans or proposed plans of adjacent territorial authorities.*

(2A) A territorial authority, when preparing or changing a district plan, must take into account any relevant planning document recognised by an iwi authority and lodged with the territorial authority, to the extent that its content has a bearing on the resource management issues of the district.

(3) In preparing or changing any district plan, a territorial authority must not have regard to trade competition or the effects of trade competition.

10 Section 74 does not list the “provisions in a proposed district plan”. By contrast, it does list proposed regional policy statements and proposed regional plans as mandatory matters for consideration.

- 11 Therefore, in interpreting section 74, there are only two possible avenues by which the provisions in a proposed district plan could be considered in a decision on a plan change to the operative plan. These are:
- (a) if the council's ability to achieve its functions under section 31 of the RMA is best served by considering the provisions of proposed plan as well as the operative plan (we will expand on this further below). As section 74 provides a "stepping stone" for section 31 to be considered, by directly referencing section 31¹; or
 - (b) if section 74 is not an exhaustive list of the matters to be considered when deciding on a plan change.

12 We deal with these two possibilities in turn.

Is the council's ability to achieve its functions under section 31 of the RMA is best served by considering the provisions of proposed plan as well as the operative plan?

13 The answer to this will differ depending on the factual situation.

14 Section 31 states that:

(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

(aa) the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district:

(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—

(i) the avoidance or mitigation of natural hazards; and

(ii) [Repealed]

(iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:

(iii) the maintenance of indigenous biological diversity:

(c) [Repealed]

(d) the control of the emission of noise and the mitigation of the effects of noise:

(e) the control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes:

(f) any other functions specified in this Act.

(2) The methods used to carry out any functions under subsection (1) may include the control of subdivision.

15 A circumstance could arise where the relevant provisions of the operative plan and those promoted by the plan change do not adequately discharge the council's section 31 obligations, but the relevant provisions of the proposed plan do. Then there would be an available argument that the provisions of the proposed plan should be considered through the "stepping stone" to section 31, listed in section 74.

¹ Section 74(1)(a)

- 16 The circumstance we are envisaging arises where the relevant objectives, policies and rules of the operative plan are no longer fit for purpose, and do not adequately provide for the matters listed in section 31(1)(a)-(f), whereas the provisions in the proposed district plan do adequately address the relevant issue. Also the plan change under consideration failed to address and resolve these issues.
- 17 An example of this circumstance is where the operative plan allows for residential development in an area, and a private plan change seeks to increase the intensification of that residential use. But new scientific information has arisen during the preparation of the proposed district plan, showing that the area is at risk of serious flooding/inundation. The provisions of the proposed plan have been drafted with the benefit of this new information and therefore direct that the area subject to the plan change is unsuitable for intensified residential use.
- 18 In this example, the provisions of the proposed district plan more appropriately discharge the council's obligations under section 31 and could be brought into consideration alongside the provisions of the operative district plan and the plan change. If that were the circumstance, we cannot think of a good reason not to have regard to the proposed district plan.
- 19 However, in reality, if the above flooding/inundation example arose, this scientific information outlining the problem would be relevant to, and likely already live, during the plan change hearing without need for recourse to the provisions in the proposed district plan.
- 20 So, while we consider that there is a probable legal route to consider the provisions of a proposed district plan using the "stepping stone" to section 31, the necessity to do so is unlikely to occur in practice.
- 21 Further, as we understand it SDC can, in this situation, fulfil its section 31 obligations without recourse to the provisions in the PDP and does not need to consider them.

Is section 74 is an exhaustive list of the matters to be considered when deciding on a plan change?

- 22 Regardless of our conclusion above as to whether section 74 matters can include the provisions of a proposed district plan, we also consider the case law that suggests that: section 74 is not an exhaustive list, and that matters outside of section 74 may also be considered.
- 23 The Court in the June 1997 case of *Kennedys Bush Road Neighbourhood Assn v Christchurch City Council* (***Kennedys Bush***) held that (emphasis added)²:

Nowhere in the Act is there a suggestion that the authority, when considering plan changes, must take into account transitional or proposed plans unless one takes a somewhat convoluted approach to the transitional provisions of the Act when construing the definition of "district plan" namely s 373(1) where a transitional plan shall be deemed to be a district plan constituted for the district.

...

The provisions of the proposed plan can be taken into account because the provisions of s 74 are mandatory but not exhaustive. It relates to matters to which

² Environment Court, Wellington, 20/6/1997, W63/97, at pages 19 and 20

the council shall have regard, not matters to which it may have regard if it so wishes. It can if it so wishes in the circumstances of a private plan change to a transitional district plan consider the matters contained in s 75 and in particular s 75(1)(k) which relates to such additional matters as it may consider appropriate.

- 24 Section 75(1)(k), referred to by the Court in the above dicta, is no longer in force (being repealed on 16 December 1997), but stated at the time of the *Kennedys Bush* decision that:

A district plan shall make provision for such of the matters set out in Part 2 of Schedule 2 as are appropriate to the circumstances of the district, and shall state—

...

(k) Such additional matters as may be appropriate for the purpose of fulfilling the territorial authority's functions, powers, and duties under this Act.

- 25 We note that the breadth of 75(1)(k) would have included a council's obligations under s 31, which we have addressed above, and which is still a relevant mandatory consideration under section 74(1)(a).
- 26 The repeal of section 75(1)(k) does not affect the broader decision in *Kennedys Bush* that section 74 is not an exhaustive list, but instead lists the mandatory considerations.
- 27 The Court in the June 1999 case of *Canterbury Regional Council v Waimakariri District Council* stated that (emphasis added):³

*For the reasons just given the District Council should promote its variation to the proposed plan now, notwithstanding that this reference is pending before the Court. This will not compromise the Court's position **because Change 53 has to be determined having regard to the matters set out in section 74 of the Act which do not include the proposed plan. In terms of that section the relevant matters for present purposes seem to be the provisions of Part II and section 32 of the Act; the relevant instruments in section 75(2) of the Act; and any relevant instruments referred to in section 74(2). While some of the issues on this reference might also arise in the context of the proposed plan for the purpose of hearing and determining the reference it is the provisions of the transitional plan [i.e. the operative plan] and the issues in that context that would be of paramount importance.***

- 28 Reading *Kennedys Bush* together with *Canterbury Regional Council v Waimakariri District Council*, we consider that a decision maker is not bound to take into account the provisions of a proposed district plan, although he or she can, if the provisions of the proposed district plan are relevant and better provide for the matters in section 31 than either the operative district plan or the plan change. It follows then on rare occasions the provisions of a proposed district plan may be seen to carry significant weight.
- 29 However, to reiterate our view above, a situation is unlikely to arise where the provisions of the proposed district plan are relevant unless the proposed district plan represents a paradigm shift in the way the matters included in the plan change are managed and the plan change fails to recognise and provide for that paradigm shift.

³ Environment Court, Christchurch, 2/6/1999 C094/99

- 30 The primary consideration, and what is of paramount importance, are the provisions of the operative district plan and considering if the plan change proposal better achieves the purpose of the RMA.

Summary to this point

- 31 In summary, our view that section 74 allows for consideration of a wide scope of factors, including a “stepping stone” to section 31, which may at times allow consideration of the provisions in a proposed district plan.
- 32 Further, section 74 is not an exhaustive list of matters to be considered, so a commissioner may, if he or she wishes, consider matters outside of section 74.
- 33 In reality, it will be uncommon that the provisions of a proposed district plan introduce a new and highly relevant issue, which is not already “live” in the plan change hearing.

Weight to be given to provisions in a proposed district plan

- 34 Given that we think a commissioner can legally consider a proposed district plan, in the limited circumstances we have outlined, we discuss the weight that it should be afforded in this situation.
- 35 The amount of weight given to the provisions in a proposed district plan would depend on:
- (a) whether or not the plan change had been accepted by the council and if so, how far the plan change had advanced through the public notification and hearings process;
 - (b) how far the proposed district plan had advanced through the public notification and hearings process; and
 - (c) whether there was a paradigm shift in how the operative district plan and the proposed district plan deals with the matters raised in the plan change. Here, we refer to our discussion above with regards to a council’s ability to discharge its obligations under section 31 are relevant.
- 36 In this current situation, the PDP has only been notified for a matter of days.
- 37 Further, PC62 has advanced through the hearings process and all substantive evidence has been presented to the Commissioner.
- 38 While there are some differences between the outcomes sought by PC62 and those in the PDP, PC62 is not inconsistent with the provisions in the PDP.
- 39 Therefore, based on our current understanding of PC62 and the PDP, we consider that the provisions in the PDP should be given little or no weight when the Commissioner makes his recommendation on PC62. The primary consideration should be the provisions in the ODP and whether or not the provisions promoted by the plan change are to be preferred in achieving the purpose of the RMA.
- 40 We make suggestions on the best process to follow, below.

Recommended process to be followed

- 41 As we have concluded that the provisions of the PDP can be legally considered (although we think they should be given little or no weight in the consideration of PC62), we suggest that the below process be followed to bring the PDP provisions into consideration for PC62.

- 42 The Commissioner could issue a minute to all parties involved, to the effect of:

The Selwyn District Council notified its Proposed Selwyn District Plan (PDP) on 5 October 2020. At this time, the hearing for Plan Change 62 is in the very final stages. The formal hearing has been completed, and all substantive evidence has been presented.

I have sought legal advice on the relevance of the PDP, and have been advised of the matters that I must consider when making my recommendation on Plan Change 62, and of the matters that I may consider if I wish, which includes in limited circumstances the PDP. I have also been advised on the appropriate weight to give the PDP in the current circumstances.

My preliminary view is that the PDP should be given little weight when deciding Plan Change 62, and that the primary consideration is the contents of the operative Selwyn District Plan.

However, I will consider any views to the contrary. Should any of the parties wish to give a view that is contrary to my preliminary view, I ask that they provide this view to me by xxx.

Any email or document should be sent to Tina.vandervelde@selwyn.govt.nz