



Memo

DATE: 17 August 2022
TO: Jocelyn Lewes
FROM: Paul Rogers
CLIENT: Selwyn District Council
OUR MATTER: 038777\439
SUBJECT: PLAN CHANGES 81 & 82 -FIRST SCHEDULE -CLAUSE 26

ISSUE

- 1 Plan Change 81 and 82 (**PC81 and PC82**) have reached the stage of directions being issued for a hearing, which is set down for Monday 12 September through to 14 September 2022. Prior to the hearing, Council wishes to clarify that it has complied with all the relevant procedural steps set out in the First Schedule, and in particular has given effect to the requirement of clause 26 of this Schedule, which requires:

"Where a local authority accepts the plan change request, ... it is then tasked with preparing the change to the plan in consultation with the person who made the request".
- 2 The resulting plan change is then publicly notified for submissions and this process must be completed within 4 months of agreeing to accept plan change requests.
- 3 The following advice is provided to address the questions as follows:
 - (a) What does clause 26 require Council to do?
 - (b) Has Council complied with these requirements?
 - (c) If not, does that non-compliance impact on the ability to conduct a hearing and make recommendations on submissions?
 - (d) If jurisdiction is affected, is there a remedy enabling the hearing to proceed on 12 September 2022?
 - (e) What if anything is the significance of the public notices issued by Council for these plan changes?
 - (f) Is it lawful to publicly notify a plan change request as opposed to a plan change prepared by the Council based on the request?
 - (g) What level of scrutiny is required regarding the clause 25 (4) test of 'not in accord with sound resource management practice'? That is, does it require Council to fully test all aspects of the request at that point or when?

- (h) If Council is required to prepare the plan change under clause 26, does it follow that the Council must be fully satisfied with the form, nature and the merit of the plan change at that point in the process?
- (i) If not, where does the jurisdiction for a merits assessment through the hearing come from?
- (j) If yes, is the hearing jurisdiction then strictly limited to matters raised in submissions?

4 We provide responses to the questions below.

SUMMARY

- 5 Taking into account the content and nature of the questions we consider that there is a risk of misinterpreting clause 26 when this clause is not considered in relation to both the context of clause 26 itself and the broader context of Schedule 1 Part 1 and Part 2, both of which materially influence the meaning of the words of interest in clause 26.
- 6 Clause 26 is procedural and not substantive. Clause 26, properly interpreted, relates to the preparation of the plan change for the purpose of notifying the plan change as distinct from preparing the plan change itself.
- 7 The use of the word 'accepts' in sub clause (1) is not ideal but it refers back to the earlier decision of the local authority to accept the plan change (or part of it) under clause 25 for further processing.
- 8 Our interpretation, even though it somewhat displaces the natural and ordinary mean of the words of interest in clause 26 (1)(a), is amply supported by the wider context of the RMA, particularly Schedule 1 Part 1 and Part 2, including the sequential process it provides.

APPROACH

- 9 Answering the above questions requires a statutory interpretation exercise of clause 26. Statutory interpretation requires the meaning of the words used in a statute to be ascertained from the text of the statute in light of its purpose and content.¹
- 10 The approach established by the Courts over many years, is that when interpreting a statute, the natural and ordinary meaning of the text must be the starting point, only to be displaced if a less usual meaning is required to better fit the wider context of the statute² or to better fulfil the purpose or policy of that statute.³

CLAUSE 26

- 11 Clause 26 provides:

¹ Section 10 of the Legislation Act 2019.

² *Agney v Pardington* [2006] 2 NZLR 520 (CA)

³ *Waitakere CC v Khouri* [1999] 1 NZLR 415 (CA)

26 Notification timeframes

- (1) *Where a local authority accepts the request or part of the request under clause 25(2)(b)-*
- (a) *the local authority shall prepare the change to the policy statement or plan in consultation with the person who made the request under clause 21; and*
 - (b) *the local authority shall notify the change or the proposed policy statement or plan-*
 - (i) *within 4 months of agreeing to accept the request; or*
 - (ii) *within the period that the Environment Court directs under clause 27.*
- (2) *However, if a direction is applied for under section 80C, the period between the date of that application and the date when the application was declined under clause 77(1) must not be included in the calculation of the 4-month period specified in sub clause (10)(b) (i).*

THE WORDS IN CLAUSE 26

- 12 We understand that the key words giving rise to this advice appear in sub paragraph (a):
- The local authority shall prepare the change ... in consultation with the person who made the request under clause 21.*
- 13 The question arises, has Council actually consulted with the proponent and if so, does that result in the Council being satisfied with the form, nature and merit of the plan change?
- 14 Giving the words as they appear in clause 26 their plain ordinary meaning, it is clear from the title to clause 26 it deals with notification timeframes. So, the content of the clause should be read with that title in mind.
- 15 Subsection 1 of clause 26 demonstrates the sequential approach of Schedule 1 to the processing of plan changes. Clause 26 comes into operation after the local authority has accepted the request under clause 25 for further processing and the process has reached the stage of public notification. Following notification further sequential steps occur with submissions, further submissions, evidence exchange and a hearing at which the merits of the plan change are tested.
- 16 Subsection (1) (b) (i), (ii) and (2) are all plainly about time periods in which notification is to occur. Clause 26 is about notification timeframes that a local authority needs to comply with in notifying a request made by a person to change a plan.
- 17 On the point of time periods, it is informing to note the time period under clause 26 of 4 months is much longer than the time period provided to the local authority in clause 25 of 30 working days to consider the request and accept it for processing, adopt it or reject it. The differing time periods must, we think, link to the scale and complexity of the local authorities' tasks under each clause.

- 18 The clause 25 exercise, given the 30-day time period, is more of a high-level review rather than a detailed one. The clause 26 task depending on the experience and resources of the proponent could be much more time consuming for the local authority.
- 19 Preparing the change for notification in consultation with the proponent who made the request for the change includes Council ensuring what is contained within the change and how the change impacts on the operative plan is accurate and suitable.
- 20 Clause 26 by providing a 4-month time frame acknowledges the consultation and the task can take some time because ensuring the plan change provisions fit with the operative plan change provisions can be time consuming.
- 21 Indeed, the plan change may have impact on many provisions spread through a range of chapters or sections of an operative plan. Council knows its operative plan and is responsible to administer it. So, to have Council 'prepare the change' as explained above makes sense. As well Council has the role to ensure taking into account the plan change that the operative plan remains consistent.

CONTEXT OF CLAUSE 26 AND WIDER CONTEXT OF SCHEDULE 1

- 22 The context of clause 26 is about notification. The words in clause 26 must be read in that context. So, the words of interest (read in that context) are not about preparing the change either from commencement or in its entirety, instead they are about preparing the plan change for notification following its acceptance for further processing under Schedule 1.
- 23 So having appropriate regard to the context of both clause 26 and Schedule 1 the words *'the local authority shall prepare the change the policy statement or plan in consultation with the person who made the request'*, means consulting with the proponent to prepare the change for notification, not to prepare the change from the outset, which could give rise to issues as to the status of the change.
- 24 The wider context of the enactment (particularly Schedule 1) has an interpretive influence, displacing the plain ordinary meaning of the above words of interest in clause 26. Schedule 1 provides for changes to planning documents initiated by local authorities. Part 1, clauses 1 to 20A deal with Council initiated plan changes.
- 25 Part 2 of Schedule 1 deals with requests by any person to change a district plan. So, two types of plan changes are provided for. Part 2 clause 25(2) provides a local authority with options when processing private plan change requests. The local authority may either adopt the request (or part of it), and if it does so it effectively becomes a council-initiated plan change.
- 26 Council initiated plan changes and any private plan change request it adopts has legal effect once publicly notified. In contrast a privately initiated plan change does not have legal effect until that plan change receives final approval under clause 17 and is made operative under clause 20. So, Council initiated plan changes and private plan change requests are treated differently under Schedule 1.
- 27 As well, as we noted earlier, for both types of plan changes, Schedule 1 utilises a sequential progression of the plan change through the plan change process. This sequential progression is an important context issue which influences the

meaning of words as they appear in individual clauses. Keeping in mind this progression, clause 26 applies only after many earlier progressive steps detailed within Part 2 have been completed.

- 28 Many of those earlier progressive steps clearly provide that the proponent has the role and responsibility of developing that plan change request in its entirety. It is not a joint role undertaken with the local authority. Rather Part 2 provides separate roles for the proponent and the local authority. The local authority is given the ability (as per clause 23) after reviewing the request to seek further information, (cl 24) enabling it to better understand the nature of the request and the effect it will have on the environment.
- 29 The effect or influence of this wider context on the key words is that when a local authority undertakes the clause 26 task it is not altering decisions already made on the plan change. Undertaking the task does not mean the local authority accepts the plan change or takes on the role of the proponent.
- 30 As well the nature of the clause 26 task is administrative, it is 'paperwork based'. It is not at all connected with assessing the nature and merits of the plan change. Those assessments occur later. At best the clause 26 task relates to the form of the plan change when considered against existing provisions of the operative plan affected by the change.
- 31 Court decisions on clause 26 are few. An early decision⁴ considered clause 26 (which at the decision date was numbered 28) noting that⁵;

"A local authority's obligations under clause 28 ... is to prepare a requested change of plan in consultation with an applicant. The process relates to the form rather than the merits of the change.... There is no act of the Council which shows anything other than an initial acknowledgement that;

(a) the proposed change has more than a little planning merit;

(b) a performance of prescribed duties to invest the proposed plan change with a form whereby its merits can be assessed by the public submission process.

There can be no act or decision inconsistent with the performance of the obligations of the local authority until it has reached its decision upon the submissions."

- 32 This decision supports the opinion we have advanced that clause 26 is procedural in sequence step and does not involve a merits assessment.

DID COUNCIL UNDERTAKE A CLAUSE 26 STEP?

- 33 Council prepared two reports both dated 11 March 2022, one each for PC81 and 82.
- 34 It is plain from reading those reports Council has issued requests for further information to the proponent who has responded and it is clear from the reading of those reports that consultation between the proponents and Council has occurred related to preparation of the plan changes.

⁴ Countdown Properties and Others v Dunedin CC AP214/93 and 215/93

⁵ At Page 23

- 35 The public notice does not need to reference any consultation but to inform those who may be affected by the plan change so they can submit or not.

CLAUSE 25(4) (c)

- 36 While on clause 25(4) (c), it raises a question as to the extent of the 'test' to be applied in terms of the ability for the local authority to reject a request or part of request, due to not being in accordance with sound resource management practice. The 'test' is being applied when determining whether or not the privately initiated plan change should proceed for further processing. This further processing will involve a submission phase, and most likely a full hearing phase, at which the full merits of the plan change will be tested.
- 37 The sequential approach evident within Schedule 1 Part 2 influences the scope and extent of that 'test'. If a local authority were to reject the request precluding it from further processing, then there would need to be some matter that was obviously demonstrating that the request was not in accordance with sound resource management practice. There is a presumption that private plan change request will be determined on their merits unless one of the grounds in clause 25(4) for refusal is made out.
- 38 The Courts have considered⁶ what is meant by the expression '*sound resource management practice*' but have to date declined to define that expression, presumably because each and every context needs careful examination. Essentially Courts have struggled to define 'sound resource management practice' finding if it is to have a meaning that meaning is referable to the purpose and principles of the Act in part 2. Furthermore the Courts have found assessing the merits of the plan change is not a task undertaken at clause 25 stage other than at a very high level.
- 39 In any event the clause 25(4) (c) issue is not an issue for the hearing stage. This is a decision made by the local authority as a precursor to a hearing on the merits. As well clause 25(4) (c) decision is a process decision and should not be of significant influence at the time the merits of the plan change are being determined.

JURISDICTION FOR THE HEARING AND OTHER MATTERS

- 40 Jurisdiction is derived from the RMA including sections 31, 32, 74, 75, 76 and Schedule 1 Part 1 and Part 2. The mandatory requirements that go to jurisdiction a Commissioner need consider are comprehensively addressed in the *Long Bay*⁷ and *Colonial Vineyards*⁸ decisions.
- 41 If clause 26 were to be interpreted differently, and a local authority prepared the plan change request to the extent it was satisfied with the form, nature and indeed merits of the plan change then the weighting to be attributed to any evidence or report prepared by the local authority would need to take that fact into account.
- 42 With a private plan change request, because it is not a council change, the usual approach is for a local authority to adopt an objective stance in the assessment of

⁶ Kerikeri Falls v Far North District Council 068/2009

⁷ Long Bay- Okura Great Park Society V NSCC A078/08

⁸ Colonial Vineyards Limited v MDC[2014] NZEnvC 55

the plan change against the purpose of the RMA. Consequently, local authority evidence and reports are usually considered to be independent.

- 43 This standard or usual approach of the role of the local authority and weighing of evidence it provides would need to be altered if the local authority actions under clause 26 were taken to be a merits assessment. As well natural justice implications would arise because a Council would be undertaking a merits assessment without considering submissions.

CONCLUSIONS

- 44 We have outlined above what clause 26 requires Council to do and when. For the reasons advanced it is our opinion Council has complied with those requirements. In our view those requirements are procedural in nature and do not affect jurisdiction.
- 45 Given clause 26 is procedural and taking into account the scheme of Schedule 1, in particular that the hearing of the merits of the plan change occurs following the submission phase, at clause 26 stage Council does not need to be satisfied with the nature and merit of the plan change, as the consultation process could impact on the form of the plan change.
- 46 The public notices issued by Council for these plan changes are appropriate. The public notices do not have to reference whether or not consultation with the proponent has occurred and the effect of that consultation on the content of the plan change.
- 47 Given Council in this case has publicly notified the plan change following consultation with the proponent, the question as to lawfulness of publicly notifying a plan change request as opposed to a plan change request prepared by the Council is not relevant.
- 48 We have explained above where the jurisdiction for the merits assessment through the hearing process comes from. Jurisdiction is not founded upon clause 26. The hearing jurisdiction is not strictly limited to matters raised in submission the jurisdiction is wider and is based on the statutory provisions against which submissions received are assessed considered.
- 49 We conclude Council has acted in accordance with clause 26, and consequently no jurisdictional issue or risks arise.



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