[2024] NZEnvC 35
Environment Court, Auckland

Beachlands South Limited Partnership v Auckland Council

ENV-2023-AKL-181
Hearing: 19 February 2024
Decision: 14 March 2024
Judge Smith, Commissioner Paine, Commissioner Gysberts

Synopsis

This was an unsuccessful application for strike-out of an appeal against proposed Plan Change 80 ('PC80') to the Auckland Unitary Plan ('AUP') on jurisdiction grounds; PC80 was notified in 2022 and was described as follows: 'RPS Well-functioning Urban Environment, Resilience to the Effects of Climate Change and Qualifying Matters is a proposal that seeks to amend the RPS in the [AUP] by adding policy to address these matters'; There was no further purpose stated; The notice listed changes to B2, B7, B8 and B10 of the RPS, but did not clarify which changes related to which elements of the wording in the description; The Court noted that at its heart, PC80 was a consequence of the National Policy Statement on Urban Development ('NPS-UD'), but this was not immediately evident from the notification or plan change wording notified; This appeal concerned submissions received on PC80 relating to NPS-UD issues that had been rejected for being out of scope, and the present strike-out application sought that the appeal should similarly be struck out for being beyond jurisdiction; The Independent Hearing Panel ('IHP') hearing PC80 had categorised submissions received in four categories: Well-Functioning Urban Environments; Climate Change Resilience; Qualifying Matters; and 'Other Matters'; Allocated to 'Other Matters' were 57 submission points by 19 submitters and 282 further submission points from 34 further submitters; Limited detail was given as to why these submissions were allocated to that category, rather than the other three categories; The IHP concluded that the Other Matters submissions were 'rejected' as they were 'not within the scope of PC80'; This was on the grounds that these submissions did not address the change to the status quo advanced by PC80 and there was a real risk that persons potentially affected had been denied an opportunity to participate; The IHP reasoned that the submissions involved issues raised by the NPS-UD in relation to responsiveness and significant development capacity, and that because 'PC80 did not address the issue', that should be dealt with in a separate plan change; The Court expressed doubts about the IHP's reasoning that PC80 had a 'very specific purpose' as a companion plan change to the Intensification Planning Instrument required of Auckland Council ('the council') under the NPS-UD; It was critical of the reliance by the IHP and the council upon the s 32 evaluation report as expressing the 'purpose' of PC80; Fundamentally, the Court did not accept that a s 32 report could itself contain the objectives or policies of any change; It was simply an evaluation of a proposal; The council officer who had prepared the s 32 report had not had any power to state a rationale for PC80 or the matters outside the scope of PC80, as they had done; The stated intention in the s 32 report was that the NPS-UD requirements had only been partly complied with, and it was intended that the NPS-UD would be fully complied with in due course; However, the Court noted that, now in 2024, there was no indication that such changes were intended to be made, nor was the intent to only implement part of the NPS-UD evident in PC80 itself; Some parties involved in the process would have recognised that words like 'well-functioning urban environment' were from the NPS-UD; There was evidence that the appellant and other s 274 parties (who were also submitters) had understood PC80 to be the council's response to that document; Given that there were some 19 submitters on the broader issues (and a significant number in reply), it appeared that this may have been a reasonable interpretation; The Court concluded as a fact that PC80 was only introduced because of the NPS-UD in order to address the obligations under that document; It concluded that it had to be open to the parties to argue whether the changes to B2, B7, B8 and B10 sufficiently gave effect to the NPS-UD obligations; The Court emphasised the mandatory nature of the NPS-UD obligations; It noted that higher court decisions on the test for determining whether a submission was 'on' a plan change had related to full discretionary plan changes by a council; Therefore, the relevant submissions and this appeal were within the scope of PC80 in general terms; Although some broader changes might have been sought, any beyond B2, B7, B8 and B10 would need to be examined on a case-by-case basis; The Court considered that the appeal should not be struck out as the Court needed to consider the evidence advanced for the parties' proposals to reach a conclusion as to whether the matters were within the scope and whether any appeal should be allowed; The strike-out application was refused; The appellant and s 274 parties were directed to provide specific statements of how the changes sought related to notified PC80; Costs were reserved

Classifications (2)

[1] **Civil procedure** To strike out

[2] **Resource management** Change or variation

Legislation Considered
Resource Management Act 1991 (NZ) s 32, s 32(1), s 32(6), s 274, s 292, s 293, Sch 1

Party Names
Auckland Council *(Respondent)*, Foodstuffs North Island Drive Holdings Limited *(Section 274 parties)*, Beachlands South Limited Partnership *(Appellant)*

Legal Representatives
WS Loutit and *RS Abraham* for Beachlands South Limited Partnership; *EL Manohar* for Auckland Council; *DA Allan* for Foodstuffs North Island and Drive Holdings Limited

Orders

Decision of the Environment Court
A: The application for strikeout is refused.
B: In particular, the Court considers it needs to consider the evidence advanced for the parties' proposals to reach a conclusion as to whether the matters are within the scope and whether any appeal should be allowed.
C: Costs are reserved.

Judgment

REASONS

Judge Ja Smith, Commissioner Sg Paine, Commissioner Ap Gysberts, J A Smith Judge

Introduction
[1] This preliminary hearing relates to whether the Appellants appeal against decisions on Proposed Plan Change 80 (**PC80**) to the Auckland Unitary Plan (Operative in Part) can be heard. In short whether the appeal should be struck out as beyond jurisdiction.

[2] While at its heart PC80 is a consequence of the National Policy Statement on Urban Development (**NPS-UD**), this is not immediately evident from the notification or plan change wording notified.

PC80
[3] Annexed hereto and marked "A" is the public notice of 18 August 2022 relating to PC80. The relevant portions of that notice are contained within two sentences reading:

> "Auckland Council has prepared the following proposed plan change to the Auckland Unitary Plan (Operative in Part) under Schedule 1 to the Resource Management Act 1991 (RMA) (**proposal**).

> Proposed plan change 80 — RPS Well-functioning Urban Environment, Resilience to the Effects of Climate Change and Qualifying Matters is a proposal that seeks to amend the RPS in the Auckland Unitary Plan (Operative in Part) by adding policy to address these matters."

[4] There is no further purpose in this notice and the (notified) plan change itself is annexed hereto and marked "B". This states on its opening page:

> "PROPOSED PLAN CHANGE 80 (PC80)
>
> RPS Well-functioning Urban
>
> Environment, Resilience to the
>
> Effects of Climate Change and
>
> Qualifying Matters Plan Change
>
> This is a Council-initiated plan change"

[5] It notes changes to B2, B7, B8 and B10 on the third page of that notice.

[6] When it turns to the proposed amendments, it can be seen that PC80 simply inserts wording changes or new words into the various parts of Chapter B Regional Policy Statement of the AUP-OP. There is no clarification within that notified document "B" as to which changes refer to which parts of the wording "Well-functioning Urban Environment, Resilience to the Effects of Climate Change and Qualifying Matters Plan Change".

The Commissioners Decision

[7] The Independent Hearing Panel (**IHP**) hearing PC80 noted the three headings [1] and then created four categories of submission adding "Other Matters" as Hearing Topic 006. [2]

[8] Before considering the submissions on the other three topics [3] the Commissioners considered Topic 006 before concluding:

> "48. Submissions coded to Hearing Topic 006 are rejected as they are not within the scope of PC80."

[9] The IHP found that PC80 is a "relatively confined plan change and has three components … ". [4]

[10] Later the IHP discussed Topic 003 — Well-Functioning Urban Environments as relating to the following provisions:

> "• B2.1 Issues;
> • B2.2 Urban Growth and Form;
> • B2.3 A quality built environment;

- B2.4 Residential growth;
- B2.5 Commercial and industrial growth;
- B2.7 Open space and recreation facilities;
- B2.8 Social facilities; and
- B2.9 Explanation and principal reasons for adoption."

[11] The next group related to Climate Change Resilience identified as Topic 004. This included all of the matters relating to well-functioning urban environments together with the following additional provisions:

"• B2.6 Rural and coastal towns and villages;
- B7.2 Indigenous biodiversity;
- B7.3 Freshwater systems;
- B7.4 Coastal water, freshwater and geothermal water;
- B8.2 Natural character;
- B8.3 Subdivision, use and development;
- B8.4 Public access and open space;
- B10.2 Natural hazards and climate change;
- B10.3 Land - hazardous substances."

[12] The Hearing Commissioners determined that Topic 005 — Qualifying matters involved reference to some of the matters in both the earlier topics, namely B2.2, B2.4, B2.5 and B2.9.

[13] What is unclear is who and how the submissions were classified in the various Topics. The IHP refers [5] to submissions and cross submissions being "coded to this topic by the IHP."

[14] In relation to Topic 006 the IHP notes that 57 submission points by 19 submitters and 282 further submission points from 34 further submitters were coded to that topic. [6] We understand that the s 274 parties before us in this case were further submitters in that category.

[15] Notwithstanding the number of submitters and cross-submitters on the issues raised, the Commissioners determined that the submissions were out of scope of PC80 and declined them. The IHP concluded the submissions and cross-submissions did not address the change to the status quo advanced by the plan change and concluded that there was a real risk that persons potentially affected by such a change had been denied an effective opportunity to participate in the plan change process.

[16] The actual wording of their findings in this regard are firstly that: [7]

> " … we find the submissions that seek to address other parts of the RPS (e.g. provisions on responsiveness to plan changes that would add significant development capacity and transport related provisions, urbanisation outside the rural urban boundary, infrastructure upgrade cost effectiveness and reference to the national planning standards) are not 'on' PC 80 and fail the first limb of the case law. [8] "

[17] They further concluded: [9]

> "It is our view that, for the reasons set out in the Council's Reply Submissions, that there would be a submissional side-wind if we agreed to the submitters' request to broaden the scope of PC 80 … "

[18] The IHP then quoted paragraphs [6.2] to [6.6] of the Council's legal reply submissions. All of these submissions were therefore rejected as being outside the scope of PC80.

The reasons for the Commissioners' conclusion

[19] Essentially, the Commissioners concluded that PC80 consisted of three components relating to the RPS provisions of the AUP-OP:

> "(a) to amend existing provisions in chapter B2 to include new proposed issues, objectives and policies and explanatory provisions relating to the well-functioning urban environment;
> (b) including new objectives in chapter B2.2, B2.5 and B2.9 to refer to qualifying matters; and
> (c) climate change resilience was not dealt with as a scope issue but clearly involves a far wider range of provisions than the other two, including the same provisions addressed by the other matters."

[20] However, there is limited detail as to why certain submissions were coded to "other" rather than to Topics 003, 004 or 005. The IHP cite E D Paul a Senior Policy Planner (Auckland Council): [10]

> " … In particular, a number of submissions considered that the issues raised in the NPS-UD in relation to responsiveness and significant development capacity criteria should be included in the RPS. As PC 80 did not address the issue, in my opinion, it should be dealt with through a separate plan change."

[21] The IHP then cites and adopts the Council submissions: [11]

> " … This is something the Council will do in due course but the submission requests are significantly beyond the scope of PC 80.
>
> … PC 80 has a very specific purpose, it was not notified as part of the IPI but as a companion plan change to it. Even so the IPI is only giving effect to NPS-UD policies 3 and 4. PC80 is narrower than that."

[22] With respect we can see nothing in the notification of PC80 that supports these contentions. The IHP goes on to say that, while significant development capacity may contribute to a well-functioning urban environment, that is not a certainty. [12]

[23] The IHP go on to quote from NPS-UD clause 3.8(2) which states:

> "(2) Every local authority must have particular regard to the development capacity provided by the plan change if that development capacity:

(a) would contribute to a well-functioning urban environment; and … ”

The section 32 Report

[24] The IHP saw the s 32 Report as part of the plan change itself. A section 32 Report is required by the Act. We note the essential requirements for s 32 in full because of their importance:

“32 Requirements for preparing and publishing evaluation reports

(1) An evaluation report required under this Act must—
- (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
- (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
  - (i) identifying other reasonably practicable options for achieving the objectives; and
  - (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
  - (iii) summarising the reasons for deciding on the provisions; and
- (c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

(2) An assessment under subsection (1)(b)(ii) must—
- (a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—
  - (i) economic growth that are anticipated to be provided or reduced; and
  - (ii) employment that are anticipated to be provided or reduced; and
- (b) if practicable, quantify the benefits and costs referred to in paragraph (a); and
- (c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

(3) If the proposal (an amending proposal) will amend a standard, statement, national planning standard, regulation, plan, or change that is already proposed or that already exists (an existing proposal), the examination under subsection (1)(b) must relate to—
- (a) the provisions and objectives of the amending proposal; and
- (b) the objectives of the existing proposal to the extent that those objectives—
  - (i) are relevant to the objectives of the amending proposal; and
  - (ii) would remain if the amending proposal were to take effect.

(4) If the proposal will impose a greater or lesser prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.

(4A) If the proposal is a proposed policy statement, plan, or change prepared in accordance with any of the processes provided for in Schedule 1, the evaluation report must—
- (a) summarise all advice concerning the proposal received from iwi authorities under the relevant provisions of Schedule 1; and
- (b) summarise the response to the advice, including any provisions of the proposal that are intended to give effect to the advice.

(5) The person who must have particular regard to the evaluation report must make the report available for public inspection—

(a) as soon as practicable after the proposal is made (in the case of a standard, regulation, national policy statement, or New Zealand coastal policy statement); or

(b) at the same time as the proposal is notified.

(6) In this section,—

objectives means,—

(a) for a proposal that contains or states objectives, those objectives:

(b) for all other proposals, the purpose of the proposal

proposal means a proposed standard, statement, national planning standard, regulation, plan, or change for which an evaluation report must be prepared under this Act

provisions means,—

(a) for a proposed plan or change, the policies, rules, or other methods that implement, or give effect to, the objectives of the proposed plan or change:

(b) for all other proposals, the policies or provisions of the proposal that implement, or give effect to, the objectives of the proposal."

[25] Section 32 is clear that the proposal is PC80 in this case, being a change to the Regional Policy Statement. It appears clear, under the definition of *objectives* under subsection (6), and it is common ground here that the notified change does not contain the objectives. Thus part (b) of the definition in subsection (6) applies and we must seek the purpose of the proposal under s 32(6)*objectives* (b).

[26] As we noted the only purpose that can be ascertained from the document is that there are changes to the RPS related to "Well-functioning Urban Environment, Resilience to the Effects of Climate Change and Qualifying Matters Plan Change".

[27] Under the definition of *provisions* in s 32(6), it notes that for a proposed plan change these are "the policies, rules, or other methods that implement, or give effect to the objectives of the proposed plan or change". It is unclear whether this requires objectives to be stated within any change or not. For current purposes we assume that the PC80 *provisions* can fit within the definition of *objective* in subsection 6*objectives* (b), being "the purpose of the proposal".

[28] Both the Commissioners in their decision and the Council before us, relied upon the s 32 Evaluation Report prepared by the Council Planning Officer as expressing that purpose. An *evaluation report* is referred to under s 32(1). It is necessary for that report to examine:

"(a) the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the Act; and

(b) whether the provisions in the proposal are the most appropriate way to achieve the objectives by:

(i) identifying other reasonably practicable options for achieving the objectives; and

(ii) assessing the efficiency and effectiveness of the provisions in achieving those objectives."

[29] Fundamentally this Court does not accept that a s 32 report can itself, being evaluative, contain the objectives or policies of any change. A section 32 report is clearly intended to be an evaluation or check against the proposal put for public consultation. Nevertheless, the Report writer stated not only a rationale for the proposed plan change but also stated the matters outside the scope of PC80. Quite simply, we conclude that a Council Officer has no power to do so.

[30] Nevertheless, the Officer's Report states: [13]

> "This plan change does not list all of the qualifying matters — this appears in Chapter C of the District Plan and will be part of the council's IPI. This will enable the Independent Hearings Panel considering the IPI to make recommendations to the council and Minister on qualifying matters that will be applied in the AUP.
>
> NPS-UD policies that reference reductions in greenhouse gas emissions are out of scope for the August 2020 plan changes. This is because the council's functions under the Act do not include consideration of greenhouse gas emissions until December 2022. This includes Objective 8(a), Policy 1(e)."

[31] It is also clear, and stated explicitly by the Commissioners, that PC80 is intended to in part implement the NPS-UD. The NPS-UD itself states:

> "3.35 Development outcomes for zones
> (1) Every tier 1, 2, or 3 territorial authority must ensure that:
> (a) the objectives for every zone in an urban environment in its district describe the development outcomes intended for the zone over the life of the plan and beyond; and
> (b) the policies and rules in its district plan are individually and cumulatively consistent with the development outcomes described in the objectives for each zone; and
> 3.36 Development outcomes consistent with intensification policies
> (1) Every tier 1 territorial authority must ensure that the development outcomes for zones in its tier 1 urban environments are consistent with the outcomes required by Policy 3."

[32] Plan changes are required in relation to tier 1 only, which is Auckland Council, as they relate to intensification. This is what is referred to throughout the various documents as the Intensification Planning Instrument (**IPI**).

[33] Nevertheless, it is acknowledged by the Council that it must make all the other changes necessary to implement the NPS-UD as soon as is practicable. Although no particular time frame is given in 4.1 of the NPS-UD, the requirement to amend the policy statement or district plan to give effect to the provisions of the National Policy Statement "as soon as practicable" gains context from the general table.

Clearwater / Motor Machinist test

[34] The High Court in Clearwater Resort Ltd v Christchurch City Council [14] and Palmerston North City Council v Motor Machinists Limited [15] set out the test to determine whether a submission is "on" a plan change.

> "(a) Limb one: the submission must reasonably be said to fall within the ambit of the plan change. This is said to involve two aspects: the breadth of the alteration to the status quo entailed in the plan change and whether the submission addressed that alteration; and

(b) Limb two: whether there is a real risk that persons directly or potentially affected by the additional changes proposed in the submission have been denied an effective response to those in the plan change process."

Problem with plan notification

[35] The stated intention in the s 32 Report and before the Commissioners was that the requirement under 4.1 had only been partly complied with. It was intended that the NPS-UD would be fully complied with in due course. Notwithstanding that we are now in 2024, there is no indication that such changes are intended to be made. Nor is the intent to only implement part of the NPS-UD evident from PC80 itself.

[36] Some of the parties involved in this process would have recognised that these words (e.g., *well-functioning urban environment*) were from the NPS-UD. Mr Loutit and Mr Allan made something of this and indicated they understood it was the Council's response to that document. Given that there were some 19 submitters on the broader issues and a further significant number in reply, it appears that this may be a reasonable interpretation of the notification and change.

[37] Given that the document itself changes some critical sections of the RPS, in particular B2, B7 and B10, the question then arises as to what parts of the plan did the provisions address and to what extent does this affect the status quo.

The first legal test — the effect on the status quo

[38] At one level it can be argued that the RPS has little direct effect on the outcomes under the Auckland Unitary Plan. It sets the objective and policy framework on which the subsequent changes to the plan are made. Given that the direct changes were the subject of notification under the IPI it could be argued that the Regional Plan had no direct impact.

[39] For our part, we do not agree. It is intended that District Plans achieve and implement the Regional Policy Statement, and it was clear in the NPS-UD direction that the Policy Statement be changed as necessary to give effect to the provisions of the NPS-UD, that this recognises the basic framework for the plans that would be assessed under the IPI and any further changes in the future.

Is it open to seek changes to PC80 based upon the NPS-UD?

[40] Mr Loutit's primary submission is that changes necessary to the RPS can be sought given the notified plan change. His argument is: it must be open to parties to dispute the extent to which the PC80 has properly given effect to the NPS-UD.

[41] In that regard, we have concluded that the notified changes themselves do not indicate what they relate to beyond well-functioning urban environment, resilience to the effects of climate change, and qualifying matters. Each of these descriptions are clearly terms of art with no generally accepted meaning. [16]

[42] To rely on an evaluative process to define not only the meaning of the changes but the meaning of the submissions and their relevance goes well beyond the words of PC80.

[43] The NPS-UD itself requires plainly an IPI and that the Regional Policy Statement be altered. We have concluded that the NPS-UD requires the Auckland Council to amend its Regional Policy Statement [or district plans] to give effect to the provisions of this National Policy Statement as soon as it practicable [4.1 of the NPS-UD]. Clause 4.1(2) is even more specific in respect of certain provisions which are not the subject of this particular case.

[44] We have concluded as a fact that PC80 was only introduced because of the NPS-UD in order to address the obligation under the NPS-UD 4.1(1).

[45] The question then becomes the extent to which the changes to B2, B7, B8 and B10 of the Regional Plan meet the requirement to implement the Regional Policy Statements to give effect to the provisions of the National Policy Statement. To suggest that privative clauses inserted by council officers can reduce the ability of parties to argue whether or not the changes give effect to the National Policy Statement is a novel proposition.

[46] Even with the notified changes in PC80, the Council accept that those provisions only gave partial effect to the NPS-UD obligations in 4.1. We conclude that it must be open to parties to argue that it did not sufficiently do so or that further provisions should be included. Although broader changes might be sought, any beyond B2, B7, B8 and B10 would need to be examined on a case-by-case basis to establish whether the change fitted within the changes to give effect to the provision to the National Policy Statement.

[47] Our reason for reaching these conclusions is because of the mandatory requirement contained in the National Policy Statement to give effect within the Regional Policy Statement to the NPS-UD.

Obligation On council to give effect to NPS-UD

[48] While generally a Council would have the power to adopt any plan changes it wishes and limit that in any way it wished (within reason), the mandatory nature of the requirements in 4.1 NPS-UD indicates that it must always be open to a party to submit that the changes have not gone far enough.

[49] We are strengthened in this view by the fact that the notified document and the actual changes nowhere state that they are only a partial implementation to give effect to the NPS-UD. This argument was one put to the Commissioners in submissions from the Council. It is also contained within the Council Officers' s 32 Report. Given the nature of the s 32 Report, which we have already discussed, we cannot see there is any power of the Council Officer to modify or insert privative clauses into notified documents or is there a resolution by the Council to do so.

[50] We conclude that the Appellants are not limited by the wording of the s 32 Report, which sought to indicate a reduced scope. In reaching that conclusion, we note in particular that ss 292 and 293 of the Act give the Court specific powers where it considers that other changes are appropriate, to consider whether they should be re-notified and on what basis. In other words, the safeguards against changes that are not expected in terms of the policy of the notified plan change can be addressed at that point in time depending on whether they have merit.

[51] Finally, we should note that this interpretation of the plan adopted by the Appellant in this case is not unique to it. It was one of 19 submitters and one of 34 cross-submitters (demonstrating a wide engagement within the relevant interest groups). Having read the changes themselves, they are particularly esoteric and the level of participation appears to us relatively high.

[52] In this regard we note that higher court decisions have related to full discretionary Plan changes by a council. In both *Clearwater* and *Motor Machinists* there was no obligation to give effect to any National standard or Regulation.

[53] Having reached that conclusion, we must then consider if any parties are affected. Given that the s 32 Report can be no more than an evaluation, that cannot alter the terms of the notified plan change, we conclude that the Appellants are not limited by the wording of PC80.

Are affected parties disadvantaged?

[54] When we come to examine the possible effects of the changes, and those matters that might be affected, we have concluded that there is little evidence to suggest that there are portions of the public who have not been able to participate. In particular, there appear to have been 19 original submitters and a further 34 cross-submitters on this

issue. Many of them are the same parties that were involved in other plan changes such as PC78, and this is specifically identified by the Commissioners in their decision.

[55] A finding that there is scope to consider these matters does not mean that changes sought will be included in the Plan. If the Court concludes that it is appropriate that plan changes can be made, there are specific provisions in s 293 of the Act providing for the manner in which the Court could consider such changes. Having heard all the evidence, the Court might conclude the changes sought may disadvantage some interests without receiving notice. It is not uncommon for the Court in those circumstances to require notice to be given of the proposed changes and an opportunity given for parties to participate at that point.

[56] Accordingly, we conclude this secondary issue is of less concern in a case such as this where there are broad changes.

[57] The question of a well-functioning environment is clearly a very broad term relating to issues of infrastructure, housing and business capacity, and the response of planning. The very breadth of that wording, in our view, means that the RPS as a whole could be open to a wide range of changes.

[58] This is not to say that the Court has considered or agreed with any of the Appellant's proposals. The Commissioners clearly considered that development capacity will not always contribute to a well-functioning urban environment. The Commissioners go on to say: [17]

> "It is apparent from the text of the NPS-UD that development capacity can, but will not always, contribute to a well-functioning urban environment. We accept they are not one in the same. On this basis we do not find there is scope to address development capacity in PC 80 as proposed by a number of submitters."

[59] Clearly, the Commissioners themselves acknowledge that development capacity may contribute to a well-functioning urban environment. It is a matter of evaluation and merit in each case whether the proposals made (in this case at the RPS level) satisfy the authority (in this case the Court) that they will do so. If it is not so satisfied, it would refuse to make the changes sought.

[60] With respect, we consider that to be a matter going to merit rather than to jurisdiction. For this reason, we do not address the merit of the proposals, and have not considered these in detail at this stage.

Consideration of the appeal

[61] We conclude that the submissions of the Appellant should be considered on their merits. We sound several notes of caution.

[62] The first is that to the extent that the proposals deviate from the three headings of well-functioning urban environment, climate change resilience, and qualifying matters, they will be increasingly difficult to justify before the Court.

[63] Secondly, the provisions that were in frame include B2, B7, B8 and B10. Where changes are sought beyond these, these are going to be increasingly difficult to establish before the Court.

[64] We accept that the Court has jurisdiction, if it is considering the core issues, to consider that there could be consequential or other changes elsewhere. Those almost always lead to a notification requirement and the Court has proven reluctant to undertake this broader investigation unless it is clearly signalled by the submissions and cross-submissions themselves.

Outcome

[65] We have concluded that the Court has jurisdiction to hear this appeal and that we should focus the attention of the Appellant by requiring a statement of the particular changes now sought on appeal, and how these are related to the wording notified. In particular we require the specific wording sought by the Appellant in respect of each of the provisions. The same requirement attaches to any s 274 party who is participating in the substantive hearing.

[66] Having received that, it may be that the Council accepts that some of those changes can or should be made. To the extent that it accepts any, then it should advise the Court and parties. If the Council does not accept the wording, it should provide the wording that it seeks to have before this Court, which we will assume in the absence of any other information to be that approved by the Commissioners.

[67] This matter should proceed relatively promptly. If, in the meantime, the Auckland Council does notify plan changes that meet the requirement of the NPS-UD, then it is quite clear that this appeal should be heard contemporaneously with those matters.

[68] The Court concludes that the submission and this appeal are within the scope of PC80 in general terms.

[69] The consideration of any particular change will be subject to arguments as to scope as well as relevance and merit on an individual basis, depending on the wording provided.

[70] The application for strikeout is refused. In particular, the Court considers it needs to consider the evidence advanced for the parties' proposals to reach a conclusion as to whether the matters are within the scope and whether any appeal should be allowed.

Directions

[71] On this basis, we make the following directions:

> "(a) the Appellant is to provide its preferred wording within 45 working days of this decision;
> (b) section 274 parties are to provide any alternative wording that they seek, identified by particular provision, within a further 15 working days; and
> (c) within a further 15 working days, the Council is to advise whether or not any of the proposed wordings are acceptable or otherwise provide a full copy of the wording it seeks to have incorporated within the Plan (which we will assume in the absence of any contrary information to be that approved by the Commissioners)."

[72] After the exchange of such information the parties may seek mediation or other directions of this Court. Failing any advice as to the course of action to be adopted by joint memorandum of the parties, the Court will hold another judicial telephone conference to conclude how it should advance the appeal.

For the Court:

"A"
Auckland Unitary Plan

Proposed Plan Change 80 — RPS Well-functioning Urban Environment, Resilience to the Effects of Climate Change and Qualifying Matters

Auckland Council has prepared the following proposed plan change to the Auckland Unitary Plan (Operative in Part) under Schedule 1 to the Resource Management Act 1991 (RMA) **(proposal)**

Proposed Plan Change 80 - RPS Well-functioning Urban Environment, Resilience to the Effects of Climate Change and Qualifying Matters is a proposal that seeks to amend the RPS in the Auckland Unitary Plan (Operative in Part) by adding policy to address these matters.

The proposal may be viewed at www.aucklandcouncil.govt.nz/planchanges. If you have any questions about the proposal, please contact: Dave Paul, Senior Policy Planner on 09 301 0101.

The following persons may make a submission on the proposal:

- The local authority in its own area may make a submission; and
- Any other person may make a submission. However, if the person could gain an advantage in trade competition through the submission, then the person can only make a submission the person is directly affected by an effect of the proposal that —
    - adversely affects the environment; and
    - does not relate to trade competition or the effects of trade competition.

You may make a submission by sending a written or electronic submission to Auckland Council at:

- Auckland Council, Unitary Plan Private Bag 92300, Auckland 1142, Attention: Planning Technician, or
- By using the electronic form on the Auckland Council website at www.aucklandcouncil.govt.nz/planchanges, or
- By email to: unitaryplan@aucklandcouncil.govt.nz;or
- Lodging your submission in person at Auckland Council, Libraries or offices

The submission must be in form 5 and must state whether or not you wish to be heard in relation to your submission. Copies of this form are available to download at www.aucklandcouncil.govt.nz/planchanges or can be collected from any Library or Council office.

Submissions close on 29 September 2022.

The process for public participation in the consideration of the proposal under the RMA is as follows.

- after the closing date for submissions, Auckland Council must prepare a summary of decisions requested by submitters and give public notice of the availability of this summary and where the summary and submissions can be inspected; and
- there must be an opportunity for the following persons to make a further submission in support of, or in opposition to, the submissions already made:
    - any person representing a relevant aspect of the public interest:
    - any person who has an interest in the proposal greater than the general public has:
    - the local authority itself; and
- if a person making a submission asks to be heard in support of his or her submission, a hearing must be held; and
- Auckland Council must give its decision on the provisions and matters raised in the submissions (including its reasons for accepting or rejecting submissions) and give public notice of its decision within 2 years of notifying the proposal and serve it on every person who made a submission at the same time; and
- any person who has made a submission has the right to appeal the decision on the proposal to the Environment Court if-

- in relation to a provision or matter that is the subject of the appeal, the person referred to the provision or matter in the person's submission on the proposal; and
- in the case of a proposal that is a proposed policy statement or plan, the appeal does not seek the withdrawal of the proposal as a whole.

John Duguid Manager — Plans & Places

Notification date: 18 August 2022

"B"
Auckland Unitary Plan Operative in Part

PROPOSED PLAN CHANGE 80 (PC80)

RPS Well-functioning Urban Environment, Resilience to the Effects of Climate Change and Qualifying Matters Plan Change

Public notification:

18 August 2022

Close of submissions:

29 September 2022

This is a Council initiated plan change

Plan Change Provisions

Note:

Amendments proposed by this plan change to the AUP are underlined for new text and strikethrough where existing text is proposed to be deleted. The use of … indicates that there is more text, but it is not being changed and is used when the whole provisions are too long to be included.

Proposed Plan Change 80

Proposed amendments to the following chapters of the Auckland Unitary Plan (Operative in Part)

Chapter B Regional Policy Statement

B2. Tāhuhu whakaruruhau ā-taone - Urban growth and form

B7. Toitū te whenua, toitū te taiao — Natural resources

B8. Toitū te taiwhenua - Coastal environment

B10. Ngā tūpono ki te taiao - Environmental risk

Proposed Amendments to the Auckland Unitary Plan (Operative in Part)

Chapter B Regional Policy Statement

B2. Tāhuhu whakaruruhau ā-taone Urban growth and form

B2.1. Issues

Growth needs to be provided for in a way that does all of the following:

(1A) contributes to well-functioning urban environments;
(1B) improves resilience to the effects of climate change …

B2.2.1. Objectives

(1A) A well-functioning urban environment that enables all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.
(1) A quality compact urban form and well-functioning urban environment that enables all of the following …
  (g) reduced adverse environmental effects; and
  (h) improves resilience to the effects of climate change.
(5) The development of land within the Rural Urban Boundary, towns, and rural and coastal towns and villages is:
  (a) integrated with the provision of appropriate infrastructure; and
  (b) resilient to the effects of climate change.

B2.2.2. Policies

(2) Ensure the location or any relocation of the Rural Urban Boundary identifies land suitable for urbanisation in locations that:
  (a) promote the achievement of a quality compact urban form;
  (aa) contribute to a well-functioning urban environment …
  (l) avoiding areas with significant natural hazard risks and where practicable avoiding areas prone to natural hazards including coastal hazards and flooding, including the effects of climate change and sea level rise on the extent and frequency of hazards; and …
(4) Promote urban growth and intensification within the urban area 2016 (as identified in Appendix 1A), enable urban growth and intensification within the Rural Urban Boundary, towns, and rural and coastal towns and villages, in a way that contributes to a well-functioning urban environment and avoid urbanisation outside these areas.
(6) Identify a hierarchy of centres that supports a quality compact urban form and contributes to a well-functioning urban environment: … …
(7) Enable rezoning of land within the Rural Urban Boundary or other land zoned future urban to accommodate urban growth in ways that contribute to a well-functioning urban environment and that do all of the following: … .
  (c) …
  (ca) incorporate resilience to the effects of climate change; and …

B2.3. A quality built environment

B2.3.1. Objectives

(1) A quality built environment and well-functioning urban environment where subdivision, use and development do all of the following …
  (f) are resilientrespond and adaptto the effects of climate change.

B2.3.2. Policies

(1) Manage the form and design of subdivision, use and development so that it contributes to a well-functioning urban environment and does all of the following …

…

(g) improves resilience to the effects of urban heating resulting from the effects of climate change, including by improving urban tree canopy cover; and

(h) provides for water reuse and rainwater collection and use.

B2.4. Residential growth

B2.4.1. Objectives

(1) Residential intensification supports a quality compact urban form and contributes to a well-functioning urban environment.

(1A) Residential intensification is limited in some areas to accommodate qualifying matters.

(2) Residential areas are attractive, healthy, resilient to the effects of climate change and safe with quality development that is in keeping with the planned built character of the area.

B2.4.2. Policies

Residential intensification

(2) Enable higher residential intensities in areas closest to centres, the public transport network, large social facilities, education facilities, tertiary education facilities, healthcare facilities and existing or proposed open space, except where qualifying matters reduce building height and/or density of urban form, which contribute to a well-functioning urban environment.

(3) Provide for medium residential intensities in areas that are within moderate walking distance to centres, public transport, social facilities and open space, whilst limiting height and/or density of urban form in areas where there are qualifying matters.

(4) Provide for lower residential intensity in areas:

(a) that are not close to centres and public transport;

(b) that are subject to high environmental constraints and qualifying matters;

(c) where there are qualifying matters and there are natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character; and …

(5) Avoid intensification in areas:

(a) where there are qualifying matters and there are natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage or special character; or

(b) that are subject to significant natural hazard risks including the effects of climate change on the frequency and extent of the natural hazards …

B2.5. Commercial and industrial growth

B2.5.1. Objectives

(2) Commercial growth and activities are primarily focussed within a hierarchy of centres and identified growth corridors that supports a compact urban form and contributes to a well-functioning urban environment.

(2A) Commercial and industrial activities are resilient to the effects of climate change.

(3) Industrial growth and activities are enabled in a manner that does all of the following …

(c) manages conflicts between incompatible activities by applying relevant qualifying matters;

B2.5.2 Policies

(2) Support the function, role and amenity of centres by encouraging commercial and residential activities within centres, ensuring development that locates within centres contributes to a well-functioning urban environment and the following …

(4) Enable new metropolitan, town and local centres which contribute to a well-functioning urban environment following a structure planning process and plan change process in accordance with Appendix 1 Structure plan guidelines, having regard to all of the following …

(g) any significant adverse effects on the environment, qualifying matters or on natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage or special character …

(10) …

(10A) Require commercial and industrial activities to be located, designed and developed with best practice resilience to the effects of climate change.

B2.6. Rural and coastal towns and villages

B2.6.1. Objectives

(1) Growth and development of existing or new rural and coastal towns and villages is enabled in ways that:

(c) …

(ca) is resilient to the effects of climate change …

B2.6.2. Policies

(1) Require the establishment of new or expansion of existing rural and coastal towns and villages to be undertaken in a manner that does all of the following …

(h) uses best practice to improve resilience to the effects of climate change.

B2.7. Open space and recreation facilities

B2.7.1. Objectives

(1) Recreational needs of people and communities are met through the provision of a range of quality open spaces and recreation facilities which contribute to a well-functioning urban environment.

(4) Open space and recreation facilities are resilient to the effects of climate change.

B2.7.2. Policies

(1) Enable the development and use of a wide range of open spaces and recreation facilities to provide a variety of activities, experiences and functions and which contribute to a well-functioning urban environment …

(11) Require best practice resilience to the effects of climate change in open space and associated recreation and biodiversity.

B2.8. Social facilities

B2.8.1. Objectives

(1) Social facilities that meet the needs of people and communities, including enabling them to provide for their social, economic and cultural well-being and their health and safety and which contribute to a well-functioning urban environment …

(4) Social facilities are resilient to the effects of climate change.

B2.8.2. Policies

(1) Enable social facilities that are accessible to people of all ages and abilities to establish in appropriate locations which contribute to a well-functioning urban environment as follows …

(4) In growth and intensification areas identify as part of the structure plan process where social facilities will be required and enable their establishment in appropriate locations which contribute to a well-functioning urban environment.

(7) Require social facilities to use best practice in resilience to the effects of climate change.

B2.9. Explanation and principal reasons for adoption

Para 1

A broad strategy is needed to address the resource management issues arising from the scale of urban growth in Auckland. The objective of a quality compact urban form and a well-functioning urban environment is supported by a primary policy approach of focussing residential intensification in and around commercial centres and transport nodes and along major transport corridors.

Para 4

A compact urban form can deliver a range of benefits and contributes to a well-functioning urban environment by …

- limiting intensification where there are qualifying matters
- promoting an integrated approach to land use and transport; and
- providing investment certainty about use and development strategies; and
- improving resilience to the effects of climate change.

Para 6

In addressing the effects of growth, a key factor is enabling sufficient development capacity in the urban area and sufficient land for new housing and businesses over the next 30 years and which contribute to a well-functioning urban environment. It is also important to ensure that urban environments are resilient to the effects of climate change …

B7. Toitū te whenua, toitū te taiao — Natural resources

B7.2.2 Policies

(5A) Improve the resilience of areas listed in the Schedule 3 of Significant Ecological Areas — Terrestrial Schedule and Schedule 4 Significant Ecological Areas — Marine Schedule to the effects of climate change.

B7.3.2 Policies

(5) Manage subdivision, use, development, including discharges and activities in the beds of lakes, rivers, streams, and in wetlands, to do all of the following …

(a) …

(aa) improve resilience to the effects of climate change …

B7.4.2 Policies

(9) Manage stormwater by all of the following:

(a) requiring subdivision, use and development to …

(ii) …

(iii) improve resilience to the effects of climate change …

B7.7 Explanation and principal reasons for adoption

Para 3

Areas containing threatened ecosystems and species require effective management to protect them, and enhance their resilience which is important for the long-term viability of indigenous biodiversity and to help respond to the potential effects of climate change.

B8. Toitū te taiwhenua - Coastal environment

B8.2.2 Policies

(4) …

(4A) Provide for the natural systems that support natural character to respond in a resilient way to the effects of climate change including sea level rise over at least 100 years.

B8.3.1. Objectives

(7) In areas potentially affected by coastal hazards, including sea level rise over at least 100 years, subdivision, use and development avoid increasing the risk of social, environmental and economic harm.

B8.4.2 Policies

(1) Subdivision, use and development in the coastal environment must, where practicable, do all of the following …

(d) take into account the likely impact of coastal processes and climate change, including sea level rise over at least 100 years, and be set back sufficiently to not compromise the ability of future generations to have access to and along the coast.

B10. Ngā tūpono ki te taiao - Environmental risk

B10.2. Natural hazards and climate change

B10.2.1. Objectives

(4) The effects of climate change on natural hazards, including effects on sea level rise, over at least 100 years and on the frequency and severity of storm events, is recognised and provided for.

B10.2.2. Policies

(1) Identify areas potentially affected by natural hazards, giving priority to those at high risk of being affected, particularly in the coastal environment, and including areas susceptible to coastal inundation and erosion as a result of sea level rise over at least 100 years.

(4) Assess natural hazard risks …

(b) across a range of probabilities of occurrence appropriate to the hazard, including, at least, a 100-year timeframe for evaluating flooding and coastal hazards, including sea level rise in response to global warming.

(6) Adopt a precautionary approach to natural hazard risk assessment and management in circumstances where:

(a) the effects of natural hazards and the extent to which climate change will exacerbate such effects are uncertain but may be significant, including the possibility of low-

probability but high potential impact events, and also sea level rise over at least 100 years; or …

(12) Minimise the risks from natural hazards to new infrastructure which functions as a lifeline utility by:

(a) assessing the risks from a range of natural hazard events including sea level rise, and low probability but high potential impact events such as tsunami, earthquake and volcanic eruptions …

(13) Require areas potentially affected by coastal hazards over the next 100 years to do all of the following …

(b) do not increase the intensity of activities that are vulnerable to the effects of coastal hazards beyond that enabled by the Plan, and reduce intensity over time in areas of high risk where this is necessary to implement managed retreat …

B10.3.2. Policies

(2) Manage the use and development of land for hazardous facilities:

(a) so that such facilities are resilient to the effects of natural hazards, including sea level rise over at least 100 years …

All Citations

[2024] NZEnvC 35, 2024 WL 1207828

Footnotes

1 Well-functioning Urban Environment; Resilience to the Effects of Climate Change; and Qualifying Matters Plan Change. See Decision following hearing of a Plan Change to the Auckland Unitary Plan under the Resource Management Act 1991, Plan Change 80 — Regional Policy Statement, dated 30 August 2023 (**IHP Decision**), at [5].

2 IHP Decision, at [8].

3 Hearing Topic 003 PC 80 RPS Well-functioning Urban Environments; Hearing Topic 004 PC 80 Climate Change Resilience; and Hearing Topic 005 PC 80 RPS Qualifying matters.

4 IHP Decision, at [25].

5 For example, IHP Decision, at [50] (on Topic 003).

6 IHP Decision, at [28].

7 IHP Decision, at [42].

8 Palmerston North City Council v Motor Machinists Limited [20213] NZHC 1290, at [80]-[82].

9 IHP Decision, at [45].

10 IHP Decision, at [34].

11 IHP Decision, at [36] — [37].

12 IHP Decision, at [39].

13 Section 32 Evaluation Report, at p 10.

14 *Clearwater Resort Ltd v Christchurch City Council* AP34/02, 14 March 2003.

15 Palmerston North City Council v Motor Machinists Limited [2014] NZRMA 519.

16 As Humpty Dumpty said to Alice (in Through the Looking Glass): "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more no less."'"The question is," said Alice,

"whether you can make words mean so many different things.""The question is," said Humpty Dumpty, "which is to be master — that's all."

17 IHP Decision, at [40].

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