[2016] NZEnvC 191
Environment Court, Auckland

Bluehaven Management Ltd v Western Bay of Plenty District Council

ENV-2016-AKL-153
ENV-2016-AKL-154
Hearing: 12 September 2016
Decision: 30 September 2016
Judge Smith , Judge Kirkpatrick

Classifications (2)

[1] **Civil procedure** Jurisdiction

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

Legislation Considered
Resource Management Act 1991 (NZ) s 5, s 32, s 32A, s 32AA, s 42A, s 279(4), Sch 1
Resource Management Amendment Act 2013 (NZ)
Resource Management (Forms, Fees, and Procedure) Regulations 2003 (NZ) Sch 1

Party Names
Bluehaven Management Ltd *(Appellants)*, Rotorua District Council *(Appellants)*, Western Bay of Plenty District Council *(Respondent)*

Legal Representatives
K Barry-Piceno for Bluehaven Management Limited; *L Muldowney* and *S Thomas* for Rotorua District Council; *M Hill* for Western Bay of Plenty District Council; *V Hamm* and *K Jordan* for Quayside Properties Limited

Orders

Decision of the Environment Court on Preliminary Issues as to Scope of Appeals
A: The appeals by Bluehaven Management Limited (ENV-2016-AKL-000153) and Rotorua District Council (ENV-2016-AKL-000154) are within the scope of Plan Change 72 to the Western Bay of Plenty District Plan and may proceed to be heard on their merits.

Judgment

REASONS

Judge JA Smith, Judge DA Kirkpatrick

Introduction
[1] This decision deals with the preliminary issue as to whether two appeals are within the scope of a plan change.

Background
[2] Plan Change 72 ("PC72") to the operative Western Bay of Plenty District Plan relates to the Rangiuru Business Park. The Business Park contains approximately 150 hectares of land and is located to the east of Te Puke and the Kaituna

River on Young Road, generally bounded by Pah Road to the west, the East Coast Main Trunk Railway and Te Puke Highway to the south, and the Tauranga Eastern Link (State Highway 2) to the northeast.

[3] The appellants, Bluehaven Management Limited ("Bluehaven") and Rotorua District Council ("RDC"), both seek to challenge the decisions on their submissions relating to the proposed plan provisions for one or more Community Service Areas ("CSAs") in the Business Park.

[4] In response, the Western Bay of Plenty District Council ("WBoPDC") and Quayside Properties Limited (the owner of most of the land which is subject to the plan change and a wholly owned subsidiary of Quayside Holdings Limited which is a Council-controlled organisation of the Bay of Plenty Regional Council) ("Quayside") challenged both appeals as being outside the scope of the Court's jurisdiction on the basis, broadly, that the relief sought in the appeals is not within the scope of the submissions made by the appellants and that the submissions made by the appellants are not on the plan change as required under clause 6 of Schedule 1 to the RMA.

[5] More particularly, [1] Quayside and WBoPDC object to the following aspects of the relief sought:

(i) The relief sought in paragraph 12 of RDC's Notice of Appeal which seeks to:
  (a) Include a new rule imposing a maximum cumulative gross floor area for all office and retail activities allowed in the CSAs to a total of 1,000m^2 for each CSA, with an associated note explaining that this rule is to ensure the CSA continues to provide a service function principally to the local business community; and
  (b) Include a new general subdivision and development rule requiring the location, layout and design of a CSA proposed to be included as part of a subdivision application to be shown in order to demonstrate how it will meet the primary local business community service function.

(ii) The relief sought in paragraph 7 of Bluehaven's Notice of Appeal which seeks to:
  (a) Include appropriate objectives and policies that identify the purpose and nature of local commercial activities and CSAs;
  (b) Impose rules and locational restrictions to ensure the CSAs are of a small scale and type that will provide only the required convenience services for the RBP workforce; and
  (c) Include a specific rule to limit GFA of each individual activity and require a cap for convenience retail and office activities to a maximum of 500m2 for each CSA.

[6] All parties have agreed that these issues should be considered and determined on a preliminary basis ahead of any hearing of the substantive merits of the appeals. This preliminary hearing has proceeded on the basis of an Agreed Statement of Facts and Issues dated 8 September 2016 and with an Agreed Bundle of Documents.

[7] Although not framed as an application to strike out the appeals under s 279(4) of the Act, the issues are essentially the same as they would be in relation to such an application. For that reason we have approached this as if it were an application to strike out the appeals. On that basis we have focussed our attention on the relevant primary documents, being mainly relevant parts of the operative Western Bay of Plenty District Plan (first review 2009), [2] PC 72 to that Plan [3] and the s 32 evaluation report prepared by WBoPDC in respect of it, [4] the submissions of Bluehaven and RDC and the further submission of RDC, [5] and WBoPDC's decisions on those submissions. [6] We have not based our decision on any evidential matters that might be contested at a hearing of these appeals on their substantive merits.

Rangiuru Business Park

[8] The history of PC72 goes back to 2005, when Quayside requested a plan change to establish an industrial business park at Rangiuru. The Council accepted that request and notified Plan Change 33 (Rangiuru Business Park zone)

("PC33") as a private plan change on 10 December 2005. The Council's decisions on PC33 were made on or about 10 January 2007,[7] with the only appeal being by Transit NZ in relation to roading matters that are not relevant for present purposes.[8]

[9] PC33 incorporated structure plan provisions and maps. Relevantly, the maps showed a single rectangular CSA in the middle of the main business park, with a frontage of approximately 260m to Young Road and a depth of approximately 100m. One of the objectives for the Business Park zone was to maintain and enhance the viability of the established retail centres elsewhere and those proposed in the adopted *Smart Growth Strategy*.[9] In support of that objective, there was a policy to avoid the establishment of large format retail or large office developments, whether standalone or in conjunction with industry, storage and warehousing. Consequent on these provisions, the permitted activities in the zone restricted offices and retailing to those which would be accessory to permitted industry, storage, warehousing, cool stores and pack houses, except in the CSA, where offices, retailing involving a maximum floor area of $100m^2$ and places of assembly were also permitted. Permitted activities not complying with one or more of the permitted activity performance standards could be considered as limited discretionary activities. Retailing and office activities not covered by the activity rules were specifically identified as non-complying activities.[10]

[10] The first review of the District Plan under the Act was notified on 7 February 2009 and the provisions of (now operative) PC33 relating to the CSA and to commercial activities generally were carried over into the proposed review of the Plan. This review was made operative on 16 June 2012. There were no appeals in relation to it other than by the NZ Transport Agency in relation to roading matters and the inclusion of an existing pack house within the business park area, neither of which are relevant for present purposes.[11]

[11] It appears to be generally agreed that anticipated development within the Business Park did not occur as a result of the supervening events of the global financial crisis in 2008. As well, development was delayed pending construction of the Tauranga Eastern Link which has now been completed.[12] A further consequence of the latter development is that changes to the environment made the operative Rangiuru Structure Plan maps out of date, including a number of infrastructure arrangements in relation to the location of culverts constructed under the Tauranga Eastern Link, and the final design of that road's proposed interchange with a road into the business park area have.

Ambit of PC72

[12] In 2015, Quayside made a further request to the Council for a plan change to amend the operative provisions of the District Plan relating to the Business Park. The Council accepted that request on 9 October 2015, and on 7 November 2015 notified PC72 - Rangiuru Business Park.[13] For present purposes, PC72 relevantly proposes the following amendments to the operative plan provisions for the Business Park in relation to the Community Services Area:[14]

(a) Divide the CSA into two distinct parts;
(b) Enable one part of the CSA to be included within a new Stage 1 and one part within Stage 2 (as opposed to the operative provisions which provide for the entire single CSA area within Stage 2);
(c) Locate each CSA at intersection points at either end of Young Road (as opposed to the operative provisions which provide for the single CSA at a central point on Young Road);
(d) Add one new permitted activity within the CSAs, specifically educational facilities (limited to childcare/daycare/preschool facilities);
(e) Specify in the wording of the permitted activity rule that the total net land area for the CSAs is 2.6ha (as opposed to the operative provisions which show a single CSA in the relevant district plan maps and structure plan, which covers an area of 2.6 ha according to the scale shown on those maps);
(f) Specify the requirement for a single contiguous development within each CSA of not less than 6000m2 and not greater than 20,000m2 net land area.

[13] Other changes proposed in PC72 but not related to the CSAs include:

(a) amending the staging regime;
(b) amending the road infrastructure provisions;
(c) amending the stormwater provisions and providing alternative options for water supply and wastewater treatment and disposal;
(d) amending the financial contribution provisions to reflect the revised staging and infrastructure provisions and to update construction cost estimates; and
(e) making various amendments to the permitted and discretionary land use activities.

The content of the submissions

[14] In its submission, Bluehaven submitted:

> " … the proposed community service area rules will enable ad hoc commercial office and retails development that is not appropriate at this location.
>
> The industrial zone has no objectives and policies that support the proposed amendment. The s 32 report contains insufficient assessment and evaluation of this issue.
>
> The proposal is inconsistent with the sub-regional commercial strategy, which promotes a hierarchy of identifiable centres with clearly defined functions as set out in the WBoP District Pan commercial chapter issues, objective and policies.
>
> The existing plan provisions have poor alignment with district plan objectives and policies, which needs to be rectified. Any plan changes should await the outcome of the Smart Growth Eastern Corridor study to ensure an integrated approach is taken. This study is likely to lead to changes being made to the plan provisions for commercial activities for both Tauranga and Western Bays. [15] "

[15] Bluehaven sought rejection of the proposed amendments, or the inclusion of appropriate objectives and policies to identify the purpose and nature of local commercial centres at the Business Park and to provide for two identified local centres of a location, scale and type to provide required convenience services to the local work force with a maximum gross floor for convenience retail and office activities not to exceed 500m^2 for each local centre.

[16] RDC's submission was a substantially longer document than Bluehaven's, which we will not set out in full. It opposed PC72 in its entirety on the bases that:

(a) it would have an adverse effect on the sustainability, vitality and viability of the industrial and commercial land resources in the Rotorua district and the wider region;
(b) it would lead to transport inefficiencies and adverse effects on the transportation network;
(c) it was inconsistent with the higher order planning instruments, including the purpose of the Act.

[17] In particular, RDC focussed its opposition on:

(a) the inclusion of additional non-industrial land use activities in the industrial rules applying to the Business Park;

(b) the changes to the provision of roading infrastructure and the expansion of stage 1 development from 25 to 45 hectares of gross land area; and

(c) the rule which proposed to enable further development outside stage 1 once a development threshold of 50 per cent within stage 1 had been achieved.

[18] A clear theme running through the whole of this submission is that PC72 would deviate from the original intended purpose of Rangiuru, which was intended to be protected for near-exclusive industrial activity. [16]

The Council's decisions on submissions

[19] In the Agreed Statement of Facts And Issues, the parties set out the following as the relevant reasons for the Council's decisions on the submissions by Bluehaven and RDC, which we have reviewed against the actual decisions and accept as a fair summary:

> "Plan Change 72 is not seeking to increase the developable area but to retain what is in the Operative Plan and to give effect to any minor locational change that may be required. The Operative CSA is in the new stage 2, so the proposal to split the CSA into two is to enable activities that would be established in a CSA to be available to the first stage of development.
>
> Plan Change 72 seeks to modify the location of the CSA, change the area from gross to nett, and add a new permitted activity for childcare.
>
> The Committee's consideration is limited to these particular amendments. The first two would not have any material effect on the purpose and function of the Business Park. The inclusion of childcare facilities is considered to provide a clear benefit.
>
> Rule 21.3.2 provides that there can only be one development per site, and its size has to be between 6,000m ^{2} and 2ha. This is to ensure a comprehensive development, rather than piecemeal small ones that may or may not join up.
>
> The location restrictions of 250m is important to ensure that the CSAs and their activities are internal to Rangiuru Business Park, rather than on the edge in order to attract passing traffic.
>
> Submissions for a cap on the gross floor area for offices and retail are considered to be outside the scope of what is a very limited plan change. This plan change is not an opportunity to re-visit such matters, as these would have to be addressed by way of a further plan change,
>
> Notwithstanding that this was considered outside the scope of the plan change, there was no evidence (such as economic analysis) other than theoretical planning scenarios given to justify a cap of any size. Nor was there any evidence provided to support submissions claiming the potential for negative effects of the CSAs on nearby town centres such as Rotorua, Te Puke and Wairake. On the contrary, submissions from the Te Puke community were in full support of all aspects of the plan change. [17] "

The scope for a submission

[20] A survey of the relevant legislation and case law is set out in Environmental Defence Society Inc & Ors v Otorohanga District Council. [18]

[21] For present purposes, the most relevant statutory provisions are:

(a) clause 6 of Schedule 1 to the Act, which allows any person to make a submission on a publicly notified proposed plan or plan change in the prescribed form;
(b) clause 14(1) of Schedule 1 to the Act, which sets out the scope of a submitter's appeal rights;
(c) clause 14(2)(a), which limits the right of appeal to provisions that were referred to in the appellant's submission; and
(d) the text of Form 5 in Schedule 1 to the Resource Management Act (Forms, Fees, and Procedure) Regulations 2003, which requires a submitter to give details of the specific provisions of the proposed plan or plan change that the submission relates to, and to give precise details of the decision which the submitter seeks from the local authority.

[22] In this case essentially the same issue arises under clause 14(1) as under clause 6: whether the submission (on which the appeal must be based) is "on" the plan change. No residual issues appear to arise in relation to the requirements of clause 14(1)(a) - (d) relating to the extent of the Council's decisions which are appealed from, as the Council included the proposed plan change provisions which were the subject of the submissions.

[23] In relation to whether the Bluehaven and RDC submissions were "on" PC72, the argument before us was focussed on the analysis undertaken by Kós J in the High Court in Palmerston North City Council v Motor Machinists Limited [19] based on the approach set out by William Young J in Clearwater Resort Ltd v Christchurch City Council. [20]

[24] The approach in Clearwater focuses on the extent to which a plan change or variation alters the relevant parts of the operative or proposed plan, rather than the broader alternative approaches of allowing submissions in terms of either anything which is expressed in the plan change or variation, or anything which is in connection with the contents of the plan change or variation. In pursuit of the adopted approach, Clearwater establishes a bipartite test:

(i) a submission can only fairly be regarded as being "on" a plan change or variation if it is addressed to the extent to which the plan change or variation changes the pre-existing status quo; and
(ii) if the effect of regarding a submission as being "on" a plan change or variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, that is a powerful consideration against finding the submission to be "on" the change.

[25] The Clearwater test was adopted in *Motor Machinists* and explained with additional analysis. Starting with the purpose of the Act in s 5 and describing the Act as an attempt to provide an integrated system of environmental legislation, Kós J identified two fundamentals inherent in that purpose:

(i) An appropriately thorough analysis of the effects of a proposed plan by means of the s 32 evaluation report which should adequately assess all feasible alternatives or further variations by a comparative evaluation of the efficiency, effectiveness and appropriateness of options. [21]
(ii) Robust, notified and informed public participation in the evaluative and determinative process to ensure that those potentially affected are adequately informed of what is proposed, citing with approval the observation that "[u]ltimately plans express community consensus about land use planning and development in any given area." [22] Kós J added the view that "[i]t would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage … might then find themselves directly affected but speechless at a later stage by dint of a third party submission … " [23]

[26] Noting that the Schedule 1 submission process lacks the procedural and substantial safeguards which exist when promulgating a plan change, Kós J held that the standard submission form (Form 5 in Schedule 1 to the 2003 Regulations) is not designed as a vehicle to make significant changes to the management regime in a plan where those are not already addressed by the plan change. Consequently, permitting the public to enlarge the subject matter of a plan change significantly beyond the ambit of a plan change is not efficient because it transfers the cost of assessing the merits back to the community. [24]

[27] Kós J then expanded on the Clearwater test by posing questions that may be asked to determine whether a submission can reasonably be said to fall within the ambit of a plan change:

> "In terms of the first limb of the test:
>
> (i) Whether the submission raises matters that should have been addressed in the s 32 evaluation report? If so, the submission is unlikely to be within the ambit of the plan change.
> (ii) Whether the management regime in a plan for a particular resource is altered by the plan change? If not, then a submission seeking a new management regime for that resource is unlikely to be on the plan change. [25]
>
> In terms of the second limb:
>
> (iii) 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? If so, then the process for further submissions under clause 8 of Schedule 1 to the Act does not avert that risk. [26] "

[28] All parties before us presented their cases based on this approach to the Clearwater test and we respectfully adopt it as the basis for this decision. However, we also note, in light of the submissions of Mr Muldowney for RDC and by reference to the survey in Environmental Defence Society Inc & Ors v Otorohanga District Council, [27] that there are other High Court authorities which are also pertinent to the question of scope which we consider must also be referred to.

[29] In Power v Whakatane District Council & Ors [28] the High Court noted that:

> "Care must be exercised on appeal to ensure that the objectives of the legislature in limiting appeal rights to those fairly raised by the reference are not subverted by an unduly narrow approach."

[30] Allan J went on in that decision to quote with approval the decision in Westfield (NZ) Limited v Hamilton City Council [29] where Fisher J said:

> "[73] On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the

changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

[74] Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implicit in sections 292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed changes would not have been within the reasonable contemplation of those who saw the scope of the original reference."

(emphasis in original text)

[31] The same approach was expressed by Wylie J in General Distributors Limited v Waipa District Council: [30]

"[55] One of the underlying purposes of the notification/submission/further submission process is to ensure that all are sufficiently informed about what is proposed. Otherwise the plan could end up in a form which could not reasonably have been anticipated, resulting in potential unfairness.

[56] There is of course a practical difficulty. As was noted in Countdown Properties [31] at [165], councils customarily face multiple submissions, often conflicting, and often prepared by persons without professional help. Both councils and the Environment Court on appeal, need scope to deal with the realities of the situation. To take a legalistic view and hold that a council, or the Environment Court on appeal, can only accept or reject the relief sought in any given submission would be unreal."

[32] As Allan J observed: [32]

"In the end, the jurisdiction issue comes down to a question of degree and, perhaps, even of impression."

[33] The issue of consequential changes is also addressed in the *Motor Machinists* [33] decision, where Kós J noted that the Clearwater [34] approach does not exclude altogether zoning extension by submission, saying:

"Incidental or consequential extensions of zoning changes proposed in a plan change are permissible provided that no substantial further section 32 analysis is required to inform affected persons of the comparative merits of that change. [35] "

[34] While accepting the usefulness of an approach which includes an analysis of the relevant resource management issues in the form the Council is required to undertake pursuant to s 32 to comply with clause 5(1)(a) of Schedule 1 to the Act, we respectfully consider that some care needs to be taken in assessing the validity of a submission in those terms. As Kós J expressly recognises, [36] there is no requirement in the legislation for a submitter to undertake any analysis or prepare an evaluation report in terms of s 32 when making a submission. The extent and quality of an evaluation report under s 32 of the Act depends very much on the approach taken by the relevant regional or district council in

preparing it. As provided in s 32A, a submission made under clause 6 of Schedule 1 may be based on the ground that no evaluation report has been prepared or regarded or that s 32 or 32AA [37] has not been complied with.

[35] As held in Leith v Auckland City Council, [38] there is no presumption in favour of a planning authority's policies or the planning details of the instrument challenged, or the authority's decisions on submissions. An appeal before the Environment Court is more in the nature of an inquiry into the merits when tested by submissions and the challenge of alternatives or modification.

[36] In that sense, we respectfully understand the questions posed in *Motor Machinists* [39] as needing to be answered in a way that is not unduly narrow, as cautioned in Power. [40] In other words, while a consideration of whether the issues have been analysed in a manner that might satisfy the requirements of s 32 of the Act will undoubtedly assist in evaluating the validity of a submission in terms of the Clearwater test, it may not always be appropriate to be elevated to a jurisdictional threshold without regard to whether that would subvert the limitations on the scope of appeal rights and reduce the opportunity for robust participation in the plan process.

[37] In that context, we respectfully suggest that one might also ask, in the context of the first limb of the Clearwater test, whether the submission under consideration seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative policy or method to achieve any relevant objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change. The principles established by the decisions of the High Court discussed above would suggest that submissions seeking some major alteration to the objectives of a proposed plan change would likely not be "on" that proposal, while alterations to policies and methods within the framework of the objectives may be within the scope of the proposal.

[38] It may be that this issue can be encapsulated by regarding the first test as including an assessment of whether the s 32 evaluation report should have covered the issue raised in the submission. This follows Kós J's wording [41] closely and involves an evaluation of the submission in terms of the issue as it is (or is not) addressed by the proposed plan change and the context in which it arises. In particular, such contextual evaluation should include consideration of whether there are statutory obligations, national or regional policy provisions or other operative plan provisions which bear on the issue raised in the submission. A failure to address the context expressly in the s 32 report may well indicate a failure to consider a relevant matter.

[39] Our understanding of the assessment to be made under the first limb of the test is that it is an inquiry as to what matters should have been included in the s 32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s 32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust, notified and informed public participation.

[40] We also respectfully note that the discussion in *Motor Machinists*, as in most of the cases on the issue of the scope for submissions made under clause 6 of Schedule 1 to the Act, arises in the context of a proposed change to an operative plan. The context of a review of an entire planning instrument is likely to mean that not only the methods but even the objectives could be open to challenge by way of submissions, because the review would not be considered within any existing framework of operative plan provisions. [42] This aspect is discussed in more detail in our decision in Motihi Rohe Moana Trust v Bay of Plenty Regional Council. [43]

The arguments presented

[41] For Quayside, Ms Hamm emphasised the history and nature of the Industrial Park, noting the issues it had faced in relation to staging, infrastructure and take-up. Within that context she submitted that the CSAs were of much lesser significance, amounting to less than 2% of the total area covered by PC72. She noted that no changes were proposed to the objectives and policies that relate to the Business Park. She referred us to the s 42A report of the WBoPDC planning officer, Mr Martelli, and the manner in which he addressed the issues relating to the CSAs. [44]

[42] In relation to the submission by RDC, she noted it sought rejection of the entire plan change but only made express reference to the proposed addition of daycare facilities.

[43] In relation to the submission by Bluehaven, she acknowledged that it was more specific but noted that it only sought rules requiring an overall cap on retail and office gross floor area within the CSAs, so was not a sufficient for the relief which seeks specific limits for each activity.

[44] On the basis that neither RDC nor Bluehaven had made any specific reference to the matters identified as the changes proposed to the CSAs, she submitted that neither submission address the degree to which PC72 changes the status quo, in terms of the first limb of the Clearwater test. She did not accept the argument that, taken overall, the proposed changes could be described as sweeping and submitted that essentially the submitters were advancing cases based on their submissions being "in connection with" PC72, which both Clearwater and *Motor Machinists* have held is not a sufficient basis to be "on" a plan change.

[45] For WBoPDC, Ms Hill noted that the Council, in the s 42A report, had identified scope as being an issue from the outset. She emphasised that PC72 was limited in its scope, with no changes proposed to the objectives and policies and clear identification of the land use activities in the s 32 evaluation report.

[46] She described the scheme of PC72 as being enabling, so as to get a stalled business park going within appropriate limits so that the CSAs would have no distributional impact.

[47] In relation to the deletion of a single mapped CSA and the change to a net area which was connected to two intersections, she submitted that this was not intended to enable the area to increase but to better provide for the establishment of a commercial area to support the industrial activities. She described this as an updating exercise.

[48] For RDC, Mr Muldowney presented his argument in five main points:

(i) As to context, he submitted that there was little controversy about the intended limited function of the CSA to support an industrial park rather than create a new centre. He referred to the centres approach in the Smart Growth Strategy, to Policy UG10B in the Regional Policy Statement relating to the sustainability of rezoning and development of urban land and to District Plan Objective 21.2.1.4 requiring commercial activities that do not have a functional need to locate in an industrial area be consolidated.

(ii) As to the scope of PC72, he argued that it was not so limited as contended and that the issues identified in the s 32 evaluation report showed an over-specified structure plan that required various changes, of which the potential increase in size and range of activities unrelated to industrial uses was an issue that was open to submission.

(iii) He developed the submission that in the context of PC72 and the broad submission that it be declined in its entirety, it was open to RDC to advance submissions which challenged the greater permissiveness of PC72 and to seek amendments which would maintain the status quo, while enabling updating to meet the requirements for infrastructure, including adjustments to the financial contribution rules.

(iv) He argued that within RDC's broad relief was scope to seek to manage the effects of commercial activity in the CSAs by such means as a cap on gross floor areas, referring to the scope for such detail

to be considered within the ambit of a plan change and submissions on it as identified in a number of cases referred to above in our discussion of the relevant case law. He was, however, careful to add that RDC's further submission to Bluehaven's submission ought not to be regarded as a limit on RDC's primary submission.

(v) He submitted that RDC's submission was a direct response to a change in the management regime for Rangiuru as proposed in PC72, and that it did not seek to expand either the area involved or the range of activities.

[49] For Bluehaven, Ms Barry-Piceno emphasised that the operative objectives and policies relating to the Business Park do not support non-industrial uses. She submitted that the s 32 evaluation report was insufficient in its consideration of potential effects and its limited identification and assessment of alternative options. She confirmed that Bluehaven had no opposition to the updating of the District Plan to deal with infrastructure and funding issues.

[50] In reply, Ms Hamm reminded us that Quayside is not the only affected landowner and that others may be affected by the changes sought by the submitters. She repeated that the area of the CSAs would not increase so there was no basis for introducing caps on gross floor area. Ms Hill identified support for PC72 from the Bay of Plenty Regional Council and the Smart Growth alliance. She repeated that PC72 should be characterised as "minor tweaks" to the management regime, with no scope for caps on gross floor area.

Are the submissions "on" the plan change?

[51] As the parties all agree,[45] PC72 as notified proposed to alter the status quo in relation to the CSA at Rangiuru Business Park in a number of different ways. In our view, it is feasible (without determining the likelihood of any possible outcome) that the changes proposed could have some degree of effect on the nature and scale of non-industrial development at Rangiuru, including:

(a) by dividing it to create two such areas rather than limiting it to a single area;
(b) by enabling it to extend along road frontages at the two main intersections within the Business Park, rather than being concentrated in a single area;
(c) by potentially expanding its footprint from an identified 2.6ha rectangle shown on the structure planning maps to an undefined footprint, the area of which may be assessed net of roads and other public places; and
(d) by increasing the range of non-industrial activities permitted in the area.

[52] In terms of the status quo, these changes should be considered in light of the existing planning regime. This is based on the approach taken by the Council in PC33, and in particular the issue statement, objective and policy which highlighted the potential adverse distributional effects on existing and proposed retail centres of locating non-accessory retail and office activities in the Business Park.[46] In the operative District Plan these matters remain important, as evidenced by both the commercial provisions (Issue 19.1.2, objective 19.2.1.1 and policy 19.2.2.3)[47] and the industrial provisions (Issue 21.1.5, objective 21.2.1.4 and policy 21.2.2.6).[48] None of these provisions are proposed to be deleted or amended by PC72.

[53] The s 32 evaluation report for PC72[49] addresses this issue in section 4.0 - Issues and Options Review and in particular in section 4.4 - Issue 4 - Land Use Activities. This section identifies the status quo and the proposed amendments as the two options. There is no identification or analysis of any possible variations of or alternatives to the proposed changes. The commentary identifies Objective 21.2.1.4 and Policy 21.2.2.6 as being relevant. The discussion there appears to emphasise a balance between "efficient and optimum use and development of industrial resources" and limiting non-industrial activities. The most appropriate option is identified as being to seek minor changes to the permitted activities while replicating the overall size of the CSA and relocating it to "more logical and central locations." The

discussion concludes with the statement that none of the changes generate redistribution effects as there is no increase in size or significant change in land uses. Our reading of these portions of the document leads us to a preliminary view (without determining any of the issues that may be raised on appeal) that the evaluation of the proposed changes to the CSAs is underlain by a number of unstated assumptions about the reasons for making these changes and the likely effects of them which may or may not be valid in this particular case.

[54] The submissions of Bluehaven and RDC substantively challenge the proposed changes in relation to the CSAs and seek approaches which are different, but (on a preliminary basis) not radically so in the context of the operative provisions.

[55] RDC's primary submission sought that the plan change be declined in its entirety. Even if that were the result of the appeal, that would leave the status quo in place. The relief now sought by RDC in its notice of appeal, as summarised in the Agreed Statement of Facts and Issues, is less than such complete rejection of the CSAs. While not specifically identified in RDC's original submission, it appears to us that the amendments sought to the rules to impose a cap on retail and office gross floor area and to require evidence of some functioning demonstrably in support of the industrial park do arise out of the specific references in the submission to RDC's concerns about the sustainability of other industrial and commercial resources including existing centres, the greater scope for non-industrial activities at Rangiuru and the tension with existing objectives and policies.

[56] Bluehaven's relief is both briefer and more specific than RDC's, to the extent of seeking:

(a) appropriate objectives and policies to identify the purpose of the CSAs;
(b) imposing rules and locational restrictions to ensure that the CSAs were of a small scale and of a type to provide only required convenience services; and
(c) a rule to limit the gross floor area of each individual activity and require a cap for both convenience retail and office activities.

[57] That relief appears to us to be within the scope of Bluehaven's original submission which clearly referred to these elements, even if in slightly different terms. This relief is therefore is also within the scope of RDC's further submission in support of the Bluehaven submission.

[58] We note that counsel for Quayside laid great stress on the extent to which both RDC and Bluehaven had raised concerns about matters that were not proposed to be changed by PC72, being the permitted activity status of non-accessory offices and retailing as permitted activities within the CSAs. She submitted that these matters should not be allowed to be re-opened for debate when they had been settled in the PC 33 process and then in the first review of the District Plan. Had PC72 left the provisions relating to the CSA completely unchanged and dealt only with the provisions for infrastructure and financial contributions, that argument would have great force in terms of the test in Clearwater. But that is not what happened in PC72. The Council has changed a number of aspects relating to the CSAs (as acknowledged by all parties) at least to the extent that we do not think that RDC and Bluehaven can be prohibited from raising issues that should form part of an integrated regime for the CSAs.

[59] Various submissions were made to us in argument at the hearing in relation to the relative size and significance of aspects of the plan change, the areas of land involved and the extent to which activities might be enabled. We do not consider it appropriate to venture into any consideration of those arguments, which plainly enter into the merits of the plan change and can only be considered and assessed after relevant evidence is presented and tested.

[60] Leaving to one side the extent to which the content of the s 32 evaluation report might be contested on its merits, there can be no real doubt that it addresses matters that are the concern of the submissions lodged by Bluehaven and RDC. On that basis and in terms of the first limb of the Clearwater test (whether the submission is addressed to the

extent to which the proposal changes the pre-existing status quo) and the first question posed in *Motor Machinists*, the submissions raise matters that should have been (and, at least to some extent, were) addressed in the s 32 evaluation report. In terms of the second question posed in *Motor Machinists*, it appears at least arguable that PC 72 did involve changes to the management regime for commercial activity which is not accessory to permitted industrial uses in the Business Park, so that it is open to Bluehaven and RDC to lodge submissions seeking a new management regime.

[61] In terms of the second limb of the Clearwater test (whether the submission would permit the planning instrument to be appreciably amended without real opportunity for participation by those potentially affected), it seems clear that there is little risk where, as here, the submitters seek relief which would restrict the extent of the change rather than increase it. The issue of potential distributional effects having been raised in the s 32 evaluation report, any potentially interested persons (including all landowners at Rangiuru) were effectively on notice that the location and extent of the CSA, and the range of activities that might occur within it, might be the subject of submissions. They could therefore make their own decisions about whether to become involved in the process by lodging submissions, or by reviewing the notified summary of submissions and then deciding whether to join the process by lodging further submissions.

Conclusion

[62] For the foregoing reasons we determine that both these appeals are within the scope of PC72 and direct that they may proceed to hearings on their merits.

[63] Costs are reserved. If any party considers there is reason to depart from the usual practice set out in clause 6.6(b) of the Practice Note 2014 and cannot reach agreement about that with the other parties, then any application must be made within 20 working days of the date of this decision.

All Citations

[2016] NZEnvC 191, [2016] ELHNZ 235, 2016 WL 5870018

Footnotes

1 Agreed statement of facts and Issues at paras 4 - 10.
2 Agreed bundle of documents, tabs 4 - 6.
3 Agreed bundle of documents, tabs 10 (as notified) and 13 (decisions version).
4 Agreed bundle of documents, tab 11.
5 Agreed bundle of documents, tabs 14 - 16.
6 Agreed bundle of documents, tab 13.
7 Agreed bundle of documents, tab 2.
8 Agreed statement of facts and issues at paras 11.1 - 11.5.
9 Agreed bundle of documents, Tab 30 (2013 version). The Smart Growth Strategy, released in different forms since 2004, is a non-statutory joint planning document of the Tauranga City Council, the Bay of Plenty Regional Council and the WBoPDC.
10 Agreed statement of facts and issues at para 11.3.
11 Agreed statement of facts and issues at paras 11.6 - 11.7.
12 Agreed statement of facts and issues, para 11.8.
13 Agreed statement of facts and issues at paras 11.9 - 11.10.
14 Agreed statement of facts and issues at para 11.11.

15 Agreed bundle of documents, Tab 14.
16 Agreed bundle of documents, Tab 15.
17 Agreed statement of facts and issues, para 13.
18 [2014] NZEnvC 070 at [7]-[22].
19 [2014] NZRMA 519 at [74]-[83].
20 Christchurch AP34/02, 14 March 2003, William Young J at [56]-[69].
21 Above at fn 19 at [76].
22 General Distributors Ltd v Waipa District Council (2008) 15 ELRNZ 59 (HC at [54].
23 Above at fn 19 at [77].
24 Above at fn 19 at [79].
25 Above at fn 19 at [81].
26 Above at fn 19 at [82].
27 Above at fn 18.
28 HC Tauranga, CIV-2008-470-456, 30 October 2009, Allan J, at [30].
29 [2004] NZRMA 556, at [574]-[575].
30 (2008) 15ELRNZ 59 (HC)
31 Countdown Properties Ltd v Dunedin City Council [1994] NZRMA 145 (HC)
32 Above at fn 28 at [43].
33 Above at fn 19 at [81].
34 Above at fn 20.
35 Above at fn 19 at [81].
36 Above at fn 19 at [79].
37 Since the coming into force of the Resource Management Amendment Act 2013 on 4 September 2013, a further evaluation in accordance with the requirements of s 32 may be required pursuant to s 32AA of the Act for any changes made since the first evaluation report was completed.
38 [1995] NZRMA 400 at 408-9.
39 Above at fn 19 and set out above in [26].
40 Above at fn 28 and set out above at [30].
41 Above at fn 19 at [81].
42 In terms of the principles set out in *Leith v Auckland CC* referred to above at [31].
43 ENV-2015-AKL-134, [2016] NZEnvC 190, which is delivered contemporaneously with this decision.
44 Agreed bundle of documents at Tab 12, esp. pp 14-18.
45 Agreed statement of facts and issues at 11.11.
46 Agreed Statement of facts and issues at 11.3.
47 Agreed bundle of documents, Tab 5.
48 Agreed bundle of documents, Tab 6.
49 Agreed bundle of documents, Tab 11.

End of Document

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