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13 July 2015

Felicity Boyd
Planner (Policy)
Upper Hutt City Council
UPPER HUTT
By email

Dear Felicity

PROPOSED PRIVATE PLAN CHANGE 40 - SCOPE OF PROPOSED AMENDMENTS

- 1 You have asked for our advice on several matters arising during the hearing of proposed Plan Change 40 - Wallaceville (**PC40**). In particular:
 - 1.1 Is the proposal put forward by the plan change proponent (**WDL**) within scope of PC40 as notified?
 - 1.2 Whether we have any concerns with that proposal, with specific reference to point 8 of that proposal?
 - 1.3 Does the further submission from Heretaunga Pistol Club on the submission from the NZ Defence Force still stand given that the NZ Defence Force's submission has been withdrawn?
- 2 We address each of these questions in our analysis below.

New proposal

- 3 The proposal put forward by WDL in its 'Response to issues raised by the hearing committee at end of day 1 of hearing' (**Response**) proposes to remove the need for a further structure plan to be developed for Area B. It instead proposes that Area B be classified as 'Wallaceville Living Precinct' and the existing Proposed Wallaceville Structure Plan (**PWSP**) is amended to reflect that. Amendments to the policies are also sought.

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- 4 In terms of scope, we have no concerns with the scope of that proposal. We understand that the intention of PC40 as notified was to rezone Area B to a residential zone. That is still what is proposed by WDL, although through a different mechanism. Area B was to be the subject of a further structure plan process through which the precinct boundary would be set. Due to concerns raised with the lawfulness of that approach, WDL is proposing to set that precinct now across all of Area B. We discuss the law around scope in more detail below when addressing the open change in zone question.
- 5 We do have concerns that the proposal put forward removes a level of scrutiny by the Council that was previously provided for.
- 6 Under the Council officer's position on PC40:
 - 6.1 A further detailed concept plan was required for Area B.
 - 6.2 That detailed concept plan was to be *approved* by the Council.
 - 6.3 Development was to be undertaken in accordance with an approved detailed concept plan (Policy 4.4.15A).
 - 6.4 Any development undertaken prior to a detailed concept plan being approved would be non-complying (with one exception).
 - 6.5 Any development undertaken that did not comply with an approved detailed concept plan would be non-complying.
 - 6.6 One of the matters of discretion for restricted discretionary activities was the degree of compliance with the approved detailed concept plan.
- 7 Under the new WDL proposal:
 - 7.1 All resource consents for development in Area B are to be *accompanied* by a spatial layout plan (there is no requirement for that plan to be approved).
 - 7.2 Subdivision and development are to be consistent with the PWSP (Policy 4.4.14). This is consistent with the policy intention of Policy 4.4.15A when the PWSP and future structure plan were separate requirements.
 - 7.3 All subdivision will be a restricted discretionary activity. The matters for discretion will include road layout, cycle and pedestrian connections, utilities and services (similar to matters intended to be covered by the detailed concept plan).
 - 7.4 There is no activity status trigger if a spatial layout plan is not included with the resource consent application.
- 8 The main differences under the WDL proposal are that the Council no longer has any ability to approve the spatial layout plan and that failure to provide the plan, or comply with it, does not trigger a change in activity status. The provision of the spatial layout plan and compliance with it are not matters for discretion, although the matters that were to be covered by the spatial layout plan appear to be matters for discretion.

- 9 If the hearings committee decides to approve PC40 on the basis of the new WDL proposal, we consider that a rule is required that triggers a higher activity status if a spatial layout plan is not provided with a subdivision consent application. This is consistent with the *Queenstown Airport*¹ cases relied on by WDL. We also suggest a matter of discretion be included to consider compliance with a spatial layout plan provided, so that the plan has some significance. The PWSP should also be amended to reflect this change in approach (as set out at point 8, page 3, of the WDL Response).

Merits of approach

- 10 As set out in previous advice we agree that the *Queenstown Airport* cases do state that it is ultra vires to require land use consent for something that does not authorise any activities, and that activity status must be determined by the RMA or its subsidiary planning documents and not by compliance with a different resource consent (although it would not necessarily be ultra vires to have activity status dependent on the existence of another resource consent).
- 11 The position taken by WDL is inconsistent with practice illustrated by the examples previously provided in the Wellington and Auckland existing planning frameworks. We also understand that a declaration is to be sought in the context of a similar approach being progressed through the Proposed Auckland Unitary Plan.
- 12 Based on the *Queenstown Airport* cases, the only way for activity status to be derived from compliance with a future structure plan is if that structure plan was itself subject to a further plan change. That is the approach that would be the most consistent with that line of caselaw and with the RMA. In this case, Area B could be rezoned residential under PC40 but require the introduction of a structure plan through a further plan change before any subdivision/development is undertaken or all subdivision/development be a non-complying activity. Or Area B could not be rezoned at all through PC40. A further plan change, when there is sufficient information available to put in place a structure plan at the time of rezoning, could then be pursued.
- 13 The alternative, as we previously proposed, requiring a structure plan to be approved by the Council (by resource consent or otherwise) is consistent with Wellington and Auckland examples. We consider that the framework set out in paragraph 6 above provides a pragmatic response to the issues at hand. It would provide the Council with the ability to approve a further structure plan prior to development. That approval being through the formal RMA consenting process, as opposed to a plan change or alternative process outside of the RMA. Non-compliance with that plan would also have more of an impact than merely being a matter of discretion (ie activity status would change) at the time of considering a subdivision.
- 14 We consider that the hearings panel has several options on this issue:

¹ *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2014] NZEnvC 93 and *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2014] NZEnvC 197.

- 14.1 Approving PC40, including the requirement for a detailed concept plan to be approved before development in Area B: In terms of this option:
- 14.1.1 Activity status being dependant on the existence or otherwise of a structure plan is unlikely to be ultra vires and is consistent with *Queenstown Airport* approach.
- 14.1.2 Approval could be:
- (a) through resource consent.
 - (b) a plan change.
 - (c) a separate non-RMA process, however there is no formal ability for the Council to do this under the RMA.
- 14.2 Approving PC40 with the requirement for a spatial plan to be included with any future consent application: This option creates no:
- 14.2.1 Vires concerns, but also
- 14.2.2 Ability for Council to approve a spatial plan.
- 15 The approach to be taken is at the discretion of the hearing's panel. We consider either approach to be within scope of PC40 as notified. For the reasons outlined above, we consider that the options at paragraph 14.1 are preferable over the WDL option at paragraph 14.2.

Change in zone from that proposed

- 16 You have asked whether it is within scope to change the zoning of areas of PC40 from that notified to a different zone. Specifically, whether an area within PC40 near Grants Bush can be rezoned to open space instead of residential as proposed by the notified version of PC40.
- 17 The central question to be determined is whether the outcome proposed is within scope of PC40 as notified or as sought to be amended through submissions on PC40.
- 18 Clause 10 of the First Schedule of the Resource Management Act 1991 (**RMA**) states that a local authority must give decisions on the provisions and matters raised in submissions. That decision must include reasons and may include matters relating to any consequential alterations necessary to PC40 arising from submissions. The decision is not limited to rejecting or accepting the relief sought (*Royal Forest & Bird Protection Society v Southland District Council* [1997] NZRMA 408 at 413).
- 19 The first question to be answered is whether the proposed rezoning was raised in a submission, or could be said to be responding to a matter raised in a submission.
- 20 If it was raised in a submission, the next question is whether that submission was on PC40. This is important as submitters are only allowed to make submissions that are on PC40

(clause 6). Submissions must be on the PC40 and cannot raise matters unrelated to what is proposed.

21 To determine whether a submission is on PC40, caselaw has set a two limb test. As set out in *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 to be 'on' a plan change, as submission must:

21.1 be within the ambit of the plan change, by addressing a change to the status quo governed by the plan change; and

21.2 not create a real risk that persons directly or potentially directly affected by the additional changes proposed in the submissions have been denied an opportunity to respond to the changes.

Analysis regarding Grants Bush

22 Submission number 10, Nick Saville seeks a buffer of open space around Grants Bush (submission point 10.4). That is the same area that is the subject of this question. The rezoning of that area to Open Space was clearly raised in a submission on PC40.

23 We consider that this submission is likely to be considered to be 'on' PC40. PC40 is seeking to rezone an area of land from Special Purpose to a mixed use residential that includes areas of commercial, retail and open space. The PC40 request outlines that the intention is for Grants Bush to become a reserve vested in the Council. That area is to be a source of identity for the surrounding residential areas and that its values are seen as contributing to the overall design and amenity of the area. Further protection to that area by a change in zoning to Open Space could be seen as another mechanism by which the outcomes already sought by PC40 are to be put in place. We consider that Nick Saville's submission is within the ambit of PC40. The most directly affected person is WDL and they have not been denied an opportunity to respond. More generally, the rezoning of the area was clearly an issue raised in PC40 as notified and we do not consider that the change in that zoning from Residential to Open Space is of the nature that those directly or potentially affected have been denied an opportunity to participate.

24 Whether or not it is within scope to rezone other areas will depend on the existence of a submission on PC40 to that effect.

Further submission

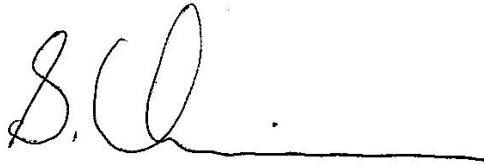
25 You have asked whether a further submission still stands if the original submission to which it relates is withdrawn.

26 Further submissions can only seek allowance or disallowance in whole or part of an original submission. If the original submission is withdrawn then there is no submission to allow or disallow.

27 The Heretaunga Pistol Club (**HPC**) further submission supported the relief sought by the New Zealand Defence Force (**NZDF**). NZDF withdrew its submission on 30 June 2015. HPC did not make an original submission and did not further submit on any other original submissions. On that basis, the HPC submission can be disregarded.

- 28 In any event, the relief sought by NZDF was a no complaints covenant in its favour. The reason NZDF withdrew its submission was that the covenant had been granted and registered. It is submission NZDF had also signalled that agreement was likely and that if reached its submission would be withdrawn. Therefore, the relief sought by NZDF, and supported by HPC has been given effect to.
- 29 We are happy to discuss any of these issues with you in further detail.

Yours sincerely

A handwritten signature in black ink, appearing to be 'S. Quinn', with a horizontal line extending to the right.

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