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PROPOSED (PRIVATE) PLAN CHANGE 40: WALLACEVILLE - STRUCTURE PLAN ISSUE

Introduction

1. We have been asked to review the amendments proposed to Plan Change 40: Wallaceville to the Upper Hutt City Plan ("**PC40**") as summarised in the document "Response to issues raised by the hearing committee at end of day 1 of hearing" ("**Harrison Grierson Summary**"), which we understand was presented to the Committee on Thursday 8 July 2015.
2. In particular, we have been asked to consider whether the proposed amendments to PC40 are:
 - (a) consistent with the Environment Court's decision in *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93, which provides guidance on the extent to which "structure planning" mechanisms can be used in a district plan; and
 - (b) within the scope of PC40.
3. We can confirm that we are satisfied on both counts. Our analysis is set out below.

Restrictions on use of structure planning after the Queenstown case

4. In the *Queenstown Airport* case, the Environment Court was concerned with the use of structure plans (or "outline development plans") in Plan Change 19 to the Queenstown Lakes District Plan. That plan change would have provided for resource consent to be sought for approval of outline development plans to specify the performance standards applying to areas of land, and the activities that could be carried out under an outline development plan.
5. The plan change also provided that certain activities could not be carried out (ie were to be prohibited) until an outline development plan had been approved for an area, and required activities to be undertaken later to comply with standards contained in an approved outline development plan.
6. The Court ultimately found that it would not be lawful for a plan change to require resource consent to be sought for an outline development plan, if the outline plan is not required itself to authorise specified activities.¹ This was on the basis that an outline plan is not an "activity" in and of itself.

¹ *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93, at [167] - [168]. The Court stating that the rule in question was unlawful "in the absence of a rule specifying activities that are expressly allowed subject to a grant of consent".

7. The Court also considered that it would be unlawful for plan provisions to require compliance with an approved outline development plan as a standard for other activities, including to determine the applicable activity status. In essence, this was because the Resource Management Act 1991 contemplated resource consent being granted for activities that comply with the "standards, terms, or conditions, if any, specified in the plan or proposed plan."² In light of this, the Court found that:³
- ... the status of an activity derives from the Act and its subsidiary planning instruments and not from a resource consent. In summary we find rules 12.19.1.1 and 12.20.3.2-4 are ultra vires s 77B of the Act insofar as the rules require compliance with a resource consent which is not a standard, term or condition that is specified in the plan change.
8. However, the Court did indicate that it would be permissible for a plan to include an assessment matter requiring consideration to be given to the degree of compliance with any applicable outline development plan,⁴ as opposed to having an outline plan specify standards that must be complied with.
9. The effect of the decision then is that the status of activities (and applicable standards which might trigger a different activity status) must be contained in the plan itself, rather than being specified in a resource consent. While the Court's decision was made with respect to section 77B and that section has now been replaced⁵ by section 87A, given that section 87A is to similar effect, we consider that the Court's reasoning remains applicable to the new section 87A as well.⁶
10. In terms of the appropriate use of structure planning mechanisms, the Environment Court's final decision on Plan Change 19⁷ approved plan provisions which required applications for subdivision to be accompanied by a "spatial layout plan" for the whole of the activity area. Later applications could then rely on a spatial layout plan approved as part of a previous application that had received consent.

Amendments proposed to PC40

11. We understand⁸ that concerns were raised in the course of the PC40 hearing that the plan change was ultra vires in that it:
- (a) required a structure plan to be approved through a resource consent process; and
 - (b) included rules providing for development in the interim period before a structure plan was approved, and provided for the activity status of other

² RMA, s 77B. That section has since been replaced by s 87A.

³ *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93, at [183].

⁴ *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93, at [189].

⁵ Under the 2009 RMA amendments.

⁶ Section 87A uses a slightly different formula, referring to "the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan." We do not consider that change to be material. However, it is notable that this formula is included in subsection 87A(5) with respect to non-complying activities, whereas the Court attributed some weight to the fact that s 77B(5) did not state that non-complying activities must comply with any standards stipulated in a plan or proposed plan (refer para [190]). As such, the Court's comments with respect to non-complying activities should be treated with caution.

⁷ *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2014] NZEnvC 197. Refer to Annexure C to that decision, at 15.1-15.2.

⁸ From the Harrison Grierson Summary, at pages 2-3.

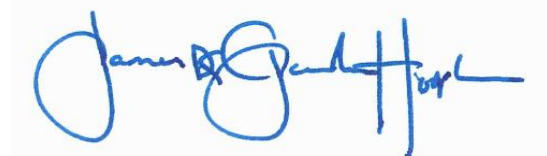
activities to be contingent on whether or not a structure plan had been approved.

12. There had also been some suggestion of compliance with approved structure plans being a requirement for certain activities within Area B.⁹
13. The Harrison Grierson Summary outlines¹⁰ a number of amendments (by reference to the Table of Amendments) that are proposed in order to address these concerns. As we understand it, the amendments will mean that the only "structure plan" requirement in the final version of PC40 will be that a "spatial layout plan" will be required to accompany subdivision or development applications, as an information requirement.
14. We do not therefore have any concerns with that approach in terms of the *Queenstown Airport* decision, and we consider that this approach is entirely consistent with the provisions that were later approved in the Environment Court's final decision on the plan change at issue in that case.
15. We have also considered whether the amendments proposed in the Harrison Grierson Summary would be "within scope" of PC40. We confirm that we do not have any concerns in this regard, given that the amendments proposed will not materially alter:
 - (a) the activities to be carried out under PC40;
 - (b) the environmental effects that can be anticipated to arise from PC40; and/or
 - (c) the persons who might be affected.

Further actions

16. Please do not hesitate to contact us if you require anything further, or would like us to advise on the detailed drafting of amendments to PC40.
17. We understand that this letter is intended to be provided to the Hearings Committee for its consideration. We are happy to address the Committee in person, if that would assist.

Yours faithfully
RUSSELL McVEAGH



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⁹ For example, we understand from the Harrison Grierson Summary that this approach was promoted by Upper Hut City Council planners with respect to Amendment 9A.
¹⁰ We have not been provided with exact wording, but understand in general terms the nature of the amendments that are intended to be made.