BUDDLE FINDLAY

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To
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Copy to
Siobhan Simpson

From
Mark Mulholland
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By Email

Dear Emily

Advice on legal queries relating to Proposed Plan Change 49 - Open Spaces

1. Thank you for seeking our advice on queries arising from the hearings held in relation to Upper Hutt City Council's (**Council**) Proposed Plan Change 49 – Open Spaces (**PC49**) (and the associated variation to that plan change relating to Silverstream Spur (**Variation**).

2. You have provided us with your preliminary view on these queries and asked us for our legal opinion. For each of these queries below, we set out in full your preliminary view as provided to us, followed by our legal opinion on the matters.

Clause 3.8(6) of the National Policy Statement on Indigenous Biodiversity (NPS-IB)

3. You have asked two queries relating to the applicability of clause 3.8(6) of the NPS-IB. The first relates to the relevance of this clause to PC49 generally, while the second is specific to the Variation. Your first query and your preliminary view on this is as follows:

> *The hearings panel asked officers to provide an assessment of PC49 and the Variation against the NPS-IB. The legal advice we are seeking specifically relates to whether clause 3.8 (6) of the NPS-IB has been triggered by PC49 and the Variation.*
>
> *The NPS-IB came into force on 4 August 2023, and Clause 3.8 (6) of the NPS-IB states that:*
>
> > *"If a territorial authority becomes aware (as a result of a resource consent or any other means) that an area may be an area of significant indigenous vegetation or significant habitat of indigenous fauna that qualifies as an SNA, the territorial authority must:*
> >
> > *Conduct an assessment of the area in accordance with subclause (2) as soon as practicable; and*
> > *if a new SNA is identified as a result, include it in the next appropriate plan or plan change notified by the territorial authority."*
>
> *Whilst Council identified potential SNAs in 2021, this work was at its very early stages. Our view is that clause 3.8(6) of the NPS-IB has not been triggered for PC49, this is because:*
>
> - *PC49 was notified on 11 August 2021, prior to the NPS-IB coming into force on 4 August 2023;*

- *no SNAs were identified in that plan change;*
- *the draft SNA's identified by Council do not form part of a current plan or plan change and have not been assessed against subclause (2) of the NPS-IB in accordance with Clause 3.8 (6)(a); and*
- *Given the three points above, PC49 would not be the 'next appropriate plan change' to give effect to the clause 3.8 (6) of the NPS-IB.*

- *In your legal opinion, is our view on PC49 not triggering Clause 3.8 (6) correct?*

4. We agree with your view that clause 3.8(6) of the NPS-IB is not triggered by PC49 and we set our reasoning below.

5. UHCC is required by section 75 of the RMA to 'give effect' to, among other things, national policy statements in its District Plan. This obligation applies even where a new NPS takes effect after a plan or plan change is notified, as is the case in respect of the NPS-IB and PC49. However, the manner in which UHCC is required to 'give effect' to an NPS depends on the wording of the NPS and any implementation and transitional provisions in an NPS are important in this regard.[1]

6. In the case of the NPS-IB, there are specific timing requirements on territorial authorities in Part 4 of the NPS-IB in respect of when they must implement aspects of the NPS-IB. In general, this must be done "*as soon as reasonably practicable*"[2], but specifically within five years after commencement for planning provisions for SNAs and for information requirements for resource consent applications,[3] and within eight years for other provisions.[4] Clause 3.8(6) requires that, if a territorial authority becomes aware that an area "*may be an area of significant indigenous vegetation or significant habitat of indigenous fauna that qualifies as an SNA*", the territorial authority must conduct an assessment of the area "*as soon as practicable*" and, if a new SNA is identified as a result, include it in "*the next appropriate plan or plan change notified by the territorial authority*."

7. We understand that UHCC has become aware of areas that may be areas of significant indigenous vegetation or significant habitat of indigenous fauna that qualify as SNAs. UHCC is obliged to undertake an assessment of those areas in accordance with Clause 3.8(6) 'as soon as reasonably practicable'. However, the obligation to include a newly identified SNA in a plan comes after that assessment has taken place and an SNA has been identified. We understand that is not yet the case in respect of the potential SNAs identified by UHCC. Accordingly, UHCC is not yet obliged by the NPS-IB to include the potential SNAs in a plan change.

8. In any event, the obligation relates to the "*next appropriate plan or plan change notified*… (emphasis added)". In our view, the clear intention of this wording is that the obligation does not apply to a proposed plan or plan change notified prior to the NPS-IB coming into force. As you note, PC49 was notified prior to the NPS-IB coming into force, and therefore could not be the 'next plan change notified'.

9. For these reasons, in our view it is not necessary to consider the 'appropriateness' of PC49 in terms of clause 3.8(6). However, if this was a relevant consideration, the fact that the draft SNAs identified

[1] See, for example, *Balmoral Developments (Outram) Ltd v Dunedin City Council* [2023] NZEnvC 59 at [90]
[2] Clause 4.1(1)
[3] Clause 4.2.
[4] Clause 4.1(2).

by UHCC did not form part of the plan change as notified would make it inappropriate for these to be introduced at a later stage. To do so would be 'out of scope' of the plan change in that there would be a real risk that persons potentially affected by the proposed SNAs would have been denied an effective opportunity to participate in the decision-making process.[5] As such, a variation would be required to introduce proposed SNAs into PC49. Plainly, this is not something that is required by the NPS-IB.

10. Your second query in relation to clause 3.8(6) of the NPS-IB relates to the Variation:

> *We also consider that clause 3.8 (6) has not been triggered by the Variation. The Variation proposes to rezone the Silverstream Spur as Natural Open Space, and an area of significant indigenous vegetation has been identified within the Natural Open Space Zone in the Variation.*
>
> *The definition of an SNA in the NPS-IB is more relevant than clause 3.8 (6) in this case. The NPS-IB defines a SNA as follows:*
>
> > *"SNA, or significant natural area, means:*
> >
> > *any area that, after the commencement date, is notified or included in a district plan as an SNA following an assessment of the area in accordance with Appendix 1; and*
> >
> > *any area that, on the commencement date, is already identified in a policy statement or plan as an area of significant indigenous vegetation or significant habitat of indigenous fauna (regardless of how it is described); in which case it remains as an SNA unless or until a suitably qualified ecologist engaged by the relevant local authority determines that it is not an area of significant indigenous vegetation or significant habitat of indigenous fauna.*
>
> *In respect of paragraph (b) above, the definition of policy statements and plans in the NPS-IB "includes regional policy statements and proposed regional policy statements, and regional plans, district plans, **and proposed plans**."*
>
> *The Variation was notified on the 5 October 2022, and we consider that the natural area for the Silverstream Spur is an identified SNA for the purposes of paragraph (b) of the definition of an SNA in the NPS-IB.*
>
> *It is acknowledged that clause 3.8 (1) of the NPS-IB states that:*
>
> > *"Every territorial authority must undertake a district-wide assessment of the land in its district to identify areas of significant indigenous vegetation or significant habitat of indigenous fauna that qualify as SNAs."*
>
> *However, whilst this has not taken place, Clause 3.8 (5) of the NPS-IB also states that:*
>
> > *"A territorial authority need not comply with subclause (1) in respect of any SNA referred to in paragraph (b) of the definition of SNA, (ie, an area already identified as an SNA at the commencement date) if, within four years after the commencement date, a suitably qualified ecologist engaged by the territorial authority confirms that the methodology originally used to identify the area as an SNA, and its application, is consistent with the assessment approach in Appendix 1."*

[5] *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [90]; *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02.

By including the natural area in the Variation it is our view that an opportunity to provide submissions on this has been provided. Submissions on the SNA were received. The hearings panel have directed expert ecological conferencing on the Silverstream Spur SNA. The outcome of this expert conferencing could help determine the extent of the natural area and provide an assessment of the Silverstream Spur natural area against the NPS-IB to give effect to clause 3.8 (5).

It is noted therefore that whilst Clause 3.8 (6) is not triggered Clause 3.10 is.

In your legal opinion, is our view that the Variation has not triggered Clause 3.8 (6) correct?

11. For similar reasons as above, we do not consider clause 3.8(6) is engaged by the Variation. That is, the Variation was notified prior to NPS-IB coming into force, and is therefore not the 'next appropriate plan change notified'.

12. We also agree with your interpretation above that the proposed area of significant indigenous vegetation is an SNA for the purposes of the NPS-IB. That is, it comes under paragraph (b) of the definition of 'SNA' because it is an area of significant indigenous vegetation which, on the commencement date of the NPS-IB was already identified in a plan. As you note, the definition of 'policy statements and plans' includes 'proposed plans', which would include PC49 as varied.

13. As an SNA which was already identified in a plan, clause 3.8(5) is relevant to the proposed area of significant indigenous vegetation. That is, within four years after the commencement date of the NPS-IB, "*a suitably qualified ecologist engaged by the territorial authority* [must confirm] *that the methodology originally used to identify the area as an SNA, and its application, is consistent with the assessment approach in Appendix 1* [of the NPS-IB]".

14. Accordingly, UHCC should be satisfied that either this requirement is met, or will be met 4 August 2027. Otherwise, the proposed area of significant indigenous vegetation would need to be included in the district-wide assessment required by clause 3.8(1).

Shooting Days at the Hutt Valley Clay Target Club

15. You asked the following query relating to shooting days at the Hutt Valley Clay Target Club:

We are seeking legal advice on whether a certificate of compliance is nullified by a plan change that includes more permissive provisions for the zone in which the activity is located?

The background to this question is that the hearings panel is considering submissions relating to the number of days that the Hutt Valley Clay Target Club can shoot. Currently the HVCTC has a certificate of compliance to operate for 80 days a year, but the notified PC49 proposes to increase the number of shooting days from 80 to 100. Following submissions seeking that the shooting days remained at 80, the section 42A report recommends that the number of shooting days is only increased to 86 days to manage effects (particularly on neighbouring properties) whilst providing some operating flexibility for the club.

The need to include a standard on shooting days is as a direct result of the proposal to rezone the area in which the HVCTC is located from the Rural Production Zone to a Sports and Active Recreation Zone (SARZ). The SARZ zone proposes a more permissive regime than the Rural Production Zone by enabling Sports and Active Recreation as a permitted activity. Under the SARZ, HVCTC would not have a limit on shooting days if an appropriate provision was not included in the permitted activity rule.

Our opinion is that the scope of submissions enables the panel to recommend the shooting days to be between 80 and 100, but in deciding what to recommend the panel is particularly

interested in the applicability of the certificate of compliance. Our view is that the certificate of compliance, limiting the shooting days to 80, will cease to be relevant if the decision is made to rezone from Rural Production Zone to the Sports and Active Recreation Zone. This is because the certificate of compliance would have been provided following an assessment of the provisions in the Rural Production Zone and these provisions will have no relevance if and when the zone in which the activity is located is rezoned as Sports and Active Recreation.

Can you please advise whether our view is correct?

16. Under section 139, a certificate of compliance is treated as a resource consent for most purposes under the RMA. As would be the case for a resource consent, the certificate of compliance held by the Hutt Valley Clay Target Club would not be 'nullified' by more permissive provisions taking effect in the district plan. That is, it would not cease to exist, and the Hutt Valley Clay Target Club could choose to continue acting in reliance on it.

17. However, if more permissive provisions in the plan take effect, the Hutt Valley Clay Target Club could choose to act in reliance on those plan provisions (i.e. to operate more than 80 shooting days in a year, as a permitted activity). In that case, the certificate of compliance would cease to have practical effect. Further, if it wished, the Hutt Valley Clay Target Club could apply for a new certificate of compliance for a higher number of shooting days.

18. We do not consider it is necessary for the certificate of compliance to have any bearing on the Panel's consideration of what should be the appropriate number of shooting days permitted by the plan.

Information on the relevance of section 138 of the Local Government Act 2002 to the development of an arterial road through the Silverstream Spur

19. You have asked the following query in relation to prospect of an arterial road through the Silverstream Spur and the potential relevance of section 138 of the Local Government Act 2002 (**LGA**):

The panel asked what processes would be needed to develop a road on the Silverstream Spur with relevance to section 138 of the Local Government Act
If the Silverstream Spur met the above definition of a 'park' and was to be "disposed of" then public consultation would be needed before part of the land could be used for a road or other infrastructure that was not only for access to or use of the park.

However, in my opinion, the Silverstream Spur is not "used principally for community, recreational, environmental or spiritual purposes. I am of this opinion, as the land does not have public access available to it. The land is currently zoned for rural and residential development but is intended to be developed into a park in the future, once suitable public access is available, as a result of this plan change, which indicates the use of part of the land for a road and other infrastructure.

The second test is whether the land was "acquired principally for community, recreational, environmental or spiritual purposes" which is less clear. Council may have originally purchased the land for a future reserve, as indicated in the documents provided by Mr Durry and Silver Stream Railway, but subsequently planted a pine plantation on the Silverstream Spur. Therefore, it is probable that the land was acquired for such a purpose and can be considered to be a park in terms of this section.

The third component to consider is whether the land is being "disposed of or sold" to create the infrastructure. Any road through the Silverstream Spur would be a public road so the land used for the road would remain public land. The current activities occurring on the

Silverstream Spur include walking and cycling by specific individuals using accesses from surrounding private properties. The 'road' would enable public access to the Silverstream Spur to enable its use as a "park" so it would be difficult to see a road as "excluding or community, recreational, environmental or spiritual purposes" as it would be enabling these activities.

Is the above interpretation correct?

20. Section 138 of the LGA provides as follows:

> ***138 Restriction on disposal of parks (by sale or otherwise)***
>
> *(1) A local authority proposing to sell or otherwise dispose of a park or part of a park must consult on the proposal before it sells or disposes of, or agrees to sell or dispose of, the park or part of the park.*
>
> *(2) In this section,—*
>
> ***dispose of**, in relation to a park, includes the granting of a lease for more than 6 months that has the effect of excluding or substantially interfering with the public's access to the park*
>
> ***park**—*
>
> *(a) means land acquired or used principally for community, recreational, environmental, cultural, or spiritual purposes; but*
>
> *(b) does not include land that is held as a reserve, or part of a reserve, under the Reserves Act 1977.*

21. We have considered, firstly, whether legalising a road within the Silverstream Spur would fall within the meaning of 'dispose of' under section 138. 'Dispose of' is not exhaustively defined in the LGA, except that subsection 138(2) confirms that this "*includes the granting of a lease for more than 6 months that has the effect of excluding or substantially interfering with the public's access to the park*." The dictionary definition of 'dispose of' means to 'to transfer to the control or ownership of another'.[6] 'Disposition' is defined in the Property Law Act 2017 (**PLA**) as meaning "*any sale, mortgage, transfer, grant, partition, exchange, lease, assignment, surrender, disclaimer, appointment, settlement, or other assurance*." While not directly applicable, we consider the PLA definition is highly informative as to the meaning of the term 'disposition' in a property context.

22. For the land to legally become road would require a process under either:

    (a) section 114 of the Public Works Act 1981 (**PWA**), which requires consent from persons with an interest in the land to be obtained before the Minister for Lands may declare land to be road by notice in the Gazette; or

    (b) the subdivision provisions of the RMA, which requires a subdivision consent to be obtained in accordance with the District Plan and, among other steps, the deposition of a survey plan by the Registrar-General of Land in accordance with section 228 RMA.

[6] 'Dispose of', *Merriam-Webster.com Legal Dictionary*, Merriam-Webster, Accessed 19 February 2024.

23. Under both processes, the land would remain vested in UHCC, meaning there is no transfer of control or ownership to another person. Neither of the processes above fall within the types of conveyance listed in the PLA definition of disposition. In addition, the public would not be excluded from land declared to be a road, but rather the presence of the road would likely provide for greater access to the balance of the land. Accordingly, this would not offend against what appears to be a key purpose of section 138, which is to provide consultation rights to the public where land once used for public purposes would no longer be available for such purposes.

24. For these reasons, we do not consider legalising a road through the Silverstream Spur would be a disposition for the purposes of section 138 LGA, particularly because there is no transfer of control or ownership to another person, and the processes required would not fall within the PLA definition of 'disposition'.

25. Given this view, it is not necessary to determine whether the Silverstream Spur is a 'park' for the purposes of section 138 of the LGA. However, we note that this is arguable, particularly given the finding of the High Court in *Mt Wellington Race Park Club Inc v Auckland Council*[7] that the word 'park' in section 138 should not be given an 'overbroad interpretation', and the use of land by the public is an important consideration in determining whether land is used as a park. We understand that public access to the land is not currently encouraged.

26. The second part of your query is as follows:

> *Additionally the panel has asked what other options are available to Council if it wishes to develop this road. They also asked about other processes for road opening and closing under the local government act.*
>
> *In my opinion the only other option would be for Council to designate a road in the District Plan with a specific corridor. Given the terrain it would also be necessary to apply for regional consents for earthworks and possibly stream crossings.*
>
> *Do you consider there are any other legal options for the development of an arterial road?*

27. Before a new local road could be established, the construction and operation would need to be authorised in accordance with the RMA. A new road might be authorised either by plan provisions (i.e. as a permitted activity), through resource consents, and/or by a designation. As we understand it, the Variation proposes to introduce provisions that envisage that a road through the Silverstream Spur might be constructed. The proposed rules would require a resource consent before the road could be developed. As you note, resource consents would also likely be needed from Greater Wellington Regional Council under the Natural Resources Plan.

28. If the plan did not include the proposed provisions, UHCC could still seek a designation for a road through the Silverstream Spur. However, the provisions of the District Plan are a matter to which particular regard must be had in terms of a recommendation on a notice of requirement under section 171(1)(a). As such, if the District Plan does not provide guidance on the appropriateness of a road in this area, it may be more challenging to confirm a designation for such a purpose.

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[7] [7] [2020] NZHC 1245.

29. Separately, UHCC would also need to work through the road legalisation requirements of the PWA or RMA (as described above) before the road could operate.

30. 'Road stopping' occurs when the legal status of land as 'road' is revoked. This would not be relevant to the construction of the Silverstream Spur unless parts of existing road needed to be stopped as part of the altered roading network in the area. For local authorities, this can occur either through a process under Schedule 10 of the Local Government Act 1974 (which includes public notification and the right of any person to object to the stopping to the Environment Court) or section 116 of Public Works Act (which requires the Minister of Lands to declare the road stopped via Gazette notice).

Conclusion

31. We trust that this advice assists, and would be happy to discuss it with you.

Yours faithfully
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