BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 242

IN THE MATTER	of the Resource Management Act 1991
AND	of an application under section 86D of the Act
BETWEEN	TIMARU DISTRICT COUNCIL
	(ENV-2016-CHC-88)
	Applicant

Court:	Environment Judge J R Jackson
Hearing:	In Chambers at Christchurch Sitting alone under section 279 of the Act
Date of Decision:	8 December 2016
Date of Issue:	8 December 2016

DECISION

A: Under section 279(1) of the Resource Management Act 1991 I direct that public notice of the application under section 86D of the Resource Management Act 1991 need not be given, nor affected persons notified of the application.

B: Under section 86D of the Resource Management Act 1991, the application by the Timaru District Council is granted, so that the rules and definitions in the Timaru District Proposed Plan Change 21 will take immediate legal effect upon notification of the Proposed Plan.

REASONS

[1] The Timaru District Council applied *ex parte* to the Environment Court on 7 December 2016 seeking an order under section 86D of the Resource Management Act 1991 ("the RMA" or "the Act") that:

(a) the Rules in the Council's Plan Change 21 ("PC 21") have legal effect from the date that Plan Change 21 is publicly notified; and

(b) public notice of this application need not be given, nor notice be provided, to affected persons.

[2] The application is supported by affidavit dated 7 December 2016 of Mr M W Geddes, District Planning Manager for the Council, and a full and useful memorandum of counsel from Mr A Schulte.

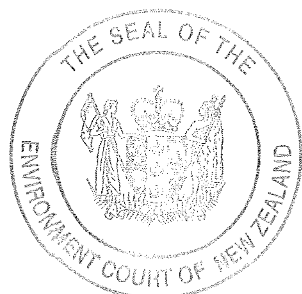
[3] Section 86B of the RMA provides:

> **86B When rules in proposed plans and changes have legal effect**
>
> (1) A rule in a proposed plan has legal effect only once a decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1, except if—
>
> (a) subsection (3) applies; or
>
> (b) the Environment Court, in accordance with section 86D, orders the rule to have legal effect from a different date (being the date specified in the court order); or
>
> (c) the local authority concerned resolves that the rule has legal effect only once the proposed plan becomes operative in accordance with clause 20 of Schedule 1.

Section 86B(1)(b) empowers the court to grant an order under section 86D that a rule can have legal effect from a date specified in the Court's order.

[4] Section 86D states:

> **86D Environment Court may order rule to have legal effect from date other than standard date**
>
> (1) In this section, **rule** means a rule—
>
> (a) in a proposed plan or change; and
>
> (b) that is not a rule of a type described in section 86B(3)(a) to (e) or (6).
>
> (2) A local authority may apply before or after the proposed plan is publicly notified under clause 5 of Schedule 1 to the Environment Court for a rule to have legal effect from a date other than the date on which the decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1.
>
> (3) If the court grants the application, the order must specify the date from which the rule is to have legal effect, being a date no earlier than the later of—
>
> (a) the date that the proposed plan is publicly notified; and
>
> (b) the date of the court order.



The facts

[5] Plan Change 21 establishes[1] an outline development plan for 27 hectares within the Broughs Gully area at the northern edge of Timaru's urban area.

[6] Mr Geddes deposes[2] that the issues relating to PC 21 have been the subject of detailed consideration by the Council, and the plan change has been the subject of thorough consultation with affected landowners.

[7] The motivation for seeking an order that the rules in PC 21 take legal effect from the time of its public notification is to avoid the risk of the policy underpinning the proposed rules being undermined by subdivision consents having to be granted by the Council before a decision on submissions on PC 21 is made.

[8] The key constraint[3] that is preventing the area's development is inadequate servicing.

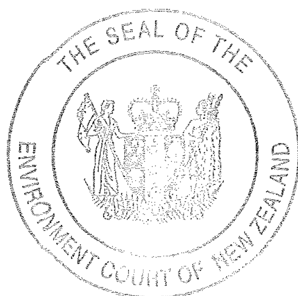
[9] The basic ideas behind the plan change are:

- to ensure co-ordinated development of the land for residential purposes;
- to roll-out infrastructure efficiently and sustainably;
- to amend financial contributions rules to address infrastructure funding at Broughs Gully.

Background to Plan Change 21

[10] Broughs Gully contains 28 different landholdings of varying sizes from 0.5 hectares to 2 hectares. Some lots contain residential dwellings, while other lots are used for low intensity rural grazing, pastoral farming, a nursery, church and a self-storage business and commercial premises.

[11] Part of Broughs Gully is zoned Residential 1 which permits lots of a minimum size of 450 m^2 (and in some circumstances, down to 300 m^2). Part is zoned Residential



1 M W Geddes affidavit dated 7 December 2016 para 9.
2 M W Geddes affidavit dated 7 December 2016 paras 11 and 12.
3 M W Geddes affidavit dated 7 December 2016 para 4.8.

4 permits lots of a minimum size of 1,500 m^2. In each case subdivision is a controlled activity.

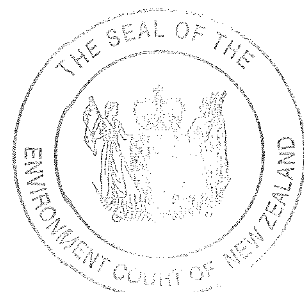
Factors to be considered under section 86D

[12] Previous decisions of the court have referred to a number of factors that should be considered. First, when considering applications under section 86D in *Re Palmerston North City Council*[4] [2015] NZEnvC 27 the court stated:

> Section 86D(2) enables a local authority to make application to the Court for an order that rules takes legal effect on a different date than that provided in s86B. As the Court has observed in earlier decisions relating to these provisions, s86D does not specify the process to be followed by the Court in determining whether or not to allow rules to become operative nor the matters to be taken into account in determining such an application. The absence of specific matters to be considered indicates that the Court has a wide discretion in determining whether or not to grant or refuse an application pursuant to s86D(2) but that discretion ought be exercised on a principled basis and having regard to the purpose of RMA contained in s5. [underlining added]
>
> In the decisions referred to above a series of factors were identified by the Court which it considered were relevant to determining those particular applications. While it is accepted that these factors might also be relevant to other applications, those decisions should not be seen as seeking to limit factors which might be relevant in any particular case. In his submissions for the Council in this instance Mr Jessen referred to a number of the factors applied by the Court in *Re New Plymouth District Council*[5] decision, namely:
>
> - The strategic importance of the plan change in question;
> - The fact that the plan change was the outcome of detailed consideration by the Council under a wider process than just RMA considerations;
> - Extensive consultation undertaken by the Council pursuant to Local Government Act provisions;
> - Ongoing subdivision pressure in areas subject to the proposed plan change.

[13] The most recent decision on section 86D RMA that counsel could refer me to was *Re Queenstown Lakes District Council* where I wrote:[6]

> [8] ... The general principle appears to be that if a proposed plan (or plan change) introduces restrictions (which can be justified under section 32 RMA) on current rights then,



4 *Re Palmerston North City Council* [2015] NZEnvC 27 at [22]-[23].
5 *Re New Plymouth District Council* [2010] NZEnvC 427 (2010) 16 ELRNZ 174.
6 *Re Queenstown Lakes District Council* [2016] NZEnvC 25 at [8]-[9].

to stop a flood of applications under the current rules in an operative district plan, the local authority can apply for one or more specified rules, which are more restrictive than the status quo, to have immediate legal effect – see *Re New Plymouth District Council*[7] (minimum subdivision lot sizes), *Re Thames-Coromandel District Council*[8] (natural hazards) and *Re Palmerston North City Council*[9] (versatile soils).

[9] In *Re Thames-Coromandel District Council* the Court noted the following themes from previous case law include some of the procedural and substantive matters that ought to be considered in assessing a section 86D application:

(a) the nature and effect of the proposed changes by reference to the status quo;
(b) the basis upon which it can be said that immediate legal effect is necessary to achieve the sustainable management purpose of the Act;
(c) the spatial extent of the area/s which are to become subject to the proposed changes and/or the approximate number of properties potentially affected;
(d) consultation (if any) that has been undertaken in relation to the proposed changes;
(e) whether the application should be limited or publicly notified, including consideration of potential prejudice.

I will respectfully follow that list, although in my view consideration of (b) should come after (c) and d).

[14] I will consider the relevant factors identified in those cases in turn. No other factors strike me as particularly relevant.

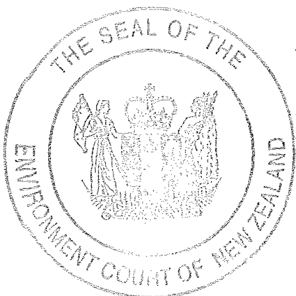
Consideration

The strategic importance of the plan change in question

[15] Apparently there has been considerable public interest in making available urban land for housing especially at "affordable prices". Mr Geddes advises the court that PC 21 will enable efficient development of land already zoned residential for housing.

Spatial extent of the area to be subject to the Plan Change

[16] The area covered by PC 21 is 27 hectares in northern Timaru is relatively small. There is a total of 28 landowners, so PC 21 does not have district wide implications except in relation to the important issue of assisting to increase the quantity of houses



7 *Re New Plymouth District Council* [2010] NZEnvC 427, (2010) 16 ELRNZ 174.
8 *Re Thames-Coromandel District Council* [2013] NZEnvC 292.
9 *Re Palmerston North City Council* [2015] NZEnvC 27.

supplied.

[17] Opportunity was given[10] to the Broughs Gully landowners to be involved in the background work by the Council leading up to PC 21. There have been two workshops for the landowners, and subsequently a hearing by the Council before its decision on 22 November 2016 to proceed with PC 21.

[18] There have also been five media articles between January and June 2016 reporting on the Broughs Gully development proposal[11].

[19] It is unlikely that the 28 landowners will be surprised by the early effect of the Plan Change. The Council claims they will not be prejudiced but in a way some free-riders might be. It may be that some could get in early if the rules were not in effect and avoid making contributions to infrastructure costs. On the other hand that would be unfair to those who are slow off the mark and socially responsible.

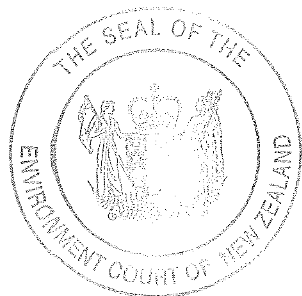
Nature and effect of proposed changes by reference to the status

[20] At present subdivision is merely a controlled activity. Rules in PC 21 introduce an Outline Development Plan procedure, revised financial contribution rules and the extension of stormwater design standards to Broughs Gully.

Ongoing subdivision pressure in areas subject to the proposed plan change

[21] In *Re Tasman District Council*[12] the court observed:

> It is reasonable to anticipate that when a local authority proposes changes to a district plan which might be seen as potentially disadvantaging some parties (for example, by way of tightening of subdivision rules), those likely to be affected might seek resource consents under existing, less restrictive, rules. The likelihood of that happening would surely have been apparent to Parliament when it considered the changes to RMA now contained in ss 86A-86G RMA.
>
> Notwithstanding that likelihood, Parliament brought down those amendments providing that, subject to limited exceptions, rules in a proposed plan would not have legal effect until parties who might be affected by those rules had the opportunity to make submissions on them and have their submissions heard and determined by the local authority.



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10 M W Geddes affidavit dated 7 December 2016 at paras 66 to 74.
11 M W Geddes affidavit dated 7 December at para 78.
12 *Re Tasman District Council* [2011] NZEnvC 47 at [7]-[9].

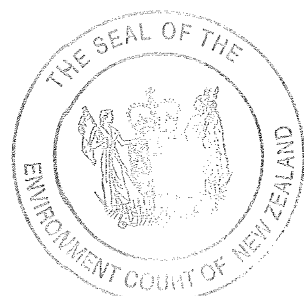
> Under those circumstances, I do not consider that the possibility that applications under existing rules might be made, of itself, will necessarily be the determinative factor in deciding an application pursuant to s86D. In my view, such an application requires a wider consideration of the purposes of any changes, their significance, the possible consequences of a *rush* of applications and the provisions of s5 RMA, rather than just consideration of the bare proposition that notification of changes is likely to generate applications for consent.

[22] In the 2015 *Re Palmerston North* case the court commented on the possibility of a "gold rush" of subdivision applications that might be generated once a Plan Change was notified. The court said[13]:

> Considerations of this gold rush effect must inevitably be speculative to a certain extent and must be approached cautiously. In particular, such contentions must be assessed in the context that ss86A - 86G RMA show a clear intention on the part of Parliament that, as a matter of common practice, rules in a proposed plan are not to have legal effect until parties who might be affected by those rules have had the opportunity to make submissions on them and have their submissions heard and determined by the local authority.
>
> I have had regard to the very helpful submission provided by Mr Jessen as to Parliament's intention in bringing down these provisions into RMA and particularly those relating to s86D. Mr Jessen provided a copy of the Ministry for the Environment's (MFE) Departmental Report to the Select Committee on the Resource Management Amendment Bill which specifically recognised the potential for the gold rush effect to take place. I consider that the key to considering this particular issue is the observation contained in the MFE Report that a gold rush on resources ... *could undermine the integrity of plans and lead to significant adverse effects on the environment and vulnerable resources ...*

[23] Mr Geddes expresses[14] his concern at the potential for subdivision applications to be made in that period between public notification of the Plan Change and a decision on that Plan Change. He wrote[15]:

> ... This risk is that one or more future subdivision applications (as is potentially occurring with September 2016 application) will have a substantial effect on sustainably servicing the area. One application cutting across the Council's proposed road, or services network could result in fundamentally altering the proposed services layout, leading to a less sustainable outcome ...

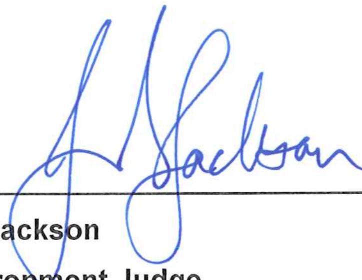


13 *Re Palmerston North City Council* [2015] NZEnvC 27 at paras [31]-[32].
14 M W Geddes affidavit dated 7 December 2016 at paras 49 to 60.
15 M W Geddes affidavit dated 7 December 2016 at 58.

Result

[24] In these circumstances I consider it is appropriate to make the orders sought.

[25] I observe that if the Council notifies PC 21 before Christmas it may well receive criticism for its timing. It may consider an appropriate way of ameliorating that issue is to extend the period in which submissions on PC 21 may be lodged.



J R Jackson
Environment Judge