

Before the Hamilton City Council Hearings Panel

Under the Resource Management Act 1991 (the **RMA**)

In the matter of a submission by the Waikato Regional Council (submitter reference 41) on Private Plan Change 2 -Te Awa Lakes

And

In the matter of Hamilton City Council District Private Plan Change 2

Legal Submissions for the Waikato Regional Council

2 December 2019

1. I appear as counsel for the Waikato Regional Council (“WRC”), a submitter in opposition.¹
2. The WRC has lodged evidence by:
 - a. Blair Keenan on economics;
 - b. Andrew Wilson on public transport;
 - c. Darion Embling on alligator weed; and
 - d. Catherine Heppelthwaite on planning (jointly with NZTA).
3. The WRC was constituted as a regional council under the Local Government (Waikato Region) Re-organisation Order 1989.
4. The Waikato Region was defined by SO Plan in that Order and has been amended by subsequent determinations of the Local Government Commission. The Waikato Region encompasses the whole of Hamilton City and the adjoining Waikato District.
5. The WRC has the functions, powers, and duties of a regional council under the Resource Management Act 1991. Its second-generation Waikato Regional Policy Statement (“WRPS”) was made operative on 20 May 2016. The WRPS has a number of provisions which are relevant to the proposed plan change. These are discussed in Ms Heppelthwaite’s evidence. Under section 75(3)(c) of the RMA a district plan must give effect to any regional policy statement. The Supreme Court in *EDS v King Salmon*² held that the words “give effect to” mean to “implement”. The Supreme Court said:

*[77] The Board was required to “give effect to” the NZCPS in considering King Salmon’s plan change applications. “Give effect to” simply means “implement”. On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. As the Environment Court said in Clevedon Cares Inc v Manukau City Council:*³

[51] The phrase “give effect to” is a strong direction. This is understandably so for two reasons:

[a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to the district level; and

[b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.

...

[80] We have said that the “give effect to” requirement is a strong directive, particularly when viewed against the background that it replaced the previous “not inconsistent with” requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more

¹ Submission reference 41.

² [2014] NZSC 38 at [77]

³ [2010] NZEnvC 211

prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

6. It is important to note that the Supreme Court expressly rejected the overall judgement approach:⁴

[83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgement" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations. We discuss at [106] to [148] below whether this approach is correct. [Concluding that it was not]

...

[135] The RMA does, of course, provide for applications for private plan changes. However, we do not see this as requiring or even supporting the adoption of the "overall judgement" approach (or undermining the approach which we consider is required).

7. Ms Heppelthwaite's supplementary statement includes a section entitled "Alignment with Regional Policy Statement" in which she concludes that the plan change, with the proposed amendments, mostly gives effect to the WRPS. She identifies three matters on which she has reservations but does not consider these to be strong enough reasons to conclude that the proposed plan change does not give effect to the WRPS.

8. In a recent decision the High Court held that "give effect to" means give 'full effect to':⁵

Assertion that the Court may give some effect to the Avoidance Policies without giving full effect.

[108] Similarly, statements from the Environment Court that the PORPS should "give some effect to Policy 9 NZCPS supported by Policy 8 without giving full effect to one or more of the Avoidance Policies in the NZCPS ...", as I see it, do not apply the correct legal test. That is an adoption of the overall broad judgement approach to implementing the NZCPS which was rejected by the Supreme Court in King Salmon.

9. The WRC has an operative Waikato Regional Coastal Plan which applies to activities below the line of mean high-water springs and hence is not relevant to this matter. It also has an operative Waikato Regional Plan which is in the very early phases of review. Under section 75(4)(b) a district plan must not be inconsistent with a regional plan for any matter specified in section 30(1) of the

⁴ e.g. at [135]–[137]; see [106] to [148]

⁵ *EDS Inc v Otago Regional Council* [2019] NZHC 2278 Gendall J

RMA (the functions of a regional council for the purpose of giving effect to the RMA in its Region).

10. The WRC also has functions, powers, and duties under the Land Transport Management Act 2003 ("LTMA"). The LTMA includes a statutory framework that seeks to grow public transport patronage with less reliance on public subsidy and requires all public transport services deemed integral to a network to be contracted with a regional council. As required under the LTMA, the WRC has a Regional Land Transport Plan and a Regional Public Transport Plan 2018 – 2028. Section 74(2)(b)(i) of the RMA requires a territorial authority, when preparing or changing a district plan, to have regard to management plans and strategies prepared under other Acts. The words "shall have regard to" indicate that such matters must be considered, but not necessarily followed.⁶
11. The WRPS also contains provisions relating to public transport. These provisions and the instruments required under the LTMA are discussed in the evidence of Mr Wilson, the WRC Manager of Public Transport.
12. Thirdly, the WRC also has functions, powers, and duties under the Biosecurity Act 1993. The relevant provisions of that Act and the Waikato Regional Pest Management Plan 2014 – 2024 made under that Act are discussed in the evidence-in-chief of Mr Embling, the WRC's Team Leader of the Biosecurity Pest Plants Team. He explains that alligator weed is a super weed. He produces as Appendix 2 the restricted place notice issued under section 130 of the Biosecurity Act.
13. He concludes that:
 - a. neither the applicant nor the section 42A report author have fully recognised the seriousness of alligator weed and the issues it creates for the proposed plan change;
 - b. the proposed plan change will significantly impact on WRC's ability to achieve the goals of the Waikato Regional Pest Management Plan 2014 – 2024 in relation to alligator weed and this will almost certainly lead to the spread of alligator weed in the Region;
 - c. modifications to the proposal will need to be made to remove potential conflicts between water quality, stormwater and alligator weed management outcomes;
 - d. modifications to the Alligator Weed Management Plan will be needed to satisfy the information requirements and the WRC.
14. Overall, he supports the WRC's submission opposing the plan change from a biosecurity perspective. The number of individual properties, residents, visitors and businesses proposed manifestly increases the risk that alligator weed will be transported off the site which will compromise the WRC's commitment to biosecurity and likely have negative effects on native biodiversity and the economy.

Update on negotiations

15. Ms Hepplethwaite and Mr Olliver continued their discussions on Thursday 28 November and Ms Hepplethwaite's supplementary evidence to be presented

⁶ *Haddon v Auckland RC* (1993) 1B ELRNZ 8; [1994] NZRMA 49.

today sets out the further provisions that were agreed between them. Those suggested provisions were discussed with Messrs Wilson and Embling on Friday. Discussions continued on Sunday.

16. Amongst the grounds of opposition in WRC's submission was that the site is unable to be served efficiently and effectively for public transport. Issue 6 of the Joint Statement of Transportation Witnesses⁷ records the intent of WRC and the applicant to jointly explore alternative concepts that could enable, or at least not preclude, options for efficiently servicing the site in the longer term.⁸ In his EIC Mr Wilson discusses a potential alternative concept of configuring the development in such a way that it does not preclude a public transport route through the plan change area such that it aligns with the unformed legal road on the opposite side of the Waikato River.⁹ He notes that Ms Heppelthwaite has proposed a new Rule 3.8.5.3.3A which he considers would achieve this.
17. Ms Heppelthwaite's supplementary evidence¹⁰ records that this has been agreed with Mr Olliver. In his summary statement of evidence Mr Wilson states: "If rule 3.8.5.3.3A were to be included then I would no longer be opposed to the plan change on public transport grounds."
18. In respect of alligator weed the applicant has agreed that the Alligator Weed Management Plan will address ongoing control in the event that the ambitious primary goal of eradication during the construction phase is not successful. The applicant has also agreed to mandatorily consent notices in respect of resource consent conditions relating to alligator weed control. On the basis that the appropriate provisions are included in the plan change, Mr Embling will say that he is no longer opposed to the plan change on biosecurity grounds.

Conclusion

19. The WRC does not support the plan change but the further amendments agreed to by the applicant have sufficiently addressed the WRC's major grounds for opposing the plan change.

J Milne

Counsel for WRC

2 December 2019

⁷ 13 September 2019

⁸ Wilson EIC paragraph 60

⁹ Wilson EIC paragraph 61 – 67

¹⁰ Heppelthwaite Supplementary paragraph 2.12