BUDDLE FINDLAY

3 June 2022

To
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From
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By Email
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Dear Wendy

Bellgrove Rangiora Limited – Request for advice

1. Bellgrove Rangiora Limited (**Applicant**) has applied for resource consents to subdivide land, and construct a housing development and neighbourhood centre at 52 and 76 Kippenberger Avenue, Rangiora (**Proposal**). The Minister for the Environment has agreed to refer the Proposal to the Bellgrove Expert Consenting Panel (**Panel**) for consideration under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**Fast-track Act**).

2. By letter dated 27 May 2022, the Panel requested the Council (under clause 25 of Schedule 6 of the Fast-track Act) to provide legal/planning advice as to the proper definition of the "environment" that is relevant for the purposes of assessing the effects in the context of the Proposal, given the conflict between the Operative Waimakariri District Plan (**Operative Plan**) and Proposed Waimakariri District Plan (**Proposed Plan**). You have asked that we provide legal advice in response to the Panel's request.

3. You have asked that we assume the background assumptions stated in the Panel's request, which are:

   (a) The Applicant accepts that the Proposal does not meet the second test set out in section 104D(1)(b) of the Resource Management Act 1991 (**RMA**) in that it will be contrary to the objectives and policies of the Operative Plan, on account of the fact that the current zoning of the land is rural and its intended use is urban.

   (b) Despite that, the Applicant also says that the Proposal would meet the objectives and policies of the Proposed Plan.

   (c) However as there is both an Operative and Proposed Plan, section 104D(1)(b)(iii) would require the Panel to conclude that the Proposal is not contrary to the objectives and policies of both plans – which it is not.

   (d) As the Proposal cannot meet section 104D(1)(b)(iii), it must satisfy the first limb of the test in s104D(1)(a) that the adverse effects of its proposal on the environment are no more than minor if the Panel are to consider granting consent.

(e) The Applicant in its application submitted that it does so by considering the effects against the provisions of the Proposed Plan, and in doing so presumes that the land will be used for urban development. There is no assessment against the operative rural zone environment and how this should now be considered in the context of other planning instruments and section 104D.

4. We understand the Panel's request for advice is focused on whether, when assessing effects on the "environment" under section 104D(1)(a), they can presuppose an urban environment that is to be brought into being by the Proposed Plan in circumstances where:

(a) the Proposed Plan is at an early submission stage, with no summary of submissions available;

(b) none of the relevant Proposed Plan rules relating to land use have legal effect; and

(c) under the Proposed Plan, the site of the Proposal is not directly zoned for urban environment, but rather it is zoned Rural Lifestyle with a capacity to then transform it to an urban environment by appropriate further application.

5. In summary, it is our opinion that for the purposes of assessing effects on the "environment" under section 104D(1)(a) in the context of the Proposal:

(a) The Panel should not focus on the specific content of the Proposed Plan.

(b) However, the Panel will need to undertake a "real world" approach to the analysis, without artificial assumptions creating an artificial future environment.

(c) In undertaking a "real world" approach, it is relevant for the Panel to consider the Canterbury Regional Policy Statement (**CRPS**) alongside the evidence before it, in ascertaining whether it is more appropriate to presuppose a "real world" future environment where the existing rural zoning is retained, or where it becomes more urbanised, notwithstanding that the relevant Proposed Plan land use provisions currently remain the subject of submissions and have no legal effect.

6. We provide the reasons for our opinion below.

The s104D gateways

7. Section 104D(1) of the RMA states:

> **104D Particular restrictions for non-complying activities**
>
> (1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either−
>
> (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
>
> (b) the application is for an activity that will not be contrary to the objectives and policies of−
>
> (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

[our underlining for emphasis]

8. Sections 104D(1)(a) and 104D(1)(b) present two gateways, whereby if neither gateway can be satisfied, then resource consent cannot be granted to the Application.

9. On the basis of the Panel's background assumption that the gateway test under section 104D(1)(b) is not met in this case, the Panel cannot go on to consider whether resource consent can be granted to the Proposal unless the gateway test under section 104D(1)(a) is met. That gateway requires the Panel to be satisfied that "*the adverse effects of the activity on the environment…will be minor*".

What is the "environment" in the section 104D(1)(a) gateway test?

10. Section 2 of the RMA provides a broad definition of "environment" as follows:

environment includes−

(a) ecosystems and their constituent parts, including people and communities; and

(b) all natural and physical resources; and

(c) amenity values; and

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

11. As noted in the Panel's letter, there is case law to the effect that the "environment" includes the existing environment and an environment that can be brought about because of permitted activities. The "environment" also includes the environment as it might be modified by the implementation of resource consents. As the Court of Appeal stated in *Queenstown Lakes District Council v Hawthorn Estate Limited* (**Hawthorn**):[1]

> In summary... in our view, the word “environment” embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed.

12. However, when considering whether adverse effects of an activity *"on the environment…will be minor*" for the section 104D(1)(a) gateway test, the High Court in *Queenstown Central Limited v Queenstown Lakes District Council* (**Queenstown Central**) held that the future environment is not strictly limited to the matters covered in *Hawthorn*. Section 104D calls for a "real world" approach to

[1] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA), at [84].

analysis, without artificial assumptions creating an artificial future environment.[2] We discuss the *Queenstown Central* case and its relevance to the present case below.

The Queenstown Central case

13. The *Queenstown Central* case was an appeal to the High Court against an Environment Court decision that granted resource consent for a new Pak 'N Save supermarket in Frankton Flats, Queenstown.[3] The relevant land was undeveloped flat land that was zoned as follows:

    (a) Rural General zone under the operative district plan.

    (b) Industrial zone under proposed plan change 19 (**PC19**), which was the subject of numerous appeals at the time.

14. In considering whether adverse effects of an activity *"on the environment…will be minor*" for the section 104D(1)(a) gateway test, the Environment Court ignored PC19 completely, effectively assuming as a fact that Frankton Flats was going to remain undeveloped. It was the Environment Court's view that "*the reasonably foreseeable environment does not include permitted activities in a proposed but challenged plan or plan change"* [our underlining for emphasis].[4]

15. However, the High Court held that the Environment Court made a material error, as the assumption that Frankton Flats would remain an undeveloped rural area was not supportable on the facts. The High Court considered that although the Environment Court was right not to focus on the specific content of PC19, it should have recognised that its assumption was contrary to:

    (a) objective 6 and policies 6.1 and 6.2 of the operative district plan, which recognised that Frankton Flats would eventually become urbanised notwithstanding its existing Rural General zoning.[5] The purpose of PC19 was to complete the urban rezoning of Frankton Flats, implementing objective 6 and policies 6.1 and 6.2 of the operative district plan;[6] and

    (b) the contest between property developers for the most valuable commercial development of Frankton Flats, which was the remaining undeveloped flat land in Queenstown to be rezoned urban.[7]

16. The High Court held that the section 104D(1)(a) gateway test is a forward looking judgement:

> I am of the view that the first gateway test is a forward looking judgment as to whether or not the proposed activities may cause an adverse effect more than "minor" on the existing and future environment. That judgment can be made, and must be made, with regard to the provisions of the operative plan, existing resource consents, commercial activity competing for use of the subject and surrounding land, and associated regulatory initiatives by way of proposed change.

[2] *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815 (HC), at [85].
[3] The Environment Court decision was *Foodstuffs (South Island) Limited v Queenstown Lakes District Council* [2012] NZEnvC 135.
[4] Ibid, at [71].
[5] *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815 (HC), at [13] and [23].
[6] Ibid, at [25].
[7] Ibid, at [13] and [23].

17. The High Court considered that:

    (a) The Environment Court had applied *Hawthorne* literally, preventing it from taking into account the reality that there was demand for more industrial land for Queenstown, which had been recognised in the operative district plan as an objective to be provided in the future, and that the only available flat land will be used at least in part for industrial activity.[8]

    (b) The Environment Court's literal application of *Hawthorne* in this context was an error of law.

    (c) PC19 was promulgated by the council "*to give effect to operative district plan objective 6, policies 6.1 and 6.2*".[9] Given objective 6 and policies 6.1 and 6.2, and Queenstown's needs, it was "*inevitable*" that Frankton Flats "*will be*" urbanised and used in part for industrial activities. "*Will be*" is the language used in section 104D(1)(a).[10]

    (d) The Court of Appeal in *Hawthorne* endorsed a future oriented assessment of the environment,[11] and had recognised the importance of context.[12]

    (e) In the context before the High Court, reading down the section 104D(1)(a) gateway test so that the judgement is based on effects in an undeveloped environment, was contrary to the operative plan and the facts, and so thwarted the intention of Parliament, amounting to a significant error of law.[13]

18. The *Queenstown Central* case has since been followed by the Courts, including in the context of considering the actual and potential effects of an activity on the "environment" under section 104 of the RMA. For example, in *Speargrass Holdings Limited v Van Brandenburg* the High Court stated:[14]

> Section 104 requires the decision maker to consider the actual and potential effects of an activity on the environment. The environment may include, to a limited extent, the environment as it might in future be modified. The limits of that were identified by the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Ltd* (Hawthorn) in which, when considering the terminology of s 104(1)(a), the Court concluded:
>
> > In our view, the word “environment” embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. …
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> As subsequently explained by Fogarty J in *Queenstown Central Ltd v Queenstown Lakes District Council*, the RMA requires a “real world” approach to analysis, without artificial assumptions creating an artificial future environment.
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> [our underlining for emphasis]

[8] Ibid, at [63].
[9] Ibid, at [37].
[10] Ibid, at [70].
[11] Ibid, at [64].
[12] Ibid at [84].
[13] Ibid, at [85].
[14] *Speargrass Holdings Limited v Van Brandenburg* [2021] NZHC 3391, at [107].

Applying the Queenstown Central case to the Proposal

19. On the basis of the reasoning provided by the High Court in the *Queenstown Central* case, we consider that for the purposes of assessing effects on the "environment" under section 104D(1)(a) in the context of the Proposal:

    (a) The Panel should not focus on the specific content of the Proposed Plan, noting that it remains subject to change due the existence of submissions. As noted at paragraph 15 above, the High Court considered the Environment Court was right not to focus on the specific content of PC19 in circumstances where PC19 remained subject to change due to the existence of numerous appeals.

    (b) The Panel will need to undertake a "real world" approach to the analysis, without artificial assumptions creating an artificial future environment (see paragraphs 12 to 18 above). We discuss this further below.

20. In the *Queenstown Central* case, the High Court's "real world" approach led to it concluding that Frankton Flats will inevitably be urbanised and used in part for industrial activities due to the combination of:

    (a) the operative district plan objective and associated policies recognising that Frankton Flats would eventually become urbanised notwithstanding its existing Rural General zoning; and

    (b) recognising Queenstown's needs, demonstrated by the contest between property developers for the most valuable commercial development of Frankton Flats.

21. In the present case, there does not appear to be any provisions in the Operative Plan recognising that the Proposal site will eventually become urbanised. However, we consider that it would be relevant for the Panel to take into account the Canterbury Regional Policy Statement (**CRPS**) when undertaking a "real world" approach to the analysis of the future environment. That is because:

    (a) In the *Queenstown Central* case, the High Court noted that PC19 was promulgated by the council "*to give effect to operative district plan objective 6, policies 6.1 and 6.2*" [our underlining for emphasis".[15]

    (b) In the present case, the Proposed Plan must, under section 75(3) of the RMA, "*give effect to*" the CRPS. The phrase "give effect to" means to implement according to the policy statement's intentions.[16] As shall be explained below, the CRPS contains provisions relevant to informing what the future environment of the Proposal site will be.

22. Accordingly, in both the *Queenstown Central* case and the present case, the relevant proposed planning instrument was giving effect to an operative planning instrument that had something to say about the future environment of the relevant land.

23. In our view, it is relevant for the Panel to consider the CRPS alongside the evidence before it, to ascertain whether it is more appropriate to presuppose a "real world" future environment where the

[15] Ibid, at [37].
[16] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [80] and [152]-[154]

existing rural zoning is retained, or where it becomes more urbanised, notwithstanding that the relevant Proposed Plan land use provisions currently remain the subject of submissions and have no legal effect.

24. The CRPS anticipates that the future environment of the Proposal site will be urbanised and directs the Council to provide for such urbanisation in its district plan, provided certain circumstances apply. In particular:

(a) The Proposal site is identified in Map A of the CRPS as a "Future Development Area".[17]

(b) CRPS objective 6.2.2(2) anticipates the provision of higher density living environments, including mixed use developments and a greater range of housing types, in a Future Development Area.

(c) CRPS objective 6.2.2(4) provides for the development of land within Future Development Areas where circumstances set out in CRPS policy 6.3.12 are met (see paragraph 24(g) below).

(d) CRPS policy 6.3.1 is to give effect to the urban form identified in Map A.

(e) The Methods relating to CRPS policy 6.3.1 include:

> **Territorial authorities:**
>
> *Will*
>
> 3. Provide for the rebuilding and recovery of Greater Christchurch in accordance with the Land Use Recovery Plan for Greater Christchurch, Policy 6.3.1 and Map A, by including in district plans objectives, policies and rules (if any) to give effect to the policy.

(f) The Principal reasons and explanation to CRPS policy 6.3.1 states:

> New residential development is provided for within Future Development Areas, where the circumstances set out in Policy 6.3.12 are met.

(g) CRPS policy 6.3.12 states the circumstances for enabling urban development in Future Development Areas as follows:

> **Future Development Areas**
>
> Enable urban development in the Future Development Areas identified on Map A, in the following circumstances:
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> 1. It is demonstrated, through monitoring of housing and business development capacity and sufficiency carried out collaboratively by the Greater Christchurch Partnership or relevant local authorities, that there is a need to provide further feasible development capacity through the zoning of additional land in a district plan to address a shortfall in the sufficiency of feasible residential development capacity to meet the medium term targets set out in Table 6.1, Objective 6.2.1a; and
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> 2. The development would promote the efficient use of urban land and support the pattern of settlement and principles for future urban growth set out in Objectives 6.2.1 and 6.2.2 and related policies including by:

[17] CRPS, as page 92.

a. Providing opportunities for higher density living environments, including appropriate mixed use development, and housing choices that meet the needs of people and communities for a range of dwelling types; and

b. Enabling the efficient provision and use of network infrastructure; and

3. The timing and sequencing of development is appropriately aligned with the provision and protection of infrastructure, in accordance with Objective 6.2.4 and Policies 6.3.4 and 6.3.5; and

4. The development would occur in accordance with an outline development plan and the requirements of Policy 6.3.3; and

5. The circumstances set out in Policy 6.3.11(5) are met; and

6. The effects of natural hazards are avoided or appropriately mitigated in accordance with the objectives and policies set out in Chapter 11.

(h) The Methods relating to CRPS policy 6.3.12 include:

Territorial authorities:

Will

1. Include in district plans objectives, policies and rules (if any) to give effect to Policy 6.3.12.

(i) The Principal reasons and explanation to CRPS policy 6.3.12 states:

The Future Development Areas are important in providing certainty that additional residential development capacity is available to accommodate population and household growth over the medium and long term.

Policy 6.3.12 provides for the re-zoning of land within the Future Development Areas, through district planning processes, in response to projected shortfalls in feasible residential development capacity over the medium term.

(j) The Anticipated Environment Results for CRPS chapter 6 states:

2. Priority areas, Future Development Areas and existing urban areas identified provide the location for all new urban development.

25. Accordingly, the CRPS anticipates the future environment of the Proposal site will be urban under the circumstances outlined in CRPS policy 6.3.12.

26. Should the Panel be satisfied on a consideration of the evidence that the circumstances set out in CRPS policy 6.3.12 will be met, then that can be a relevant factor toward supporting a conclusion under a real world analysis that it is more appropriate to presuppose a future environment of the Proposal site that is urban rather than rural, notwithstanding that the relevant Proposed Plan provisions currently remain the subject of submissions and have no legal effect.

Yours sincerely

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