BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 54

IN THE MATTER	of the Resource Management Act 1991
AND	of an application under s 86D of the Act
BY	TASMAN DISTRICT COUNCIL
	(ENV-2018-WLG-000033)
	Applicant

Court:	Environment Judge B P Dwyer sitting alone under s 279 of the Act
Heard:	In Chambers at Wellington
Date of Decision:	1 May 2018
Date of Issue:	1 May 2018

DECISION OF THE ENVIRONMENT COURT

A: Application granted

REASONS

Introduction

[1] Tasman District Council (the Council) has made application to the Court for orders in these terms:

(i) Amendments to rule 16.3.5.4A and 16.3.5.5A of the Tasman Resource Management Plan to be introduced by Variation 1 to Plan Change 60 shall take effect from the date Variation 1 is publicly notified.

(ii) The public notice for Variation 1 to Plan Change 60 shall contain a statement that the Environment Court has made an order under section 86D Resource Management Act 1991 that proposed rules 16.3.5.4A and 16.3.5.5A of Variation 1 to Plan Change 60 shall have legal effect from the date of public notification.

[2] The application then goes on to identify the reasons for which the orders are sought in these terms:

(i) It achieves the purpose of the Act;
(ii) It is necessary to give effect to the objectives of Plan Change 60 and the TRMP;
(iii) PC60 and Variation 1 are part of the Applicant's strategic approach to regulating subdivision of productive and potentially productive land in the District's Rural 1 Zone;
(iv) Productive and potentially productive land is a finite resource;
(v) Plan Change 60 has been through a First Schedule process;
(vi) The possible consequences of a rush of applications for subdivision include undermining the objectives of Plan Change 60 and the TRMP, along with inefficiency;
(vii) Such further grounds as deposed in the affidavit of Geoffrey Stephen Markham;
(viii) Such further grounds as submitted in the Memorandum of Counsel for the Applicant.

As noted in the *reasons* section, the application was accompanied by a detailed affidavit sworn by Mr G S Markham (Principal Planner Environmental Policy at the Council) and a memorandum from counsel to the Council.

Background

[3] It will be seen from the description of the application in para [1] (above) that the rules which the Council seeks to have legal effect are amendments to Rules 16.3.5.4A and 16.3.5.5A of the Tasman Resource Management Plan (the District Plan) which the Council will introduce by a Variation (Variation 1) to Plan Change 60 (PC60) to the District Plan.

[4] PC60 was a plan change to the District Plan which was notified in January 2016. A number of submissions were received, hearings held by the Council and decisions issued and six appeals were lodged to the Environment Court. I understand that five of those appeals have been resolved by consent order and that the remaining appeal is currently before the High Court awaiting a decision. In short, PC60 has all but completed its process.

[5] PC60 addressed (inter alia) a matter of considerable resource management

importance in the Tasman District, namely the cumulative adverse effects of the subdivision, development and use of rural land other than for plant and animal production. Rural Zones occupy about 35 percent (339,562 ha) of the District's land area and contain many thousands of properties. PC60 sought to regulate subdivision and land use (particularly) in the Rural 1 and 2 Zones.

[6] The Rules subject to this application apply in the Rural 1 zone where PC60 had brought down strong and directive Objectives and Policies to retain and enhance opportunities for plant and animal production and reduce land fragmentation. PC60 contained a rule "cascade" establishing the status of varying types of subdivision under the District Plan to give effect to the Objectives and Policies. These range from controlled to restricted discretionary to non-complying. The subdivision controls are based on sites existing before or after 30 January 2016 and lot sizes of 12 ha or more or alternatively an average size of 12 ha provided no lot is less than 5000m^2..

[7] Unfortunately, at some stage after the making of the Council decisions on PC60 its staff identified two inadvertent errors in the Rules contained in the final version of PC60. Variation 1 has been brought down to remedy these errors, although only one of those errors is subject to this application. Mr Markham's affidavit identified that error in the following terms:

> 18. However, a problem arises with the rule cascade where the average of 12ha is not met for a site that existed before 30 January 2016 and the minimum lot size of 5000m^2. The amended text of the Decisions Version does not provide for non-complying status in these circumstances as recommended by staff and purportedly adopted in the Decision. There is not a rule that regulates this scenario. Therefore Council's position is that the activity at present under the TRMP defaults to discretionary as a[n] innominate activity pursuant to section 87B(1)(a) or (b).

The consequence of this error is that subdivisions of Rural 1 land described above would fall to be considered as discretionary activities rather than non-complying activities notwithstanding the very clear intentions of PC60 and the Objectives and Policies contained therein (which will shortly become operative) that such subdivisions should be non-complying

[8] The Council seeks to remedy the defect in PC60 by way of Variation 1. The

primary reason why it seeks its proposed amendments to Rules 16.3.5.4A and 16.3.5.5A take effect at the time of notification is the commonly relied on issue of concern about the possibility of a gold rush of resource consent applications. Mr Markham contends that such a gold rush ... "could be generated by public knowledge of the rule amendments before they might otherwise take effect, leading to a series of discretionary activity resource consent applications undermining the outcome intended by Council to ensure greater protection of the productive capacity of rural land. This is particularly material in the Rural 1 Zone where much of the District's productive land is located".[1]

[9] The gold rush issue is one which commonly comes before the Court in applications such as these. The Court had this to say about the gold rush proposition in its Decision *Re Palmerston North City Council*[2] where it commented as follows:

> [31] 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.
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> [32] 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 ...*
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> [33] I consider that the key consideration in this case is not so much the speculative potential for there to be a rush of subdivision applications affecting high quality land in the Council's district but rather that if such a gold rush was to take place it could undermine the sustainable management of a vulnerable

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1 Markham Affidavit, para 22.
2 *Re Palmerston North City Council* [2015] NZEnvC 27.

> resource. The evidence provided by the Council as to the extent of Class 1 and Class 2 soils in its district and the subdivision pressure on them satisfies me in the first instance that such soils are a vulnerable resource in the district so that it is appropriate to take a conservative approach to management of that resource until the Council has finally determined the outcome of PC15A.

[10] It must be observed that in this case, the Council has failed to provide adequate information to support findings of the sort which I made in para [33] of the *Palmerston North* case. In that case I had very extensive information regarding ongoing conversion of land containing Class 1 and 2 soils into lifestyle blocks with a consequent loss of production. Paragraphs [8] - [19] of the *Palmerston North* Decision contain a detailed description of that issue. The information provided by the Council was sufficient to satisfy the Court that it should make an order under s 86D accordingly. Such detail is lacking in this case.

[11] On initial consideration of the application I was inclined to either decline it or alternatively seek further information from the Council in line with that provided in the *Palmerston North* case. On further consideration, I find that there is an additional relevant factor which makes it appropriate to grant the order sought by the Council in this case.

[12] The additional factor is that it becomes apparent on consideration of the Council documents that the outcome which it seeks to achieve in respect of the rules arise out of a mistake or omission in the processing of decisions under PC60. The effect of that mistake or omission in this case is that the Rules contained in PC60 fail to adequately give the effect to the Objective and Policy outcomes sought by the plan change insofar as the Rural 1 Zone is concerned. The Objectives and Policies in question have been settled and are not subject to challenge.

[13] I consider that had the deficiencies in PC60, which have now become apparent, been ascertained after the plan change had become operative, they are of a nature which could be cured by application of s 292 RMA. Alternatively, had they become apparent during the course of hearing any appeals against PC60, they are deficiencies which might properly have been cured by application of s 293 RMA.

[14] Under those circumstances, I consider that it is appropriate to make the order sought by the Council and I hereby do so.

Order

[15] The application is approved accordingly and I hereby order that:

(i) Amendments to rule 16.3.5.4A and 16.3.5.5A of the Tasman Resource Management Plan to be introduced by Variation 1 to Plan Change 60 shall take effect from the date Variation 1 is publicly notified.

(ii) The public notice for Variation 1 to Plan Change 60 shall contain a statement that the Environment Court has made an order under section 86D Resource Management Act 1991 that proposed rules 16.3.5.4A and 16.3.5.5A of Variation 1 to Plan Change 60 shall have legal effect from the date of public notification.

B P Dwyer
Environment Judge