BEFORE THE ENVIRONMENT COURT

Decision No. [2010] NZEnvC 234

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of appeals under Clause 14 of the First Schedule to the Act

BETWEEN **INFINITY INVESTMENT GROUP HOLDINGS LIMITED**

WILLOWRIDGE DEVELOPMENTS LIMITED

ORCHARD ROAD HOLDINGS LIMITED

(ENV-2009-CHC-46)

AND **REMARKABLES PARK LIMITED**

(ENV-2009-CHC-48)

AND **FIVE MILE HOLDINGS LIMITED (IN RECEIVERSHIP)**

(ENV-2009-CHC-50)

Appellants

AND **QUEENSTOWN LAKES DISTRICT COUNCIL**

Respondent

Court: Environment Judge R G Whiting sitting alone under s 279 of the Act

Hearing: 28 April 2010

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Appearances: Mr C N Whata and Ms J R Kirby-Brown for Infinity Investment Group Holdings Limited, Willowridge Developments Limited and Orchard Road Holdings Limited
Mr J D Young for Remarkables Park Limited
Mr W P Goldsmith for Five Mile Holdings Limited (in receivership)
Mr M A Ray and Mr G M Todd for Queenstown Lakes District Council

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DECISION OF THE COURT ON PRELIMINARY QUESTIONS OF LAW

A. Plan Change 24 falls within the scope of the RMA.

B. Plan Change 24 does not come within the prohibition of section 74(3).

C. The Affordable Housing: Enabling Territorial Authorities Act 2008 does not prevent affordable housing from being addressed under the RMA.

D. The proposed rules relate to a resource management purpose.

E. Whether PC 24 is a licence, and/or a subsidy, and/or a tax is a question of fact, which may be determined at the substantive hearing.

REASONS

Introduction

[1] Plan Change 24 – Affordable Housing is a proposal by the Council to address its concerns about the effects that a shortage of affordable housing is having on the welfare of the community. Plan Change 24 is the mechanism Council has chosen to introduce affordable housing into the policies of the District Plan so that it can become a relevant matter when plan changes are proposed as well as when resource consent applications are considered.[1]

[1] Memorandum of counsel for the respondent, dated 27 July 2009.

[2] There are three extant appeals. The appellants have raised numerous issues in their notices of appeal. However, counsel for the respondent in a memorandum dated 27 July 2009 considered that these could be reduced to four general issues that would need to be considered by the Court, namely:

1. Whether affordable housing is a matter that can be addressed in the context of the Resource Management Act 1991;

2. Whether or not there is an affordable housing shortage in the district;

3. Whether or not intervention using the planning process is appropriate;

4. Whether the mechanisms included in Plan Change 24 are an appropriate response to the problem.

[3] Counsel for Infinity, by memorandum dated 28 October 2009 sought leave for the consideration of two preliminary questions of law:

1. Is QLDC empowered by the RMA to require new development to subsidise affordable housing by the imposition of financial contributions under amendments 3 to 9 of Proposed Plan Change 24?

2. Is QLDC prohibited by s 74(3) of the RMA from requiring new development to subsidise affordable housing in order to mitigate an effect of competition for land under amendments 3 to 9 of Proposed Plan Change 24?

[4] Counsel for Remarkables Park, by memorandum dated 4 November 2009 sought leave for the Court to determine the following question of law:

1. Does the RMA empower the Council to direct that developers provide or subsidise affordable housing?

[5] This question of law is similar to that advanced by counsel for Infinity, but raises a broader question as to the purpose of the RMA and the council's role under the RMA.

[6] By a procedural decision dated 16 November 2009, Judge Jackson granted leave for the preliminary questions of law to be heard by way of interlocutory proceedings. These were heard in Queenstown on 28 April 2010.

Plan Change 24

[7] Counsel for the respondent summarised how Plan Change 24 would work, as follows:[2]

> [16] PC 24 proposes to introduce two objectives in section 4.9 (District-wide Issues), namely:
>
> *Objective 1 – Access to Affordable and Community Housing:*
>
> *To provide a range of opportunities for low and moderate income Resident Households and Temporary Worker Households to live in the district in accommodation appropriate for their needs.*
>
> *Objective 2 – Quality of Affordable and Community Housing:*
>
> *To ensure the provision of high quality Affordable and Community Housing in proximity to places of work, transport and community services.*
>
> [17] These objectives are supported by the following policies:
>
> *Objective 1 policies:*
>
> *1.1 To assess the impact of the development and/or subdivision on the supply of and demand for Affordable and Community Housing, and whether a contribution towards Affordable and Community Housing is necessary to mitigate any adverse effects and/or impact of the development and/or subdivision.*
>
> *1.2 To ensure that the Affordable Housing demand generated by the development and/or subdivision is met.*
>
> *Objective 2 policies:*
>
> *2.1 To ensure that Affordable and Community Housing is located within the urban settlements of the district.*
>
> *2.2. To ensure that Affordable and Community Housing is well designed and energy efficient.*

2.3 *To avoid the concentration of Affordable and Community Housing with provisions for its spread throughout a development and the urban settlements of the district.*

[18] The primary method introduced by PC 24 is the requirement for an Affordable and Community Housing Assessment to be completed as part of any future plan changes and in certain resource consent applications. This assessment process utilises the "linkage zoning approach" – that is, the focus of assessment is on the likely employment to be generated by the development, the income profile of those employees, and as a result, the demand for Affordable Housing generated as a result of that development.

[19] 'Affordable Housing':

> *Means housing whose cost to rent or own does not exceed thirty percent of the gross income of lower and moderate income households and which reflects the design criteria established in Appendix 11.*

'Community Housing':

> *Means affordable housing that maintains long term affordability for existing and future generations through the use of a Retention Mechanism.*

'Retention Mechanism':

> *Means those tools which ensure the long term affordability of Community Housing for existing and future generations. Will normally involve the transfer of ownership to the Council or the use of covenants, encumbrances or similar restrictions.*

'Community Housing' is that component of 'Affordable Housing' which has the retention mechanism designed to ensure that it remains available for use by low/moderate income families. A 'retention mechanism' is defined in Plan Change 24 and Council expects that this will require either the transfer of land or money to an appropriate entity (such as a Housing Trust) or that similar arrangements are made to secure long term affordability (typically involving the imposition of covenants or consent notices).

[20] Appendix 11 to the Plan Change sets out the process by which the assessment of Affordable and Community Housing demand is to be completed. Two routes are offered: one involves the application of pre-set demand figures, the other by specific analysis.

[2] Submissions of counsel for the respondent, 28 April 2010.

[21] This assessment then leads to the identification of the quantum of Affordable and Community Housing which should be provided. Affordable Housing is taken to mean housing which should be able to be rented/ purchased at an affordable level by low to moderate income households, but does not need to be subject to a specific retention mechanism (and thus [initial and] future rental levels/prices are determined by the market place). Community Housing means housing that is subject to a retention mechanism which will ensure that the housing will remain affordable to future purchasers/renters. Appendix 11 states that Community Housing should represent forty percent of the total Affordable Housing/Community Housing demand.

[22] Appendix 11 (Section 2, Part 13, Step 3) suggests how Affordable Housing may be provided:

> *"this may include (but is not limited to) the use of duplexes, townhouses, residential flats and apartments".*

[23] In practical terms this means that the developer at the time a plan change request is submitted or an application for a resource consent (non-complying or in some cases discretionary) is made will include in the plan or application, provision for the applicable Affordable Housing component. This may require the appropriate number of allotments to be set aside for multi-unit or duplex development. In other words there would be a requirement to incorporate allotments which encourage a form of housing that by its nature is more likely to be affordable to lower and moderate income families. Appendix 11 indicates that up to sixty percent of the Affordable and Community Housing component may be sold by the developer in the normal way.

[24] Appendix 11 indicates that at least forty percent of the Affordable Housing component is to be set aside for Community Housing. This component is the only direct contribution required. It can be satisfied by either the setting aside of land for that purpose, by making a payment equal to the value of the land concerned, or by actually providing the housing. The Community Housing component can be either managed by an appropriate trust or by the developer however, it must be retained for Community Housing.

[25] The amount of Affordable and Community Housing that Appendix 11 provides should be set aside is calculated according to the predicted level of [demand] that will [be created]. Amounts for the standard contribution rates vary according to different broad land use categories and are calculated on the basis of the projected employment that would arise from that development and the profile of the housing needs of those employees.

[26] Finally it is important to understand that not all developments will be required to provide for Affordable Housing. As a guide, residential subdivision would need to be in excess of 11 allotments before the Affordable Housing provisions would have any impact upon it.

Council's reasons for the plan change

[8] From a reading of the affidavits filed for the interlocutory proceedings, the plan change, and counsel's submissions, it appears that the provision of affordable housing is being put in place to mitigate or remedy an effect expected to arise directly from the operation of aspects of the District Plan that were put in place for good resource management reasons. The logic of this is as follows:

- The QLDC area is one of very desirable landscapes, many of which are (presumably) identified as Outstanding Natural Landscapes, and in large part is generally an outstanding natural environment.

- Much of that district's economic prosperity and viability is dependent upon the tourism that the outstanding natural environment generates. One consequence of the nature of the economic prosperity (being tourism based) is that much of the employment is service-based. Much of the employment flowing from the provision of tourism services generates only low or moderate incomes. The district is dependent upon this employment to service the tourists that are the key to the district's economic well-being.

- To protect this outstanding natural environment, and the economic wellbeing that flows from it, QLDC have put in place a policy of urban containment, restricting the areas open for urban development and the scale and intensity of residential development in the rural areas. One consequence of this is that the supply of land for development, and residential development in particular, is reduced compared to what it might otherwise be.

- One consequence of a constrained supply of land is an increase in the price of that land. This has a direct effect on the price of housing available in the district. A second consequence of a constrained supply of land is a change of

mix of housing versus non-housing development, and a change in the housing mix, from that that the market would provide if left to its own devices.

- Generally, the amount of lower-margin development will reduce in favour of higher margin development. In the case of housing, lower margin development is typically lower cost housing, and this will decline under a situation of a constrained land supply.

- If the mechanisms to protect the outstanding natural environment are successful, this will increase economic growth by increasing the amount of tourism and increase the amount of low to moderate income employment.

[9] Thus the operation of policies put in place under the RMA will have an adverse effect on the provision of lower cost housing while increasing the demand for lower cost housing. This can be seen as an adverse effect of the policies and as something that the Council considers should be remedied or mitigated.

Issues arising from the appellants' submissions

[10] From a synthesis of the appellants' submissions, I identify the following matters that are required to be determined:

1. Is the proposed plan change within the scope of the RMA?

2. Does the proposed plan change come within the prohibition of section 74(3)?

3. Does the Affordable Housing: Enabling Territorial Authorities Act 2008 prevent affordable housing from being addressed under the RMA?

4. Do the proposed rules relate to a resource management purpose?

5. Is PC 24 a licence, a subsidy or a tax?

Is the proposed plan change within the scope of the RMA?

[11] A useful starting point is to consider whether Plan Change 24 meets the purpose of district plans, set out in section 72:

72 Purpose of district plans

The purpose of the preparation, implementation, and administration of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act.

[12] The functions of a territorial authority, prescribed by section 31, include "the control of any actual or potential effects of the use, development, or protection of land, ..." as well as "[t]he establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:".[3] The generation of Plan Change 24 falls within the Council's functions, as it is a response to constraints on the use and development of land.

[13] In addition, this plan change is being carried out to achieve the purpose of the Act. There is said to be "a deliberate openness about the language" used in Part 2, and this Part of the Act should not be "subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used".[4] The urban containment policy, and the consequent pressure for land, has contributed to the Council's decision to prepare Plan Change 24. At a broad level, Plan Change 24 promotes the sustainable management of land and housing, enabling people to provide for their wellbeing while also remedying or mitigating the effects of constrained land use on people and communities.

[14] In proposing to change its district plan, the Council must comply with section 74(1), the elements of which also assist in determining whether Plan Change 24 is within the scope of the RMA:

74 Matters to be considered by territorial authority

(1) A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, a direction given under section 25A(2), its duty under section 32, and any regulations.

[3] RMA 1991, s 31(1)(a) and (b).
[4] *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 at 86.

[15] Having already referred to the Council's functions and the purpose of the Act in Part 2, the remaining element to consider is whether the plan change is in accordance with the Council's duty under section 32. There is no suggestion that the Council failed to carry out a section 32 evaluation, prior to publicly notifying Plan Change 24. While an evaluation must examine the proposed objectives, policies and rules, a substantive hearing is the suitable forum for any section 32 arguments concerning the appropriateness of the contents of Plan Change 24.

Does the proposed plan change come within the prohibition of section 74(3)?

[16] Section 74(3), as it applied prior to 1 October 2009, provides "[i]n preparing or changing any district plan, a territorial authority must not have regard to trade competition".[5] Plan Change 24 is also to be determined as if Part 11A, which came into effect on 1 October 2009, had not been inserted into the RMA.[6]

[17] "Trade competition" is not defined in the RMA. However, Wylie J considered the words "refer succinctly to the rivalrous behaviour which can occur between those involved in commerce".[7] Clearly the mischief the provision was introduced to address was competition between traders of the same kind – for example competition between the big supermarket chains. The provision is not addressed to the operation of markets, be they competitive or otherwise.

[18] In preparing Plan Change 24, the Council has not had regard to rivalrous behaviour between commercial opponents. While it may be said that the Council has had regard to the effect of competing uses for land arising out of its own plan provisions, the Council has not sought to regulate competition between identified competitors through Plan Change 24.

[19] Even if the above conclusion is incorrect, and trade competition effects arise from the proposal, other effects beyond those ordinarily associated with trade

[5] Section 161 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 provides that where a change had been publicly notified before 1 October 2009, but had not proceeded to the stage at which no further appeal was possible, the change "must be determined as if the amendments made by this Act had not been made".
[6] Resource Management (Simplifying and Streamlining) Amendment Act 2009, s 161.

competition may also be produced. In *General Distributors Ltd v Waipa District Council*, Wylie J stated:[8]

> Effects may however go beyond trade competition and become an effect on people and communities, on their social, economic and cultural wellbeing, on amenity values and on the environment. In such situations the effects can properly be regarded as being more than the effects ordinarily associated with trade competition.

[20] Wylie J further considered that a territorial authority is required to take significant social and economic effects into consideration:[9]

> It follows that s 74(3) does not preclude a territorial authority preparing or changing its district plan, from considering those wider and significant social and economic effects which are beyond the effects ordinarily associated with trade competition. Indeed it is obliged to do so in s 74(1).

[21] The urban containment policy, and the consequent pressure for land, has contributed to the Council's decision to prepare Plan Change 24. Even if trade competition effects arise from the proposal, the Council was required to take into account the significant economic and social effects arising from Plan Change 24. Overall, I find that the Council has complied with section 74(3) by not having regard to trade competition in changing its district plan.

Does the Affordable Housing: Enabling Territorial Authorities Act 2008 prevent affordable housing from being addressed under the RMA?

[22] In *Stewart v Grey County Council*, the Court of Appeal identified the need for an inconsistency, before it becomes necessary to resolve conflicting provisions of two statutes:[10]

> It is inevitable that in the complex legislative processes of a modern society there will be occasional conflicts and inconsistencies between the provisions of different statutes. There are well established rules for determining which provisions are to prevail. The starting point, of course, is that there be an inconsistency. If it is reasonably possible to construe the provisions so as to give effect to both, that must be done. It is only if one is

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[7] *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [82].
[8] *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [82].
[9] *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [93].

so inconsistent with, or repugnant to the other, that the two are incapable of standing together, that it is necessary to determine which is to prevail.

[23] *Stewart* was referred to with approval by the High Court, which considered that "[w]here two statutes deal with the same subject matter, the proper approach to interpretation is to try to give each its effect without creating conflict".[11] The Court considered that the RMA and the Civil Aviation Act were not in conflict.[12] While the Director of Civil Aviation set the minimum acceptable safety standards, the Planning Tribunal considered Glacier Helicopter's application in accordance with section 104 of the RMA and concluded that an air accident in this area was of low probability, but would have a high potential impact on the local communities' social and economic conditions.[13] The Court considered the Tribunal was not necessarily contradicting the Director, as the issues were not identical, and the Tribunal was able to look more particularly at the communities affected and to require a higher degree of safety.[14]

[24] The Affordable Housing: Enabling Territorial Authorities Act 2008 deals specifically with the narrow subject matter of affordable housing. One of its two purposes is to "enable a territorial authority, in consultation with its community, to require persons doing developments to facilitate the provision of affordable housing— ...".[15] This does not prevent a territorial authority from addressing housing needs in carrying out its functions under the RMA, being the more general legislation. The issue is whether the purpose of the RMA allows for affordable housing to be addressed under this more general enactment. As noted earlier, Part 2 uses deliberately open language. Provision for affordable housing may promote the sustainable management of land and housing, enabling people to provide for their wellbeing while also remedying or mitigating the effects of constrained land use on people and communities.

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[10] *Stewart v Grey Council Council* [1978] 2 NZLR 577 at 583.
[11] *Director of Civil Aviation v Planning Tribunal* [1997] 3 NZLR 335 at 340.
[12] *Director of Civil Aviation v Planning Tribunal* [1997] 3 NZLR 335 at 340.
[13] *Director of Civil Aviation v Planning Tribunal* [1997] 3 NZLR 335 at 339-340.
[14] *Director of Civil Aviation v Planning Tribunal* [1997] 3 NZLR 335 at 340.
[15] Affordable Housing: Enabling Territorial Authorities Act 2008, s 5(a).

[25] In addition, I note that the Affordable Housing: Enabling Territorial Authorities Act also contemplates that conflicts may arise between a territorial authority's affordable housing policy and its district plan.[16] By providing for the resolution of such conflicts, the Affordable Housing Act identifies the potential for overlap with the RMA, and enables effect to be given to both statutes.

Do the proposed rules relate to a resource management purpose?

[26] In *Nugent Consultants Ltd v Auckland City Council*, the Planning Tribunal considered that sections 5, 31, 32, 72 and 76, describe "[w]hat is expected of district rules":[17]

> In summary, a rule in a proposed district plan has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have a purpose of achieving the objectives and policies of the plan.

[27] In order to achieve the purpose of the RMA, the rules proposed in Plan Change 24 seek to assist the Council in controlling the effects of land use constraints arising out of its own plan provisions. While acknowledging that the objectives, policies, and rules of Plan Change 24 are in contention, I am not prepared at this stage of the proceedings to hold that the rules fail to be necessary in achieving the Act's purpose.

Is Plan Change 24 a licence, a subsidy or a tax?

[28] In submissions in support of their interlocutory applications, counsel for Infinity and counsel for Remarkable Parks each referred to Plan Change 24 as a licence, and/or a subsidy, and/or a tax. Yet no economic evidence was adduced to address any of those three terms.

[16] Affordable Housing: Enabling Territorial Authorities Act 2008, s 29.
[17] *Nugent Consultants Ltd v Auckland City Council* [1996] NZRMA 481 at 484.

[29] In the absence of economic evidence, I am not prepared to determine that Plan Change 24 amounts to a licence, and/or a subsidy, and/or a tax, as these are questions of fact.

Decision

[30] The following answers are given in response to the issues discerned from counsels' preliminary questions of law:

1. Plan Change 24 falls within the scope of the RMA;

2. Plan Change 24 does not come within the prohibition of section 74(3);

3. The Affordable Housing: Enabling Territorial Authorities Act 2008 does not prevent affordable housing from being addressed under the RMA;

4. The proposed rules relate to a resource management purpose;

5. Whether PC 24 is a licence, and/or a subsidy, and/or a tax is a question of fact, which may be determined at the substantive hearing.

[31] Since Plan Change 24 is not *ultra vires*, the appeals will be heard at a substantive hearing. However, the issue of whether Plan Change 24, or parts of it, are either a tax, a subsidy, or a licence, may well be relevant at the substantive hearing to whether the proposed plan rules are appropriate, as required by section 32. Indeed, Plan Change 24 would have to pass the tests set out in the RMA, and the tests collectively described in *Long Bay* for objectives, policies and rules in a plan.[18]

[32] It was also argued that the rules setting out the alternative contributions did not all comply with the definition of "financial contribution" in section 108(9) of the RMA. This is a matter more appropriately dealt with at the substantive hearing. If any purported contributions are found to fall outside of the definition, then an appropriate remedy can be had at that time.

[18] *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*, A078/2008, 16 July 2008 at [34].

Direction

[33] I direct that counsel for the Council is to liaise with the other parties and lodge with the Court on or before 27 August 2010 a memorandum with an agreed timetable to efficiently determine this matter.

Costs

[34] Costs are reserved.

DATED at **AUCKLAND** this 9th day of July 2010.

R G Whiting
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND