



22 August 2014

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For: Ivan Thomson

Plan Change 84 / District Plan Review - LEX14740

1. We refer to your request dated 18 August 2014 for advice relating to the effect of the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 (**Order**) on Plan Change 84 (**PC84**). PC84 proposes a comprehensive change to the provisions of the Special Purpose (Airport) Zone (**SPAZ**).
2. # You have asked us how PC84, if it is to become operative under clause 20 of the First Schedule of the Resource Management Act 1991 (RMA) during the life of the Order, will integrate into the Replacement District Plan (RDP). We understand this issue has been the subject of various discussions during the Council hearing, as well as the subject of supplementary legal submissions by counsel for Christchurch International Airport Limited (**CIAL**).¹
3. The Council hearing has been adjourned and the Minute² issued by Commissioner Thomas states "in closing the Council requested an adjournment to obtain a legal opinion of matters relevant to this decision in the Order in Council". This advice will be made available to the parties to the hearing for their comment.

Summary

4. If PC84 is made operative under clause 20 of the First Schedule of the RMA, the relevant provisions in the Operative City Plan will be replaced by those in the approved version of the plan change. The Order does not alter this standard RMA practice. At the same time however, the Order deems those same provisions to become part of the RDP.³ The effect of this is that the final operative PC84 provisions that are included in the Operative City Plan will be simultaneously "replaced" by the equivalent provisions (ie the SPAZ) in the RDP, as two identical sets of operative provisions cannot co-exist in different plans. At that point, there will be no SPAZ in the Operative City Plan - therefore satisfying the Council's obligation to review all provisions in the operative Christchurch City Plan and Banks Peninsula District Plan (**existing district plans**).
5. The SPAZ would not be subject to the review process under the Order (ie, review and preparation of a proposal, notification, submissions, hearings and decisions). As the SPAZ provisions will also not be subject to a 'decision' by the Hearings Panel, in our view clause 13(5) and (6) of the Order are not applicable to PC84. The Hearings Panel will have no power to make any subsequent changes to the provisions of the SPAZ.

¹ Further legal submissions on behalf of CIAL, dated 14 August 2014.

² Commissioners' Minute Number 1, dated 15 August 2014.

³ Order, clause 4(3).

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Clause 4(3): Any change to the existing district plans that is made operative by the council under clause 20 of Schedule 1 of the RMA while this order is in force is deemed to be part of the replacement district plan;

Clause 4(4): The Council may make changes of minor effect to a change referred to in subclause (3) without using the process set out in Schedule 1 of the RMA or in this order.

11. If the Council is to approve PC84 and it becomes operative (clause 20(1) First Schedule, RMA), the approved change will form part of the Operative City Plan.⁶ The Order through clause 4(2)(b) is clear that it does not override this normal RMA principle. However, at the same time as the approved change becomes operative under the First Schedule of the RMA, those same provisions will simultaneously be "replaced" by the equivalent provisions (ie the SPAZ) in the RDP.

12. The Order does not explicitly provide that the deemed inclusion of the provisions into the RDP also "replaces" the equivalent parts of the existing district plans (in that they 'fall away' from the Operative City Plan). However, in our view this is the only logical outcome of the deeming provision in the Order - two sets of operative provisions cannot co-exist in different plans and is also consistent with the statutory approach in section 86F of the RMA. Clause 16 of the Order also provides, relevantly:

Clause 16(1): As soon as is reasonably practicable after the date that a proposal is deemed to have been approved, the council must make the proposal operative as part of the replacement district plan by giving public notice in accordance with clause 20 of Schedule 1 of the RMA.

Clause 16(2): On and from the day on which a proposal is made operative under subclause (1), that proposal replaces any parts of the existing district plans that were identified in the report of the hearings panel required by clause 13(1)(c) of Schedule 3.

13. Assuming the SPAZ was to be approved through the RMA process, in our view at the same time as the SPAZ is deemed to be part of the RDP, the equivalent provisions in the Operative City Plan are "replaced", or essentially fall away. They no longer form part of the Operative City Plan, and there is no need for them to be reviewed under the process outlined in clause 6(1) of the Order.

Changes to the Special Purpose (Airport) Zone by the Council

14. While integrating the operative SPAZ provisions into the RDP, the Council can make "changes of minor effect to a change" without having to use the process set out in Schedule 1 of the RMA or the review process set out in the Order.

15. There is clearly no case law to provide guidance on what "changes of minor effect" mean under clause 4(4) of the Order. The terminology used in clause 4(4) is however similar to that used in the first limb in clause 16 of the First Schedule of the RMA, which provides:

A local authority may make an amendment [without using the Schedule 1 process] to its [proposed plan] to alter any information, where such an alteration is of minor effect, or may correct any minor errors.

⁶ And indeed, following a decision on submissions, any rules that are not under appeal will be deemed to be operative in accordance with section 86F of the RMA

16. We consider it is reasonable to take guidance from established case law under clause 16 of the First Schedule of the RMA, and consider the following guiding principles can be applied to this situation.
17. The test for "minor effect" under clause 16 of the First Schedule of the RMA is whether the amendment affects the rights of some members of the public, or whether it is merely neutral: *Re an Application by Christchurch City Council* (1996) 2 ELRNZ 431. Whether an alteration is of "minor effect" is a question of fact and requires examination of the likely effects of altering a public document without public input: *Re an Application by Northland Regional Council* (A012/99).
18. The Environment Court in the *Christchurch* case made a distinction between altering information on the one hand and correcting minor errors on the other (the latter not being relevant to this advice). The Court found that clause 16 allowed a local authority to alter "information" which the Court considered meant "anything said in the plan which informs the public of their rights and obligations". Such information can be altered if the effect of the change on anyone whose rights and/or obligations will be affected by the change is minor.
19. The Court held that "minor" meant that the effect of the amendment would be such that if it had been in the original proposed plan, no one would have bothered to make a submission about it. The Court stated:
- In deciding what might or might not have drawn a submission I consider the touchstone should be; does the amendment affect (prejudicially or beneficially) the rights of some member of the public, or is it merely neutral. If neutral it is a permitted amendment under clause 16, if not so then the amendment cannot be made pursuant to clause 16.⁷*
20. As mentioned, the second limb of clause 16, corrections of errors, is not specifically relevant to clause 4(4) of the Order.

Changes of minor effect - PC84

21. As set out in the Council Officer's reply for PC84,⁸ the key (relevant) changes to the format of the RDP are:
- (a) strategic issues are grouped within a "strategic directions" chapter, rather than through the plan;
 - (b) objectives and policies are simple, outcomes based provisions. Quoting from the reply at paragraph 16:

... there are no complex policies covering a range of matters such as for Policy 12.12.1 of Plan Change 84. So the ideal for accommodating this material in the Replacement District Plan format would be for this to be split into multiple policies;
 - (c) there is no explanatory text or reasons for rules. Again from paragraph 16 of the reply:

... so the idea would be for this material to drop out, to fit in with the new format.

⁷ At 440.

⁸ Paragraph 16.

22. We add also that the proposals that are to be notified on 27 August 2014 under the Order contain activity based rules (unlike the Operative City Plan which is a combination of both activity and effects based rules), and do not include any Anticipated Environmental Results, Zone Statements, nor Explanations and Reasons. Relevant 'expectations' of the Ministers from Schedule 4 of the Order are that the RDP uses clear, concise language and is easy to use, and that the RDP contains objectives and policies that clearly state the outcomes that are intended for the Christchurch district. The Council must have particular regard to these expectations when preparing the RDP, as must the Hearings Panel when making a decision on proposals under the Order.
23. For the purposes of this advice we have been provided by the Council with a marked up version of the PC84 text that highlights certain provisions with the label "removed to be consistent with the district plan review format". This is **attached** to this advice.
24. We consider that the removal of all explanatory text from PC84, as indicated in the attached document, would not be a change of minor effect within the scope of clause 4(4) of Schedule 1 of the Order. We also do not consider that transferring the explanatory text into the section 32 evaluation report would make the change a minor one. The format and drafting of the Operative City Plan has essentially meant that explanatory text has been necessary to clarify the intention of the rules, objectives and policies. In the absence of that explanatory text/reasons, the application and outcome of the rules (and objectives and policies) may well change. The fact that submitters have sought amendments to the explanatory text in their submissions and that has been focused on at the Council hearing, is an example of the importance that is placed on this text in the Operative City Plan. This can be compared with the approach taken to the drafting of the Phase 1 proposals through the RDP, which has been to draft strong, clear objective, policies and rules so that explanatory text is not required.
25. We note also that the reporting officer has concluded that PC84, with amendments to the objective, policy, rules and explanatory material, will better meet the purpose of the Act and Council's functions as set out in section 31 of the RMA.⁹ This same recommendation is endorsed in the officer's reply, but with further amendments to the PC84 provisions, including to explanatory text as a result of specific submissions.
26. At a general level, there may be scope to split provisions in PC84, as a change of minor effect. For example, Policy 12.12.1 of PC84 could potentially be split into multiple policies and the effect on members of the public would be merely neutral.
27. There may also be some scope to reformat the provisions so that key elements of the explanatory text are refocused/formatted into the relevant objective or policy, without affecting the rights of some members of the public. That is, a reformatting change might be neutral, however we are not in a position to provide a considered view on this option without reviewing specific examples.
28. We can also envisage some other issues with the "integration" of PC84 into the RDP as there are provisions in PC84 whose application is not confined to the SPAZ. For example, there is a change to an Operative City Plan rural policy (the rural chapter is part of Phase 2 of the district plan review) and PC84 also includes some definitions which are inconsistent with the versions to be notified in the Phase 1 chapter on 27 August 2014.

- what are these?

⁹ Section 42A report summary, paragraph 33.

Changes to the Special Purpose (Airport) Zone by the Hearings Panel

- 29. The supplementary legal submissions for CIAL suggest that changes can be made to the SPAZ after it is deemed to be part of the RDP under clause 13(5) of the Order. We consider that the Hearings Panel does not have any power to make such changes. Clause 13(5) provides that:

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While the hearings panel is considering a proposal, it may reconsider any decision it has already made on another proposal if it considers it is necessary or desirable to do so to ensure that the replacement district plan is coherent and consistent.

- 30. If the SPAZ is deemed to be part of the RDP, the Hearings Panel will not make a "decision" on the SPAZ and in any event it would not fall within the definition of a "proposal" under the Order. Therefore there is no earlier "decision on a proposal" to be revisited and in our view the Order does not allow the Hearings Panel, under clause 13(6), to either make changes of no more than minor effect or to direct the Council to prepare and notify a new proposal on the SPAZ.

Options within PC84 hearing

- 31. We have been asked to advise what the options are for the Commissioner hearing PC84 under the First Schedule of the RMA. In our view, three options exist for Commissioner Thomas, as far as his role allows him to make recommendations on provisions and submissions under clause 10 of the First Schedule of the RMA.
- 32. The other options (which are set out below) sit with the Council.

Recommendation

- ① 33. The first option is for the Commissioner to make a recommendation under clause 10 of the First Schedule on the PC84 provisions and submissions. This would then leave the Council to follow the process set out in paragraphs 11 to 13 above (ie, integrate the SPAZ into the RDP, making changes of minor effect only). There would be no review of the SPAZ under the Order, nor any scope for the Hearings Panel to reconsider it.

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Interim recommendations on the merits of the plan change

- ② 34. The second option involves the Commissioner issuing an interim recommendation on the substantive merits of PC84, with a direction to the Council to re-write the change based on that interim recommendation, in a manner that is consistent with the format of the RDP. The key benefits obtained through this option are that the time and cost invested in the change to date by both Council and submitters will not be lost, nor will the benefits of having an independent commissioner maker hearing submissions on the merits of the change.
- 35. Following this, comments and/or submissions could be sought from submitters on the newly formatted material, prior to the Commissioner issuing a final recommendation on the change. This would then leave the Council to integrate the SPAZ into the RDP, making changes of minor effect only. There would again be no review of the SPAZ under the Order, nor any scope for the Hearings Panel to reconsider it.
- 36. There is a possible issue with whether this option is within the scope of submissions but we have not been asked to consider this issue. If this is an issue, the Council will have to consider initiating a variation to the change (see paragraph 38(a) below).

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Decline PC84

37. The final option for the Commissioner, which we raise only for completeness, is for him to recommend that PC84 be declined (which we understand is within the scope of submissions on PC84).

Options for Council to address the issues raised in this advice

38. There are two options open for Council, in the direct context of PC84. These are:
- (a) to initiate a variation to PC84 under clause 16A of the First Schedule of the RMA (the Council can do this at any time before the change is approved); and
 - (b) to withdraw PC84 and prepare and notify a Special Purpose (Airport) Zone "proposal" under clause 6(1)(b) of the Order.

If PC84 is not made operative during the life of the Order

39. This advice has assumed that PC84 will be made operative during the life of the Order – a step that essentially 'circumvents' the review process set out in the Order for the rest of the existing district plans. There is however a possibility that it may not become operative before April 2016, for example if the change is declined, or is approved but an appeal to the Environment Court is not resolved before April 2016.
40. If this happens, then in our view the Council's duty under clause 6 of the Order to review *all* operative provisions in the existing plans, would trigger a review of the SPAZ provisions that are currently in the Operative City Plan.
41. This leaves the Council in a difficult position, particularly given the timing of the parallel processes under the RMA and the Order, and the need for the Council to meet its statutory obligations under the Order. For example, if PC84 was to be approved but appealed to the Environment Court, it is difficult to determine how long it might take for the appeal to be resolved and for clause 4(3) of the Order to be activated (hence, circumventing the clause 6(1)(a) obligation).

Yours faithfully
SIMPSON GRIERSON



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