

Section 104D of the Resource Management Act and Part 2 Assessment

1. Introduction-

The gateway test of section 104D of the Resource Management Act requires that resource consent for a non-complying activity can only be granted by a consent authority 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.

Accordingly, the decision maker only needs to be satisfied that the proposed activity meets either one of the limbs of s 104D, these being either the adverse effects of the activity will be no more than minor, or the activity will not be contrary to the objectives and policies of the District Plan. Subject to Part 2 of the Act, should the proposed activity meet either one of these threshold tests then it is appropriate for the activity to be considered against the criteria set down by Section 104 of the Act.

In *Arigato Investments Ltd v Auckland Regional Council*¹ the Court of Appeal noted that the nature of non-complying activities means that it is unlikely that a non-complying activity will find direct support from any specific provision of the Plan.

As noted by the Environment Court in *Lightening Ridge Partnership v Hastings District Council*.²

“It is self-evident that a non-complying activity will rarely, if ever, find direct support in the objectives and policies of a plan, but an absence of support does not equate to the activity being contrary to those provisions – contrary to in this context means... repugnant to... or ... opposed to... the objectives and policies considered as a whole; see Monowai Properties Limited v Rodney District Council (A215/03). Further, as we have noted, the Council’s position, as advanced before us, was that the proposal is inconsistent with the objectives and policies of the District Plan. The point may be a somewhat fine one, but inconsistent with is not necessarily contrary to.

Similar sentiments were expressed by the Environment Court in *Outstanding Landscape Protection Society Incorporated v Hastings District Council*³ and in *Pencarrow Hills Limited v Hastings District Council*.

¹ [2002] *** 323

² At paragraph 24 of the decision

³ [2008] NZRMA 8

In the decision of *Beacham v Hastings District Council*⁴, the Court, after setting out the relevant Plains Zone objectives and policies held;

In summary, we accept that those provisions aim to promote the sustainable management of the Heretaunga Plains land resource, finite in nature and with a productive and life supporting capacity, not just for the present but also for future generations. Also, as Mr Mathieson put it... commercial and industrial activities are limited in relation to the type and size of those activities, particularly those that do not support the sustainable use of the versatile soils resource.

*This is an issue thoroughly traversed in a number of relatively recent decisions of the Court. For instance, in *McKenna v Hastings District Council (W16/2008)* and *Ngatarawa Development Trusts Limited v Hastings District Council (W17/2008)*, the Court found that the proposals then before it were so contrary to the thrusts of the plan provisions that they should not be given resource consents.*

*The scenario in *Hawke's Bay Land Protection Society Inc v Hastings District Council (W57/2009)* was different, in that what was before the Court was a Council initiated Plan change to enable the establishment of a Regional Sports Park. Nevertheless, what was at stake was some 30 hectares of Plains Zoned land, the productive capacity of much of which would, for all real purposes, be lost if the park was built. In that instance the Court found that while a productive capacity of the soil was undoubtedly important, countervailing values prevailed. **The point to be made here is that the protection of the capacity of the plains soils is not an absolute, and other activities are not prohibited.***

In each case, it is the question of assessing effects and of considering the plan provisions. If the adverse effects significantly outweigh the positives and/or the proposal is in irreconcilable conflict with the plan provisions, then a negative answer is plainly indicated. If things are not that bleak, then it may be that a proposal can still be regarded as promoting the purpose of the Act – the sustainable management of resources.”

(Emphasis added)

2. Section 104D (a) Potential Adverse Effects

An assessment of the potential adverse effects of the development has been provided with the referral application. The development will not, in an overall sense, generate more than minor adverse effects on the environment, notwithstanding that there will be a loss of Plains Production land. The site has the ability to avoid, remedy and/or mitigate any actual or potential effects related to natural hazards, infrastructure, reverse sensitivity, odour, noise and amenity.

The principal areas of potential adverse effects of the development relate to the loss of productive utilisation of the development land and the impact on the character and amenity of the surrounding area.

The effect of the loss of the productive capacity of the development land is negligible in the context of-

- a) the overall Rural land resource of the Hastings District (comprising Plains Production Zone land of approximately 26,000 hectares and 470,000 hectares of Rural zoned land⁵); and

⁴ Decision W075/2009

⁵ Section 2.2.2.3 of Operative (in part) Hastings District Plan. Chapter 2.2.2 (“District Characteristics”)

- b) the productive constraints of the subject land-flooding, a lack of irrigation water and proximity to the existing urban area of Clive (including Clive school).

As identified in the application, the ability of the site to be used productively has diminished due to an expired resource consent to take water for irrigation, with Council unlikely to approve a new resource consent with a 'sinking lid' policy to the ability to access water across the Heretaunga Plains⁶.

The proximity of the site within a peri-urban environment also hampers the productive value of the site with potential effects arising at the urban/rural interface (including Clive School) around noise, chemical use, odour, affecting a continued 'right to farm'. The proposed development shifts this interface with greater separation between productive land with physical characteristics- roading, muddy creek, and landscaped amenity setbacks.

The development will be encapsulated within an existing urban footprint with these clearly defined physical boundaries (show on the application site plans) and bring additional much needed medium density housing to the area.

Although the continuing loss of land from productive use (noting that land has in the past been signalled for loss with its prior General residential zoning and/or identification in growth strategies) is considered to be an "actual or potential adverse effect". However given that the Hastings District contains circa 500,000 hectares of rural land, the loss of 13 hectares of land under this application represents a **0.0026% reduction** (or loss). This is considered to be a less than minor loss when balanced against the positive effects associated with providing 173 houses to meet the requirements of NPS-Urban Development, and demonstrated social, cultural and economic benefits. It is an unavoidable consequence of providing for urban growth in Hastings to address a well-documented housing crisis and housing bottom lines. In the Hastings District any future provision of housing will inevitably involve LUC Class1-3 (Highly Productive) soils, given the physical make-up of the districts land resource.

Natural Hazards

As has previously been discussed in the application, Clive has historically experienced flooding events, most significantly being in 1974 when sea water breached the shingle bank because of a coastal storm with seawater flooding 300 hectares of horticultural and urban land between East Clive and Clive. Since 1974 as explained, a series of stop banks, sea walls and stormwater pumping network has been put in place.

The site is currently low lying with the majority of the existing ground levels sitting below the established HBRC 50-year flood level of RL = 11.50 (Hawke's Bay local authority datum +10m MSL). Figure 2 below shows the extent of flood risk in the area. It is understood that this flood modelling was undertaken around 2002 and is due for an update.

Figure (2) below demonstrates that flooding on the subject property and within the adjacent urban area is not directly hydraulically connected to spillover flooding from Muddy Creek. The flooding in Clive is the result of localized ponding, rather than out of channel spillover from Muddy Creek.

The application proposes to raise the land to no less than RL 11.8, 100 mm above the modelled 1/100-year flood level, with additional freeboard, as necessary, added to the floor level of buildings (by way of consent notice). Hydraulic neutrality for the site will be achieved through the proposed engineered solution, incorporating onsite retention and detention prior to discharge and therefore no displacement of flood water will occur as a result of the proposed development.

⁶ Attached is a screenshot of the HBRC consents website, showing no current resource consents applicable to the land

Infrastructure Effects

Detail of the proposed engineering servicing and geotechnical assessment of the subdivision is provided at Enclosure E. Services can be provided, via existing reticulated services. As shown on the plans the site has services available to it and were any limitations are identified in stage 2 investigations and upgrades are required the applicant acknowledges they will need to fund these, to ensure capacity to service the development is achieved and maintained.

Noise & Dust Effects

There will be some temporary effects during the construction phase. However, adhering to Construction Standards will help mitigate any actual or potential effects. A condition consistent with this approach is proposed.

That while the earthworks are being undertaken and prior to re-vegetation, areas of exposed earth shall be regularly dampened with water to ensure that no wind born dust is able to be carried and deposited outside the property boundaries.

That earthwork operations shall be conducted so as to comply with the provisions of New Zealand Standard NZS 6803P "Measurement and Assessment of Noise from Construction, Maintenance and Demolition Work".

Noise levels from earthworks will be measured in accordance with the New Zealand Standards NZS 6803P: 1984 "Measurement and Assessment of Noise from Construction, Maintenance and Demolition Work".

Construction

The construction process will also result in additional traffic movements. However, any actual or potential effects will be temporary in nature. The site is of a size that will allow for off street parking and loading during construction, thereby reducing any potential traffic conflict.

The above Conditions of consent can be used to effectively manage the temporary construction effects. These conditions relate to hours of operation, maximum noise levels, dust mitigation measures and vehicle movements.

Other Matters, including Positive Effects

The proposed activity will not cause any adverse environmental effects on the surrounding environment in terms of hazardous substances, odour, and the discharge of contaminants or other nuisance elements.

There are no registered archaeological sites, heritage items or sites of waahi tapu within the subject area. There are no identified flora or fauna requiring special protection. Therefore the proposal will not have any adverse effects on natural or physical resources having aesthetic, recreational, scientific, historical, spiritual or cultural or other special value for present or future generations.

The development is therefore expected to meet the requirements of s 104D(a) of the Resource Management Act, in so far (subject to appropriate conditions) the actual or potential adverse effects will be no more than minor in scale or significance. A stage 2 application will demonstrate in detail this with supporting evidence. Conditions of consent will aid in avoiding, remedying and /or mitigating any actual or potential effects.

The development will have significant positive effects. An economic analysis outlining the economic benefits and job creation that will be created by existing unmet need for homes within the local housing market was provided in the application.

The development layout provides an Open Space area with strong linkages to Muddy Creek, encouraging use for amenity, recreation and movement, in addition to its primary purpose of stormwater detention and resilience during high rainfall events not only for those within the development, but also the surrounding area (there is a wider benefit). The generous road corridors provide significant potential for the incorporation of suburban landscaping to soften the site and create a distinctive green character.

The development benefits from mid-point location between the cities of Napier and Hastings on a key transport corridor offering significant public transport options for schooling, commuting and intercity travel. Reduced reliance on private vehicle use is further enhanced by the ease of direct access to off road travel between the cities and elsewhere for recreational activities by virtue of the interlinked cycleway network across the region. Clear logical and defensible boundaries for urban development within Clive will also result in reducing the risk of reverse sensitivity effects currently present with multiple residential activities interfacing directly with low intensity productive uses.

3. S104D(b) Objectives and Policies of Relevant Plans

Consideration of the relationship of the development to the objectives and policies of the relevant plans is intrinsically related to the housing bottom lines for Hastings, which are required to clearly articulate the development capacity that is required to satisfy short, medium and long term predicted demand. Associated to the housing bottom lines is the identified 1300-1600 home backlog shortfall in supply that currently exists and the ongoing predicted 200 home annual shortfall of development delivery against the annual demand.

Consistent with the NPS-UD, *Objective 3.1 AA.1 of the Hawke's Bay Regional Policy Statement (RPS)* requires that planning decisions relating to the Napier-Hastings urban environment have particular regard to the housing bottom lines.

The high-level *Urban Strategy objectives and policies* of the Partially Operative Hastings District Plan set out the strategic approach of the district to enabling the provision of urban development to meet future demand. These objectives and policies generally accord with the relevant provisions of the Regional Policy Statement (RPS), and there is therefore general alignment of the Partially Operative Hastings District Plan growth strategy with the Regional Policy Statement and HPUDS approach. Objectives UDO1, UDO2 and UD03 and policies UDP1 – UDP8 of the Partially Operative Hastings District Plan generally set out the principles for suburban containment and necessary growth. As previously stated, this strategic level guidance is fundamentally based on the principles and specific provisions of HPUDS and the Regional Policy Statement.

Given the site has not been specifically considered in HPUDS (after its previously partial *General residential* zoning and its identification in prior urban development strategies), development of the site can be (re)considered as an additional opportunity on merit against the existing growth demand and housing backlog shortfall. As a site that is neither allocated nor identified as being inappropriate for development in HPUDS, development of the site is not considered contrary to the relevant high level Partially Operative Hastings District Plan objectives and policies that set the strategic direction of the district.

The Plains Strategic Management Production zone contains an overarching *Objective PSMO1*

“The land based productive potential and open nature of the Plains environment is retained.

and Policy PSMP1 requires *“that the subdivision of land within the Plains Strategic Management Area shall be for the purpose of a land based productive use”*.

Additionally, Policy PSMP5 seeks to-

Establish clear and distinct urban boundaries to prevent incremental creep of urban activities into the Plains Production Zone.

Although not consistent the above objectives require balance against the higher order Regional Planning approach of urban expansion in order to meet bottom lines. The RMA enables a proper consideration of all aspects of a site. Rigid adherence to the mantra that all land and soils require maintenance and protection and that this requirement “trumps” all other considerations does not promote sustainable management of natural and physical resources. To this end, this is consistent with Objective PPO2- *“To provide for flexibility in options for the use of versatile land”* and POLICY PPP11- *“require that any subdivision within the Plains Production Zone does not result in reducing the potential for versatile land to be used in a productive and sustainable manner”*.

The themes to emerge from the objectives are the desire for a compact city philosophy within defined urban limits in order to avoid urban sprawl and ad hoc development on the surrounding versatile and productive land. The numerous benefits of consolidating development within a confined area by placing increasing reliance on intensification and higher density urban development over time are well understood and made explicit from both the objectives themselves and the policies that follow. Along with acceptance of higher density living the clear expectation from the RPS is that all future urban development should result in quality built environments while addressing such effects as; managing reverse sensitivity effects, avoiding unnecessary encroachment of urban activities on versatile land of the Heretaunga Plains, avoiding or mitigating risks from natural hazards; avoiding inappropriate urban activities in rural parts of the Heretaunga Plains; and retaining versatile land for primary production purposes.

Whilst, on the face of it, given the site is zoned Plains Production and its non-complying status it would appear contrary to the Policy direction of retaining versatile soils for primary production, when the existing characteristics, its limited productive potential and an inability to amalgamate with other Plains zoned land (to increase potential) is considered that the application is overall not in consistent with these provisions and the anticipated outcomes (Section 2.4.2) for the Urban strategy of-

- **UDA01-** *A well-functioning residential market that is able to cater for and respond to demand for a range of residential housing types with the focus on compact development.*
- **UDA02-** *Increased intensification of the existing urban environments, while maintaining acceptable levels of residential amenity.*

Although the subject land is not identified in current growth strategies (such as the Heretaunga Plains Urban Development Strategy- HPUDS), these have not been updated since 2017.

Consideration of the relationship of the development to the objectives and policies of the relevant plans is intrinsically related to the housing bottom lines for Hastings, which are required to clearly articulate the development capacity that is required to satisfy short, medium and long term predicted demand. Associated to the housing bottom lines is the identified 1300–1600 home backlog shortfall in supply that currently exists and the ongoing predicted 200 home annual shortfall of development delivery against the annual demand.

Assessment of this application against the Operative (in part) Hastings District Plan must include consideration of the Objectives and Policies. The relevant Objectives and Policies are appended to this application. Overall, given its strategic identification for urban growth, the proposal viewed as being consistent with all of the objectives and policies in relation to subdivision and land development, with the exception of Objective SDO1 which relates to the minimum site size for the zone. Further to this, although the proposal is unable to comply with *Objective PLO1* and *Objective PLO3* and associated *Policy PLP1* which seek to retain the life-supporting capacity of the Heretaunga Plains soils the ability for this site to be productively used has already identified as limited; and a residential use would be the most appropriate, efficient use of this land.

In assessing the application against the Objectives and Policies contained within the “*Urban Development and Strategic Directions*” section of the District Plan, the proposed development is consistent with this desired direction.

Hawkes Bay Regional Policy Statement (RPS)

Chapter 3.1B (Managing the Built Environment) of the RPS contains a raft of provisions relevant to the Oderings application, many of these being mechanical in nature in terms of describing the process of undertaking and considering issues associated with urban development.

The Regional Policy statement provides a route for consideration of non-strategically identified land through Policy POL UD4.2 (appended to the application and again to this response).

Policy POL UD4.2 of the Hawkes Bay The Regional Policy Statement states-

NEW RESIDENTIAL GREENFIELD GROWTH AREA CRITERIA (HERETAUNGA PLAINS SUB-REGION)

POL UD4.2 In determining future Residential Greenfield Growth Areas, not already identified within Policy UD4.3, for inclusion within urban limits in the Heretaunga Plains sub-region, the following general criteria shall apply:

- a) *Must form an extension contiguous with existing urban areas and settlements.*
- b) *Land is identified as having low versatility, and/or productive capacity has been compromised by:*
 - i. *Size and shape of land parcels that mitigates against productive use;*
 - ii. *Surrounding land uses and reverse sensitivity;*
 - iii. *Lack of water and/or poor drainage.*
- c) *Clear natural boundaries exist, or logical greenbelts could be created to establish a defined urban edge.*
- d) *Supports compact urban form.*
- e) *Can be serviced at reasonable cost.*
- f) *Can be integrated with existing development.*
- g) *Can be integrated with the provision of strategic and other infrastructure (particularly strategic transport networks in order to limit network congestion, reduce dependency on private motor vehicles and promote the use of active transport modes).*
- h) *An appropriate separation distance from electricity transmission infrastructure should be maintained in order to ensure the continued safe and efficient operation and development of the electricity transmission network.*

- i) *Promotes, and does not compromise, social infrastructure including community, education, sport and recreation facilities and public open space.*
- j) *Avoids or mitigates the following locational constraints:*
 - i. *projected sea level rise as a result of climatic changes*
 - ii. *active coastal erosion and inundation*
 - iii. *stormwater infrastructure that is unable to mitigate identified flooding risk*
 - iv. *flood control and drainage schemes that are at or over capacity*
 - v. *active earthquake faults*
 - vi. *high liquefaction potential*
 - vii. *nearby sensitive waterbodies that are susceptible to potential contamination from on-site wastewater systems or stormwater discharges*
 - viii. *no current wastewater reticulation and the land is poor draining*
 - ix. *identified water short areas with the potential to affect the provision of an adequate water supply*

A resource consent process best provides the ability to address the above in relation to the subject land, existing housing and infill areas. The above criteria can clearly be demonstrated in a stage 2 application and this approach allows a “shovel ready” approach to developing the site with its location, infrastructural base and well-defined boundaries.

While on a site-specific level the rural use of the land will be lost, this development will not adversely compromise the overall primary production capacity and role of the Plains Production Zone land resource, as required by the objectives and policies for the zone.

Because site size (approximately 0.0026% of overall rural land resource)) and proximity to existing residential development and reserve land the development is not considered to adversely compromise the productive capacity of the district wide or site-specific land resource.

Part 2 of the Resource Management Act

Protection of versatile soils is a matter relevant under Section 5 of the RMA and can be given weight in district and regional planning.

Section 5(2)(b) does not mean that land of good quality whatever its location size and other features is effectively proscribed from urban use. In *Becmead Investments Ltd v. Christchurch City Council* the Court stated:

“We have indicated that section 5(2)(b) is couched in a general way. It falls to be applied so that its broad requirement is met. Obviously it is not to be taken as meaning that land containing soil of good quality whatever its location, size and other features is effectively proscribed from use in any circumstances for residential development and activity.”

Protection of soil is placed in a situation of primacy. In *Canterbury Regional Council v. Selwyn District Council and Tucker* the Court stated:

“In the present case we agree with Mr Mulligan that the RMA does not place soil in a situation of primacy, any more than section 5(2)(b) could be construed as placing an absolute prohibition upon the use of air or water.”

It is considered essential to recognise that the protection of versatile soils is only one part of the mix when considering potential urban growth paths and that there are some equally or

more important factors to consider and which local authorities must consider under the statutory framework of the RMA.

The suggestions/inference that Section 5(2)(b) places the safeguarding of the life supporting capacity of soil in a situation of primacy. Whilst the matter of high class soils is a matter of some importance it remains only one of a number of matters which must be taken into account in reaching a balanced and integrated decision with respect to the RMA.

In *Plain Sense v. Dunedin City Council C137/04* it is stated:

We accept that section 5(2)(b) particularly directs the Court to safeguarding the life-supporting capacity of, inter alia, soil and is reflected in the Plan provisions which similarly seek to protect the high class soils. In this case it is high class soils of the Taieri as a group which are sought to be protected, having regard to their regional and district significance.

This does not constitute a veto on any alternative use of the land but merely a matter that must be taken into account in establishing the sustainable management. There is no doubt there would be a loss of high class soils if this land was rezoned as Industrial and developed fully in accordance with that zone. On the other hand, the high class soils may be preserved by permitting the continuation of rural uses upon it.

We have concluded that, on balance, the Industrial zone will better meet the purpose of the Act and the objectives and policies of the Plan by zoning specific area as available for industrial uses. We have concluded this will have the following beneficial outcomes:

- (a) It will relieve the potential pressure on rural land and other high class soils for industrial development;*
- (b) It maintains the ability for the land to be used for rural uses and thus the utilisation of the high class soils;*
- (c) It balances the desire to maintain these high class soils with the other matters under section 5, including the economic benefits that would derive from increased industrial development and its social and employment consequences;*
- (d) The loss of any high class soils is finite and would not establish a precedent for other industrial development on high class soils. To the contrary, it reinforced the scheme of the Plan that the high class soils in Rural zones are preserved for appropriate uses.*

Consequently, it seems appropriate that if this area is to be zoned for an urban use (ie Industrial) it should be removed from the high class soils map. To that end it appears to use that the conclusion of the Commission to remove it from the same is entirely appropriate. The high class soils map does not show all high class soils within the district. All urban areas are specifically excluded. Thus the inclusion of a particular site is to represent those high class soils to which the Rural zone provisions apply. If it is zoned Industrial its inclusion on the map would no longer serve any purpose.

In our view the zoning of this land as Industrial meets the purpose of the Act overall. Although the loss of high class soils is regrettable, the loss is finite and balanced by economic and social benefits to the community.

This development offers a viable and practical solution for residential development which will help to relieve pressure for development on more fertile land (for eg. LUC Class 1 and LUC 2-without same limitations) across the District. In any event, there are several distinguishing features that set this site apart from other productive land within the district. These have been identified earlier.

It is considered that the proposed land use consent will not be contrary to the provisions of Part 2 of the Resource Management Act and represents sustainable management as envisaged by Section 5 of the Act. In terms of the social, economic and cultural wellbeing of people and communities for their health and safety, the proposed development does not

threaten the existing environment nor does it create any potential adverse effects in terms of social, economic and cultural wellbeing.