

High Level 104D assessment

Introduction

The gateway test of s 104D of the RM Act requires that resource consent for a noncomplying 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.

In other words, only one of the two “gateway” tests under section 104D need to be met.

Section 104D (a) Potential Adverse Effects

Key potential adverse effects have been addressed in the materials provided in support of the referral application. The development will not generate more than minor adverse effects on the environment, noting that the High Court has said of the standard of “minor”:¹

However, regard to the scheme and purpose of the Act, and particularly the functioning of s 5, shows there is nothing arbitrary in the term “minor”. It is a sensible standard which, understood for its purpose, is designed to give applications which will have only a “minor” adverse effect on the environment but are for other reasons non-complying an opportunity to be approved.

And:²

Turning to the dictionaries we find that the adjective “minor” is defined in the New Zealand Oxford Dictionary of “lesser or comparatively small in size or importance”. According to The Shorter Oxford English Dictionary “minor” means “... lesser ... opposite to MAJOR ... comparatively small or unimportant”. We hold that those meanings are what is intended in s 104D(1)(a). The reference to “comparatively” emphasises that what is minor depends on context — and at least all the authorities agree on that.

It is also important to understand that change (even significant change), in itself, does not equate to the *adverse effects* being more than minor.

This was illustrated by the High Court as follows:³

There is no doubt that a PAK’nSAVE supermarket and/or a Mitre 10 Mega would have major effects on the future environment. They involve the erection of very large buildings, putting in place a large number of car parks, and will generate

¹ *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZRMA 239

² *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243.

³ *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZRMA 239, at [72]-[73].

tens of thousands of vehicle movements each week. They would enhance the economic wellbeing of the community by delivering the benefits of competition in the marketplace.

The question is not whether the Foodstuffs (or Cross Roads) proposal would affect the environment. **But the question is whether it will be an adverse effect, and if so, can the consent authority be satisfied it will be less than minor.**

The High Court also confirmed the “forward looking” focus of the effects gateway:⁴

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. But the judgment is not made in any static setting, for example, examining PC19(DV) as though it will remain unchanged.

The principal areas of potential adverse effects of the development relate to 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 given that the land was already lost from productive plans use (the previous nursery development being a commercial activity not making use of the soils directly) and in the context of the overall productive plains land resource of the Hastings District (comprising Plains Production Zone land of approximately 26,000 ha⁵).

The development will be encapsulated within an existing urban footprint with clearly defined physical boundaries and character of the existing residential and bring additional much needed medium density housing to the area, and the related effects will not be more than minor.

Other potential areas of adverse effects are readily avoided or mitigated by the development proposal. The existing site zoning is somewhat of a misnomer, whereby land based productive use of the site has the ability to generate more than minor reverse sensitivity effects, given the close proximity of existing housing and public sports fields immediately abutting the site.

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.

S104D (b) Objectives and Policies of Relevant Plans

It is long recognised that the phrase “contrary to”, in the context of section 104D, means “repugnant to” or “opposed to” the objectives and policies considered as a whole.⁶ It is therefore not enough that a proposal does not find direct support among the objectives and policies, or is even opposed to just some of them.

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

⁴ *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZRMA 239, at [35].

⁵ Section 2.2.2.3 of *Hastings District Plan*

⁶ Eg see *Monowai Properties Ltd v Rodney District Council* (Environment Court, Auckland A 215/03, 12 December 2003, Judge Thompson).

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 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 UDO3 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 through past strategies, development of the site can be 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 contrary to the relevant high level Partially Operative Hastings District Plan objectives and policies that set the strategic direction of the district.

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.

Policy UD4.2 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 relevant Partially Operative Hastings District Plan objectives and policies of the Rural Strategic Management Area apply to development across the rural environment of the district. While on a site-specific level the rural use of the land will be lost, this development will not 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 and proximity to existing residential development and reserve land the development is not considered to compromise the productive capacity of the district wide or site-specific land resource.

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-

- **UDAO1-** *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.*
- **UDAO2-** *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.

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

As mentioned, the site although zoned Plains Production is not highly productive land. Its versatility and quality is marginal and therefore its development is not unsustainable. Again, its use for housing will relieve pressures for development on other parts of the Heretaunga Plains.

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.

Based on the above, on balance the proposal will not be contrary to the Objectives and Policies of the Hastings District Plan as a whole.