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13 March 2015

His Honour Judge David Kirkpatrick
Auckland Unitary Plan Hearings Panel
Level 15
Tower One
205 Queen Street
Auckland

Re: Assessment of the Vires of Unitary Plan provisions for Framework Plans

Introduction

1. I have been asked to provide an opinion to the Hearings Panel about whether or not the Framework Plan (FP) provisions in the Proposed Auckland Unitary Plan (PAUP), as amended through hearing processes, are *ultra vires* the Resource Management Act 1991 (the RMA or the Act).

2. The questions that the Panel would like addressed include:

> Is it *ultra vires* the Act that:
>
> 1. Where a precinct requires a FP, it is non-complying to undertake an activity if there is no pre-existing FP (and where one is not being applied for concurrently) but a restricted discretionary activity if there is an approved FP? Ie the activity status of the activity is determined by reference to the **presence** (cf compliance with) of an approved FP?
> 2. A minority landowner in a precinct that requires a FP has non-complying activity status when similar activities would otherwise be more permissive, but for example, the major landowners may not have applied for a FP yet?
> 3. One of the matters of discretion for assessing an activity in an area subject to a FP is whether the activity is "consistent with an approved FP"?
> 4. The FP provisions provide "incentives" to encourage the mechanism to be used, including:
>   a. Non-notification unless special circumstances apply, even where there may be land use, development or subdivision control infringements?
>   b. Increases in height from that provided in other rules eg in the Wynyard Quarter precinct?
>   c. Non-complying activity status applies if there is no FP?
> 5. A precinct could enable a FP to apply to land other than that owned by the applicant?
> 6. An applicant for one FP can be required to demonstrate how their FP integrates with neighbouring sites and other FPs?

7. FPs can become part of the consideration of consents but are not part of the public record as a normal planning regulation?

Executive Summary

3. For the reasons set out in this opinion I consider that:

4. In respect of questions 1 and 2, a rule that categorises an activity as non-complying in the absence of an approved FP may be at risk of being found *ultra vires* the RMA in terms of section 87A(5)(b). The same reasoning would apply to a rule which makes an activity a restricted discretionary activity in the absence of an approved FP in terms of section 87A(3)(b). [1]

5. In respect of question 3, it is not *ultra vires* the RMA if one of the matters of discretion for processing activities in areas subject to an approved FP is on the basis of whether the activity is "consistent with an approved FP". [2]

6. In respect of question 4, proposed incentives for the use of FPs are:

   a) Non-notification unless special circumstances apply.
   b) Increases in height from that provided in other rules, for example in the Wynard Quarter Precinct.
   c) Non-complying status applies if there is no FP.

7. These process incentives encouraging applications for resource consents for FPs are likely to be *ultra vires* the RMA. The proposed non-notification incentive is inconsistent with the precinct rules that allow for limited notification, which is more appropriate for a resource consent for a FP that involves a land use planning method to integrate infrastructure, roads and services in a precinct. [3] To provide for a process incentive rule for applications for a resource consent for a FP on the basis that a FP can exceed performance standards in a precinct is likely to be *ultra vires* section 76(3) of the RMA, which requires the Council, when making a rule, to have regard to the actual or potential effect on the environment of activities, including any adverse effects. [4] Also, the incentive to classify as non-complying in the absence of a FP is *ultra vires* section 87A(5)(b) of the RMA. [5]

8. In respect of question 5, a land use planning framework that allows an individual landowner to apply for an activity that will affect land of another landowner without their consent may give rise to the principle of non-derogation of grant, if the

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1 Paragraphs [60] – [64] of Opinion.
2 Paragraphs [65] – [66] of Opinion.
3 Paragraphs [71] – [73] of Opinion.
4 Paragraphs [74] – [75] of Opinion.
5 Paragraph [76] of Opinion.

interference is substantial. [6] The principle of non-derogation of grant could also be relevant if the landowner who holds a resource consent for a FP is unable to give effect to that consent because other land owners within the precinct resist their land being used and developed in accordance with the FP. [7]

9. In respect of question 6, a rule requiring an applicant for a resource consent for a FP to demonstrate how the FP will integrate with neighbouring sites and other FPs would not be *ultra vires* the RMA. It accords with section 76(3) of the RMA which requires the Council, when making a rule, to have regard to the actual or potential effect on the environment of the activities. [8]

10. In respect of question 7, there should be a rule in the PAUP requiring the Council to make FPs available as part of the public record in order to achieve integrated development within a precinct. [9]

Background

11. Section 122 of the Local Government (Auckland Transitional Provisions) Act 2010 requires the Auckland Council to prepare, implement and administer a document called the Auckland Combined Plan that meets the requirements of a regional policy statement, a regional plan, including a regional coastal plan, and a district plan.

12. The PAUP is structured in seven parts, each containing chapters. Parts 1 and 2 are concerned with higher order matters, including objectives and policies. Part 3 comprises the regional and district rules that will implement the policies.

13. The PAUP uses FPs as a tool to encourage integrated planning of large scale development in identified precincts. Chapter A at 4.2.2 describes Framework Plans in the following way:

> **4.2 Area based planning tools**
> ...
> **2 Framework plans**
> A framework plan is a voluntary mechanism for land owners to demonstrate and achieve a broad spatial pattern of land use, subdivision and development within a defined greenfield or brownfield redevelopment area. Framework plans are applied at a finer-grained scale than structure plans. They are generally enabled following the approval of a structure plan or similar planning process. A framework plan itself requires a resource consent.

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6 Paragraph [79] of Opinion.
7 Paragraph [80] of Opinion.
8 Paragraph [83] of Opinion.
9 Paragraph [85] of Opinion.

14. Chapter G contains general provisions and procedures for implementing the Unitary Plan. The rules for FPs are contained in rule G2.6. Individual precincts then contain their own provisions for FPs.

15. The notified version of the PAUP at G2.6 included the following general rules on FPs:

> **Activity status and notification**
> 2 The following rules apply to framework plans unless otherwise specified in the precinct:
> a. A framework plan, amendments to an approved framework plan and a replacement framework plan within a precinct is a restricted discretionary activity where it complies with all of the applicable controls.
> b. Subsequent resource consent applications for subdivision, land use and development within a precinct **must comply with the most recently approved framework plan for** the application area.
> c. Any subsequent resource consent applications within a precinct **that do not comply with the most recently approved framework plan** applying to the application area will be assessed as a non-complying activity, or alternatively must be accompanied by an application for approval of either an amended or a replacement framework plan.
> d. An application for a framework plan must apply only to land that the applicant is the owner of, unless otherwise specified in the precinct.
> e. A restricted discretionary activity application for a framework plan will be assessed without the need for public notification unless special circumstances exist. Limited notification may be undertaken, including notice being given to any parties specified in the precinct rules.
> f. A concurrent application for a development control infringement will be assessed together with a framework plan.
> [Emphasis added]

16. The matters over which discretion is restricted for land use, development or subdivision "that complies with an approved framework plan" are provided for in rule G2.6.7, while the assessment criteria for such activities is provided for in rule 2.6.8.

17. In essence, the PAUP approach to FPs is that FPs which comply with all applicable controls are restricted discretionary activities. Subsequent land uses which comply with FPs are also restricted discretionary activities. If land use activities do not comply with a FP, they are non-complying activities.

18. Concerns have been raised over the validity of such framework provisions in terms of the recent decision in **Queenstown Airport Corporation Ltd v Queenstown Lakes District Council** [10] (the **Queenstown** decision). In that decision the Environment Court addressed the *vires* of rules relating to an Outline Development Plan (ODP) in Plan Change 19 (PC19).

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10 **Queenstown Airport Corp Ltd v Queenstown Lakes District Council** [2014] NZEnvC 93 (the **Queenstown** decision).

19. After mediation and meetings between the parties, key changes have been made to the framework provisions. The Council's proposed amended provisions are attached to Ms Rachel Dimery's evidence. [11]

20. The questions that the Panel would like addressed are to be considered in light of the amendments and the legal implications of the **Queenstown** decision.

The Queenstown decision

21. PC19 provides for the comprehensive re-zoning of rural land known as the Frankton Flats. It was notified by the Queenstown Lakes District Council in 2007 and has since become operative. [12]

22. The version of PC19 considered by the Court included the following features:
    a) The operative Queenstown Lakes District Plan defines "Outline Development Plan" as meaning a plan which delineates the performance standards and/or activities on the area of land.
    b) The objectives and policies for PC19 expressly provide for the use of ODPs as the central means of giving effect to the objectives and policies.
    c) Rule 12.20.3.6 provides that it is a prohibited activity to undertake any activity until an ODP has been approved.
    d) An ODP is approved by way of a resource consent: rule 12.20.3.3(iii).
    e) Rule 12.19.1.1 and rules 12.20.3.2, 12.20.3.3 and 12.20.3.4, which dealt with permitted, controlled, limited discretionary, and discretionary activities, each referred to the requirement for the activity to be "in accordance with" any approved ODP for the area.
    f) Any use of land which did not comply with a consent for ODP activities is a non-complying activity: rule 12.20.3.5 ii.

23. The proposed rules at issue therefore proposed to classify activities as permitted (or controlled, limited discretionary or discretionary activities) depending on whether the activity for which consent is sought is in compliance with a resource consent for another activity (being an ODP land use consent).

24. The rules at issue also proposed to classify activities as non-complying or prohibited depending on whether there had been a prior grant of consent for another activity (being an ODP land use consent).

25. The Court held that this approach was *ultra vires* in terms of section 77B of the RMA, which stated: [13]

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11 Primary evidence of Rachel Dimery, Attachment B.

12 PC19 was made operative in December 2014.

13 Section 77B of the pre-2009 RMA was applicable, as PC19 was publicly notified in July 2007. The current equivalent is section 87A of the RMA.

77B Types of activities

(1) If an activity is described in this Act, regulations, or a plan or proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the standards, terms, or conditions, if any, specified in the plan or proposed plan.
(2) …
(3) If an activity is described in this Act, regulations, or a plan or proposed plan as a restricted discretionary activity, -
  (a) A resource consent is required for the activity; and
  (b) The consent authority must specify in the plan or proposed plan matters to which it has restricted its discretion; and
  (c) The consent authority's powers to decline a resource consent and to impose conditions are restricted to matters that have been specified under paragraph (b); and
  (d) The activity must comply with the standards, terms, or conditions, if any, specified in the plan or proposed plan.
(4) …
(5) If an activity is described in this Act, regulations, or a plan or proposed plan as a non-complying activity, -
  (a) A resource consent is required for the activity; and
  (b) The consent authority may grant the resource consent with or without conditions or decline the resource consent.
(6) Particular restrictions for non-complying activities are in section 104D.
(7) …

26. The position taken by QLDC was that:

a) For permitted (or controlled, limited discretionary or discretionary activities) the obtaining of an ODP consent is a "standard" within the meaning of section 77B.

b) A rule requiring consent to be obtained as a pre-condition to development is not novel. Such a rule is an example of the cascade or sieve approach approved of in the Planning Tribunal's decision in **An Application by Christchurch City Council.** [14]

27. The Court agreed with advice provided by Mr R Bartlett QC as *Amicus Curiae* that the status of an activity derives from the Act and from its subsidiary planning instruments, rather from a resource consent. [15] The Court continued (at [177]):

> If the words "… compliance with … any approved Outline Development Plan" in the permitted activity rule are given their natural and ordinary meaning, the rule requires compliance with a grant of resource consent for ODP activities; including all the conditions of a consent. When these words are considered within the wider policy context, **the purpose of the rule is to require all activities within C1, C2 and E2 to comply with a prior grant of resource consent. Arising out of the exercise of a discretionary power, a consent (including all of its conditions) is not a standard that is specified in the plan change.**
> [Emphasis added]

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14 **An Application by Christchurch City Council** [1995] NZLR 129.

15 **Queenstown** decision at [158] and [183].

28. The Court discussed the Planning Tribunal decision of **An Application by Christchurch City Council** which was relied upon by QLDC for the proposition that it is permissible for a district plan to prescribe for the consequence on non-compliance with specified standards. In that case the Christchurch City Council was reviewing its Transitional District Plan. The Tribunal held that it was lawful for a district plan to contain a rule in respect of permitted activities in the following form:

> Any activity which complies with the standards specified for the zone where the standards specified go to the effects which activities have on the environment rather than to their purpose.

29. The Court distinguished the Planning Tribunal's decision, stating that there is no evidence that the Christchurch District Plan "either then, or now, has a rule classifying permitted activities subject to either a prior grant of consent for another activity or subject to compliance with the grant of consent for another activity." [16]

30. The Court also considered a second but related difficulty with the proposed rule: [17]

> A second related difficulty with the permitted activity rule is that the classification of the activity proceeds from the exercise of the consent authority's discretion whether to grant a limited discretionary application for ODP activities. Thus the plan change does not convey in clear and unambiguous terms the use to which the land may be put.

31. The Court therefore concluded that the proposed rules for permitted, controlled, limited discretionary and discretionary activities which require compliance with an approved ODP were *ultra vires* section 77B, as the rules required compliance with a resource consent which was not a standard, term or condition specified in PC19. [18]

32. The proposed rule requiring consent for ODP activities themselves (rule 12.20.3.3(iii)) was also found to be *ultra vires.* The Court noted that this rule did not actually identify the ODP activities for which resource consent is required and found that in the absence of a rule specifying activities that are expressly allowed subject to a grant of resource consent (and therefore allowed by that ODP consent), the rule was *ultra vires* in terms of sections 77A(1) and 77B(3) of the pre-2009 RMA. [19]

33. The Court suggested that the rule for non-complying activities be amended to make it non-complying (rather than prohibited) to develop in advance of an ODP. A rule which made an activity a non-complying activity in the absence of an approved ODP may not be *ultra vires* the RMA, on the grounds that section 77B(5) did not stipulate that an activity must comply with any standards specified in a plan. [20]

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16 Ibid, at [181].
17 Ibid, at [178].
18 Ibid, at [183].
19 Ibid, at [167] and [168].
20 Ibid, at [190] and [191].

34. Another amendment offered by the Court was to include for future applications an assessment matter ascertaining compliance with any applicable consent for ODP activities. [21]

35. A crucial finding of the Environment Court was that an activity's status must be clear from the plan. It cannot be linked to compliance with another resource consent. It can, however, be linked to the existence or presence of another resource consent as the Court accepted that it would not be *ultra vires* section 77B for a rule to make an activity a non-complying activity in advance of an ODP being approved.

36. The reasoning behind this finding was that section 77B(5) of the RMA did not stipulate that an activity must comply with any standards stipulated in a plan. [22]

37. As the Court stated at [190], in contrast to other types of activities, section 77B(5), which was concerned with non-complying activities, "does not stipulate that the activity must comply with any standards (terms or conditions) stipulated in a plan or proposed plan". Accordingly, while an activity's status cannot be linked to *compliance* with another resource consent (such as an ODP land use consent), it can be linked to the *existence* of another resource consent. Thus, rules which make an activity a non-complying activity *could* apply in advance of an ODP being approved, on the grounds that section 77B(5) did not stipulate that an activity must comply with any "standards, terms or conditions" specified in a plan.

38. Following the reasoning of the Environment Court, one of the implications of the **Queenstown** decision for the rules in the PAUP and in terms of section 87A(5) is that to classify activities as non-complying activities subject to *compliance with* an approved FP, would be *ultra vires* the RMA.

The proposed FP provisions as amended

39. The notified version of the FP provisions in the PAUP includes various rules which relate the status of an activity to compliance with an approved FP. It has been acknowledged by the parties that, in light of the **Queenstown** decision, these rules may be *ultra vires* the RMA.

40. In light of the **Queenstown** decision various rules have been amended. The key features of the amendments are summarised in Auckland Council's opening submissions at [11.17] and include:

    a) The removal of rules which set the activity status of an activity by reference to compliance with an approved FP;

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21 Ibid, at [189]. Refer Auckland Council's opening submissions at [11.11(d)].

22 Ibid, at [190].

b) The inclusion of rules which set the activity status of an activity by reference to the presence of an approved plan;

c) The inclusion of matters of discretion regarding whether an activity is "consistent with an approved framework plan".

41. At [11.19] of the opening submissions, Counsel for the Council submitted:

> Council considers that the above amendments will ensure that the framework plan provisions are not *ultra vires* the RMA and will meet the concerns expressed by the Environment Court in the **Queenstown** decision. It appears that all submitters agree with Council on this matter.

42. In the Council's closing submissions at [4.9], the key difference between what is now proposed and what was notified is explained:

> The key difference between what is now proposed and what was notified is that land uses no longer derive their status from whether they **comply with** a framework plan. The status of a land use now depends on whether a framework plan **has been approved** for the land on which the land use is proposed to occur. The land use will be more restrictive if there is no approved framework plan.
> [emphasis not added]

1. Is it *ultra vires* the RMA that, where a precinct requires a FP, it is non-complying to undertake an activity if there is no pre-existing FP, but a restricted discretionary activity if there is an approved FP.

43. The Environment Court in the **Queenstown** decision made it clear that the lawfulness of the ODP provisions was a matter of statutory interpretation and the interpretation of the District Plan and PC19, and that the merits of the ODP process were not in issue. [23]

44. As the PAUP was publicly notified in September 2013, the post-2009 RMA provisions apply.

45. As stated in section 72, the purpose of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Section 75 of the Act specifically describes the contents of district plans, and identifies what must and what may be included. Section 75(1) states:

> (1) A district plan must state –
> (a) The objectives for the district; and
> (b) The policies to implement the objectives; and
> (c) The rules (if any) to implement the policies.

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[23] Ibid, at [140].

46. A district plan may also state the methods, other than rules, for implementing the policies for the district. [24]

47. Section 76 addresses the making of rules in district plans. It provides:

> **76 District rules**
> (1) A territorial may, for the purpose of –
> (a) Carrying out its functions under this Act; and
> (b) Achieving the objectives and policies of the plan, -
> include rules in a district plan.
> (2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.
> ...
> (3) In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect.
> (4) A rule may –
> (a) Apply throughout a district or part of a district:
> (b) Make different provision for –
> (c) Apply all the time or for stated periods or seasons:
> (d) Be specific or general in its application:
> (e) Require a resource consent to be obtained for an activity causing, or likely to cause, adverse effects not covered by the plan.
> ...

48. Section 77A enables the Council to categorise the activities to which the PAUP relates. The activities that can be provided for are set out in section 77A(2) of the RMA. Those activities were explained in the following way by Randerson J in **Auckland City Council v The John Woolley Trust:** [25]

> a) Permitted activities (which do not require any consent);
> b) Controlled activities (which require a resource consent but must be granted unless there is insufficient information to determine whether the activity is a controlled activity);
> c) Restricted discretionary activities (which are subject to the particular restrictions under s 104C);
> d) Unrestricted discretionary activities (where the full range of considerations under s 104 undoubtedly apply);
> e) Non-complying activities (which are subject to all the provisions of s 104 and the further particular restrictions in s 104D); and
> f) Prohibited activities.

49. Section 77A(1)(b) enables the Council to make rules for the six classes of activities.

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24 Section 75(2)(b) of the Resource Management Act 1991.

25 **Auckland City Council v John Woolley Trust** [2008] NZRMA 260 (HC) at [30], cited with approval by Collins J in **Lambton Quay Properties Nominee Limited v Wellington City Council** [2014] NZHC 878 at [28].

50. The six classes of activities are further described in section 87A of the RMA. Section 87A was passed in 2009 and replaced section 77B, which was central to the Environment Court's reasoning in the **Queenstown** decision.

51. While the Environment Court's reasoning will apply equally to the wording of the post-2009 section 87A, the wording with respect to non-complying activities is different. Section 87A(5) now stipulates that the activity must comply with any "requirement" (and terms or conditions) specified in the plan. There was no such requirement with the former section 77B(5). Section 87A(5) provides:

> (5) If an activity is described in this Act, regulations (including a national environmental standard), a plan, or a proposed plan as a non-complying activity, a resource consent is required for the activity and the consent authority may –
> (a) decline the consent; or
> (b) grant the consent, with or without conditions, but only if the consent authority is satisfied that the requirements of section 104D are met and **the activity must comply with the requirements, conditions, and permissions**, if any, **specified in the** Act, regulations, plan, or **proposed plan**.
> [Emphasis added]

52. Resource consent has the meaning set out in section 87, and includes all conditions to which the consent is subject .[26] There are five types of resource consent including a land use consent which is described as "a consent to do something that otherwise would contravene section 9 or section 13".

53. There is a clear link between an "activity" and a "use". Section 9(3) provides:

> **9 Restrictions on use of land**
> ...
> (2) No person may use land in a manner that contravenes a district rule unless **the use** –
> (a) is expressly allowed by a resource consent; or
> (b) is allowed by section 10; or
> (c) is an activity allowed by section 10A.
> [emphasis added]

54. Thus the "use" of land in a particular manner is an activity.

55. The rules in the PAUP state that a resource consent is required for a FP in a precinct. It is a restricted discretionary activity and section 87A(3) would apply. The rules as amended also state that it is non-complying to undertake an activity in advance of a FP being approved. Section 87A(5) would apply in that situation. A land use consent is required in both situations, as otherwise a person would be undertaking an activity or use of land that would contravene section 9(3).

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[26] Section 2 of the Resource Management Act 1991.

56. Applying the reasoning of the Environment Court and the new wording of section 87A(5), the activity status of an activity must be set by reference to a "requirement" of a rule specified in the PAUP.

57. The question is, therefore, whether the obtaining of a FP consent is a "requirement" in terms of section 87A(5)(b). In my opinion it does not come within the terms "conditions" [27] or "permissions".

58. In my opinion, obtaining a land use consent for a FP is not a "requirement" within the meaning of section 87A(5)(b). Obtaining a FP consent is an activity or a bundle of activities requiring land use consent.

59. The word "requirement" as used in section 87A is not defined in the context of the section. The word does have a specific meaning in Part 8 of the Act, which deals with designations, as meaning the term given to a proposal for a designation. However, it is obvious that a "requirement" in section 87A does not have the same meaning as "requirement" in Part 8.

60. In the **Queenstown** decision, it was found that a rule linking an activity's status to the presence or existence of another resource consent may not be *ultra vires*. However, on the Court's reasoning, this can only be the case where the relevant subsection does **not** stipulate that an activity must comply with any requirements (or condition or permission) stipulated in the plan or proposed plan. The Environment Court was addressing the pre-2009 section 77B(5) which did not stipulate that a non-complying activity must comply with any standards specified in a plan.

61. Section 87A(5)(b) now stipulates that an activity must comply with any requirements stipulated in a plan.

62. Therefore, in my opinion, a rule which makes an activity a non-complying activity in the absence of an approved FP may be at risk of being found *ultra vires* the RMA in terms of section 87A(5)(b). The same reasoning would apply to a rule which makes an activity a restricted discretionary activity in the absence of an approved FP in terms of section 87A(3)(b).

63. The consequence of this is that a resource consent application within a precinct where a FP is required but there is no existing FP, will need to be considered on its merits and without its activity status being linked to the existence or presence of an approved FP.

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[27] See section 2 of the Resource Management Act 1991.

2. Is it *ultra vires* the RMA that a minority landowner in a precinct that requires a FP has non-complying activity status when similar activities would otherwise be more permissive, but for example, the major landowners may not have applied for a FP yet?

64. In my opinion, the concerns raised by this question do not need to be addressed given my opinion on the *ultra vires* issue raised by Question 1.

3. Is it *ultra vires* the RMA that one of the matters of discretion for assessing an activity in an area subject to a FP is whether the activity is "consistent with an approved FP"?

65. The Environment Court in the **Queenstown** decision specifically suggested as a possible amendment that the rules include an assessment matter "ascertaining compliance with" any applicable consent for ODP activities. [28]

66. In my opinion the suggested amendment to include matters of discretion regarding whether an activity is "consistent with" an approved FP is not *ultra vires* the RMA.

4. Is it *ultra vires* the RMA that the FP provisions provide "incentives" to encourage the mechanism to be used?

67. The PAUP provides "incentives" for the use of FPs, for example:
   a) Non-notification unless special circumstances apply.
   b) Increases in height from that provided in other rules, for example in the Wynard Quarter Precinct.
   c) Non-complying status applies if there is no FP.

68. The notified version of the PAUP at G2.4 provides that controlled and restricted discretionary activities "will be considered without public or limited notification, or the need to obtain written approval from affected parties, unless":
   a) Otherwise specified in the PAUP; or
   b) Special circumstances exist.

69. Following mediation, Ms Perwick for the Council proposed a "simpler" version of the rule which was supported by all the expert planners who filed evidence on this topic. [29] The version proposed by Ms Perwick is set out in Council's opening submissions at paragraph [6.5].

70. In my opinion, a rule dealing with notification is not needed in Chapter G, as the individual precincts all contain their own provisions for notification for FPs. It would

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28 The **Queenstown** decision at [189].

29 Joint Planning Statement of Evidence dated 14 November 2014 at [7.40].

appear that all the notification clauses provide for limited notification to be considered, including notice being given to any owner of land subject to the FP.

71. It appears that paragraph [3] of the proposed amendments attached to Ms Dimery's evidence is unnecessary and would be inconsistent with individual precinct rules on notification. [30]

72. It is important when an application by a landowner for a FP is made, that the need for limited notification be considered because of the rule in the PAUP which requires an applicant to provide information to show how the development would integrate with other sites within the precinct, including details of any development proposal on adjoining sites.

73. There is also the issue that any resource consent for a FP should be able to be given effect to which would require a level of cooperation between the landowners within the area of the proposed development. If adjoining landowners are not notified of an application for a FP this could raise difficulties in enforcing the FP once granted.

74. The chapter in the PAUP for the Wynard Quarter Precinct includes a rule which provides for additional height coverage with an approved FP. [31]

75. In my opinion, a rule providing for additional height with an approved FP may be *ultra vires* section 76(3) of the RMA which requires the Council, when making a rule, to have regard to the actual or potential effect on the environment of activities, including any adverse effect.

76. In my opinion, for the reasons stated with respect to Question 1, a rule linking non-complying status with an approved FP may be at risk of being found *ultra vires* the RMA.

5. Is it *ultra vires* the RMA that a precinct could enable a FP to apply to land other than that owned by the applicant?

77. The proposed FP provisions as amended include a rule that an application for a FP must apply only to land that the applicant is the owner of, or the owner's nominee, "unless otherwise specified in the precinct". [32]

78. There are several precincts where it is stated that an application for a FP can apply to either the entire precinct or only to land that the applicant is owner of, for example the Bayswater Marina and Riverhead South precincts. In other cases, it is stated that an

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30 Primary evidence of Rachel Dimery, Attachment B, para [3].

31 Chapter K3.13 Wynard, 5.1 Building height, clauses 1 and 2.

32 Primary evidence of Rachel Dimery, Attachment B, page 26, para [10].

application for a FP can apply to the whole of the precinct area, with no reference to ownership.

79. In my opinion a planning framework that allows an individual landowner to apply for an activity that will affect land of another landowner may give rise to the principle of non-derogation of grant if the interference is substantial.

80. The principle of non-derogation could also have relevance to the landowner who holds a FP resource consent if integration with other sites within the precinct cannot be achieved.

81. This should not be an issue if the joint FP provisions are utilised.

6. Is it *ultra vires* the RMA that an applicant for one FP can be required to demonstrate how their FP integrates with neighbouring sites and other FPs?

82. The PAUP as notified includes a rule, where there is no joint FP, for an individual landowner to demonstrate how the development integrates with neighbouring sites.

83. In my opinion this is not *ultra vires* the RMA as it comes within section 76(3) of the RMA which requires the Council, when making a rule, to have regard to the actual or potential effect on the environment of activities.

84. It could properly be included as an assessment matter ascertaining integration with neighbouring sites.

7. Is it *ultra vires* the RMA that FPs can become part of consents but are not part of the public record as a normal planning regulation?

85. In my opinion there should be a rule in the PAUP requiring the Council to make FPs available as part of the public record as it would foster integrated development within a precinct.

8. Conclusion

86. The classification of an activity on the basis of whether a resource consent for a FP is in place is likely to be *ultra vires* section 87A of the RMA. If the FP provisions are amended to remove the link between the activity status of an activity and the presence of an approved FP, then the central *ultra vires* issue should be addressed.

87. It is not *ultra vires* the RMA if a matter of discretion for assessing an activity in an area subject to a FP is whether the activity is consistent with an approved FP.

88. The process incentives encouraging applications for resource consents for FPs are likely to be *ultra vires* the RMA. The proposed non-notification incentive is inconsistent with the precinct rules that allow for limited notification, which is more appropriate for a resource consent for a FP that involves a land use planning method to integrate infrastructure, roads and services in a precinct. To provide for a process incentive rule for applications for a resource consent for a FP on the basis that a FP can exceed performance standards in a precinct is likely to be *ultra vires* section 76(3) of the RMA, which requires the Council, when making a rule, to have regard to the actual or potential effect on the environment of activities, including any adverse effects. Also, the incentive to classify as non-complying in the absence of a FP is ultra vires section 87A(5)(b) of the RMA.

89. To allow a landowner to apply for a FP as a land use over another owner's land without that owner agreeing is likely to raise issues involving the principle of non-derogation of grant. To allow a FP to apply to land in a precinct when other landowners in that precinct refuse to allow the FP to be given effect to on their land, would also raise the principle of non-derogation of grant for the landowner who holds the resource consent for the FP.

90. It is not *ultra vires* the RMA if an applicant for an FP is required to demonstrate how the FP integrates with neighbouring sites and other FPs. The purpose of that rule would come within section 76(3) of the RMA which requires the Council, when making a rule, to have regard to the actual and potential effect on the environment of activities.

91. A resource consent for a FP that provides for the way and rate of development in a precinct as a land use planning method should be a public document.

92. If there are further aspects about suggested changes to the FP provisions in the PAUP you would like me to address, please do not hesitate to contact me.

Yours faithfully

Dr Royden Somerville QC