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Andrew Purves
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CHRISTCHURCH

Email

Dear Andrew

STATUS OF APPLICATIONS

Introduction

- 1 I refer to your email of Friday 29 June at 1.06 p.m.
- 2 The question on which you have invited my opinion was whether the transitional district plan can be disregarded and the Holcim application assessed solely in terms of the partially operative district plan.

Background

- 3 The proposed district plan was notified in 1996. Most of the proposed district plan has been made operative.
- 4 The provisions relating to the rural zones and the planning maps have not been made operative.
- 5 The proposed Holcim activities will be situated in the rural zone.

Section 104

- 6 Applications for resource consent must be assessed by the consent authority under section 104 of the Act.
- 7 Section 104 requires the consent authority to have regard to, among other things, *"any relevant provisions of a plan or proposed plan"*.
- 8 *"Plan"* means *"operative plan"*. *"Operative plan"* means a plan which has been made operative under clause 20 of the First Schedule. An *"operative plan"* includes parts of a plan which have been made operative under that clause in that schedule: see section 2.
- 9 *"Proposed plan"* means a plan which has not become operative under clause 20 of the First Schedule: see the definitions in section 2.
- 10 For the purposes of section 104 therefore, the rural zone provisions and planning maps are a *"proposed plan"* and those provisions of the transitional district plan which apply to the Holcim sites remain relevant to the assessment.

- 11 Under section 104, both planning instruments must be considered. It is for the decision-maker to determine what weight to give to instruments.
- 12 The tendency is to give greater weight to a document prepared under the Resource Management Act, particularly if it is well advanced through the First Schedule processes to becoming operative.
- 13 Weight applies to objectives and policies. Weight does not apply to rules. Rules are, by comparison with objectives and policies, black letter law. A rule is a rule. Rules in a proposed plan have the same weight as rules in an operative plan; section 9 prohibits activities which contravene a rule in both operative and proposed plans, unless expressly allowed by a resource consent. Under section 9, whether the rule in the proposed plan is operative is immaterial.

Section 19 RMA

- 14 Section 19 RMA now reads:

“Certain rules in proposed plans to be operative

(1) A rule in a proposed plan is to be treated as if it is operative and any previous rule is inoperative if the time for making submissions or lodging appeals on the rule has expired and—

(a) No submissions in opposition have been made or appeals have been lodged; or

(b) all submissions in opposition and appeals have been determined; or

(c) all submissions in opposition have been withdrawn and all appeals withdrawn or dismissed.

(2) Every reference in this Act or in regulations to a plan or an operative plan is to be treated as including a rule in a proposed plan that is operative in accordance with subsection (1).”

- 15 Formerly it read:

“Changes to plans which will allow activities

“(1) Where—

“(a) A new rule, or a change to a rule, has been publicly notified and will allow an activity that would otherwise not be allowed unless a resource consent was obtained; and

“(b) The time for making or lodging submissions or appeals against the new rule or change has expired and—

“(i) No such submissions or appeals have been made or lodged; or

“(ii) All such submissions have been withdrawn [or rejected] and all such appeals have been withdrawn or dismissed—

“then, notwithstanding any other provision of this Act, the activity may be undertaken in accordance with the new rule or change as if the new rule or change had become operative and the previous rule were inoperative.

“[(2) Where—

“(a) A submission is made in respect of a proposed plan which, if accepted, would allow an activity that would otherwise not be allowed unless a resource consent was obtained, and that submission is accepted; and

“(b) The time for lodging an appeal against the decision to accept the submission has expired and—

“(i) No such appeal has been lodged; or

“(ii) All such appeals have been withdrawn or dismissed—

“then, notwithstanding any other provision of this Act, the activity may be undertaken as an activity which is allowed as if that part of the plan had become operative.]”

16 The current version of section 19 was introduced by the Resource Management Amendment Act 2003.

17 The 2003 Amendment included transitional provisions set out primarily in section 112:

“Continuation and completion of matters under principal Act

(1) If, before the commencement of this section,—

(a) an application has been made for a resource consent or for any matter in relation to a resource consent (including a change or review of conditions of an existing consent); or

(b) a notice of requirement has been given for a designation or a heritage order; or

(c) an application has been made to become a requiring authority or a heritage protection authority; or

(d) a policy statement, plan, change, or variation has been publicly notified,—

the continuation and completion of that matter (including any rights of appeal) must be in accordance with the principal Act as if this Act had not been enacted.

(2) If, before the commencement of this section, an appeal has been lodged or an objection made, the continuation and completion of that appeal or objection must be in accordance with the principal Act as if this Act had not been enacted.

(3) *If, before the commencement of this section, an application for a subdivision consent has been made, the continuation and completion of all proceedings in relation to that subdivision, including the approval and deposit of a survey plan, must be in accordance with the principal Act as if this Act had not been enacted.*

(4) *If, before the commencement of this section, a declaration, enforcement, or abatement action under Part XII of the principal Act had commenced, the continuation and completion of that action (including any appeals) must be in accordance with the principal Act as if this section had not been enacted.*

(5) *If, before the commencement of this section, a notice of appeal or notice of inquiry has been lodged with the Environment Court, sections 271A and 274 of the principal Act apply as if section 271A had not been repealed, and section 274 had not been repealed and substituted, by this Act.*

(6) *For the purposes of this section, an appeal includes a reference to, or an inquiry by, the Environment Court.”*

18 Section 112 has had a chequered history.

19 For present purposes, section 112(1)(d) provides that a plan which has been publicly notified before 1 August 2003 is to be continued and completed as if the RMA had not been amended by the 2003 Amendment.

20 It has been held that the new section 19 does not apply to a plan notified before 1 August 2003: SMW Consortium v Tasman District Council W21/2006 (interim decision) and W34/2006 (final decision).

21 In essence, the Environment Court declined to read significant change made by the substitution of section 19 retrospectively. Therefore none of the rules in the proposed plan were to be treated as operative. The proposed plan did not become operative in the Court's view until it had been made operative under clause 20 of the First Schedule. As a result, the transitional plan subsisted and had to be taken into account.

22 There are competing Environment Court decisions about whether the 2003 Amendment is to be applied retrospectively or not.

23 The line of authority which does not apply the amendment retrospectively has had recent approval by Justice Fogarty in the High Court in Matukituki Trust v Queenstown Lakes District Council.

White v Waitaki District Council

24 In that case, the Court applied section 19 to the rural provisions of the proposed district plan.

25 Not only did the Court hold that the rules were deemed to be operative, it said that in section 19:

““Rule” must include the corresponding objectives and policies.”

26 With respect, on this point the Court was wrong.

27 “Rule” cannot be taken to mean objectives and policies. In Campbell v Napier City Council, W67/05, another division of the Environment Court rejected the approach adopted in White to treating objectives and policies as being deemed to be operative by section 19.

28 In addition, the Court’s approach is inconsistent with section 112 of the 2003 Amendment and overlooks section 104 of the RMA.

29 For these reasons, in my opinion, White should not be applied.

Conclusion

30 Section 19 as enacted by the 2003 Amendment does not apply.

31 Its predecessor is not relevant in this context.

32 The Holcim proposals must be assessed by reference to both the transitional and proposed plans.

Please contact me if you wish to discuss further.

Yours faithfully

ROSS DOWLING MARQUET GRIFFIN

Per



A J Logan

Partner

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c.c. Jack Chandra