BEFORE WHANGAREI DISTRICT COUNCIL

IN THE MATTER OF	The Resource Management Act 1991
AND	
IN THE MATTER OF	Hearing for Private Plan Change 113 Ruakaka Racecourse, Whangarei Racing Club

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SUBMISSIONS OF COLLEEN HEATHER PRENDERGAST
11 November 2013

Introduction

1. My name is Colleen Heather Prendergast. I hold the qualifications of Bachelor of Town Planning (BTP) and Bachelor of Laws (LLB), both from the University of Auckland. My work experience includes some 20 years in planning working for central and local government, and 9 years in the role of Senior Tutor teaching planning law and planning practice at the School of Planning at the National Institute of Arts and Creative Industries, University of Auckland. I joined Henderson Reeves Connell Rishworth in 2007, and am currently a senior solicitor in the Litigation team specialising in resource management.

2. I am making these submissions in my personal capacity as a land owner of property in Peter Snell Road Ruakaka.

3. I have read the s 42A report from Mrs McNeal and note that she has picked up on some of my concerns, notably in respect to Management Plans. I note from the draft track changes set out in Part 2 of the s 42A report however that REE 1.5 does not provide for management plans to be mandatory and required prior to any development within the precincts. In that regard, I agree with the statements made in evidence by Andrew Riddell for the Department of Conservation; given the lack of detailed assessment of some of the effects of the activities as proposed by the plan change rather than the Master Plan, the management plan for each precinct (except for Precinct A) should be required before development occurs and be publicly notified.

4. However, Mrs McNeal appears to have misunderstood the basis for my submissions in respect to the format, the use of requisite policies, and a notification rule based on policies rather than effects. My concerns as to the lack of clarity and certainty for

readers of the plan in respect to permitted activities also remains. This submission addresses those concerns.

Format and structure

5. My submission sought that the proposed change revert to "the tried and true" format of objectives, policies and rules, so that the links between can be followed and the way in which the objectives are to be achieved is transparent and clear. I expressed concern at the use of mandatory language and reference to performance standards within the "requisite policies", indicating that as being more appropriate in a rule than a policy. I also sought that the plan change define permitted activities and performance standards/development controls for each precinct.

6. As it is currently drafted, the plan change follows the format and language of the approach adopted by the Council in aspects of its review of the district plan. Rather than set out objectives and policies, and the rules by which they will be achieved, the change identifies objectives and lists the activities classified as discretionary. It then refers to eligibility, notification, requisite policies and general policies. Following the linkages between the provisions, particularly between the objectives, policies and rules is difficult. No permitted activities are listed. To discover whether a particular activity is permitted, it is necessary first to consider the discretionary activities, and then to consider the provisions under the eligibility heading.

7. It has long been recognised that the provisions of a district plan should be clear and certain; members of the public should be able to readily understand what can or cannot be done without requiring professional assistance[1]. Plans should be written in clear and simple language, avoiding jargon and ambiguity. From my experience in the education sector, I am aware that the general public has an average reading age of a 13 year old.

8. By listing discretionary activities rather than permitted activities, the plan change requires a degree of analysis before the reader can determine what can be done as of right. Some will have difficulty in working out what they or their neighbours can do on their property without a resource consent. Some may not bother at all and just do it anyway. I confess it took me somewhat longer than I would have expected to determine what was permitted in each of the precincts, and I am more than relatively experienced in reading district plans.

9. There has been, and still is considerable criticism of the complexity of the RMA and the time and costs involved with its processes. The government is continuing to promulgate amendments to the Act seeking to "streamline and simplify" its requirements.

10. The public has a general understanding of the nature of a policy: as a guide to the way in which the overall objectives are to be achieved. Similarly, most if not all understand the regulatory nature of a rule. Those terms have been used in district plans for some 22 years. Why change something for change sake? It is my submission that many of the requisite policies are in fact rules in any case. Why not call them a rule?

11. I note that in his evidence, Mr Mead considers the requisite policy and management plan approach will work and that concerns about certainty will recede over time although he sees no problem with a more traditional approach if desired.[2] My concern

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1 *Sandstad v Cheyne Developments Ltd* (1986) 11 NZTPA 250 (CA)

2 David Mead, Statement of evidence 25 October 2013, para 36

is not so much related to the management plan approach, although I do think such plans should be mandatory (and given the lack of detail provided in the change, notified) before any development occurs within the precincts.

12. My concern relates to the need for transparency and clarity as well as certainty within the district plan. It is my submission that the current formatting/structure/content does not provide the required transparency, clarity or certainty.

Requisite policies

13. In paras 297 – 299 of her s 42A report, Mrs McNeal explains the origin of the term "requisite policies" and justifies the use of mandatory language by reference to the Ministry for the Environment's Quality Planning website and guidance notes.

14. I acknowledge that the guidance notes do indicate that policies can be directive, and in that instance can include mandatory words such as "shall" or "must." That language is clearly appropriate in policies where a particular strategy is important to achieve an objective. However, those same guidance notes go on to say that thresholds and standards should be in rules and that policies that incorporate thresholds or standards should be avoided.[3]

15. Many of the requisite policies in the plan change incorporate performance standards. Those that do are, in my submission, rules by another name. They should be separated out and recognised as rules.

16. If the above seems like an overly pedantic criticism of an innovative approach, consider this:

17. In line with the government's determination to reduce some of the complexity surrounding assessment when both a proposed and operative plan had to be considered, the 2009 Simplifying and Streamlining Amendment Act inserted ss 86A – 86G into the Act. Those sections (copy attached) specify when a rule in a proposed plan is to have legal effect. With the exception of the matters specified, rules in a proposed plan will generally not have legal effect until decisions on submissions are made and publicly notified unless otherwise ordered by the Environment Court or the Council resolves to delay the time of legal effect until the plan becomes operative.

18. On that basis, when a proposed plan or Council promoted plan change is notified and no resolution or Environment Court order to delay or require early legal effect is made, regard and varying weight must be given to the objectives and policies of the proposed plan from the time of notification, but no regard is to be had to the rules, at least until the time for submissions has passed. Given that the rules provide the regulatory framework within which compliance is required, the difficulties and confusion of the former regime is avoided (or at least that is the rationale and hope behind the sections).

19. However, in the approach currently being followed by the Council, regard to the requisite policies (which contain the performance standards) is required from the date of notification of the proposed plan. In effect therefore, the regulatory framework provided by the performance standards in the requisite policies has effect from the date of notification despite the requirements of ss 86A – 86G. Such an approach is not within the spirit and intent of the 2009 Amendment Act and in my submission, is invalid.

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[3] http://www.qualityplanning.org.nz/index.php/plan-steps/writing-plans/writing-issues-objectives-and-policies

Notification

20. The s 42A report notes that requisite policies were introduced to the district plan as a means of determining when resource consents must be notified.[4] If a proposal is contrary to requisite policies it must be publicly notified. Conversely, where the proposal is consistent with requisite policies it can proceed without public notification.[5] The report continues in paras 299 – 300 by referring to the explanation provided at the time of introduction of the approach. This first justifies the rule on notification, and then justifies assessment of activities against requisite policies as not being contrary to s 77D of the Act. In particular, it argues (in part):

> [T]his basis for determination is likely to result in more active consideration and rigorous analysis of policies at the outset of development. This approach provides for a greater emphasis and focus on the outcomes sought by the plan (through its objectives and policies, rather than assuming that the methods (rules relating to activity status) are the "be all and end all." Concerns expressed that exceeding stated thresholds does not necessarily lead to adverse effects are relevant where Council specifies permitted, controlled or restricted discretionary thresholds. ... If a proposal is contrary to the requisite policies, then it must be publicly notified. That is not to say that the application must as a matter of course be declined, nor does it mean that the hearing will always be required.

21. I acknowledge, and have no concerns about a provision within the plan change (or district plan) precluding or providing for notification of any application. I also agree that a more focussed approach to policies which provides guidance to those considering or assessing development, particularly in respect to non-complying activities is long overdue. But that is important for the substantive assessment of the proposed activity, not to the notification decision. My concern is with the basis on which the rule requires the decision on notification to be made.

22. Sections 95A – 95E of the Act (copy attached) set out the matters to be considered in decisions on notification. Clearly the discretion whether to notify or not, and if notified the type of notification, lies with the Council, unless of course a rule or NES precludes notification, or the applicant requests notification or special circumstances exist. Importantly, the Act requires consideration of whether the likely level of adverse effects will be more than minor as the basis for the decision, not whether an activity is likely to be contrary or not contrary to policies.

23. It is a principle of statutory interpretation that words in an Act (or in this case, a plan) are used purposefully, and that words should be used consistently throughout the document. The term "not contrary" is used elsewhere in the RMA. That there is a difference in resource management terms between more than "minor adverse effects" and "not contrary" can be seen in the two threshold tests applying to the consideration of non-complying activities set out in s 104D of the Act.

24. The term "not contrary" has been defined in case law to mean more than mere non-compliance. To be contrary, an activity will be opposed to in nature, different, opposite to, repugnant to the policies.[6] A decision that a proposed activity should be notified because it will have more than minor adverse effects on the environment however requires consideration of among other things, the degree of non-compliance, the likely

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4 s 42A report, para 298

5 ibid

6 *NZ Rail Ltd v Marlborough DC* [1994] NZRMA 70 (HC); *Queenstown Bungy Ltd v Queenstown Lakes DC* EnvC C035/02; *Elderslie Park Ltd v Timaru DC* [1994] NZRMA 433 (HC); *Armstrong v Central Otago DC* EnvC C131/08

adverse effects on the environment and the parties (if any) likely to be affected in the circumstances of each particular case. The Act is clear, absent of the provisos, an application must be publicly notified if the likely adverse effects are considered to be more than minor.

25. In my submission, even if the basis on which the decision is to be made can be accepted (and I don't believe it can), the current rule provides no certainty and will be difficult to administer. Does an activity have to be not contrary to all requisite policies before it will be notified? Or just one or two? But, where a proposed activity can meet some of the policies but not others, case law shows it cannot be said to be contrary to the policies.[7] What if the proposal cannot be said to be contrary (opposite or repugnant) to the policies, but will have more than minor adverse effects on a particular property or properties because of topography or the particular circumstances of the location – should it be notified? How will people know? On what basis will the decision be made?

26. The purpose of providing for a rule on notification, as provided for in s 77D is applauded as a means of providing clarity and certainty to readers, users and administrators alike. Unfortunately, as outlined above I am of the opinion that as it currently stands the rule is invalid. Even if I am wrong in that opinion, I believe the rule is void for uncertainty and should be deleted. By all means, provide a rule on notification – but based on the likely level of adverse effects as required by the relevant provisions of the RMA.

Conclusion

27. I acknowledge that my submissions relate as much to the approach being taken to the review of the district as to the plan change currently being considered. For the avoidance of doubt, I consider a comprehensive approach to the future uses to be made of what is a unique facility is to be preferred to ad hoc development as the need or opportunity arises. The requirement for Management Plans setting out the details of the proposed uses for each precinct will allow for better sustainable management and avoidance of effects overall and is endorsed.

Prendergast

Colleen Prendergast

11 October 2013.

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[7] *Crater Lakes Park Ltd v Rotorua DC* EnvC A 126/09