

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TAMAKI MAKAU**

Decision [2024] NZEnvC 056

IN THE MATTER OF

an application under s 86D of the
Resource Management Act 1991

BETWEEN

HASTINGS DISTRICT COUNCIL

(ENV-2024-AKL-024)

Applicant

Court: Environment Judge MJL Dickey

Hearing: On the papers
Last case event: 23 February 2024

Date of Decision: 26 March 2024

Date of Issue: 26 March 2024

DECISION OF THE ENVIRONMENT COURT

A: The application under s 86D of the Resource Management Act 1991 is granted.

B: The following rules in Plan Change 6 to the Hastings District Plan (Partly Operative) have immediate legal effect from the date of this decision:

- (a) proposed rule SLD7A Subdivision of lifestyle sites in Rural and Rural Residential Zones to replace Category 3 residential uses;



- (b) proposed rule SLD16A Subdivision of lifestyle sites in Rural and Rural Residential Zones to replace Category 3 residential uses not meeting General Site standards and terms in 30.1.7;
- (c) proposed rule 30.1.7AA Subdivision of Residential Lifestyle Lots for Displaced Category 3 Landowners;
- (d) proposed new Assessment Criteria 27 to section 30.1.8 Assessment Criteria;
- (e) proposed new definitions in Chapter 33.12 for “Community of Interest” and “Category 3 Land”.

REASONS

Introduction

[1] Hastings District Council has made an *ex parte* application under s 86D of the RMA for orders that specified rules in Plan Change 6 (**PC6**) to the Hastings District Plan (Partly Operative) (**HDP**) have legal effect from the date of this decision.

[2] The application is supported by affidavits of:

- (a) Angus Bruce Charteris, Manager – Recovery and Special Projects, Hastings District Council; and
- (b) Rowan Regis Wallis, Environmental Policy Manager, Hastings District Council.

Background to PC6

[3] PC6 is a direct response to Cyclone Gabrielle, which resulted in significant damage to properties in the Hawke’s Bay in mid-February 2023. A subsequent process carried out by Hawke’s Bay Regional Council identified that many of the affected areas are no longer considered safe for residential occupation. These areas are identified as “Category 3”.

[4] HDC and Napier City Council subsequently adopted a “Category 3 Voluntary Buy-Out Policy” which applies to Category 3 land on which there was a residential dwelling as at 13 February 2023 (immediately before Cyclone Gabrielle). In summary, it provides a voluntary process for Category 3 residential landowners to sell their land to the relevant council (if the land is 2 ha or less) or to receive a relocation grant (if greater than 2ha or by election for a smaller property). The relocation grant sees the owner retain the land but relinquish the right to use it for residential activity. The Policy currently applies to approximately 165 properties in the Hastings District which have residential dwellings on Category 3 land. The overarching objective of the Policy is the removal of risk-to-life associated with people living on Category 3 land.

[5] The operation of the Voluntary Buy-Out Policy, which is funded on a 50:50 cost share basis by the Councils and the Crown, provides financial assistance to affected landowners to move away from Category 3 land. However there remains the issue of where the owners can move to, particularly given a strong desire amongst affected owners to remain within their community and the restrictive subdivision rules for Hastings’ rural areas.

PC6

[6] PC6 was publicly notified on 24 February 2024, and is being advanced under the Severe Weather Emergency Recovery (Resource Management-Streamlined Planning Process) Order 2023 (**SPP Order**). It provides a fast-track process for a planning process to enable development of housing or papakāinga that is necessary or desirable to provide permanent housing for people displaced by a severe weather event.

[7] PC6 rules provide that lifestyle subdivision in the Rural or Rural Residential Zones to replace Category 3 residential uses is a controlled or restricted discretionary activity. The rules are an exception to the otherwise limited opportunity for lifestyle subdivision in those zones. It provides a limited pathway for landowners affected by Cyclone Gabrielle to subdivide a lifestyle site within their community of interest. The usual provisions around maximum lot size, balance area, amalgamation requirements among others, do not need to be met.

The proposed changes

[8] PC6 amends Chapter 30.1 Subdivision and Land Development section of HDP by proposing the following additional objective and policies:

OBJECTIVE

SLD07

To enable limited lifestyle subdivision for Cyclone Gabrielle affected landowners to provide a permanent housing option where the ability to undertake residential activity has been permanently surrendered.

[9] The policies which are designed to implement the PC6 new objective are:

POLICY SLDP22

Allow the creation of residential lifestyle lots in the Rural and Rural Residential Zones to replace residential uses no longer available to landowners as a result of Cyclone Gabrielle and the classification of land by Hawke's Bay Regional Council as Category 3.

POLICY SLDP23

Limit the ability to undertake Cyclone-Gabrielle related lifestyle subdivision to the provision of permanent housing within an affected landowner's community of interest.

[10] Two new rules are to be inserted which would allow the creation of lifestyle lots in the Rural and Rural-Residential zones. The subdivision permitted by PC6 does not need to comply with the 30.1.6 *Subdivision Site Standards and Terms* which provide for minimum net site areas. However, compliance is required with all relevant subdivision site and general site rules specified in Rule 30.1.7 *General Site Performance Standards and Terms* which includes rules pertaining to building platforms, water supply, wastewater and stormwater disposal, property access, outdoor living areas, electricity supply, as well as requirements for esplanade reserves as appropriate for subdivision less than 4ha.

[11] The proposed new activity status rules are:

SLD7A	<p>Subdivision of lifestyle sites in Rural and Rural Residential Zones to Replace Category 3 residential uses</p> <p>Subdivisions to create lifestyle lots in the Rural Zone and Rural Residential Zone which comply with all relevant Subdivision Site and General Site Performance Standards and Terms specified in 30.1.7.</p> <p>Note, compliance with 30.1.6 is not required.</p>	C
SLD16A	<p>Subdivision of lifestyle sites in Rural and Rural Residential Zones to Replace Category 3 residential uses not meeting General Site standards and terms in 30.1.7</p> <p>Subdivisions to create lifestyle lots in the Rural Zone and Rural Residential Zone which comply with 30.1.7.AA(1), (2), (3) and (5) but do not comply with 30.1.7.AA(4) or one or more General Site Performance Standards and Terms in 30.1.7 not specifically listed.</p>	RDNN

[12] Subdivision is provided for as a controlled activity where it complies with all relevant performance standards or is a non-notified restricted discretionary activity (**RDNN**), where some, but not all, performance standards are met.

[13] The specific performance standards relevant to the new rules are contained in proposed Rule 30.1.7AA, which states:

1. Any application under this rule shall be accompanied by:
 - (a) an unconditional agreement with the Council under the Category 3 Voluntary Buy-Out Policy for a property purchase or relocation offer which includes the permanent removal of the ability to use the Category 3 land for residential purposes; and
 - (b) a statement by the Category 3 landowner which confirms the new lot is intended for use by the landowner for permanent housing.
2. An application under this rule must be made within 2 years of entering the Agreement above.
3. The new lot shall not be located within an identified natural hazard area or on Category 3 Land. Coastal Environment/ ONL/Wahi Taonga
4. The new lot shall be within the identified Community of Interest area of the site that is being replaced.
5. The new lot shall be a minimum of 4000m².

[14] Compliance with standards 1, 2, 3 and 5 is mandatory. If any of those standards are not met, the application will need to follow the ‘normal’ path for subdivision. Non compliance with standard 4, relating to the ‘Community of Interest’ area (defined as being 5km from the boundary of the Owner’s Category 3 site) can be assessed as a RDNN.

[15] PC6 proposes additional assessment criteria that would apply to consideration of RDNN applications which specifically address the Category 3 qualification to be able to subdivide. Proposed new Assessment Criteria 27 is:

27 Category 3 Replacement Lifestyle Subdivision

In addition to the General Assessment Criteria in 30.1.8.1, Council will have regard to the following matters for any subdivision associated with the creation of lifestyle lots as replacement for sites affected by the Category 3 buy-out process.

- a. Whether the proposed subdivision achieves the purpose of enabling the development of housing in the Hastings district that is necessary or desirable to provide permanent housing for people displaced by Cyclone Gabrielle.
- b. The proposed legal instrument for ensuring that the creation of the lifestyle lot is for permanent housing for displaced Category 3 landowners:
- c. Consideration of whether the proposed site can reasonably be considered to be within the "community of interest" of the Category 3 affected property to ensure that the objective of allowing people to remain in their community can be achieved.

[16] Finally, two new definitions are proposed for ‘Community of Interest’ and ‘Category 3 Land’.

The grounds for the application

[17] While it is anticipated that the streamlined process provided by the SPP Order will enable PC6 to be operative by around August 2024, the Council wishes to make the subdivision option available immediately for affected landowners.

[18] The Council acknowledges that the request to use s 86D in relation to rules that are more enabling than the existing provisions is unusual. The typical situation is that an order is sought to prevent a ‘gold rush’ where the environment affected by

a plan change might be compromised by reliance on existing rules and undermining the strategic outcomes sought by the change. In this case, the existing subdivision rules will continue to apply in parallel with the new rules, so it is likely any applicant will still need to apply for a non-complying subdivision pending the rules becoming operative.

[19] Nevertheless, the Council sees merit in having the new rules take legal effect so that they can be taken into account as part of the consent process. Acting with urgency to enable people to move out of Category 3 areas is a priority for the Council. The rules provide a clear signal to Category 3 landowners of the intention to provide a lifestyle subdivision pathway, and, as PC6 moves through the SPP Order process, greater weight will be able to be afforded to the rules, depending on the submissions received.

[20] Ms Davidson for the Council submitted that the number of new sites likely to be created in reliance on PC6 before a decision on submissions can issue is limited by:¹

- (a) the number of Category 3 properties eligible for a buy-out in the Hastings District, being 165;
- (b) the number of those property owners who will have entered an unconditional agreement under the Policy before a decision is made;
- (c) the number of those property owners who decide to proceed under the rule and can locate a suitable site and reach agreement with the owner of that site to proceed with a subdivision.

[21] Ms Davidson advised that it is anticipated that the number of applications for lifestyle sites which are created under PC6 prior to a decision being issued is relatively low, perhaps in the order of 10 applications. The Council considers this to be a meaningful contribution to Category 3 owners' individual recovery pathway.

¹ Council's memorandum in support of application, dated 23 February 2024 (**Council's memorandum**), at [17] and Mr Charteris' affidavit.

Section 86D Resource Management Act 1991

[22] In accordance with s 86B(1) of the RMA, rules in a proposed plan ordinarily have legal effect once a decision on submissions is made and publicly notified under cl 10(4) of Schedule 1. Section 86D(3) gives the Court the power to order that a rule in a proposed plan has legal effect from a different date, as follows:

86D Environment Court may order rule to have legal effect from date other than standard date

- (1) In this section, **rule** means a rule—
 - (a) in a proposed plan; and
 - (b) that is not a rule of a type described in section 86B(3)(a) to (e).
- (2) A local authority may apply before or after the proposed plan is publicly notified under clause 5 of Schedule 1 to the Environment Court for a rule to have legal effect from a date other than the date on which the decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1.
- (3) If the Court grants the application, the order must specify the date from which the rule is to have legal effect, being a date no earlier than the later of—
 - (a) the date that the proposed plan is publicly notified; and
 - (b) the date of the court order.

[23] Section 86D does not specify the process to be followed or the criteria to be applied in considering such an application. However, as with any discretion, the decision maker must exercise the discretion on a principled basis.

[24] The Court, in *re Thames-Coromandel District Council*,² noted the following factors from previous case law that may be relevant when assessing an application under s 86D:³

- (a) the nature and effect of the proposed changes with reference to the status quo;

² *Re Thames-Coromandel District Council* [2015] NZRMA 315.

³ *Re Thames-Coromandel District Council* at [9].

- (b) the basis upon which it can be said that immediate legal effect is necessary to achieve the sustainable management purpose of the RMA;
- (c) the spatial extent of the area(s) which are to become subject to the proposed changes and/or the approximate number of properties potentially affected;
- (d) consultation (if any) that has been undertaken in relation to the proposed changes; and
- (e) whether the application should be limited or publicly notified, including consideration of potential prejudice.

[25] In *re Palmerston North City Council*,⁴ the Court phrased these matters slightly differently, accepting the following general matters as relevant to the assessment of a s 86D application:⁵

- (a) the strategic importance of the plan change (or proposed plan);
- (b) whether the plan change was the outcome of detailed consideration by the local authority under a wider process than just RMA considerations; and
- (c) the extent of consultation (if any) undertaken.

[26] In the more recent decision in *re Waimakariri District Council*,⁶ the Court also identified that aspects of vulnerability (such as scarcity of the resources and any irreversible effects, and pressure on resources) are additional matters to consider.⁷

[27] While these themes may provide the court with some guidance, they fall short of being principles in themselves.⁸ They do, however, provide a useful framework against which to assess the request made. The Council has assessed the proposed changes in accordance with that framework.

⁴ *Re Palmerston North City Council* [2015] NZEnvC 27.

⁵ *Re Palmerston North City Council* at [23].

⁶ *Re Waimakariri District Council* [2021] NZEnvC 142.

⁷ *Re Waimakariri District Council* at [16] and [17].

⁸ *Re Thames-Coromandel District Council* [2015] NZRMA 315 at [10].

The nature, purpose, effect and significance of the proposed changes by reference to the status quo

[28] The Council submits that the significance of the proposed changes in the context of the HDP is relatively low, but is relatively high for individual Category 3 landowners for whom a subdivision pathway may enable them to accept an offer and relocate out of Category 3 land.

[29] That is because the HDP provides for lifestyle subdivision in the Rural and Rural Lifestyle Zones, subject to compliance with certain limits. PC6 amends or removes some of those limits to make it easier for Category 3 landowners to create a site for future housing, but does not introduce a fundamentally new activity into either zone.

The basis upon which immediate legal effect of rules is necessary to achieve the sustainable management purpose of the RMA

[30] PC6 directly relates to s 5 of the RMA – it is associated with the management of land that is affected by a significant natural hazard and where residential activities could pose a serious risk to life. It aims to protect the health and safety of the landowners whose properties have been identified as Category 3, which means that they can no longer be considered safe for residential purposes. Further, that it helps to provide for the social, economic and cultural wellbeing of the directly affected landowners by providing an option for them to relocate to a safer environment that remains within their community of interest area.⁹

[31] Providing the PC6 rules with immediate legal effect will enable its objectives to be achieved as soon as possible.

The spatial extent of the areas which are to become subject to the proposed changes and/ or how many properties will potentially be affected

[32] The Council advises that PC6 is limited to providing for lifestyle subdivision in the Rural and Rural Residential Zones, within five kilometres of affected Category

⁹ Proposed Plan Change 6: Category 3 Landowner Subdivision Provisions Section 32 Evaluation (**Section 32 Report**), at page 5.

3 land.

[33] Given the limited class of landowners able to take advantage of the proposed rules, the Council asserts the number of new lifestyle sites anticipated to be applied for prior to PC6 becoming operative is very low.

Whether consultation and consideration has been undertaken in relation to the proposed changes

[34] The Council has engaged with the landowners whose houses have been classified as Category 3, and who will be affected by the proposed changes.

[35] In addition to consultation with Category 3 landowners, the s 32 Report attached to Mr Wallis's affidavit explains that an invitation to engage was also sent to the District's Post Settlement Governance Entities, with Tamatea Pokai Whenua, Maungaharuru Settlement Trust and Mana Ahuriri all having indicated in principle support for PC6.¹⁰

[36] Given the limited application of PC6, the Council submits that there has been adequate opportunity to understand the impacts of PC6.

Whether the plan change has been or should be limited or publicly notified, including consideration of potential prejudice¹¹

[37] PC6 was publicly notified on 24 February 2024. The SPP Order provides for the usual 20 working day period for written submissions, but further submissions are not provided for. A hearing will then be convened by an independent hearings panel made up of at least one commissioner and one commissioner with a knowledge of tikanga Māori. The panel's report is then referred to the Minister for the Environment for decision. There is no provision for appeals. HDC anticipates that PC6 could be operative by August 2024.

¹⁰ Section 32 Report, at page 9.

¹¹ Council's memorandum at [23]-[26].

[38] Relief that may be sought by submissions is likely to fall into one of the following categories:

- (a) opposition to PC6 as a whole;
- (b) requests to tighten the performance standards that must be met for a lifestyle subdivision;
- (c) requests to expand the application of PC6;

[39] The Council does not consider that having the rules take legal effect early will compromise the ability for any such relief to be granted.

[40] PC6 is being proposed by HDC as part of the recovery from Cyclone Gabrielle and particularly in recognition of the very difficult situation facing Category 3 landowners. The rules are limited in scope and are relatively straightforward in their application. The Council does not consider any person will be prejudiced by allowing the rules to take early legal effect.

The strategic importance of the plan change in question / Whether the proposed changes are the outcome of detailed consideration by the Council under a wider process than just RMA considerations

[41] The Council submits that PC6 is an important aspect of Hastings District's recovery from Cyclone Gabrielle in that it provides pathways for landowners whose land is no longer considered safe for residential occupation. It complements the voluntary buy-out process adopted by HDC which provides affected landowners with funds to move out of a Category 3 area, while PC6 provides options for such owners to move to new, safer, sites within their community.

Aspects of vulnerability - for example, scarcity of the resources at issue and any irreversible effects / Pressure on resources¹²

[42] The Council submits that the impact of having the PC6 rules take early effect is minimal in that very few sites are expected to be realised prior to the rules becoming

¹² Council's memorandum, at [35]-[37].

operative. In the period until a decision on PC6 is issued the existing rules will also apply, so applications will be fully scrutinised.

[43] Decisions on PC6 by the independent hearings panel is expected by around May 2024, subject to being able to appoint an appropriately qualified Panel. Under the SPP Order, the Minister is then notified and makes a decision at which time the planning instrument becomes operative. Allowing a month for the Minister's decision, PC6 will either be operative or withdrawn by around August 2024. This means there is a window of around six months where the PC6 rules would apply in parallel with the existing subdivision rules.

[44] Should PC6 be declined or substantially amended, at most there are likely to have been a handful of lifestyle sites created in accordance with the rules. As lifestyle sites are anticipated in the relevant zones, the Council does not consider that it is likely to have a significant effect on the Rural and Rural Residential land resource.

Outcome

[45] I accept the Council's assessment, as set out above, of the proposed changes and the effects of giving PC6 rules immediate effect.

[46] I am satisfied that PC6 will not "open the gate" in an uncontrolled manner to subdivision applications, and there is good reason for the rules to be given immediate effect considering the exceptional circumstances that have led to PC6 and its narrow focus such that it can be described as being designed to meet the purposes of the RMA, in particular s 5(2). It provides a clear intended pathway to support Category 3 applicants.

[47] On this basis the application under s 86D of the RMA is granted. I order that the following rules in Plan Change 6 to the Hastings District Plan (Partly Operative) will take immediate legal effect from the date of this decision:

- (a) proposed rule SLD7A Subdivision of lifestyle sites in Rural and Rural Residential Zones to replace Category 3 residential uses;

- (b) proposed rule SLD16A Subdivision of lifestyle sites in Rural and Rural Residential Zones to replace Category 3 residential uses not meeting General Site standards and terms in 30.1.7;
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MJL Dickey
Environment Judge

