

TOPIC: Outline Development Plan Provisions

Introduction

[126] This part concerns an issue raised by the court as to whether a land use consent may be granted for an Outline Development Plan prepared in accordance with PC19.

[127] The issue was argued by the parties at the hearing in Queenstown on 24-27 February 2014, with Mr R Bartlett appearing as Amicus Curiae.

The provisions for outline development plans in PC19(DV)

[128] The operative Queenstown Lakes District Plan defines "Outline Development Plan" as meaning:

... a plan within a zone or over an area of land or a site which delineates the performance standards and/or activities in the identified areas of the zone, or on the site or area of land.

[129] PC19(DV) contains an objective, policy and rules concerning the use of Outline Development Plans within Activity Areas C1, C2 and E2.¹²³ While the parties propose amendments to the higher order provisions of PC19(DV), to provide a necessary level of context we set out the relevant provisions from P19(DV) next.

[130] Objective 2 is:

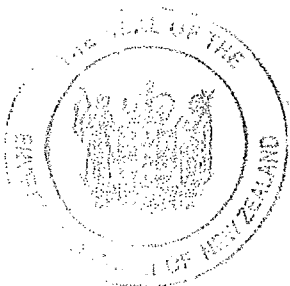
To enable the creation of a sustainable zone utilising a Structure Plan and an Outline Development Plan process to ensure high quality and comprehensive development.

[131] As policy 2.1 provides, development in Activity Areas C1, C2 and E2 is to be undertaken in accordance with an Outline Development Plan (**ODP**):

Policy 2.1

To ensure that development is undertaken in accordance with a Structure Plan and Outline Development Plans in Activity Areas C1, C2, and E2, so that a wide range of urban activities can be accommodated within the Zone while ensuring that incompatible uses are located so that they can function without causing reverse sensitivity issues.

¹²³ All references are to PC19's decision version.



[132] The purpose of the ODP is expanded upon in a section titled the Explanation and Reasons for Adoption, which states that when considering ODPs it is important care is taken to ensure adjacent activities can co-exist while avoiding reverse sensitivity effects.

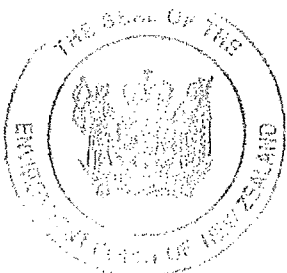
[133] A series of rules give effect to the objective and policy. Commencing with the rule for prohibited activities, rule 12.20.3.6 provides that where an ODP is required it shall be prohibited to undertake any activity until such time as an ODP has been approved. An ODP is approved by way of resource consent (rule 12.20.3.3(iii)). Rule 12.20.3.3(iii) states that an ODP is a requirement for activity areas C1, C2 and E2. While this rule does not identify any activities that would be expressly allowed if resource consent was granted, it does list extensive matters over which the District Council's discretion would be limited. This rule contains an advice note that any approval of an ODP shall not constitute an approval for any controlled, limited discretionary, discretionary or non-complying activity or building which shall require separate resource consent under the relevant rule(s) of this zone.¹²⁴

[134] The following zone standard stipulates, amongst other matters:

12.20.5.2 Zone Standard (xvi)

- (a) no resource consent shall be approved or development undertaken in the absence of an approved Outline Development Plan;
- (b) no development shall be undertaken in the absence of an Outline Development Plan; and
- (c) all development must be in accordance with an approved Outline Development Plan.

[135] Other rules classify activities as being permitted, controlled, limited discretionary or discretionary (rules 12.19.1.1 and 12.20.3.2-4). Each of these rules refer to the requirement for the activity to be in accordance with the plan's site and zone standards and Structure Plan and with any approved ODP for activity areas C1, C2 and E2.



¹²⁴ Queenstown Lakes District Plan at J-17.

[136] While the ODP provisions were challenged at the substantive hearing, in the Interim Decision the court found the method to have merit and provided guidance on the wording of the relevant objectives and policies. Responding to these directions, the planners conferenced and proposed amendments to the objectives and policies in their Joint Witness Statements dated 28 November 2013 and 23 January 2014.

Court's directions on vires

[137] Having reviewed the amended provisions in the first JWS (dated November 2013) the court sought advice from the parties whether an ODP that provides for the matters listed in a new policy 3.2 is a land use consent. When responding the parties were directed to consider the rules, methods and assessment matters relevant to ODPs.

[138] The expert witnesses in their second JWS discussed the purpose of the ODP provisions in the context of PC19. We come back to their evidence later.

[139] Having considered the planners' advice and prior to the hearing reconvening on 4 February 2014, the court issued a minute¹²⁵ identifying an issue with the vires of the ODP provisions and seeking legal submissions. When the hearing reconvened on 4 February 2014, and notwithstanding their clients' instructions to support the ODP provisions, counsel had yet to formulate their submissions on the provisions' vires.¹²⁶ The court adjourned the topic until 24 February 2014 and appointed Mr R Bartlett, Amicus Curiae.

[140] In subsequent minutes the court reiterated to the parties that the vires of the ODP provisions is a matter of statutory interpretation, and interpretation of the District Plan and PC19.¹²⁷ The merits of the ODP process were not in issue.¹²⁸

Planners' Second Joint Witness Statement

[141] In their second JWS,¹²⁹ the planners advised that "ODPs are a land use consent".¹³⁰ ODPs are the main tool by which "mid-level urban structuring elements

¹²⁵ Dated 29 January 2014.

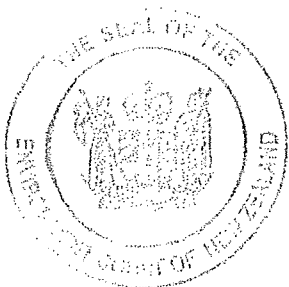
¹²⁶ Reconvened hearing 4-5 February 2014, Minute dated 11 February 2014.

¹²⁷ Minutes dated 30 January and 11 February 2014.

¹²⁸ Minutes dated 30 January and 14 February 2014.

¹²⁹ Dated 23 January 2014.

¹³⁰ Second JWS at 20.



within the relevant activity areas will be put in place”.¹³¹ These structuring elements include the minor/secondary road network (being roads not included in the Structure Plan), reserves and open spaces, walkway connections and building platforms. These activities are capable of being consented.¹³² ODPs are also to include urban design assessment matters, which “technically” the planners did not regard as being an activity (the term “activity” appears to be defined by the planners as a “physical development that uses resources”).¹³³

[142] The following general principles are said to apply to ODPs:

- (a) ODPs should not set out activity classifications within activity areas;
- (b) ODPs should not change the main performance standards for an activity (e.g. height); and
- (c) any criteria or assessment matters set out in the ODP must align with and develop the policies and associated outcomes within the plan change itself.

[143] The planners conceived of an approved ODP as a “guiding plan, rather than a fixed blueprint”.¹³⁴ They noted ODPs can be amended via a variation to the original land use consent, or by way of a new land use consent. In their view persons wanting to develop land are not bound by the ODP criteria as the ODP sits outside the District Plan but “such consents could draw upon the criteria as a guide as to what is appropriate”.¹³⁵ At some point in time the need for a comprehensive ODP will likely fall away after all the roads, accessways and reserves have been established.¹³⁶

[144] We set out next the sections of the Act relevant to our consideration of the vires of the relevant rules and methods.¹³⁷

Relevant RMA Provisions

[145] As PC19 was publicly notified in July 2007 the applicable statute is the Resource Management Amendment Act 2005. Counsel did not address this statute but instead

¹³¹ Second JWS at 19.

¹³² Second JWS at 19-20.

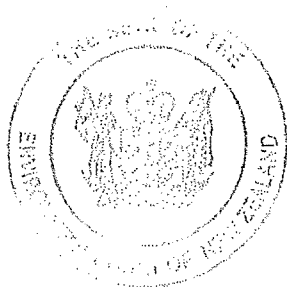
¹³³ Second JWS at 20.

¹³⁴ Second JWS at 21.

¹³⁵ Second JWS at 22-23.

¹³⁶ Second JWS at 21-22.

¹³⁷ The version of the Act that applies, is the version immediately before the enactment of the Resource Management (Simplifying and Streamlining) Amendment Act 2009.



directed their submissions to the Act's most recent amendments. At the court's direction the parties filed a memorandum post-hearing in which they accepted that PC19 is subject to the law as it was prior to the 2009 amendments, but submitted the post 2009 amendments were not material to the submissions given.¹³⁸ We have applied (as best we can) their arguments to the correct statutory provisions. In doing so, we note s 87A, which was referred to extensively in submissions, prior to 2009 was numbered s 77B.¹³⁹ All other amendments to the RMA subsequent to the notification of the plan change have kept the same section number.

[146] The purpose of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. The contents of District Plans are described in s 75(1). A District Plan must state the objectives for the district; the policies to implement the objectives; and the rules (if any) to implement the policies. A District Plan may also state, amongst other matters, the methods, other than rules, for implementing the policies for the district (s 75(2)(b)).

[147] Sections 76 and 77A address the making of rules in District Plans. Section 76 contains a general provision about rule making:

- (1) A territorial authority 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 a part of a district;

¹³⁸ Joint memorandum of counsel and Amicus Curiae, dated 20 March 2014 at [2] and [4].

¹³⁹ This section applied between 10 August 2005 to 30 September 2009, until substituted as from 1 October 2009, by s 60 Resource Management (Simplifying and Streamlining) Amendment Act 2009.



- (b) Make different provision for—
 - (i) Different parts of the district; or
 - (ii) Different classes of effects arising from an activity;
- (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.

[148] Pursuant to s 77A, rules may apply to the types of activities identified in s 77B:

77A Power to include rules in plans

- (1) A local authority may make rules describing an activity as an activity in section 77B.
- (2) When an activity in a plan or proposed plan is described as an activity in section 77B, the requirements, restrictions, permissions, and prohibitions specified for that type of activity apply to that activity in that plan or proposed plan.
- (3) The power to specify conditions in a plan or proposed plan is limited to conditions for the matters in section 108 or section 220.

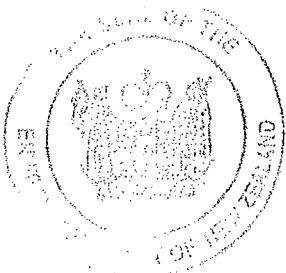
[149] Six types of activities are identified in s 77B being permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited activities. Three types of activity are particularly relevant to the issues at hand and in respect of those activities s 77B states:

Permitted 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.

Restricted Discretionary Activities

- (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.



Non-complying Activities

- (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.

[150] Resource consent has the meaning set out in s 87, and includes all conditions to which the consent is subject.¹⁴⁰ Section 87 describes five types of resource consent, although only two are applicable. These are:

Section 87

In this Act, the term **resource consent** means any of the following:

- (a) a consent to do something that otherwise would contravene section 9 or section 13 (in this Act called a **land use consent**);
- (b) a consent to do something that otherwise would contravene section 11 (in this Act called a **subdivision consent**);

...

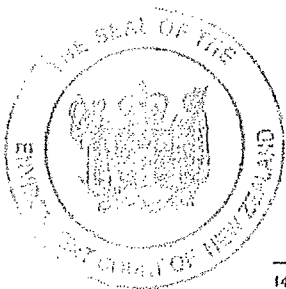
[151] Finally, s 9(1)(a) states (relevantly) no person may use land in a manner that contravenes a rule in a District Plan or Proposed District Plan unless the activity is expressly allowed by a resource consent. While the term “activities” features in the sections noted above, s 9 talks about the “use of land”. Section 9(4) defines “use” in the following way:

In this section, the word **use** in relation to any land means—

- (a) Any use, erection, reconstruction, placement, alteration, extension, removal, or demolition of any structure or part of any structure in, on, under, or over the land; or
- (b) Any excavation, drilling, tunnelling, or other disturbance of the land; or
- (c) Any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land; or
- (d) Any deposit of any substance in, on, or under the land; or
- (da) Any entry on to, or passing across, the surface of water in any lake or river; or
- (e) Any other use of land -

and **may use** has a corresponding meaning.

¹⁴⁰ Section 2.



Vires of the provisions

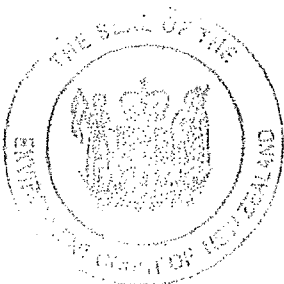
Submissions in support by QLDC and QCL

[152] QLDC says it is artificial to treat an ODP as a mere “plan” which does not authorise any activity. A consent approving an ODP would allow the use of land for a range of activities, including the use of land for activities that are identified in Table 1 as being permitted activities¹⁴¹ and the infrastructural elements of a development, some of which counsel notes.¹⁴² QLDC’s subtle argument turned on whether a consent for an outline development plan may be granted, with counsel arguing that it may provided that the consent authorises permitted activities.¹⁴³ The ODP may also include conditions unrelated to permitted activities.¹⁴⁴

[153] QLDC argues the plan change rules have two features: the obtaining of consent for an ODP is a “requirement” of a permitted activity within the meaning of s 87A(1) and secondly, a permitted activity is to comply with an approved ODP.¹⁴⁵ The “requirement” is specified in the zone standards (clause 12.20.5.2 (xvi)). (NB: this submission was made as if s 87A applies, which it does not. The correct provision is s 77B.)

[154] While we were not told, we assume from QLDC’s citation of *Re Application by Christchurch City Council* that it equates the term “requirement” which appears in s 87A, with the term “standard” in s 77B. We make no findings on whether the term “requirement” and “standard” are the same, but have considered QLDC submission on this basis. Thus we understand QLDC to say that for permitted activities the obtaining of an ODP consent is a standard specified in PC19. All activity types are subject to the same standard.¹⁴⁶

[155] QLDC submitted 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



¹⁴¹ QLDC opening submissions dated 27 February 2014 at [8].

¹⁴² QLDC opening submissions at [14].

¹⁴³ Transcript at 621-622.

¹⁴⁴ Transcript at 626.

¹⁴⁵ QLDC opening submissions at [30]-[32].

¹⁴⁶ QLDC reply submissions at [21].

approved of in the Planning Tribunal decision of *Re Application by Christchurch City Council* [1995] NZLR 129.¹⁴⁷

[156] QCL also submits that the effect of rule 12.19.1.1 (for permitted activities) and Table 1 is that certain specified uses of land will be permitted provided that they comply with an ODP. Until ODP activities are consented no use of land is permitted.¹⁴⁸ QCL argues:

- (a) a consent for an ODP acts as a consent to use the land for permitted activities;¹⁴⁹
- (b) subject to a consent granted for an ODP, an activity may be permitted (either because it is listed in Table 1 as a permitted activity or it does not otherwise contravene a rule in the plan change – such as those activities that are not located in buildings);¹⁵⁰
- (c) without an approved ODP the use of land would contravene a rule in a Plan and therefore s 9(3) of the Act;
- (d) provided that a consent is granted to allow one activity to take place that would otherwise contravene rule 12.20.3,¹⁵¹ in particular allowing a permitted activity, it is a consent to do something that otherwise would contravene a rule in a District Plan;¹⁵² and
- (e) accordingly, the ODP is a resource consent within the meaning of s 87(a) of the Act.

Submissions of the amicus curiae

[157] Mr Bartlett was directed to present legal argument for and against the proposition that a land use consent may be granted for an ODP prepared in accordance with PC19. He had the advantage of seeing draft submissions of QLDC and QCL and was able to reply to these and we summarise next his key points.

¹⁴⁷ QLDC reply submissions at [13]-[14].

¹⁴⁸ QCL submissions dated 20 February 2014 at [15].

¹⁴⁹ QCL submissions dated 20 February 2014 at [16]-[17].

¹⁵⁰ QCL submissions dated 20 February 2014 at [18]-[27].

¹⁵¹ The rule for permitted activities is rule 12.19.11 and in the context of the submissions we understand Mr Gordon to be referring to this class.

¹⁵² QCL submissions dated 20 February 2014 at [28].



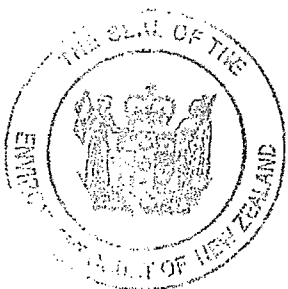
[158] Mr Bartlett says that the status of an activity derives from the Act and from its subsidiary planning instruments, not from a resource consent.

[159] Under the RMA the resource consent provisions predicate a connection to activities and to the implementation of rules. Resource consents:¹⁵³

- entitle use of land in a manner that contravenes a district rule (s 9(3));
- are not real property but run with the land (s 122);
- if unimplemented, lapse on the date specified in the consent or if no date is specified, within five years (s 125(1));
- may have the lapse period extended subject to meeting criteria (s 125(1A));
- are permissive;
- may subsist with any other number of unimplemented and inconsistent consents on the same property;
- may be subject to an application for a change or cancellation of conditions by the consent holder (s 127);
- may be subject to cancellation by the consent authority (s 126(1));
- may be subject to review of condition by the consent authority (s 128/129);
- may be subject to an application for surrender (s 138).

[160] With reference to the above attributes of a resource consent, Mr Bartlett submits that it cannot have been Parliament's intention that a consent would prescribe the rules that are to apply to a consent granted for another activity.¹⁵⁴

[161] In his view it is not possible to discern in PC19 whether a proposed activity is permitted or not because of the pre-condition that consent for an ODP be obtained first.¹⁵⁵ He summarises QCL's argument as "permitted activities only become permitted activities to those who have first obtained an outline development plan", and submits this is inconsistent with the definition of a permitted activity. A permitted activity is something that does not require a resource consent.¹⁵⁶ Finally, Mr Bartlett submits under QLDC's and QCL's approach activities that are not listed in the plan change and



¹⁵³ Bartlett submissions dated 27 February 2014 at [33].

¹⁵⁴ Bartlett submissions dated 27 February 2014 at [34].

¹⁵⁵ Bartlett submissions dated 27 February 2014 at [57].

¹⁵⁶ Bartlett submissions at [47].

which do not contravene a rule in the plan change, would need to be identified in an ODP to meet the requirements of s 9 that they are expressly allowed by a resource consent.

Consideration of vires

Purpose of the ODP provisions

[162] First, we acknowledge the premise in PC19(DV) that it is prohibited to undertake any activity within C1, C2 and E2 until such time as a resource consent is granted for an ODP (rule 12.20.3.6). Remarkably this rule was not referred to by QLDC and QCL.

[163] Secondly, we found it helpful to set out the scheme of the ODP provisions in this plan change. The scheme has four features:

- (a) there is a requirement for a single application for resource consent for a group of activities [we refer to this as the consent for ODP activities];
- (b) the timeframe for processing an application for ODP activities is set in the plan;
- (c) until such time as there is consent for ODP activities the use of land is prohibited in three activity areas; and
- (d) any use of land that does not comply with a consent for ODP activities is a non-complying activity.

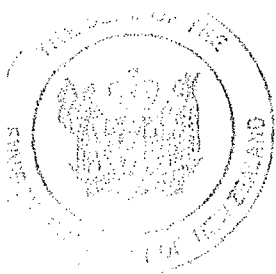
[164] We turn next to the issue identified by the court.

Issue: Is a land use consent granting an outline development plan a “consent” within the meaning of ss 9 and 87 of the Act?

Rule 12.20.3.3(iii) – the rule for limited discretionary activities

[165] An application for a consent for ODP activities is to be made pursuant to rule 12.20.3.3(iii).

[166] Counsel did not directly address rule 12.20.3.3(iii) and yet its subject matter is at the heart of the legal argument. The rule simply states “Outline Development Plan requirement for development within Activity Areas C1 C2, and E2” and then follows matters in respect of which the District Council’s discretion is limited.



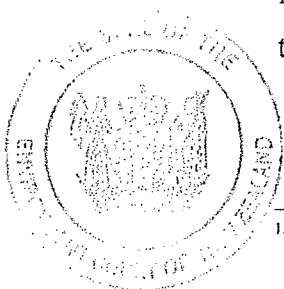
[167] While at times counsel and the planners spoke of outline development plans as if they were an activity (i.e. the plan is an *activity*), we understand in this plan change the term “outline development plan” means a consent granted for a bundle of activities. In the latter context, the QLDC and the planners also spoke about “outline development plans” as being a consent granted for the structural or structuring activities within the three activity areas. Assuming this is correct, rule 12.20.3.3(iii) does not actually identify the activities for which resource consent is required. Rather, the reader is left to deduce from the matters to which discretion is limited under this rule and also from the relevant policies, the activities that are the subject of an application for resource consent.

[168] In the absence of a rule specifying activities that are expressly allowed subject to a grant of consent, rule 12.20.3.3(iii) is ultra vires s 77A(1) & 77B(3). To come within s 77B (3), and to be consistent with the operative District Plan’s definition of “outline development plan”, rule 12.20.3.3(iii) is to list activities that are limited discretionary activities.

[169] If the court found difficulties with the plan change rules Ms Macdonald suggested introducing a new rule(s) requiring an application to be made for a series of ODP activities (not exhaustively listed). These activities would be classified as discretionary activities, as opposed to limited discretionary activities in the plan change.¹⁵⁷ Subject to what we say below Ms Macdonald’s rule is a step in the right direction. However, with the classification of ODP activities having potentially changed from a limited discretionary activity under rule 12.20.3.3(iii) and the content of the rule not finalised, we make no final finding on the same.

Vires of the activity rules (rules 12.19.1.1 and 12.20.3.2-4)

[170] The amendment of the rule 12.20.3.3(iii) or insertion of a new rule(s), would not address the matters raised by all counsel concerning the vires of the permitted activity rule and, more generally, all of the activity rules. The consideration of vires arises under two heads, as follows:



¹⁵⁷ QLDC opening submissions at [34].

- (a) can the status of a permitted activity or indeed any activity be determined by a prior grant of consent?
- (b) can a rule prohibit permitted activities in specified circumstances?

Issue: Can the status of a permitted activity, or indeed any activity be determined by a prior grant of consent?

[171] In accordance with s 77A the QLDC has categorised activities as belonging to one of six types of activities and has made rules for each type accordingly.

[172] QLDC says there is nothing in the Act which prevents a rule requiring as a pre-condition to any development, the approval of a resource consent. The obtaining of an ODP is a “requirement” within the meaning of s 87A(1) [we interpolate – a “standard” under s 77A]. Ms Macdonald submits all activities are subject to the same *requirement* as part of the rules’ sieve process.¹⁵⁸ This argument had some initial attraction, until the standard was considered in the context of other rules and the plan change policies.

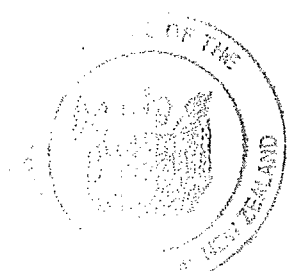
[173] We asked if a resource consent is required for the bundle of activities covered by an ODP what rule would be contravened if land were used without consent being granted? In her reply Ms Macdonald for QLDC submits that for the purpose of s 9,¹⁵⁹ the rule in the plan which is contravened is the zone standard (12.20.5.2 Zone Standards (xvi)). She advised this zone standard is a “requirement” within the meaning of s 87A(1).¹⁶⁰ We do not agree with this submission for the following reasons.

[174] Section 87(a) of the Act defines resource consent as meaning, amongst other things, a consent to do something that would otherwise contravene s 9. Section 9(1)(a) provides no person may use land in a manner that contravenes a rule in a District Plan unless the use is expressly authorised by a resource consent. In the absence of an ODP consent, all activities within AA-C1, C2 and E2 are prohibited (rule 12.20.3.6). Thus the rule in the plan that is contravened if land is used in the absence of a consent for ODP activities, is the prohibited activity rule (rule 12.20.3.6). If land is proposed to be

¹⁵⁸ QLDC reply submissions at [13-14, 21].

¹⁵⁹ QLDC, in common with other counsel, referred to s 9(3). The correct section is s 9(1). The amendments made to s 9 under the Resource Management (Simplifying and Streamlining) Amendment Act 2009 do not apply.

¹⁶⁰ QLDC reply submissions at [21].



developed, but not in accordance with any consent granted for ODP activities, then the rule in the plan that is contravened is the rule for non-complying activities (12.20.3.5 non-complying activities (ii)).

[175] We return to the rule for permitted activities which was the particular focus of QLDC and QCL submissions. Rule 12.19.1.1 identifies a garden centre and its ancillary activities,¹⁶¹ and the activities in Table I as belonging to the class of permitted activities subject to compliance with:

- the site and zone standards;
- Structure Plan; and
- any approved outline development plan for activity areas C1, C2 and E2.

[176] The rule also provides that an activity is permitted if it is not listed as a controlled, discretionary, non-complying or prohibited activity.¹⁶² Likewise the rules for controlled, limited discretionary and discretionary activities require compliance with any approved outline development plan.

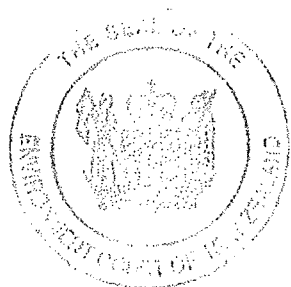
[177] If the words "... compliance with ... any approved Outline Development Plan" in the permitted activity rule are given their natural and ordinary meaning, the rule requires compliance with a grant of resource consent for ODP activities; including all the conditions of a consent.¹⁶³ When these words 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.

[178] 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

¹⁶¹ Rule 12.20.1.1(b).

¹⁶² We note the rule refers to Table I in rule 12.20.3.7 and also to Table 12.20.3.6. If the relevant rule is Table 1 in rule 12.20.3.7 there appears to be an error in its drafting.

¹⁶³ See s 2 definition of "resource consent".



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.

[179] Given this, we find the rules requiring compliance with “any approved Outline Development Plan” to be ultra vires s 77B(1) of the Act.

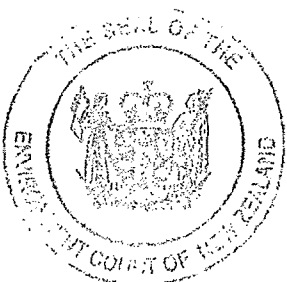
[180] We address briefly the Planning Tribunal decision of *An Application by Christchurch City Council*¹⁶⁴ referred to us by QLDC in support of the rules. The Christchurch City Council was in the process of reviewing its Transitional District Plan, when it applied for declarations as to the validity of rules classifying activities subject to their compliance with certain standards. Those standards were likened to a sieve test, and QLDC says this description fits the rules in PC19(DV). The Planning Tribunal noted s 9 was the only section in the Act constraining land use activities and if there is no rule in a District Plan then a particular activity is not constrained by that section.¹⁶⁵ That said the Planning Tribunal declared:

- (i) That it is lawful for a district plan to contain a rule in respect of permitted activities having 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.”

- (ii) That under the provisions of the Resource Management Act 1991 a district plan may prescribe and categorise the consequence of non-compliance with specified standards and may restrict the exercise of the consent authority's discretion to particular standards specified in the plan.

[181] We have 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. It follows we are not satisfied that the Planning Tribunal's declaration supports the approach taken in PC19(DV).



¹⁶⁴ [1995] NZRMA 129.

¹⁶⁵ *An Application by Christchurch City Council* at 16.

[182] We struggle to understand how the classification of permitted activities can proceed from a grant of a resource consent. In this regard we were not assisted by QLDC simply passing off the rule as being not excluded under the Act. The importance of this issue is captured by Justice Allen in *Power v Whakatane District Council*¹⁶⁶ where he observed (without deciding the particular matter):

It is settled law that a Council may not reserve, by express subjective formulation, the right to decide whether or not a use comes within the category of permitted use: *McLeod Holdings Ltd v Countdown Properties Ltd* [1990] 14 NZTPA 362 at 372. It is arguable also that a rule which provides that an activity is a controlled activity only if it has been the subject of an approved outline plan is similarly invalid. That was the view expressed by Judge Sheppard in *Fletcher Development and Construction Ltd v Auckland City Council* [1990] 14 NZTPA 193. As Mr Ryan submits, a member of the public would have no way of ascertaining at any given point of time whether a particular development on the subject site would be a controlled activity or a discretionary one. That would have to await the settlement (or not as the case may be) of a development plan in consultation with the stipulated parties.

Outcome

[183] We agree with Mr Bartlett that under s 87A (or correctly s 77B) the status of an activity derives from the Act and its subsidiary planning instruments and not from a resource consent. In summary we find rules 12.19.1.1 and 12.20.3.2-4 are ultra vires s 77B of the Act insofar as the rules require compliance with a resource consent which is not a standard, term or condition that is specified in the plan change.

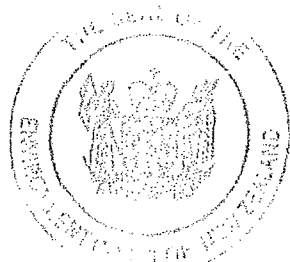
Issue: Can a rule prohibit permitted activities in specified circumstances?

[184] As noted above, counsel did not address the rule for prohibited activities. It appears the prohibited activity rule is a method to secure a procedure under the plan change, namely the obtaining of a consent for ODP activities prior to any development of activity areas C1, C2 and E2.

[185] Section 77B(7) addresses prohibited activity status in this way:

If an activity is described in this Act, regulations, or a plan as a prohibited activity, no application may be made for that activity and a resource consent must not be granted for it.

¹⁶⁶ CIV-2008-470-456 at [45].



[186] There is at least one appeal seeking the deletion of this rule.¹⁶⁷

[187] The Court of Appeal in *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development*¹⁶⁸ considered definition of prohibited activity needs no elaboration. "It simply means an activity for which a resource consent is not available". PC19(DV) arguably extends the definition of prohibited activity, by including permitted activities. Having heard no submission on the rule we do not decide whether the rule has this effect.

Potential amendments

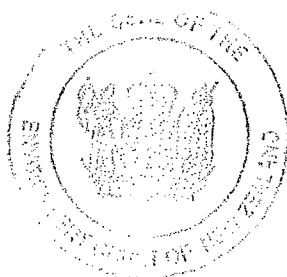
[188] Subject to jurisdiction we posit that what is intended by the rule prohibiting all activities is to create a deferred zoning over activity areas C1, C2 and E2 where land may not be used in accordance with the plan change until a specified event occurs. The event that would cause the lifting of the deferment is the obtaining of consent for a bundle of ODP activities. If this is correct, with the appropriate policy support a resource consent application for ODP activities and other land use and subdivision consents could be filed together and be processed sequentially.

[189] The purpose of rules 12.19.1.1 and 12.20.3.2 - 4 is to make a proposed land use activity non-complying, if the land use contravenes a consent granted for ODP activities within the relevant activity area.¹⁶⁹ We suggest that this purpose *may* be maintained and policies given effect to, if the rules are amended to delete reference in the rules to "...compliance with ... any approved Outline Development Plan"; delete or amend zone standard 12.20.5.2(xvi) which duplicates matters already provided under the rules classifying non-complying and prohibited activities; amend the rule for non-complying activities to add that "the use or development of land within activity areas C1, C2 and E2 in the absence of a consent granted for ODP activities is a non-complying activity" and to include an assessment matter ascertaining compliance with any applicable consent for ODP activities.

¹⁶⁷ Notice of appeal filed by Five Mile Holdings Ltd (in receivership).

¹⁶⁸ [2007] NZCA 473 at [41].

¹⁶⁹ See 12.20.3.5 non-complying activities (ii) which provides that any activity which is not listed as a prohibited activity and which does not comply with one or more of the relevant Zone Standards, shall be a non-complying activity.



[190] In contrast with the other types of resource consent, s 77B(5) does not stipulate that the activity must comply with any standards (terms or conditions) stipulated in a plan or proposed plan. Instead s 77B(6) states that the particular restrictions for non-complying activities are those specified in s 104D. Pursuant to s 104D(1)(b) the use of land not in accordance with a consent for ODP activities would be contrary to the objectives and policies for the plan change, which expressly provides for the use of Outline Development Plans as the central means to give effect to the objectives and policies.

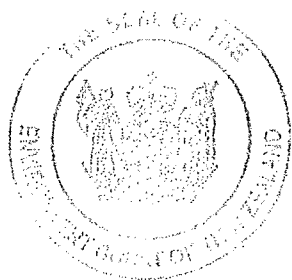
[191] If the rule for non-complying activities were to be amended in the way suggested, this does not appear to offend s 77B(5). Such a rule may be described as a *procedural rule*. Mr Bartlett queried the vires of procedural rules without venturing an opinion on the matter.¹⁷⁰ However, we can see no impediment under the sections of the Act referred to above. The sustainable management purpose of requiring the consent of ODP activities prior to development is described fully in the objectives and policies, although there may need to be some refinement of these subject to confirming the bundle of activities comprising the ODP consent. Such a rule would more closely follow the scheme of the Act than those currently in PC19(DV).

[192] That said, the rule for non-complying activities will need to be developed in conjunction with the rule for ODP activities. In accordance with s 76(3) when formulating any rule regard shall be paid to the actual or potential effect on the environment of the activities that are the subject matter of a rule. This section is particularly important in order that the subject matter of the rules satisfy the lawful requirements of a resource consent. However, these are not matters which we need decide now; the merits and vires of these amendments will be the subject of further submissions from the parties.

Overall Conclusion on ODP provisions

[193] Under the rules for prohibited and non-complying activities, the District Council would retain a high level of control over future land development. The rules, if not circumscribed, have the potential to incur developers' significant costs both in time and

¹⁷⁰ Bartlett at paragraph [9].



resources. Vires aside, this potential must be relevant to a s 32(3) evaluation as to their appropriateness for achieving the plan change objectives.

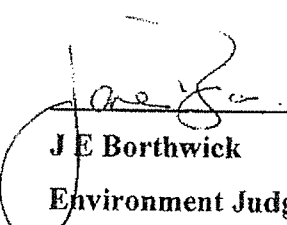
[194] The effect of these amorphous provisions is not well understood. While Ms Macdonald talked about the consent for ODP activities as a “detailed blueprint for future development”,¹⁷¹ the planners said it was a “guiding plan, rather than a fixed blueprint”,¹⁷² not binding on developers because it would fix criteria outside of the District Plan.¹⁷³ This difference of opinion alone gives us considerable cause for concern.

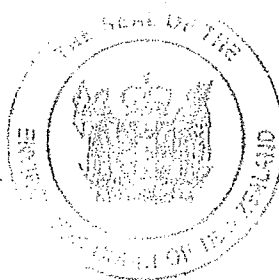
[195] We find that the rules for permitted, controlled, limited discretionary and discretionary activities (rule 12.19.3.1 and rules 12.20.3.2-4) are ultra vires the Act.

[196] Mr Bartlett was right to caution against making a finding on vires until the parties had settled the final wording of the rules, especially given the court’s directions that counsel were to consider the policies, rules and methods at this hearing. We are heartened at Ms Macdonald’s concluding remark that at most this is a technical issue and look forward to QLDC’s response in due course.

[197] That said, we reserve our decision on the ODP objectives and policies pending a final determination of the rules. In doing so we take on board Mr Young’s plea that there may be value in counsel reviewing the objectives and policies proposed by the planners. We agree and leave is granted for the parties to do the same and the provisions will be further considered at the same time as the lower order hearing.

For the court:


J E Borthwick
 Environment Judge



¹⁷¹ QLDC reply submissions at [18].

¹⁷² At 21.

¹⁷³ At 22-23.