BEFORE THE HEARINGS PANEL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of proposed Plan Change G: Aokautere Urban Growth to the Palmerston North City Council District Plan

---

STATEMENT OF REPLY EVIDENCE OF DAVID MURPHY ON BEHALF OF PALMERSTON NORTH CITY COUNCIL

STRATEGIC PLANNING

Dated: 28 November 2023

TABLE OF CONTENTS

REPLY EVIDENCE OF DAVID MURPHY

A. INTRODUCTION

[1] My full name is David Richard Murphy.

[2] I prepared a s 42A report dated 15 September 2023 on Strategic Planning (**s 42A Report**) on behalf of the Palmerston North City Council (**Council**) for proposed Plan Change G: Aokautere Urban Growth to the Palmerston North District Plan (**PCG**).

[3] My experience and qualifications are set out in my s 42A Report.

[4] I repeat the confirmation given in my s 42A Report that I have read and will comply with the Code of Conduct for Expert Witnesses in the Environment Court Practice Note 2023, and that my evidence has been prepared in compliance with that Code.

B. RESPONSE TO PAUL THOMAS ON BEHALF OF CTS INVESTMENTS LTD, WOODGATE LTD, AND TERRA CIVIL LTD

[5] Mr Thomas suggests that PCG gives the false impression that PCG is releasing large areas of land for additional development. Mr Thomas does not consider that PCG is releasing large areas of land for additional development with respect to the Les Fugle interests' land (CTS Investments Ltd, Woodgate Ltd, and Terra Civil Ltd). Mr Thomas notes that PCG makes part of the Rural-Residential land available for development, but also takes larges areas of both Rural-Residential and Residential land for reserves.[1]

[6] It is true that PCG is not solely about the provision of greenfield development to be provided through the rezoning of rural or rural residential land. However, I disagree with the suggestion that this is the impression that the Council sought to make. I consider it to be reasonably clear in the s 32 report under the heading "Why Aokautere?" that there were four drivers for the Council when this process began in 2018.[2] Three of these drivers relate directly to the resource management issues arising from the existing patterns of development within Aokautere. PCG is advertised as a plan change that seeks to shift away from the low-level regulatory approach of the first-

1 Statement of Evidence of Paul Thomas dated 27 October 2023 at [29].
2 Proposed Plan Change G: Aokautere Structure Plan – Section 32 Report at section 2.2.

generation plan and toward an approach where increasing controls are applied over areas that have not yet been developed.

[7] At paragraphs 41-64 of Mr Thomas' evidence is a discussion about the National Policy Statement for Urban Development 2020 (**NPS-UD**) in which Mr Thomas expresses his view that there is no evidence that PCG's directive approach to medium density will be feasible in the sense meant by the NPS-UD, specifically that it will not be commercially feasible for the developers. Mr Thomas suggests that instead of PCG, a better approach might be to allow the developer to drive development through private plan change requests, and he uses the Mātangi plan change as an example. Doing it this way, Mr Thomas suggests, would ensure that such medium density areas would be 'feasible'.[3]

[8] I wish to respond to these points from a strategic planning perspective, as I respectfully disagree with the implications of Mr Thomas' opinions here.

[9] While I can accept that the NPS-UD discussion on feasibility is one that anticipates developer input into the 'commercial' feasibility of development generally, I have some difficulty with the suggestion that it is only the developers who can comment on the feasibility of certain types of development.

[10] Over a period, at least since the Council completed its sectional district review on its residential zone in 2018, it has generally sought to encourage and enable various forms of 'medium density' through the District Plan. However, this 'enablement' approach has fallen somewhat short in achieving city-wide uptake of development to higher density. The reasons why such measures have not resulted in a widespread uptake beyond Kainga Ora developments in Palmerston North is, I'm sure, multi-factorial. However, in my experience developers frequently cite an apparent lack of market and commercial viability of medium density.

[11] There is a paradox at the heart of things here. The Council has identified that there is a latent demand for small dwellings, which 'medium density' would provide, however development of these is hindered by a prevailing reluctance among developers to

[3] Statement of Evidence of Paul Thomas dated 27 October 2023 at [56].

undertake this form of development. How, then, can one definitively determine the feasibility or market potential if it has not been given a chance to materialise?

[12] In my opinion, this problematic dynamic can be solved partly as a planning issue whereby the introduction of more prescriptive planning measures can play an important role in facilitating a move away from existing land use patterns that Council's Housing and Business Needs Assessment (**HBA**) would suggest have not met the needs of the whole community. Developers' perspective may only shift if they are confronted with a planning framework that actively encourages and incentivises the variability that is essential to meet the specific housing needs that the Council has identified for the city. I understand this view is supported by the evidence of Mr Cullen.

[13] I am not aware of any inherent characteristic or evidence suggesting that medium-density developments would be unsuccessful in Palmerston North, and the Council's HBA suggests that demand for these housing models exists. As far as I am aware, the Palmerston North market is not intrinsically different from any other New Zealand markets where medium-density living has proven to be successful. Mr Cullen's evidence may support this observation too.

[14] Mr Thomas raises questions about the potential demand for medium density in PCG, by reference to the Council's upcoming medium density plan change under Proposed Plan Change I: Medium Density Residential Zone (**PCI**).[4] It is important to note that this plan change is being prepared but has not yet been notified by the Council. I note that recent technical reporting in the preparation of PCI indicates that there are stormwater constraints through the city that may have a significant impact on the locations or areas within the city where medium density could be a permitted activity, due to the need for significant infrastructure upgrades. It is too early to say with certainty, but it may affect about half of the previously anticipated zone extent under PCI.

[15] Addressing the suggestion that that areas proposed for medium density in PCI are likely to negate demand for medium density in PCG, I consider that the PCI proposal, while undoubtedly a positive step to expand options in Palmerston North, does not make Aokautere irrelevant. Firstly, given the potential reduction in the extent of medium

[4] At [58].

density zoning under PCI, it becomes more important to provide medium density provisions in PCG to accommodate the evolving demand for diverse housing options.

[16] Furthermore, as a standalone plan change, PCG remains independently significant. Providing diverse housing options to cater to a broader spectrum of preferences and needs is in my opinion an important principle in the development of new residential growth areas like Aokautere. Accordingly, with or without the influence of PCI's potential reduction, it is important that PCG, on its own merit, provides for the incorporation of diverse housing options within its boundaries.

Resource Consents

[17] At various places in his evidence Mr Thomas refers to historical issues regarding earthworks and resource consenting issues. I am not sure what level of first-hand experience Mr Thomas has had with the historical issues and the current resource consent processes. Personally, I have not been directly involved myself except to the extent that I was involved in negotiations with the landowner regarding the Abby Road Gully crossing and Notice of Requirement. As an officer of the Council, I have retrieved details and report the following:

Regarding Mr Thomas' discussion about the proposed retirement village at paragraph 103

[18] The resource consent application for a proposed retirement village which was made in 2021 was returned by the Council as incomplete under s 88 of the Resource Management Act 1991. The decision to return the application as incomplete has been upheld twice, first by an independent commissioner (Robert Schofield), and then by the Environment Court in response to an appeal by the Applicant. A copy of the Environment Court decision is at **Attachment A**. Mr Thomas says that "*it would be understandable if the applicant felt that the Council did not want the economic stimulus of a project of this scale*" which is not a fair characterisation of the Council's position. The resource consent was returned not because the Council does not 'want' a retirement village, but because the application was incomplete. It was not returned illegitimately.

[19] Indeed, Council officers spent some time consulting with Mr Thomas and Mr Fugle about their aspirations for a retirement village prior to notification of PCG in order accommodate those plans. Consultation on this topic is documented in a recent High Court decision on a judicial review application brought by this submitter, a copy of which is at **Attachment B**. That decision sets out the steps taken by the Council team to consult with Mr Fugle on these matters in the context of PCG.[5] I note that this decision is under appeal by the submitter.

Regarding Mr Thomas' discussion about the consenting of earthworks at the site of the intended retirement village, at paragraph 108

[20] It is true that the Council issued a resource consent for earthworks in the location in 2023. This is LU 7013. I do not know to what extent this resource consent has been acted upon, but I understand that its conditions do require significant testing with regards to the problematic historical earthworks that had been completed in that location. In my view, it is important to note that the resource consent covers not only the earthworks that would be required to complete the fill within the gully, but also provides retrospective consent for earthworks previously undertaken in that area between 2007-2012. I can provide a copy of this resource consent upon request.

Regarding Mr Thomas' discussion about the "Alan Miers Way" crossing resource consent, at paragraph 87 and other places

[21] It is true that the Council has an application before it, which is an earthworks consent application. The Council decided that it needs to be publicly notified. Although Mr Thomas states that "*the Council appears to have put this application on hold*", this application is not on hold for any reason other than the developer has thus far not paid the fixed fee required by the Council to publicly notify land use consents. My assumption is that the applicant does not wish to pay for public notification (I note that the decision to publicly notify this application was also the subject of the aforementioned High Court proceedings). The Council's City Shaping Team is not responsible for the application being on hold.

[5] *CTS Investments LLC v Palmerston North City Council* [2023] NZHC 1742 at [54].

C. RESPONSE TO LES FUGLE ON BEHALF OF CTS INVESTMENTS LTD, WOODGATE LTD, AND TERRA CIVIL LTD

[22] Mr Fugle signals concern about the rising costs of development under PCG that he considers will result in unaffordable sections.[6] While I appreciate the concerns raised about the potential implications of compliance costs on affordable housing, I note that neither Mr Fugle (or myself, I acknowledge) have specific expertise in the complexities of market dynamics. While I can acknowledge that compliance costs might result from PCG requirements, the developers' strategies in response to these costs can influence the final 'pricing' of sections.

[23] Mr Fugle criticises the Council's consultation processes.[7] I note that this submitter judicially reviewed the Councils PCG consultation processes (which I refer to above at paragraph [19]), and these were upheld as being sound in relation to consultation with this submitter.

[24] Mr Fugle refers to a stormwater issue where he describes a PNCC discharge as continuing to cause substantial erosion, sediment outflow and flooding of land 'beneficially owned' by Woodgate Ltd.[8] There are many things in this paragraph that are incorrect, suffice to say that the Council's discharge is lawful and is not causing erosion on this land. My understanding is that previous incomplete earthworks was the primary cause of continued erosion on that land. I do not know whether 'erosion' continues to occur on Mr Fugle's land, but I would expect any such issues to be addressed through the implementation of the resource consent referred to at paragraph [20] above.

[25] At paragraphs 47-49 Mr Fugle discusses his views on the proposed commercially zoned area of PCG. While the Council's views on the merits of this area are best addressed by experts, I note Mr Fugle's suggestion that the property owner would negotiate its sale. I simply wish to record that the Council anticipates the need to work with developers on various aspects of the plan change concerning vesting and the timing of various

6 Brief of Evidence of Les Fugle dated 4 November 2023 at [12].
7 At [14].
8 At [27].

aspects of it. However, the Council does not negotiate through evidence on plan changes.

[26] At paragraphs 59-65, Mr Fugle accuses PNCC of issuing a 'land grab' without compensation in PCG. I note that the intent of PCG is to exercise control over development in accordance with its statutory functions, rather than seeking to obtain excess land. Should funding or land acquisition discussions arise during the progression of PCG's development the Council is committed to engaging in fair and even-handed conversations, adhering to all applicable principles.

D. RESPONSE TO SARAH DOWNS AND SARAH JENKIN ON BEHALF OF WAKA KOTAHI

[27] At paragraphs 8.1- 8.10, Ms Downs includes some discussion about the Palmerston North Integrated Transport Initiative (PNITI), from January 2021, to make the point that the proposed development at Aokautere is inconsistent with the city's own growth plans. This is not the case.

[28] This plan change process was commenced in 2018, and is consistent with the City Growth Plan for 2021-2031. It is explicitly referred to in the recommended programmes for PNITI in relation to safety improvements and access for new housing developments:[9]

> Overall, the programme will:
>
> - Reduce freight movements on residential and place-based streets by up to 50%
> - Support and enable Urban Cycling Masterplan initiatives and investment by flow reductions through the city centre, rural villages/townships and key places/routes increasing the attractiveness of active modes across the study area.
> - Reduce the number of congested intersections by 50% and improve journey times on key freight routes by up to 10 minutes

[9] Palmerston North Integrated Transport Initiative (PNITI) – Network Options Report, January 2021, Waka Kotahi, page iii.

- Reduce deaths and serious injuries by 35-40% across the rural freight network

- Support economic development such as the KiwiRail Freight Hub and North East Industrial Zone which enables positive land use changes within the city

- Improves safety and access for new housing developments at Whakarongo, Aokautere and City West

[29] Ms Downs states that "*the only Aokautere-specific reference is a recommendation for a safety assessment and/or improvements of SH57 in the long term*" at paragraph 8.6, but this is not an accurate reflection of PNITI. While Aokautere is referred to in that section in relation to how SH57 severs the community in Aokautere, it is not mentioned here that improvements to this area are specifically a "long term" project under the PNITI.

[30] In fact, PNITI refers to PCG as a housing development that is expected within 10 years, as shown by the extract below from PNITI, which tracks the 'uncertainty' level of the various identified development projects, including housing development at Aokautere.

FACTOR	TIME	PROBABILITY	IMPACT	COMMENTS
FACTORS AFFECTING DEMAND				
Housing developments (Aokautere, City West, Urban Intensification, Ashhurst)	Within 10 years	Reasonably foreseeable	Medium	This development will create additional, or reallocate some existing, trips on the network. In the medium term (2018-2028) Palmerston North are planning for: • 2,760 greenfield • 2,098 infill • 662 rural/ rural-residential In the long term (2028-2048) they are planning for: • 5,220 greenfield
				• 3,967 infill • 1,253 rural/ rural-residential Covid 19 impacts are outlined in Section 10.3.

[31] Additionally, I note that there is existing residential zoning providing greenfield development space at Aokautere. Approximately 530 lots were already development-enabled before PCG was notified. This shows that PCG is not an 'unexpected' development for the Council to pursue in a way that is contrary with PNITI.

[32] Section 11 of Ms Downs' evidence provides comment on addressing the transport-related effects of growth in the PCG area. This is notwithstanding Ms Downs making the point that Waka Kotahi is not responsible for transport improvements that are required due to growth enabled by PCG.

[33] Despite this, and based on my understanding from notes of technical conferencing on Traffic matters, there are planned network improvements by Waka Kotahi aimed at enhancing road safety for all road users. The traffic experts consider that these Waka Kotahi improvements will address short-term safety concerns, allowing for development under PCG before the completion of major network improvement projects, such as the Ruapehu Drive/ Summerhill Drive upgrades, and before the previously identified 2028 timeline mentioned in my s 42A Report.[10]

[34] I am grateful to Mr Connelly from Waka Kotahi for confirming that these upgrades will happen, and to the traffic witnesses for confirming the positive impact they will have on existing safety issues and/ or issues that might arise from PCG. This is very welcomed information by the Council and its experts.

[35] As to any additional network improvements to intersections or other matters involving the State Highway network (especially once development levels exceed certain safety thresholds), I emphasise my understanding that, as recorded in my s 42A Report, Waka Kotahi might require external funding for timely progress.[11] Council contributions, developer contributions (or other potential funding sources) may be required here. I remain confident that at the appropriate time (my understanding from Ms Fraser is that it is difficult at this stage to identify 'when' further upgrades will be required), the Council, Waka Kotahi, and developers will engage in discussions to address these requirements, ensuring the timely delivery and funding of such works.

[36] It is also worth repeating that provision has been included in the draft 2024-34 LTP to account for these possibilities, including for the preparation of a business case to Waka Kotahi in the first financial year. The Council is committed to continuing this work

10 Section 42A Technical Report of David Murphy dated 15 September 2023 at [56].
11 At [55].

programme and discussions with Waka Kotahi, and I am confident that they will be timed appropriately to enable the orderly growth within PCG.

[37] Both Ms Jenkin and Ms Downs include discussion, responding to my s 42A Report, that Waka Kotahi is not accountable for funding the costs associated with growth resulting from PCG. While I acknowledge the complexity of funding and the limits of these obligations, I am concerned that delving into a debate on this matter within a hearing context might not be constructive. Nevertheless, I consider it important to highlight that development within the PCG area is already largely enabled without PCG, and this has been the case for many years. Accordingly, and as PNITI itself acknowledges, there are existing challenges with the roading network through Aokautere including the local road and State Highway networks.

E. RESPONSE TO CHRISTLE PILKINGTON ON BEHALF OF PALMERSTON NORTH INDUSTRIAL & RESIDENTIAL DEVELOPMENT LTD

[38] Ms Pilkington gives her view that it is inappropriate to 'stifle' any development due to external agencies' failure to upgrade roading infrastructure in timely manner.[12] Ms Pilkington then expresses concern as to Waka Kotahi commitment to progress land transport upgrades to facilitate residential growth elsewhere.

[39] As noted above, I am pleased to see that the traffic experts in this case have reached agreement that Waka Kotahi's proposed works will address short term safety concerns. From my perspective it is reasonable to take Waka Kotahi's word that these improvements will occur, but I recognise that there may need to be appropriate provisions crafted to address these matters. As to further works required beyond certain safety thresholds, I am confident that issues as to funding including any necessary business cases and discussions with developers can occur at the appropriate time.

[40] I note that various other witnesses have also commented on matters relating to the required road network upgrades, commenting on certainty regarding timing and investments in the necessary measures. My views in relation to these matters are

[12] Statement of Evidence of Christle Pilkington dated 27 October 2023 from [19].

sufficiently captured in my responses above to Ms Pilkington and the Waka Kotahi witnesses above.

[41] At paragraphs 51-62 of Ms Pilkington's evidence, and also generally in Mr Fugle's statement of evidence, is some discussion about the need for various gullies to be vested. While I leave the substantive aspects of responding to these matters to Ms Copplestone and the relevant technical experts, I wish to comment generally as to the Council's approach to vesting.

[42] While site-specific stormwater infrastructure intended to support large non-residential developments may be able to remain in private ownership, stormwater infrastructure that benefits multiple residential properties is generally best vested with Council to ensure it is publicly accessible and maintained over the lifetime of the asset. In circumstances where such infrastructure will serve multiple residential properties but is provided by a single developer at the time of subdivision, the Council is willing to negotiate a developer agreement. This could involve the developer providing and vesting the stormwater infrastructure in lieu of paying stormwater development contributions.

F. RESPONSE TO JOHN FARQUHAR ON BEHALF OF HERITAGE ESTATES (2000) LIMITED

[43] Mr Farquhar makes comments in relation to Private Plan Change B (**PPCB**) initiated by the submitter.[13]

[44] I wish to be clear that it is not so simple as to say that PCCB has been placed on hold by the Council. The reality is that PCCB was lodged with the Council in 2009 and notified but has since become stale. I communicated the Council's views about PPCB to Mr Paul Thomas (who was engaged by HEL at the time) by letter dated 7 July 2021. In this letter I stated that that PPCB would need to be lodged afresh, as it is well outside of the time limits for a plan change such as to be an abuse of process. A copy of that letter is at **Attachment C**.

[45] While it is accurate, as noted by Mr Farquhar, that the Council anticipated the completion of the Kākātangiata plan change by now, unforeseen circumstances have

[13] Statement of Evidence of John Farquhar dated 3 November 2023 at [6].

affected this timeline. However, it is important to clarify that no specific undertakings or agreements were made with Mr Farquhar regarding the completion of the Kākātangiata plan change within this timeframe. Despite the delay, Mr Farquhar has cooperated by refraining from re-lodging a private plan change request. This is acknowledged, and the expectation remains that the preparation will progress with the goal of notifying the change as soon as possible, noting that the final timing of the plan change may be impacted by broader 2024-34 LTP decisions the Council makes regarding the operational and capital (growth) expenditure necessary to support the rezoning and development of Kākātangiata.

[46] Despite this, I note that Mr Farquhar offers various opinions from a developer's point of view on several aspects of PCG. It is noteworthy that in paragraph 10 Mr Farquhar supports a developer led approach based on his views as to the competence, resources, and market-savvy nature of land developers in Aokautere, as opposed to the Council. Additionally, Mr Farquhar characterises the Council as a trade competitor. While this viewpoint is interesting, it is essential to recognise that the Council's objectives with PCG is to facilitate and regulate development in accordance with its statutory functions.

[47] Further, as to the Council development referred to in this paragraph at Whakarongo, the zoning for this development and the resource consents necessary were approved by hearing commissioners. The Council is unconcerned as to the current rate of sale, noting that their marketing coincides with the market slowdown. My understanding is that there remains significant interest in the properties, but that financing is presenting as a problem for potential buyers. Ultimately, the Council is happy that it continued to deliver sections in this market at a time when the private sector was not doing so, and this, in my opinion, is to the Council's credit.

28 November 2023

David Murphy

G. ATTACHMENTS

Attachment A – Woodgate Limited v Palmerston North City Council [2023] NZEnvC 252

Attachment B – CTS Investments LLC v Palmerston North City Council [2023] NZHC 1742

Attachment C – Letter to Paul Thomas dated 7 July 2021

ATTACHMENT A

Woodgate Limited v Palmerston North City Council [2023] NZEnvC 252

IN THE ENVIRONMENT COURT
AT WELLINGTON

I TE KŌTI TAIAO O AOTEAROA
KI TE WHANGANUI-A-TARA

Decision No. [2023] NZEnvC 252

IN THE MATTER	of an appeal under s 358 of the Resource Management Act 1991
BETWEEN	WOODGATE LIMITED
	(ENV-2023-WLG-004)
	Appellant
AND	PALMERSTON NORTH CITY COUNCIL
	Respondent

Court:	Environment Judge L J Semple sitting alone under s 279 of the Act
Hearing:	27 September 2023 at Wellington
Appearances:	G Woollaston for Woodgate Ltd
	N Jessen for the Council
Last case event:	27 September 2023
Date of Decision:	21 November 2023
Date of Issue:	21 November 2023

DECISION OF THE ENVIRONMENT COURT

A. The appeal is refused. The decision of the Palmerston North City Council to return Resource Consent Application RC6923 as incomplete under s 88(3) of the Act is upheld.

B. Costs are reserved. Any application for costs is to be filed within 10 working days and any response within five working days of receipt of any application.

REASONS

Background

[1] The Appellant lodged an application for resource consent (RC6923) with the Palmerston North City Council (the Council) on 13 July 2022. That application sought subdivision and land use consents to construct, maintain and operate a retirement village at 131-153 Pacific Drive, Fitzherbert, Palmerston North City.

[2] By letter dated 9 August 2022, the Council determined the application to be incomplete under s 88(3) of the Act.

[3] The Appellant lodged a Notice of objection under s 357 of the Act on 10 August 2022 and that objection was heard by an Independent Commissioner (Commissioner Schofield) on 7 March 2023.

[4] By decision dated 5 April 2023, Commissioner Schofield dismissed the objection and upheld the original decision that the application was incomplete under s 88(3) of the Act. It is this decision which is the subject of the appeal now before the Court.

The Appeal

[5] The appeal was lodged on 28 April 2023 pursuant to s 358 of the Act and alleges that the "Commissioner misdirected himself as to the data threshold to be met under 88(3), and as to the appropriateness of aggregating minor data elements/deficiencies, each of which were amenable to being … within a s 92 request for information process, to form a view that the totality of the application was

insufficient for s 88(3) purposes".[1]

The Law

[6] Section 88 relevantly provides:

> (2) An application must—
>
> (a) be made in the prescribed form and manner; and
>
> (b) include the information relating to the activity, including an assessment of the activity's effects on the environment, that is required by Schedule 4.
>
> (c) *Repealed.*
>
> …
>
> (3) A consent authority may, within 10 working days after an application was first lodged, determine that the application is incomplete if the application does not—
>
> (a) include the information prescribed by regulations; or
>
> (b) include the information required by subsection (2)(b)
>
> …
>
> (3A) The consent authority must immediately return an incomplete application to the applicant, with written reasons for the determination.

[7] Schedule 4 provides that an application must include the following matters relevant to this appeal:

- an assessment of the activity against the matters set out in Part 2;
- an assessment of the activity against any relevant provisions of a document referred to in s 104(1)(b);
- an assessment of the effects of the activity in "such detail as corresponds with the scale and significance of the effects that the activity may have on the environment" and including the information required by cl 6; and addressing the matters specified in cl 7.

---

1 Opening submissions of Counsel for the Appellant at [6].

[8] Clause 6 requires, relevant to this appeal:

- an assessment of the actual or potential effect on the environment of the activity;
- if the activity includes the discharge of any contaminant, a description of—
  - the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and
  - any possible alternative methods of discharge, including discharge into any other receiving environment;
- a description of the mitigation measures (including safeguards and contingency plans where relevant) to be undertaken to help prevent or reduce the actual or potential effect.

[9] Relevant to this matter, cl 7 provides that an assessment must address any discharge of contaminants into the environment, and options for the treatment and disposal of contaminants and any risk to the neighbourhood, wider community or the environment through natural hazards.

[10] As the High Court sets out in *Aspros v Wellington City Council*, s 88(3) provides the Council with a discretion to determine whether an application is complete, an exercise which the Court refers to as "an administrative decision to be made in light of that particular application" and which must be made bearing in mind the requirement that "the material provided under section 88(2) … should be proportionate to the potential effects of the activity".[2]

[11] Determining whether the material is proportionate to the potential effect is "to be reasonably and objectively assessed; it is not merely what an applicant considers is appropriate".[3] Moreover, "both the local authority and other persons who may be affected should be given enough information to assess for themselves the potential

---

2 *Aspros v Wellington City Council* [2019] NZHC 1684, (2019) 21 ELRNZ 276 at [29] and [31].

3 *Mawhinney v Auckland Council* [2017] NZEnvC 162 at [53] (*Mawhinney*).

effects of the proposal".[4]

The Court's powers on appeal

[12] The relatively recent decision of the Court in *Country Lifestyles Ltd v Auckland Council,* traverses the scope of the Court's powers on appeal under s 358 of the Act, specifically the extent to which the Court can, and should, conduct a de novo determination of a s 88(3) decision of the Council on appeal.[5]

[13] In *Mawhinney* the Court noted that the decision making power in s 358 of the Act:[6]

> … occurs in a suite of miscellaneous provisions in Part 14 including section 357 and sections 357A to 357D RMA. These all relate to objection and appeals for various procedures. Their place in the scheme of the RMA suggests a relatively quick review for error rather than a comprehensive view of the merits (which does not make much sense in relation to a procedural error anyway).

[14] Put another way:[7]

> We consider it is likely that Parliament did not intend the Environment Court to substitute its judgment on all the procedural issues which are the subject of section 357 objections, to be subject to a full "de novo" assessment by the Environment Court. We consider the "review" type tests and an ultimate "fairness and reasonable" assessment are likely all that is required in most circumstances under section 357.

[15] "Most circumstances" does not, of course, mean all. The Court accepted in *Mawhinney* that some circumstances may call for a different approach and made reference to the decision in *Far East Investments Ltd v Auckland City Council* where the Court determined that it had "the same power and discretion to impose a condition for a financial contribution of land as the primary consent authority had".[8] Moreover the Court in *Mawhinney*, despite contending a "fair and reasonable" assessment was all that was required, conducted a *de novo* assessment in accordance with the parties'

---

4 *Mawhinney* at [55].

5 *Country Lifestyles Ltd v Auckland Council* [2022] NZEnvC 247 (*Country Lifestyles*).

6 *Mawhinney* at [101].

7 *Mawhinney* at [104].

8 F*ar East Investments Ltd v Auckland City Council* A048/01 at [41].

preference.

[16] Conversely, in *Country Lifestyles*, the Court determined that "a 'fresh view' of the Council's decision under s 88(3)" was neither helpful nor appropriate and as such adopted a fair and reasonable test.

[17] In this case, Counsel for both the Appellant and Respondent identified that a fair and reasonable test was appropriate, and no evidence was adduced on which the Court could conduct its own *de novo* assessment. As such, the Court limits itself to an assessment as to whether the decision of Commissioner Schofield was fair and reasonable.

The Commissioner's Decision

[18] The decision records, in full, the matters identified by the Council as being in insufficient detail such that the application was determined to be incomplete under s 88(3). As recorded in the decision at paragraphs [34] and [35], the matters identified by the Council contain a mix of major and minor deficiencies.

[19] Acknowledging that some matters were of a minor nature and may have been "rectifiable through the further information process following formal receipt of the resource consent application",[9] the Commissioner determined that there were a "number of … matters … of more than minor importance".[10]

[20] In particular, the decision identifies the "relatively large-scale level of earthworks" requiring a "high standard of geotechnical compliance", which the Council identified could not be adequately assessed without the provision of additional information. This included matters identified in the Applicant's peer review report relating to pre-earthworks testing and reporting for areas where earthworks had previously been undertaken. The absence of a natural hazards assessment for fault rupture, settlement, liquefaction and slope stability as required by sch 4, cl (7) is

---

9 Decision at [35].

10 Decision at [34].

also identified as a significant information deficit.

[21] Further, the decision notes the development could be expected to have "significant stormwater management effects, not only from stormwater generated within the site through new impervious surfaces, but from that received from off-site, from the existing residential development upstream from the site. In this respect, I find that the resource consent application contained significant information shortcomings in addition to many minor matters".

[22] These matters are identified in the Council's letter and require among other things "a comprehensive Stormwater Management Plan (SMP) prepared by a chartered professional stormwater engineer".

[23] In answer to questions from the Court, Counsel for the Appellant acknowledged that the "least adequate element" was stormwater. Counsel also confirmed that the Appellant was aware that the "extent and adequacy of compaction had been of concern to the Council" and there "should have been liquefaction advice included". Counsel also accepted the Appellant was aware that it was a "complex site".

[24] From the information provided, it was not possible for the scale and significance of the potential effects of the proposal in relation to stormwater discharge and geotechnical and natural hazard risk, to be adequately determined. As such, the application failed to meet the requirements of s 88 and sch 4 of the Act.

[25] The Appellant argued at both the objection hearing and before this Court, that if such information gaps existed, the Applicant ought to have been afforded the opportunity to address those deficiencies via a s 92 process, rather than having the application returned under s 88(3).

[26] I agree with Commissioner Schofield's observation that "the Council is not obliged to proactively pursue information inadequacies". As the Court noted in *Country Lifestyles* "[i]f the application does not contain the fundamental information, it

is not appropriate to fill the gaps with a request for further information".[11] The gaps in this instance were fundamental.

[27] Having considered the decision, I am satisfied that Commissioner Schofield correctly categorised the deficiencies in stormwater, geotechnical and natural hazard assessment as significant information gaps which warranted the return of the application under s 88(3). The decision to decline the objection was therefore fair and reasonable in the circumstances.

[28] There is, however, one area of the decision on which I want to make some further comment. Counsel for the Council submitted that "it is appropriate and indeed correct for its letter of determination of 9 August 2022 to identify all matters in respect of which deficiencies were identified"[12] and that "it should not be required to 'filter out' all those identified deficiencies that might in other circumstances be excused as merely matters of detail".[13] Commissioner Schofield appears to accept this submission saying at paragraph [33] of the decision "it is appropriate for the Council to identify all information required to assist in the processing of a resource consent application, including minor matters".

[29] While there may be some efficacy or helpfulness in advising an applicant of all matters that have been identified on a review of the application, a determination under s 88(3) should refer clearly to the matters on which that determination has been made.

[30] As the Court addressed in *Aspros v Wellington City Council*:[14]

> The information at the time the application is made must conform with the requirements of sch 4, in order for the application to be accepted as complete. At the time of the decision to refuse or grant the application, however, the question then arises whether the Council had adequate information to make its decision. This second inquiry has no place in the s 88 consideration of completeness of the application.

---

11 *Country Lifestyles* at [76].

12 Opening submissions at [25].

13 Opening submissions at [23].

14 *Aspros v Wellington City Council* [2019] NZHC 1684, (2019) 21 ELRNZ 276 at [30].

[31] In this instance, the Council accepts that its letter of 9 August 2022 contains matters that render the application incomplete under s 88, matters that could be resolved by an information request under s 92 and matters which go to whether consent should be granted under s 104. As such, it is difficult, if not impossible, to discern the relevant considerations under s88 from those matters which "have no place in the s 88 consideration of completeness".

[32] While in this instance the decision clearly identifies the major deficiencies related to stormwater, geotechnical and natural hazard assessment as the grounds for a return of the application under s 88(3), the same cannot be said for the original determination letter of 9 August 2022. That is a matter the Council are invited to reflect on in future decisions.

Determination

[33] I am satisfied that the decision reached by Commissioner Schofield to decline the objection was fair and reasonable. The application is incomplete pursuant to s 88(3).

Costs

[34] Costs are reserved. Any application for costs is to be filed within 10 working days and any response within five working days of receipt of any application.

L J Semple
Environment Judge

ATTACHMENT B

CTS Investments LLC v Palmerston North City Council [2023] NZHC 1742

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE PAPAIOEA ROHE

CIV-2022-454-00099
[2023] NZHC 1742

IN THE MATTER	of the Judicial Review Procedure Act 2016, entailing an application for Judicial Review, and associated relief
BETWEEN	CTS INVESTMENTS LLC First Plaintiff
	WOODGATE LIMITED Second Plaintiff
	TERRA CIVIL LIMITED Third Plaintiff
AND	PALMERSTON NORTH CITY COUNCIL Defendant

Hearing: 26 June 2023

Counsel: G J Woollaston for Plaintiffs
N Jessen for Defendant

Judgment: 5 July 2023

JUDGMENT OF RADICH J

Introduction

[1] In August 2022, Palmerston North City Council (the Council) notified a plan change – known as Plan Change G (PCG) – to provide additional housing supply in the Aokautere area, to the southeast of Palmerston North City.

[2] When it did so, it was in the course of processing resource consent applications by the second applicant, Woodgate Limited (Woodgate) for a retirement village on

land to which PCG related.[1] Two months after PCG was notified, the Environment Court, on the Council's application, made orders bringing PCG into immediate effect, in advance of public hearings on PCG which are scheduled to take place later in the year.

[3] The PCG provisions place obligations on the applicants in the development of the proposed retirement village that are more onerous than would have been the case if the resource consent applications had been considered under the provisions of the Palmerston North City Council District Plan (the District Plan) that are replaced by PCG.[2]

[4] The applicants have submitted in opposition to PCG. They have not challenged the Environment Court's decision. However, in this proceeding they seek orders setting aside the Environment Court's decision and, effectively, setting aside the Council's decision to notify PCG on the basis of allegations that:

(a) The Council, in preparing PCG, failed to consult with people who represented adequately the interests of the applicants.

(b) To the extent that it did consult with people who represented the interests of the applicants, the Council did not provide sufficient information to enable them to assess the impacts of PCG and to provide meaningful submissions.

(c) The applicants should have been given notice of the Council's intention to make an application under s 86D of the Resource Management Act 1991 (the RMA) for PCG to have immediate effect.

[5] The issues that arise are these:

(a) What is the nature and extent of the Council's obligation to consult during the preparation of a proposed plan?

---

1 As it is described more fully below, Woodgate is proposing to develop the retirement village land owned by the first applicant, CTS Investments LLC, and the third applicant, Terra Civil Limited, and is a land development company, acting as an agent for CTS Investments and Woodgate.

2 The applicants resource consent application would fall to be determined under PCG as it was returned by the Council as being incomplete after the Plan Change was notified.

(b) Did the Council consult during the preparation of PCG with people who represented sufficiently the interests of the applicants?

(c) Did the Council, in consulting with people it regarded as representing sufficiently the interests of the applicants, provide those people with adequate information to enable consultation to be meaningful?

(d) Should the applicants have been given notice of the Council's s 86D application?

(e) If there was a flaw in the consultation undertaken by the Council on PCG:

(i) Is the relief sought by the applicants available to them?

(ii) If relief is available, should the Court in the exercise of its discretion, decline to grant relief by reason of three factors advanced by the Council: an alleged lack of prejudice, delay and improper purpose through the proceeding being, in effect, a collateral attack on the Environment Court's s 86D decision?

[6] For the reasons I go on to give, I have not found there to have been any flaws in the consultation undertaken by the Council as it was preparing PCG and, had there been a flaw, it would not have been appropriate for the Court to have granted the relief that is sought.

Background

The parties

[7] CTS Investments LLC (CTS), incorporated in the United States of America, owns a 48.16 ha parcel of land just to the northeast of Pacific Drive in the Aokautere residential area in Palmerston North. Woodgate has an unconditional sale and purchase agreement over the land with CTS. The transfer has yet to take place but Woodgate refers to itself as being the equitable owner of the land.

[8] Leslie Fugle (Mr Fugle) is Woodgate's primary director and shareholder. Woodgate is a land development company.

[9] Terra Civil Limited (Terra Civil) is a land development company as well. It is described as being "the agent for CTS Investments and Woodgate Limited".[3]

The retirement village application

[10] On 19 March 2022, Woodgate applied for a resource consent to undertake earthworks for the proposed retirement village.[4] On 13 July 2022, it applied for a land use and subdivision consent to construct and operate a retirement village complex on the Pacific Drive land (the retirement village application).

[11] On 8 August 2022, the Council publicly notified PCG. It had been discussing with landowners in the area covered by PCG the potential changes it would bring on occasions since 2018, as outlined in more detail in [53] below.

[12] On 9 August 2022, the Council returned the retirement village application under s 88(3A) of the RMA as incomplete because it did not include certain mandatory information in its geotechnical report and because information on landscape, urban design, stormwater management and traffic was regarded as being insufficient.

[13] On 10 August 2022, Mr Fugle objected to the Council's decision to return the application "on behalf of the applicant" under s 357 of the RMA. The objection was not upheld.

[14] On 25 August 2022, the Council applied to the Environment Court for an order, under s 86D of the RMA, that PCG be given immediate effect, notwithstanding that the public submission process had not concluded and hearings had not begun. As is common (as discussed further below), the application was brought by the Council on an ex parte basis. It was granted by the Environment Court on 25 October 2022.

---

3 In the applicants' joint submission on PCG of 5 September 2022. It was explained during the hearing that Terra Civil is a company that is controlled by or on behalf of Mr Fugle's children and stepchildren. It has significant land holdings adjacent to the CTS land, with which this proceeding is concerned.

4 The proposed earthworks covered an 8.4 ha area, involved the movement of 3,400 metres of earth and the work was projected to take 11 weeks.

[15] As a result of the retirement village application having been returned by the Council, on 31 August 2022, Woodgate made a new application for a resource consent to begin the earthworks for the retirement village. That application remains extant.

[16] CTS, Woodgate and Terra Civil have prepared a joint submission on PCG and will be heard on the submission later in the year.

Plan Change G

[17] PCG has been under development since 2018. Its purpose is to provide additional housing supply in Aokautere to help meet growth projections for Palmerston North over the medium to long term. Palmerston North's population is projected to increase by over 31,000 people over the next 30 years – from 90,500 to 121,664 people. Five hundred new dwellings are said to be needed each year between now and 2031 and PCG forms a part of the approach taken by the Council to cater for that growth. It will do so by rezoning land and providing 1,050 new homes of differing densities.

[18] The development of PCG followed a master plan process – a high-level plan that provides a conceptual layout to guide future growth and development. The master planning process saw the creation, alongside PCG, of a structure plan – a series of maps and diagrammatic representations of the proposed zoning, layout, features, character and transportation links for areas being developed.

[19] To give effect to the structure plan, PCG:

(a) rezones 454 ha of land within the structure plan area from rural-residential and recreation to residential, local business, conservation and amenity zones;

(b) makes provision for a proposed Aokautere residential area with an associated set of objectives, policies and rules;

(c) makes provision for a proposed local business zone with the addition of the Aokautere Neighbourhood Centre Precinct Plan which includes

a set of objectives, policies and rules for the development of a local centre; and

(d) rezones a network of gullies within the area to become part of a conservation and amenity zone.[5]

[20] As is discussed in further detail in [53] and [54] below, in preparing PCG, the Council consulted under cl 13 of sch 1 of the RMA with iwi, landowners, government departments and agencies, community groups and members of the community. The report under s 32 of the RMA, required to accompany a plan change proposal, describes the Council as having engaged, in particular, with the three landowners who owned the developable land within Aokautere. Mr Fugle was seen by the Council as the representative of one of those landowners. The Council described the interests of the applicants as "the Fugle interests".

[21] Submissions on PCG closed on 5 September 2022. One hundred and seven submissions were received. Hearing commissioners are being appointed and it is expected that submissions on the Plan Change will be heard in the last quarter of the year.

The Environment Court decision

[22] Under s 86D of the RMA, a local authority may apply, before or after a proposed plan is publicly notified under cl 5 of sch 1 of the RMA, to the Environment Court for rules in the plan to have legal effect from a date other than the date on which the decision on submissions relating to the rules in the plan would normally be made and publicly notified under cl 10(4) of sch 1 of the RMA.[6]

[23] The Act does not specify the process to be followed or the criteria to be applied in determining an application under s 86D. However, as the Environment Court has said, it was likely to have been contemplated by Parliament that, in the normal course of events, applications under the provision will be determined by the Court on an

---

5 As described in [85] of the s 32 report on PCG.
6 Resource Management Act 1991, s 86D(2).

ex parte basis.[7] If other parties were involved in the process, there may well be substantial delay and the s 86D process would effectively give rise to the premature consideration of issues that need to be considered by a Council itself through its hearings on a plan change proposal under sch 1.

[24] That reality is illustrated in the Environment Court's decision here in which the Court observed that the retirement village application was before the Council and that, if the application was considered as a controlled activity subdivision under the rules that PCG would replace, that would put at risk the planning strategy and related benefits that were intended from PCG.[8]

[25] The Environment Court described the discussions that had taken place in 2019 and 2020 between the Council and landowners on PCG in the following terms:

> [36] Landowner discussions took place in 2019 and 2020 regarding the draft Structure Plan, with the availability of more residentially zoned land in the area generally supported. One of the messages was that the landowners wanted re-zoning to occur quickly. … The other major landowner, Les Fugle, was supportive of rezoning to enable more development, but did not support the Council's structure plan approach, protection of the gullies from development, stormwater management controls, the inclusion of a LBZ and the provision of medium density housing.
>
> [37] Further discussions with landowners occurred over 2021 and 2022 around specific issues. The concept of a retirement village was discussed with one landowner (Mr Fugle) including its relationship with the proposed Structure Plan. A retirement village has been provided for within the Structure Plan but is carefully located in a manner that complements and supports the planning strategy for the Aokautere growth area.
>
> (Footnotes omitted).

[26] The Court's reasons for its view that PCG should be given immediate effect were these:

> [53] Although the area affected is large, the Council has engaged with the landowners. The activity status of some activities will be more stringent and there will be more standards and matters to address when making applications for resource consent. PCG will have a definite impact on landowners who wish to develop their land in a way that is contrary to the structure plan in PCG. However, I consider the risk to the environment in terms of the ongoing effects of unplanned subdivision and development are such that it is appropriate, and in fact necessary, that the PCG rules be given legal effect now

---

7 *Re New Plymouth District Council* [2011] NZEnvC 8 at [35] and [36].

8 *Re Palmerston North City Council* [2022] NZEnvC 214 at [18], [21] and [52].

> rather than when decisions on submissions are made. It is difficult to 'take back' poor planning outcomes that fail to provide for necessary housing and appropriate infrastructure and that damage the natural environment. Affected landowners (and members of the public) now have the opportunity to challenge the provisions through the Schedule 1 process.

The applicants' submission on Plan Change G

[27] In their 5 September 2022 submission on PCG, the applicants described themselves in the following way:

> The submitters are one of three major landowning interests associated with the Plan Change area as shown on map page 13 of the Master Plan document being the land labelled as "Fugle Interests".

[28] Page 13 of the master plan document shows three large tracts of land within the PCG area. One is labelled "Fugle Interests", the second is labelled "Green Interests" and the third is labelled "Waters Interests". Green and Waters are the other landowners who have interests within the PCG area. The way in which Mr Fugle's name is lent to the interests of all three applicants in this proceeding is relevant to the second issue that is discussed below.

[29] In their submission on PCG, the matters raised by the applicants include the following:

(a) They were concerned that PCG would impose a specific design solution on the development of the area.

(b) They observed that some land was "down zoned" from residential to conservation.

(c) They saw PCG as representing a "major shift" from enabling developments to be designed and tested through resource consent processes to directing design solutions from the outset.

(d) They saw the implementation of PCG through the structure plan being more akin to a "detailed design master plan".

(e) They expressed the view, as they do in this proceeding, that a joint process should have been in place with landowners at the outset – a form of partnership.

(f) They were concerned about the direction to establish a neighbourhood centre in the retirement village area.

(g) They were opposed to the extent of medium density residential development that was being directed.

(h) They expressed concerns about what they saw as being errors in supporting technical reports.

(i) While supporting provision made in PCG for the retirement village, they believed that the site should be extended to the southeast.

(j) A proposed road in the plan was opposed, as was a change from residential zoning to conservation and amenity zoning in a part of the plan.

(k) They opposed the proposed location of the neighbourhood centre, submitting that it should be located elsewhere.

(l) They opposed assessment criteria for retirement villages.

(m) They opposed the requirement for transport network improvements to be in place before subdivision.

(n) They opposed proposed non-complying activity rules.

[30] The applicants' submission on PCG illustrates the extent to which they are affected by it. The effects on them are confirmed by Mr Dunidam, the principal planner at the Council. In evidence for the s 86D process, he observed that, unlike the position under the previous rules, a retirement village would be assessed under PCG on the basis of its location within the structure plan, its connectivity with the roading network, the ways in which it integrates with proposed local business zones, a number of specific design outcomes and principles and the availability and timing of infrastructure, including identified transport infrastructure. If a proposed retirement village is not located and developed in accordance with the structure plan, it would become, under PCG, a non-complying activity.

Legal principles

[31] Schedule 1 of the RMA makes provision for the preparation, change and review of policy statements and plans.

[32] Under cl 3(1), during the preparation of a proposed plan, a local authority "shall consult" with an identified list of groups and office holders including Ministers of the Crown, local authorities and tangata whenua. Clause 3(2) adds to the mandatory requirements in subcl (1) a residual discretion, in the following terms:

> (2) A local authority may consult anyone else during the preparation of a proposed policy statement or plan.

[33] Subclause (4) adds:

> (4) In consulting persons for the purposes of subcl (2), a local authority must undertake the consultation in accordance with s 82 of the Local Government Act 2002.

[34] Section 82 of the Local Government Act 2002 (the Local Government Act) is a long provision but it needs to be set out because different parts of it are relevant here. It is in the following terms:

> **82 Principles of consultation**
>
> (1) Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken, subject to subsections (3) to (5), in accordance with the following principles:
>
> (a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons:
>
> (b) that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority:
>
> (c) that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented:
>
> (d) that persons who wish to have their views on the decision or matter considered by the local authority should be provided

by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons:

(e) that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration:

(f) that persons who present views to the local authority should have access to a clear record or description of relevant decisions made by the local authority and explanatory material relating to the decisions, which may include, for example, reports relating to the matter that were considered before the decisions were made.

(2) A local authority must ensure that it has in place processes for consulting with Māori in accordance with subsection (1).

(3) The principles set out in subsection (1) are, subject to subsections (4) and (5), to be observed by a local authority in such manner as the local authority considers, in its discretion, to be appropriate in any particular instance.

(4) A local authority must, in exercising its discretion under subsection (3), have regard to—

(a) the requirements of section 78; and

(b) the extent to which the current views and preferences of persons who will or may be affected by, or have an interest in, the decision or matter are known to the local authority; and

(c) the nature and significance of the decision or matter, including its likely impact from the perspective of the persons who will or may be affected by, or have an interest in, the decision or matter; and

(d) the provisions of Part 1 of the Local Government Official Information and Meetings Act 1987 (which Part, among other things, sets out the circumstances in which there is good reason for withholding local authority information); and

(e) the costs and benefits of any consultation process or procedure.

…

[35] As the Environment Court has observed, the discretion to consult in cl 3(2) is left deliberately wide in order that a council can, in appropriate cases, consider the

groups of people it may wish to consult.[9] The Environment Court observed in *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* that, while s 82 of the Local Government Act does not apply expressly to cls 3(1) and (3), which identify those with which local authorities "shall consult", it was likely that Parliament intended the provision to apply to cl 3(2) to ensure that discretionary consultation undertaken by a local authority under that clause was meaningful.[10]

[36] While that must be so, and while s 82 will provide clear guidance to local authorities on the principles of consultation, it is no more than that: an expression of the common law consultation requirements. Those common law requirements will apply alongside s 82 and must, equally, inform the decision on the part of a local authority on whether to consult and, if so, how it will consult under cl 3(2).

[37] In these circumstances, it is necessary to say something about the common law requirements. They have been expressed so well in so many cases that the summary that follows can only be regarded as a skim across the relevant principles with an eye to the facts and circumstances of this case.

[38] Consultation is the way in which, for certain exercises of public power, the principles of natural justice are applied. A right to natural justice is triggered if an exercise (or a proposed exercise) of public power will be likely to affect someone's rights, interests or expectations.[11]

[39] However, the requirements of natural justice – the form the consultation should take – will vary materially, depending on the circumstances of any given case. At one end of the spectrum, a decision maker acting in accordance with the principles of natural justice might need to hold a hearing and allow for the examination of witnesses and the presentation of submissions. At the other, it might be enough for there to have been a conversation or an exchange of emails. Relevant factors will include the nature of the person or entity being consulted, the nature of the interest at stake (whether the

---

9 *Thomas v Bay of Plenty Regional Council* EnvC Christchurch A011/08, 1 February 2008 at [52]. See also *Briggs v Kapiti Coast District Council* [2011] NZEnvC 57.

10 *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* [2010] NZRMA 285 (HC) at [47].

11 See generally *CCSU v Minister for the Civil Service* [1985] AC 374 (HL); *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA); and *Wellington International Airport Limited v Air New Zealand* [1993] 1 NZLR 671 (CA).

power will cause an inconvenience or affect a liberty), the statutory scheme, the nature of the power being exercised, whether there will be further opportunities for input and whether there have been prior opportunities for input.[12]

[40] Accordingly, consultation on a high-level policy might properly be carried out with representatives or focus groups while a decision on a particular issue will be likely to require consultation with everyone who may be affected. The point is that, depending upon the decision in question, consultation need not always involve consulting individually with all affected persons.[13]

[41] The essential ingredients of consultation, as relevant here, may be summarised in the following way:

(a) It requires a meaningful opportunity to comment at an appropriate stage on a proposed exercise of power.[14]

(b) Those to be consulted must be provided with details of relevant information the decision maker is likely to take into account so that intelligent responses may be made.[15]

(c) Sufficient time must be allowed to enable a reasonable opportunity for those consulted to express their views.[16]

(d) Consultation cannot be treated as a mere formality. By the same token, it is not negotiation. There is no requirement that those consulted should agree with the final decision.[17]

(e) A decision maker must maintain an open mind and be ready to change its mind or even start afresh in the context of resource consent decision-making (rather than, for example, decision making by a judicial

---

12 See generally *R v Home Secretary, ex parte Doody* [1994] 1 AC 531, [1993] 3 All ER 92 at 106; and *Ali v Deportation Review Tribunal* [1997] NZAR 208 (HC).

13 *XY v Attorney-General* [2016] NZHC 1196, [2016] NZAR 875.

14 *New Zealand Maori Council v Attorney-General* [the Forests case] [1989] 2 NZLR 142 (CA) at 152.

15 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA) at [108].

16 *Diagnostic Medlab Limited v Auckland District Health Board* [2007] 2 NZLR 832 (HC) at [290].

17 *New Zealand Pork Industry Board v Director-General of Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477 at [168].

officer). The test in resource consent decision-making is whether the Council approached the decision with a closed mind.[18]

[42] From these broad principles, the nature and extent of the obligation to consult on the preparation of a proposed plan under cl 3(2) falls to be considered.

First issue – what is the nature and extent of the Council's obligation to consult during the preparation of a proposed plan?

[43] For the Council it is said that cl 3(2) of sch 1 of the RMA and s 82 of the Local Government Act work separately. It is said that, first, the Council has a discretion as to who it will consult with under cl 3(2) and then, having determined that, it will turn to s 82 to consider how it will consult with them. It is said that, at the first step, the Council has an option to design a consultative process that is administratively efficient and appropriate to the nature of the proposal which may involve, for example, consultation with representatives with classes of interested people or spokespeople of interested groups. But it does acknowledge that the Council should, at the first step, be informed by common law natural justice principles.

[44] I do not believe that the two provisions work in silos as has been suggested. As discussed in [39], who to consult with and the way in which consultation should be undertaken requires a consideration of a range of factors.

[45] Section 82(1)(a) and (b) of the Local Government Act, for example, requires the Council to consider who the persons are who will or may be affected by a decision. The provisions work together.

[46] In this case, the following considerations are relevant:

(a) The discretion in cl 3(2) is as broad as can be. Having directed, under cl 3(1) the office holders and groups who "shall be" consulted, subcl (2) goes on to say that "a local authority may consult anyone else …".

---

[18] *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541 [2019] 2 NZLR 501 at [77].

(b) The point at which consultation takes place is "… during the preparation of a proposed … plan".[19] In other words, the Council is not consulting before it prepares a plan. So it is not looking for views on whether it should begin a plan change process. And it is not consulting at the end of the process. Therefore, it is not looking for views on final proposals or provisions. It is consulting while it is considering what the proposed changes might be.

(c) The subject matter is a potential new set of provisions and parameters for the development of land; rather than a decision on a particular land use. It is at a relatively high level. Accordingly, while a broad range of people may be affected, not everyone who might be affected in some way by the proposals need be consulted.

(d) When the preparation process for the proposed plan is completed, it will be publicly notified. At this point, any person may make a submission under cl 6 of sch 1of the RMA and substantive hearings will be held under cl 8B. It would be unduly cumbersome if consultation was required on particular proposed plan provisions at the formative stages of the plan change process as well.

[47] With these considerations in mind, consultation under cl 3(2) may be limited to those who are likely to be most affected by the changes that are being considered and otherwise to representatives of people or groupings who may more broadly be affected.

[48] Those people should be provided with sufficient information to enable them to make relevant, useful and intelligent responses. They need not have chapter and verse but they should understand the considerations and the type of material the Council will be taking into account as it prepares a proposed plan change. And they should be given a sufficient opportunity to present their views to the people who will exercise the statutory power; people whose minds must be receptive to alternative views.[20]

---

19 Schedule 1, cl 3(1).

20 *Enterprise Miramar Peninsula Inc v Wellington City Council*, above n 16.

[49] It is sufficiently clear that, under cl 3(2), the Council needed to consult with the applicants on PCG. For CTS, 32 per cent of its title is within the area that is being rezoned. For Terra Civil, the figure is 76 per cent. Woodgate, as mentioned, has an equitable interest in TCL's land.

[50] Mr Fugle has said in evidence that the business zone overlay, which forms a part of PCG, would see the potential loss of between 16 and 27 lots (depending on the final layout) with an average expected gross return of approximately $350,000 to $400,000 per lot if an average lot size is used. Woodgate has, Mr Fugle has said, spent more than $100,000 in preparing and advancing the retirement village application.

[51] With that context and framework in mind, major landowners whose land fell within the area covered by PCG needed to be consulted. The individuals from the applicants who needed to be involved in the consultation and the material with which they should have been provided to comment upon are the next questions.

Second issue – did the Council consult with people who represented sufficiently the interests of the applicants?

[52] It is said for the applicants that consultation on the part of the Council with Mr Fugle was inadequate. It is said that, while Woodgate is the beneficial owner of the CTS land, the Council needed to consult with CTS separately. Further, although Terra Civil was project-managing the retirement village process, it has a separate adjacent land holding and needed to be consulted separately.

[53] In order to consider the allegations, it is necessary to set out the consultation process undertaken by the Council, first, at a broad level and, secondly, with the applicants through Mr Fugle. At a broad level, the Council's consultation process may be summarised in the following way:

(a) Between 2018 and 2019, the Council engaged with the three landowners who own the developable land within Aokautere at various times. Maps in the master plan report from the Council's urban designer that accompanies the s 32 report on PCG show the three land areas and describe them as "Fugle Interests", "Green Interests" and

"Waters Interests". The planner for the applicants, Paul Thomas, refers also to the applicants' land holdings, with reference to these maps, as the "Fugle interests".

(b) The Council engaged with key stakeholders including Horizons Regional Council and Waka Kotahi in 2019 over a range of issues including water management, biodiversity, housing density, public transport and road transport.

(c) In August 2019, the Council held a 'drop in session' on the proposed structure plan and Plan Change attended by 65 people who discussed a broad range of issues.

(d) During 2020, the Council liaised further with the Regional Council over matters including landscaping, geotechnical hazards, gully protection, water quality and biodiversity. It liaised with the owners of the land referred to in (a) above as the "Green Interests" and the "Waters Interests" over issues relating to their land. The Council received a cultural impact assessment from Rangitāne o Manawatū following a range of hui.

(e) During 2021, the Council consulted with Waka Kotahi about State Highway 57, with the Regional Council about the stormwater and management of the gullies and with Rangitāne o Manawatū over issues including restoration works, affordable housing, stormwater impact on gully systems and archaeological matters.

(f) Between 2021 and 2022, the Council consulted with the three landowners on specific issues. The s 32 report on landowner consultation during this time included the following:

> One landowner has also raised the possibility of a retirement village locating within the Residential zone, near the proposed local business zone and on land that was proposed to accommodate medium density development under the structure plan.
>
> Council has engaged with the landowner over whether a retirement village could be incorporated into the plan change without

compromising underlying principles/outcomes sought for the plan change. …

(g) The Council's "record of consultation" includes entries to the effect that Mr Green was supportive of the Council's approach for the land to be zoned quickly and that Mr Waters was supportive of the proposed plan change and had no immediate plans to develop. Mr Fugle was recorded as being supportive of the land being zoned to enable further development but as being unsupportive of structure planning, the intended protection of the gullies from development and the provision of a local business centre. It recorded also Mr Fugle's intention to build a retirement village near the proposed business zone and noted that the Council is "committed to work with Fugel [sic] to see whether a retirement village could be incorporated into the Plan Change. Meeting with Fugels' [sic] technical experts was undertaken in April 2022."

[54] The Council's interactions with Mr Fugle in particular may be summarised as follows:

(a) On 31 July 2018, Mr Fugle, a consultant surveyor engaged by Mr Fugle and two Council officers met as part of what the consultation notes describe as being "clause 3 consultation".[21] Mr Fugle was described as the "company representative". The structure plan, which sits behind PCG, was discussed in broad terms.

(b) On 20 September 2019, Mr Fugle and two Council officers met and Mr Fugle provided further feedback on the structure plan, addressing the northern gully crossing, road alignment, roading patterns, the number of roads, the need for a structure plan at all, the workability of the proposed commercial area and the need for flexibility.

(c) In 2020, the Council corresponded with Mr Fugle over a particular roading connection.

---

[21] The meeting notes are titled "Feedback on preliminary Aokautere Structure Plan".

(d) On 27 January 2022, the Council gave Mr Thomas, the planner for all three applicants,[22] the then latest version of the structure plan. On 28 January 2022, Mr Thomas was given a copy of the "Draft Master Plan Design Report" and a "Draft Precinct Plan" for the neighbourhood centre proposed in PCG and which would impact the retirement village proposal. A PowerPoint presentation of PCG was provided at the same time which included a description of the goals of PCG, the latest iteration of the structure plan and what the proposed PCG would include. It noted, in particular, the objectives, policies, rules and maps in the District Plan that would be changed and presented different options for the structure plan and for the incorporation of the applicants' proposed retirement village within the structure plan.

(e) On 24 February 2022, Mr Dunidam sought a meeting with Mr Fugle and Mr Thomas to discuss the proposed plan change, the inclusion of the retirement village and any other developments on the land.

(f) The meeting between Mr Fugle, Mr Thomas and Mr Dunidam took place online on 2 March 2022. Technical information and development plans for the retirement village were discussed. Mr Thomas, in his affidavit, has said that the primary reason for this meeting was to enable the Council to explain its conclusion that substantial upgrades were required to road intersections before any further development could take place on the land.

(g) In an email exchange between Mr Fugle and Mr Dunidam following the meeting on 2 March, Mr Fugle expressed his appreciation for the Council having shared a report it was sending to the Council on the plan change and expressed his concerns about road alignment, the community centre and the gullies. He expressed concerns about the way in which "wider roading issues" might delay the retirement village project, requesting that these points be raised at a meeting with the

[22] As confirmed by him in the submission for the applicants on PCG.

mayor. In a response on the same day, Mr Dunidam noted the points and indicated that they would be passed on to the mayor.

(h) On 21 March 2022, Mr Thomas, for the applicants, emailed Mr Burns – an urban design expert engaged by the Council – asking for his thoughts on "the retirement village concept for Aokautere vis a vis the structure plan and how the two can best work together". Mr Thomas asked for a telephone conversation.

(i) On 5 April 2022, a team of people for the Council and a team of people for the applicants met to discuss ways in which the retirement village proposal could work with PCG. The Council team comprised Mr Dunidam, Mr Burns, another member of Mr Burns' consultancy, and a member of the law firm instructed by the Council. The applicants' team comprised Mr Thomas, an urban design consultant, a landscape consultant and an architectural planning consultant. A set of drawings were sent by Mr Burns to the meeting attendees later in the day and a further meeting was arranged. The drawings provided four options for ways in which the retirement village could be incorporated within PCG.

[55] It is sufficiently clear that the Council consulted with all of the applicants. While, in the earlier stages, it did so with Mr Fugle, the Council regarded Mr Fugle as being a representative of each of the applicants. It expressed that to be the case in its consultation notes, in the s 32 report and in the maps, referred to in [53(a)] above, which associate Mr Fugle's name with the applicants, collectively.

[56] It was reasonable for the Council to proceed on that basis. First of all, consultation is a two-way street. The Council engaged with Mr Fugle on the basis that he was the right person to consult with on the "Fugle interests" land. If Mr Fugle wished to include others within discussions, he could have done so. That is what occurred later in the process when expert planners, architects and urban designers were included by Mr Fugle in discussions with the Council. Mr Thomas proceeded on that basis too – preparing a joint submission on PCG for all applicants collectively. And,

as Mr Fugle has said in his affidavit, it is Woodgate which alone spent the $100,000 in preparing and advancing the retirement village application.

[57] For these reasons, the Council did, in my view, consult with people who represented sufficiently the interests of the applicants.

Third issue – was sufficient information provided to the people with whom the Council consulted?

[58] For the applicants it is said that the extent of information given to Woodgate, through Mr Fugle and Mr Thomas before notification of PCG, was not sufficient to enable them to formulate and present views on the proposal. It is said in the applicants' submissions that, while they were provided with certain documents, they were:

> not provided with the opportunity to review and address the granular details proposed to be implemented by PCG, to whit the proposed draft rules, and implementation level requirements pertaining to the proposed [retirement village] development.

[59] The short point is that the applicants were not provided with the actual PCG provisions during the consultation process because they had not at that point in time been prepared. There may well have been various drafts under development but, as discussed in [46(c)] and [47] above, consultation at the cl 3(2) phase is at a relatively high level. It is to be conducted "during the preparation" of a proposed plan.

[60] The applicants were provided with different iterations of the structure plan as it was being prepared, with a copy of the underlying master plan, the supporting information used in the August 2019 public consultation, a copy of the master plan design report, the draft precinct plan for the proposed neighbourhood centre and a PowerPoint presentation addressing details within PCG. Mr Fugle, on behalf of the applicants, was able to express his views on a broad range of issues, as mentioned in [54] above. Detailed engagement took place between experts engaged by Mr Fugle and Council members and experts engaged by the Council over the incorporation of the retirement village proposal into PCG. The Council, as a result of these engagements, made material amendments to the structure plan through the inclusion of the retirement village option, just as had been sought by the applicants.

[61] This amounted, in my view, to the provision of sufficient information to enable the applicants to understand the matters that the Council was taking into account "during the preparation" of the proposed plan and to enable the applicants to make relevant and intelligent responses.

[62] Mr Dunidam has said that Mr Fugle was consulted more than any other person during the PCG process, that the consultation with him resulted in significant changes to the PCG prior notification and that the discussions were not at a high level but focused on the structure plan as the most critical part of the PCG framework.

[63] If further detail needed to be provided at the cl 3(2) stage – whether through the provision of draft plan change provisions or more granular information as the applicants have suggested – then consultation on the development of a proposed plan would come close to replicating the submission and hearing process that is prescribed through sch 1 of the RMA once the plan change is notified. It would be difficult to know where to draw the line; whether different iterations of draft provisions or supporting papers needed to be consulted on separately and where the process should begin or end.

[64] That is not to say that draft plan change provisions need never be provided during consultation at the cl 3(2) stage. There may be cases where, with a more confined plan change proposed, it would be appropriate to do so. But, on the basis that has been discussed, that was neither necessary nor appropriate on the facts of this case.

[65] Moreover, the points that have been addressed by the applicants in this proceeding – including their view that the development of PCG should have been a joint process through which the Council worked in partnership with landowners – are addressed in the applicants' submissions on PCG and will be addressed on the oral submissions the applicants will make on PCG later in the year.

[66] The hearing commissioners (who are to be appointed by the Council) will be able to consider and address the PCG provisions with which the applicants have concerns.[23]

[67] For these reasons, the Council did in my view provide sufficient information to the people with whom it consulted under cl 3(2).

Fourth issue – have the applicants been given notice of the s 86D application?

[68] For the applicants, it is said that consultation was undertaken "in form only" as the Council had determined already that it would seek to bring the PCG provisions into immediate effect under s 86D of the RMA.

[69] There is no evidence of any such determination on the part of the Council and, as discussed in [23] above, the s 86D process must by its very nature in most cases proceed on an ex parte basis.

[70] There was no error in the Council's approach to the application it made under s 86D and the applicants chose not to challenge the Environment Court's decision. They would have had standing to bring a judicial review proceeding if they felt that the Environment Court erred in proceeding ex parte or in the basis upon which its decision was made.[24] This point leads on directly to the next issue in the proceeding.

Fifth issue – is the relief sought by the applicants available to them?

[71] As I have found that there was no flaw in consultation undertaken by the Council on PCG it is not strictly necessary to address this issue. However, had I found there to have been a flaw, it would not have been appropriate for the Court to grant the first prayer for relief in the applicants' statement of claim. That prayer for relief seeks that "the determination of the Environment Court is quashed". The Court could only

---

23 The fact that expert decision-makers under the RMA are best placed to consider substantive disputes during a RMA process is a point emphasised by the Court in *Red Hill Properties Limited v Papakura District Council* (2000) 6 ELRNZ 157 (HC) as adopted and applied in *Graham v Auckland Council* [2013] NZHC 833, [2013] NZAR 696 at [50]–[62].

24 On the basis that the applicants' rights may be impacted by the decision. See Judicial Review Procedure Act 2016, ss 4 and 5. The common law judicial review principles are relevant also.

grant relief of that sort if the decision of the Environment Court itself was in issue and if a flaw had been found in that Court's process.

[72] It is certainly the case that, in the event that a cause of action is made out in a judicial review proceeding, relief should follow and it should be effective.[25] However, quashing, or directing reconsideration of, a decision that is subject to a flaw and quashing a subsequent decision of a Court are very different matters. Accordingly, the relief sought under this head was not available to the applicants. That point, in turn, leads to the next.

Sixth issue – had a ground of review been made out, should the Court have exercised its discretion to grant relief?

[73] Because the Environment Court decision cannot be set aside in this proceeding, then this Court cannot, either legally or practically, go back a step further and effectively set aside, or stay, notification of PCG. That would, as the Council says, undermine the Environment Court decision that followed. It would necessitate a 'restart' of the sch 1 process when it is past half way through. And it would cause prejudice to third parties: the submitters and further submitters on the Plan Change whose work on submissions, including through the engagement of experts, would need to be put to one side and reframed in the future.

[74] Moreover, the plaintiff has not been unduly prejudiced. As mentioned in [21], a full plan change process under schedule 1 of the RMA is underway. The applicants have filed substantive submissions on the plan change as a part of that process. Their submissions will be considered by independent commissioners at a public hearing.[26] Should they not be satisfied with the decision of the commissioners, they would have a right of appeal to the Environment Court; an appeal that is heard de novo.[27]

[75] For these reasons, had a flaw in the Council's consultation process been found, it would not have been appropriate for the Court to have exercised its discretion and to grant relief.

---

25 *Air Nelson Limited v Minister of Transport* [2008] NZAR 139 at [61].

26 Schedule 1, cl 10 of the RMA. And see *Trustpower Ltd v Electricity Authority* [2017] 2 NZLR 253 (HC) at [100]–[107]; and *Deliu v New Zealand Law Society* [2015] NZCA 12 at [25].

27 Schedule 1, cl 14, and s 290 of the RMA.

Result

[76] The application for judicial review is declined.

[77] If costs are sought and cannot be resolved between the parties, then the respondent may, within 10 working days from the date of this decision, file a memorandum and the applicants may, within a further 10 working days, file a memorandum in response. Any such memoranda, including schedules, should be limited to five pages in length.

Radich J

Solicitors:
Dewhirst Law, Palmerston North for Plaintiffs
Cooper Rapley, Palmerston North for Defendant

ATTACHMENT C

Letter to Paul Thomas dated 7 July 2021

PAPAIOEA
PALMERSTON
NORTH
CITY

pncc.govt.nz
info@pncc.govt.nz

Te Marae o Hine
The Square
Private Bag 11034
Palmerston North 4442
New Zealand

7 July 2021

Paul Thomas
Thomas Planning Ltd
2A Jacobsen Lane
Ngaio
WELLINGTON 6035

Oasis #15289068

Dear Paul

Private Plan Change B

Thank you for your 18 June 2021 letter, further to our meeting of 15 April 2021 about Council's Kakatangiata plan change and Plan Change B.

I do not agree with your recollections as to what was expressed and/ or agreed at the meeting. While any confusion is regretted, a legal opinion has not been requested, and is not considered necessary at this stage. I also do not agree that your letter correctly or precisely recites views that I expressed at the meeting.

In relation to the processing of Pioneer City West Ltd's ("**PCWL**") PC B, the quandary that the Council is faced with is that there has been no decision within two years after notifying the proposed plan, as required by cl 10. This is essentially because your client chose not to proceed the plan change to a hearing. It has now been approximately 8 years since PC B was notified, well outside the time limit for a decision under cl 10.

You seem to have the view that '*renotification*' alone could address the Council's concerns about there being no decision within two years, but it is not clear how that can occur in a procedural sense. As you will recall, PC B was "*accepted*" by the Council under cl 25 of Schedule 1. Clause 26(1)(b) requires that notification of accepted requests must occur "*within 4 months of [the Council] agreeing to accept the request*". If the Council were simply to jump back to the notification step, it would then therefore be in breach of cl 26 unless the Council could also step back further and revisit the procedure under cl 25. I note that is not your suggestion.

I recall expressing a view at our meeting that if PCWL was determined to progress a private plan change in respect of its land at the same time as the Council is progressing its Kakatangiata plan change, then the proper process and next sensible step for PCWL would be to take the time to review and update its plan change, and to make a new request under Part 2, cl 21. I stand by that, in terms of procedural correctness and good planning practice. On my review, Schedule 1 does not allow a Council to choose to rewind a plan change to any convenient procedural step and pick things up from there. To do so would risk placing the Council in an abuse of process situation, particularly for a plan change that is so far removed in time from being accepted and notified.

To be clear, our preference and recommendation to PCWL would be to continue to engage in the Kakatangiata plan change process, which is being prepared through drafting and consultation stages, and is supported by a dedicated Council budget.

Yours sincerely

David Murphy
CHIEF PLANNING OFFICER
Palmerston North City Council