IN THE ENVIRONMENT COURT
AT WELLINGTON

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

Decision No. [2024] NZEnvC 010

IN THE MATTER	of an appeal under cl 14 of Schedule 1 of the Resource Management Act 1991
BETWEEN	FRASER AURET RACING
	(ENV-2020-WLG-037)
	Appellant
AND	RANGITĪKEI DISTRICT COUNCIL
	Respondent

Court:	Environment Judge B P Dwyer Environment Commissioner D J Bunting
Hearing:	On the papers
Last case event:	Submissions dated 9 October 2023
Date of Decision:	8 February 2024
Date of Issue:	8 February 2024

DECISION OF THE ENVIRONMENT COURT

A: Provisions sought by IRO-MAR regarding Rules DEV-R5 and DEV-R6 and compulsory notification provision not to be included in plan change.

B: No reservation of costs.

REASONS

Introduction and background

[1] On 27 April 2023 the Environment Court determined an appeal by Fraser Auret Racing (Fraser Auret) against a decision of Rangitīkei District Council (the Council) through an independent Commissioner on a plan change to the Council's operative District Plan proposing to rezone approximately 217 ha of land on the southern boundary of Marton from Rural to Industrial.[1] A group called Interested Residents of Marton and Rangitikei Inc (IRO-MAR) joined the Fraser Auret appeal as a s 274 party.

[2] The initial plan change proposal was amended by decisions on submissions, both as to the extent of the plan change area and the provisions applying to it. Among other things, the area to be rezoned was reduced by the Commissioner from the originally proposed 217 ha to approximately 40 ha with development subject to a structure planning process.

[3] The plan change proposal evolved further as the appeal process unfolded. Relevant to these proceedings, the Council sought that the area to be rezoned expanded from 40 ha (as approved by the Commissioner's decision) to approximately 65 ha referred to as the Marton Industrial Development Area (MIDA). Development of the MIDA was to be guided and constrained by a Comprehensive Development Plan whose "key components" are described in some detail in paragraph [19] of the Court's decision (the 65 ha proposal).

[4] The changes sought in the 65 ha proposal were outside the scope of the Fraser Auret appeal. During the appeal pre-hearing process the Council signalled that it would seek that the Court exercise its powers under s 293 RMA which gives a broad authority to make orders which are otherwise outside the scope of an appeal or reference. In anticipation of considering exercise of that authority the Court required

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1 *Fraser Auret Racing v Rangitīkei District Council* [2023] NZEnvC 071.

notification of the 65 ha proposal to identified persons who might join the appeal should they wish to do so. Further s 274 parties joined the proceedings. By the time of the hearing Fraser Auret's issues had been resolved. The only s 274 party to take an active role in the hearing was IRO-MAR.

[5] The appeal decision approved the 65 ha proposal. As part of that decision the Court approved two non-complying activity rules DEV-R5 and DEV-R6 (the Rules) and a requirement for compulsory public notification of any resource consent applications under Rules DEV R2-R6 (the compulsory notification requirement), all of which were sought by IRO-MAR. The Rules and compulsory notification requirement provide as follows:

DEV-R5	Any activity not provided for in DEV-R3	Non-complying
DEV-R6	Any activity that breaches B1.5, DEV-S2, DEV-S3, DEV-S4, DEV-S5, DEV-S13	Non-complying

Notification

Applications for consent pursuant to Rules DEV-R2 – R6 will be publicly notified.

[6] The basis on which the Court approved the Rules and notification requirement was set out in its decision as follows:

> [224] On the basis that these proposed **Rules DEV-R5** and **DEV-R6** have not been opposed by the Council, they are approved.
>
> **Notification**
>
> [225] IROMAR seeks that consent applications pursuant to **Rules DEV-R2 to R6** be publicly notified. While this has not been opposed by the Council, we approve the public notification of **Rules DEV-R3, DEV-R4, DEV-R5 and DEV-R6** (but not **DEV-R2)** on the basis that, in the specific context of this plan change, these Rules have either Discretionary or Non-complying status.

In each case the comment that the Council did not oppose inclusion of the Rules or notification requirement was wrong.

[7] The Council appealed the Court's decision, seeking that the High Court quash those parts of the decision and remit the matter back to this Court for reconsideration.

IRO-MAR joined the High Court proceedings. It did not oppose the High Court finding that this Court had made an error in law in the matters set out above but did not agree with all of the grounds of appeal contended by the Council.

High Court appeal

[8] The High Court found that the Environment Court erred by:[2]

- Taking into account an irrelevant matter when it approved the Rules on the basis of the Council's perceived absence of opposition to them;
- Failing to take into account relevant evidence from various sources in deciding to approve the Rules; and
- Taking into account an irrelevant matter (the perceived lack of opposition by the Council) when it approved the compulsory notification requirement.

[9] The High Court quashed paragraphs [224] and [225] of the Environment Court's decision and remitted those matters for reconsideration in light of the High Court's findings.[3]

Parties' submissions

[10] The Court received submissions from the Council and IRO-MAR. We will summarise the submissions only briefly. In doing so we express our understanding that the issue to be determined by the Court in general terms with respect to the Rules regarding activities is what is the most appropriate status of those activities and, in the case of the compulsory notification requirement, whether that requirement is necessary or the most appropriate method to ensure that (in this case) the objectives and policies of the 65 ha proposal are achieved.

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2 *Re Rangitikei District Council* [2023] NZHC 2608 at [71]-[72] and [79]-[80].
3 *Re Rangitikei District Council* [2023] NZHC 2608 at [87].

[11] The Council's position was that discretionary status is appropriate for all activities that are not in general accordance with MIDA or which do not meet applicable development standards (except Rule DEV-R4 which relates to industrial activity prior to the completion of MIDA Stage 1 and Stage Two, Item 1 (roading upgrades)).[4]

[12] The Council submitted (in summary) regarding activity status that:

- The key starting point for the Court's analysis should be Objective DEV-O1 of the plan change which seeks to enable industrial activities in the MIDA;

- Policy DEV-P2 demonstrates that activities not in general accordance with the MIDA might still be accommodated if they can demonstrate an operational need to locate there and contains 11 matters to be achieved in determining any applications for such activities;

- Policy DEV-P5 requires that a precautionary approach should be taken when considering applications for industrial activities under Policy DEV-P2 insofar as noise and vibration, dust, odour and other emissions are concerned;

- A broad categorisation of (industrial) activities as non-complying in the context of the above Objective and Policies sends "… an inaccurate signal that such activities are unwelcome or should be generally not allowed. Instead, what is anticipated … is that such activities should warrant full consideration in accordance with the prescriptive policies, and alignment with the outcomes anticipated for the area";[5]

- The Council referred to the discussion in paragraphs [56]-[64] of the High Court decision outlining the findings of the various planners who had considered the 65 ha proposal and concluded (without contrary evidence from IRO-MAR) that non-complying activity status was inappropriate for

4 Council submissions dated 9 October 2023 at [7].
5 Council submissions dated 9 October 2023 at [16].

the proposal;

- IRO-MAR had provided no evidential foundation for non-complying activity status for the activities in question.

[13] Insofar as the compulsory notification requirement is concerned, the Council submitted that:

- Contended concerns as to communication regarding the plan change and the Court's use of s 293 do not provide an appropriate basis for requiring compulsory notification of future applications;

- The Council's planning witness addressed the issue of notification and supported the Council's position. The witness contended that it is appropriate to rely on ss 95 and 95A-95E to determine notification requirements;

- The activity status of an activity does not have a bearing on compulsory notification of applications for that activity;

- Section 95A(8)(b) requires that if the Council decides an activity will have or is likely to have adverse effects on the environment that are more than minor, public notification must and will occur.

[14] IRO-MAR contended that non-complying status is necessary and there is evidence before the Court that the proposed rules are the most appropriate outcome. A theme of the IRO-MAR submission was a contention as to lack of public consultation by the Council as to the plan change in general and inadequate notification of the 65 ha proposal.

[15] IRO-MAR submitted (in summary) that:

- Non-complying status was an appropriate way for Councils to signal that certain types of proposals will be subject to a greater level of scrutiny because at least one adverse effect will be more than minor and to indicate

to the community that some activities will be inappropriate in some locations;

- An activity might generally be accorded non-complying status where the receiving environment was delicate or vulnerable, and/or the activity in question was particularly noisy or likely to produce adverse effects;

- There was a difference in perception and attitude when considering non-complying and discretionary activity status applications;

- It was justified on the merits to discourage industrial activities, other than those for which the plan change was designed because of its easy access to the railway, from seeking to establish in the MIDA;

- A number of standards (identified in paragraphs [40] to [47] of the submission) were significant and important to the protection of the environment.

[16] IRO-MAR says that the compulsory notification requirement is important "… to restore some balance, given the wider community's side lining to date…".[6] The IRO-MAR submissions included a series of examples as to its contended concerns in these regards.

Discussion

[17] We commence our discussion by referring to the comments in paragraph [4] (above) as to the broad authority which s 293 confers upon the Court to direct changes to proposed plans regarding any matters identified by the Court. We are conscious that this authority is to be exercised cautiously and sparingly after hearing an appeal or inquiry into a proposed plan. As is sometimes the case with the exercise of s 293 powers, the Council had signalled in advance that it would seek that the Court exercise those powers to consider the 65 ha proposal which had emerged from discussions and negotiations between the parties during pre-hearing processes

6 IRO-MAR submissions dated 9 October 2023 at [9].

including mediation. The 65 ha proposal represented a considerable refinement of both the initial plan change proposal and the proposal for 40 ha development approved by the Commissioner, albeit over a larger area than approved by the Commissioner.

[18] Section 293 does not require there to be public notification of changes proposed pursuant to this process but we consider that the provisions of ss 269(1) and 293(2)(b) enable the Court to make directions requiring notification of changes if it sees fit. These matters were addressed by the Court in minutes dated 17 January and 15 March 2022 which ultimately directed that the following persons be given notice of the 65 ha proposal:

- All parties to the appeal before the Court;
- All submitters on the original proposal;
- The Department of Conservation;
- Royal Forest and Bird Protection Society Inc; and
- The owners/occupiers of all properties having a common boundary with the site or divided from the site only by a road or river boundary (if any).

[19] The Court considered that notification to these parties of details of the 65 ha proposal brought that matter to the notice of all parties who had expressed interests in the original proposal[7] or the proposal approved by the Commissioner and appealed, the Department and Society who had an interest in matters pertaining to potential bat habitat which were unknown at the time of the original application/hearing and nearby owners/occupiers who might be directly affected in some way by development on the site. The Court does not accept the seeming implication in IRO-MAR's submissions that such notification was inadequate. For the record we note that nothing in the evidence we heard led us to conclude that the Council had not met the consultation obligations contained in Schedule 1 RMA in advancing the plan change.

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[7] The Commissioner's decision records that 18 submissions and 21 further submissions were received.

[20] Both the High Court decision and the Council's submissions in this matter commented on the failure of IRO-MAR to provide planning evidence contradicting that of four planners who agreed that discretionary status was appropriate in this case. Counsel for IRO-MAR contended that an evidential foundation for non-complying status was established during questioning of the Council's planning witness, including by the Court.

[21] The determination of appropriate status of activities (inter alia) in proposed plans is a matter requiring consideration of a mixture of relevant factual, legal, policy and statutory issues, all measured by reference to the requirements of s 5 RMA. Although it is entirely proper and common practice for planning witnesses to give evidence and express opinions on all of these matters, ultimately, identification of appropriate status is a matter for determination by the consent authority or Court and one on which counsel for any party might properly express opinions contrary to those advanced by planning witnesses even in the absence of planning evidence on the part of their party.

[22] We consider that the position is accurately described in these terms in paragraph 8 of IRO-MAR's submissions:

> 8 … As the Court is well aware, the Environment Court may receive anything in evidence that it considers appropriate to receive. It is a Specialist Court, with its own planning expertise and as such able to evaluate the merits of appropriate activity status. Importantly, the Environment Court[8] is entitled to come to a view different to the planning assessment of Council's planning expert.

For the sake of completeness we acknowledge that the fact that four planners who considered the 65 ha proposal have reached a common conclusion as to status of activities in this case may be a matter to which the Court might give some weight in its considerations.

[23] Both parties raised matters pertaining to perceptions attaching to discretionary and non-complying status of consent applications. The Council contended that giving non-complying status to a broad range of industrial activities sent "… an inaccurate

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8 And, we add, counsel for IRO-MAR.

signal that such activities are unwelcome or generally not allowed".[9] This to some extent mirrored IRO-MAR's submission as to perception and attitude.[10] IRO-MAR's submissions appear to be based at least in part on the view that applications for non-complying consents will be subject to a greater degree of scrutiny of effects than applications for discretionary consents.[11]

[24] In terms of perception, we agree that non-complying consent is regarded generally as being a more restrictive pathway to consent than a discretionary consent (although whether that is the case in any given instance will depend very much on the nature of the proposal, its potential effects and the provisions of relevant objectives and policies). There are differences between the basis on which effects and plan provisions are considered under ss 104 and 104D and s 104D contains a "gateway test" which any application must pass to obtain consent. However any suggestion that actual and potential effects on the environment for applications being determined under s 104 are subject to a lesser degree of scrutiny than applications under s 104D is simply wrong. Section 104 contains no limitations on effects matters which can be brought into consideration when considering applications for (fully) discretionary activity consents nor on the scrutiny to which such effects might be subject by a consent authority which has a statutory obligation to assess actual and potential effects appropriately.

[25] We have had regard to and accept the submissions made on behalf of the Council in these terms:

> [11] The Council submits that the key starting point in this analysis is to refer the primary objective of this plan change, which is to facilitate industrial activities within the proposed MIDA, that achieve sustainable transport outcomes while addressing adverse effects. This objective is explicitly stated in DEV-O1 and forms the cornerstone of the Council's submissions on this issue.
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> [12] Within this context, it is also important to recognise that the Council's plan change relies on a Comprehensive Development Plan ("**CDP**") process that was based on specified modelled activities that were consistent with its objective. However, as explained to the Court by the

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9 See paragraph [12], second bullet point (above).

10 See paragraph [15], third bullet point (above).

11 IRO-MAR submissions dated 9 October 2023 at [27], referring to *Mighty River Power Ltd v Porirua City Council* [2012] NZEnvC 213, also paras [43] and [47].

> Council's expert planner, Ms Brenda O'Shaughnessy, the proposed plan change "…*has never been exclusive to the activities on which the CDP has been modelled*." Ms O'Shaughnessy has been clear that the Council's objective is not directed to 'only' allow the activities specifically modelled, as it is an objective focused on achieving specified 'outcomes' within the area.
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> [13] The salient point here is that the objective for the plan change does not signal that activities not conforming to the MIDA are unanticipated and should be disallowed. This is evident with regard to the carefully crafted suite of policies that follow this objective.
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> (footnotes omitted)

[26] The High Court observed[12] that a consequence of the imposition of Rules DEV-R5 and DEV-R6 would be that even very minor deviations from the specified rules, standards and design principles would become non-complying activities in the MIDA which as the Council submits has the Objective of facilitating industrial activities. We acknowledge that there is an apparent incongruity in that situation.

[27] If, as IRO-MAR contends, adverse effects of any particular future development proposal requiring discretionary activity consent are more than minor (and that cannot be predicted until development proposals are actually received) those effects can be appropriately scrutinised by the consent authority in determining whether or not to grant consent as required by s 104. As noted previously, we do not consider that that level of scrutiny will be any less than might be accorded to a non-complying proposal.

[28] Nothing in the findings which we made in our initial decision support the proposition that the environment in the vicinity of the MIDA is of such delicate or vulnerable nature[13] as to require the imposition of non-complying status. In particular the matter of protection of bat habitat which arose belatedly (after the Council hearing) was addressed by appropriate conditions agreed by parties with expertise in that regard. Nor did we find the environment surrounding the site to be delicate or vulnerable. Our observation was that this is a "typical" rural environment and that appears consistent with the views expressed by the Council's landscape witness. No part of the application site is identified as an Outstanding Natural Landscape/Feature in the District Plan nor was the presence of any such landscape/feature in the vicinity

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12 *Re Rangitikei District Council* [2023] NZHC 2608 at [46].

13 Refer para [28] IRO-MAR submissions dated 9 October 2023.

which might be adversely affected by development on the site identified.

[29] Finally we record that the planning evidence which we heard supports the contention that discretionary activity status is appropriate in this case. We refer to our earlier comments in paragraphs [20] – [22] (above) in that regard.

[30] Having considered all of the above matters we determine that discretionary activity status is appropriate in this case and we decline to insert in the plan change Rules DEV-R5 and DEV-R6 which were quashed by the High Court and which we have reconsidered.

[31] Insofar as the compulsory notification decision is concerned, we observe that at least to some extent IRO-MAR's position is advanced on the basis that compulsory notification will rectify contended notification/consultation/communication failures in the plan change process including (as we understand it) by the Court. We do not accept that as being the case. Nor, in any event, do we consider that compulsory notification is an appropriate response to any such contended failings.

[32] We refer to our findings in paragraph [28] (above) and consider that nothing in the environment of the site or nearby area is of such delicacy or vulnerability as to require compulsory notification as sought by IRO-MAR.

[33] Sections 95 – 95E RMA contain a notification regime addressing notification matters including assessment of adverse effects as part of that process. We concur with the view advanced by the Council that this regime enables appropriate consideration of the need for notification of any given application in any particular circumstances.

[34] Having regard to all of the above matters we decline to insert in the plan change a compulsory notification requirement.

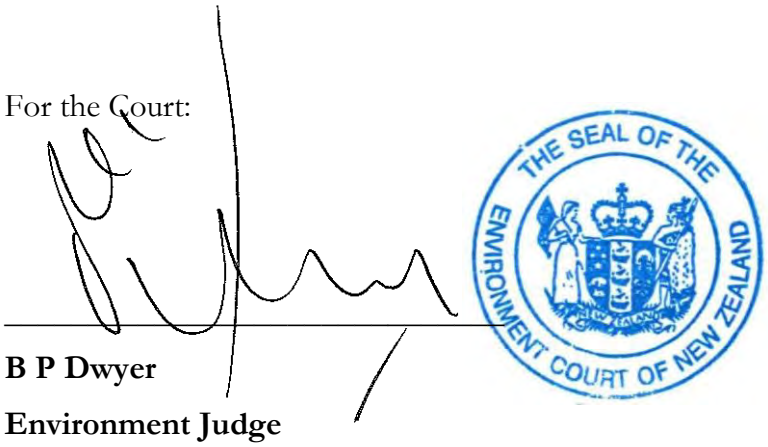
Outcome

[35] For the various reasons stated we determine that the appropriate form of plan

change in respect of the MIDA is one excluding requested non-complying activity Rules DEV-R5 and DEV-R6 and the compulsory notification requirement as set out in paragraph [5] above. The Council is requested to submit a copy of the plan change document in final form to the Court for issue under seal.

[36] There is no reservation of costs. The need for this decision arises from an misunderstanding on the Court's part and neither party ought be penalised for that in costs terms.

For the Court:



B P Dwyer
Environment Judge