BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 119

IN THE MATTER	of an appeal pursuant to Clause 14 of the First Schedule of the Resource Management Act 1991
BETWEEN	RICHARD BLACK (ENV-2012- CHC-000132) Appellant
AND	WAIMAKARIRI DISTRICT COUNCIL Respondent

Hearing at: 26, 27 and 30 August 2013; further submissions received from the parties up to 5 March 2014

Court: Principal Environment Judge LJ Newhook
Environment Commissioner J Mills
Environment Commissioner E von Dadelszen

Appearances: Mr MM Bell for the Appellant
Mr AJ Prebble for the Respondent

Date of Decision: 29 May 2014

DECISION OF THE ENVIRONMENT COURT

A. Appeal dismissed.

B. Costs reserved.

C. Leave reserved to apply under s293 concerning problematic Plan Change provisions.

REASONS FOR DECISION

Introduction

[1] The appellant, Richard Black, has appealed a decision by Waimakariri District Council to decline the relief sought in his submission concerning Plan Change 32 ("**PC 32**") which was designed to establish a boundary for future growth at the settlement of Mandeville, about 5km west of Kaiapoi, and identifying various characteristics that any growth within the boundary should achieve. The appellant wished to have the boundary line moved outward to include his rural property on the outskirts of this small settlement, essentially a mapping issue. The appeal sought as well, the relief "*any further amendments to Plan Change 32 required as a consequence of allowing this appeal*," and this prayer attained considerable focus during the hearing because PC32 introduced a new Objective (18.1.2) and a new Policy (18.1.2.1) that were claimed to be poorly drafted and needing amendment.

[2] The appeal was initially filed complaining about the omission from within the Mandeville Growth Boundary ("**MGB**"), of the land of the appellant at 82 Ohoka Meadows Drive, and that of his neighbour Mr M Cotton, at number 83. The latter's property was withdrawn prior to commencement of preparation for the hearing, and as an apparent consequence two parties under s 274 RMA withdrew, the Poultry Industry Association of New Zealand and Tegel Foods Limited.

[3] The MGB is shown outlined in red on a Locality Map attached as Appendix A, and variously includes pieces of land zoned Residential 4A, Residential 4B, and Rural. The appellant's property is shown labelled "Black" immediately southeast of an area zoned Residential 4B (a rural-residential zone). It is a property of approximately 4ha in size, with legal description Lot 3 DP 394407.

[4] Many factual issues were the subject of agreement recorded in a Joint Statement filed in February 2013, some details from which we record shortly.

Key issues agreed and others unresolved

[5] The planning witnesses for each of the two parties prepared a joint statement in April 2013 setting out matters agreed between them and matters the subject of disagreement.

[6] Key issues agreed were fourfold:

(a) Further rural residential growth at Mandeville needs to be managed;

(b) The key issue for this appeal is whether the MGB line is located in the most appropriate place in relation to the appellant's land; rather than the appropriateness of the boundary line approach as a policy to manage rural residential growth at Mandeville;

(c) If there is going to be a line approach to manage growth it should relate to the form and function of the Mandeville settlement, and needs to make good sense in terms of urban form and function;

(d) The rural residential zone provides an appropriate housing choice and there is a demand for this type of development.

[7] There was disagreement as to:

(a) whether the appellant's land should be included within the MGB, the factors being whether or not any adverse effects on the environment would result;

(b) whether the site readily integrates with the adjoining rural residential zone (access in fact being through that zone), and whether the site is distinguishable from other rural sites adjoining and outside the MGB;

(c) whether inclusion would be consistent or inconsistent overall with relevant statutory and non-statutory documents;

(d) whether inclusion would achieve the requirements of Objective 18.1.2 promulgated in PC 32 (depending on what the objective means);

(e) whether inclusion of the site within the MGB would meet the requirements of Policy 18.1.2.1 promulgated in PC 32 (depending on what the policy means).

Statutory and non-statutory documents examined

[8] It was agreed that relevant statutory documents[1] to consider are:

(a) The Canterbury Regional Policy Statement;

(b) Proposed Change 1 to the Regional Policy Statement (Commissioners' decision version dated 20 September 2012);

(c) The Waimakariri District Plan (and of course PC 32 itself);

(d) The Canterbury Recovery Strategy

[9] It was agreed that non statutory documents to be considered include:

(a) The Waimakariri District Rural Residential Development Plan 2010 ("**RRDP**"), promulgated under the Local Government Act 2002;

(b) The [then draft] Environment Canterbury Land Use Recovery Plan ("**LURP**").

Plan Change 32

[10] The relevant provisions of PC 32 are in 2 principal parts, each relating to a chapter of the operative district plan, and are as follows:

> **Chapter 18**
>
> ***Constraints on Development and Subdivision***
>
> *Environmental Results Expected*
>
> Mandeville
>
> a. Further disjointed and peripheral growth at Mandeville is avoided to prevent further encroachment of the Mandeville settlement into the surrounding Rural Zone.
>
> b. The characteristics of the surrounding Rural Zone are maintained or enhanced by limiting further effects associated with the growth and development within Mandeville.

[1] Statutory in the sense of being generated under the RMA

c. Lot sizes within the boundary of Mandeville remain consistent with the minimum and average lot sizes of the Residential 4A and 4B zones.

d. The form, function and characteristics of Mandeville are enhanced by the consolidation of new growth with existing subdivision and development to achieve an integrated environment within a defined growth boundary.

e. Subdivision and development within Mandeville is provided with reticulated services.

Objective 18.1.2

Provide for limited growth and development within the existing Mandeville settlement that achieves:

a. A compact living environment within a rural setting;

b. Consolidation of the existing Mandeville settlement by providing for new subdivision and development within the existing Mandeville settlement boundary;

c. Provision and utilisation of reticulated infrastructure and services;

d. The maintenance and enhancement of the characteristics of the Residential 4A and 4B Zones;

e. Promotion of the use of alternate transport modes for transit within the Mandeville Settlement; and

f. The preservation of the distinct and distinguishable boundaries of the Mandeville settlement.

Policy 18.1.2.1

Limit Mandeville settlement to within its boundary existing at 20 September 2011 shown on District Plan Maps 56, 57, 91, 91A, 92, 93 and 167

Chapter 17: Residential Zones

Table 17.1: Residential Zone
Characteristics – Residential 3 and 4A/B

Residential 3...

Residential 4B

- Predominant activity is living;
- detached dwellings and associated buildings;
- dwelling density is lowest for Residential Zones;
- dwellings in generous settings;
- average lot size of 0.25-1.0 hectare;
- limited number of lots located in a rural environment;
- rural style roads or accessways;
- opportunity for a rural outlook from within the zone;

- few vehicle movements within the zone;
- access to zones not from arterial roads;
- community water and/or sewerage schemes; and
- limited kerb, channelling and street lighting

The relevant statutory framework

[11] Section 74(1) of the RMA is the starting point for preparing and changing a District Plan. This provides:

> (1) A territorial authority must prepare and change its District Plan in accordance with –
>
> (a) its functions under s 31; and
> (b) the provisions of Part 2; and
> (c) a direction given under s 25A(2); and
> (d) its obligation (if any) to prepare an evaluation report in accordance with s 32; and
> (e) its obligation to have particular regard to an evaluation report prepared in accordance with s 32; and
> (f) any regulations.

[12] Stated simply, rules are to implement the policies of the District Plan, and the policies are to implement the objectives above them.[2] It was of interest in this context that uncertainties as to the meaning of the proposed new objective and new policy featured strongly during the hearing.

[13] By s 75(3) a District Plan must give effect to any National Policy Statement… and any Regional Policy Statement. In addition to those requirements, when preparing or changing a District Plan, a territorial authority shall, by s 74(2) have regard to any proposed Regional Policy Statement (here Proposed Change 1 to the Canterbury RPS). By s 74(2)(b), the territorial authority shall also have regard (amongst other things) to management plans and strategies prepared under other Acts, which of relevance here include:

(a) The Urban Development Strategy ("**UDS**")

(b) The Rural Residential Development Plan ("**RRDP**")

(c) The LURP (which was a draft plan at the time of the hearing, but was confirmed by the Minister of Local Government in December 2013[3].

---

[2] ***Long Bay-Okura Great Park Inc Soc v North Shore City Council***, NZEnvC A078/08 at paragraphs [31 to [34]

[3] Gazetted on 6 December 2013

[14] By s 32(1) the evaluation report required under the Act must:

> (a) Examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the Act; and
> (b) Examine whether the provisions of the proposal are the most appropriate way to achieve the objectives by –
> (i) Identifying other reasonably practicable options for achieving the objectives; and
> (ii) Assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
> (iii) Summarising the reasons for deciding on the provisions; and
> (c) Contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

[15] We note that the High Court in ***Rational Transport Soc Inc v New Zealand Transport Agency***[4] held that "most appropriate" in s 32(1)(a) does not need to be the superior method; but that instead a value judgement is required as to what, on balance, is the most appropriate when measured against the relevant objectives; that "appropriate" means suitable; and that there is no need to place a gloss upon the word by incorporating that it be superior.

[16] By s 32(1)(a) RMA, a key function of a territorial authority in giving effect to the Act, is the establishment, implementation and review of objectives, policies and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district. We shall commence with the effects aspect because that underpins many of the other issues that are required (to their various degrees) to be considered by statute.

Environmental effects of relevance

[17] Each party called the evidence of a landscape architect and a planner. A high level of agreement was reached between each of these two groups of experts in the joint statements that they prepared after conferencing. We have been able to make use of a lot of that material in place of quite extensive sections of the evidence-in-chief of each witness. It can also be said that we gained the impression during the hearing that effects on the environment was ultimately not the subject of much controversy[5]. Also by way of preliminary observation, and as is so often the case, little change occurred in the opinions of the witnesses while under cross-examination.

---

[4] [2012] NZRMA 298

[5] Mr Prebble for instance signalling at para [7] of his opening submissions for the council that great issue was not taken with the appellant's landscape evidence.

[18] The planners were Ms F Aston, called by the appellant, and Mr M C Bacon, a staff planner at the council. They agreed that:

(a) In the context of the zoning of the adjoining Ohoka Meadows Rural-Residential zone, and if re-zoned for Rural Residential purposes under the current District Plan provisions, the most appropriate zoning for the Black site would be Residential 4B.

(b) Water and sewerage reticulation is available from existing Mandeville infrastructure.

(c) The nearby power transmission lines would not assist in the identification of a logical growth boundary.

(d) Adverse reverse sensitivity effects from the existing poultry farm in Mandeville Road, having regard to current farming practices, are unlikely to arise at the Black property; and there are no other lawfully established intensive farming activities in the immediate surrounding area that could give rise to actual or potential adverse reverse sensitivity effects having regard to information in the Council's effluent-spreading database.

(e) The existing right of way driveway to the site (which runs through the residential 4B zone) has the capacity to service future potential rural residential lots up to four in number.

[19] There was a moderate level of disagreement between the planners about rural character and landscape effects, which is best however dealt with in the context of analysis of the landscape architect's evidence.

[20] Similarly, there was a minor level of disagreement between the planners about the potential for general adverse amenity effects, again best resolved in the context of the landscape evidence.

[21] The landscape witnesses were Mr JE Head for the appellant, and Mr AW Craig called by the respondent. They conferred and produced a helpful joint statement of matters agreed and unresolved. They confirmed that they had each employed a definition of landscape that "*landscape reflects the cumulative effects of physical and cultural processes*", sourced from their professional institute. They also agreed that landscape character is defined by a combination of factors including landform, vegetation cover and patterns, water bodies and areas of human activity. In

the case of this site, they agreed that the landscape character area that must be considered includes the settlement of Mandeville and its rural context. They advised that the methodologies adopted by each of them, were the same.

[22] The landscape witnesses made the following record of key facts and assumptions:

(a) The landscape character of the site is currently rural, and is typical of the contextual rural environment.

(b) The site's amenity is chiefly derived from abundant open space in proportion to built form that is further dominated by the presence of vegetation, including pasture. Ephemeral attributes such as tranquillity also contribute to amenity.

(c) There are no significant natural features on the site, and nor does it exhibit high levels of naturalness. That is, it has been fully modified for farming purposes.

(d) The site adjoins part of the existing Mandeville residential 4B Zone located around Ohoka Meadows Drive. A portion of the site boundary corresponds to the proposed Mandeville Growth Boundary.

(e) No consideration given to any other influences on growth such as traffic management, service reticulation, indeed any matters other than landscape.

(f) An assumption made that residential 4A and 4B activity generally results in high amenity.

(g) Acceptance that potential rezoning for Residential 4B activity within the site would change the character of the landscape from one that is typically rural to one that is typically rural residential.

(h) Acceptance that the change just described would result from higher building density and land use likely devoted to amenity outcomes, and would result in greater apparent diversity compared to existing site character.

(i) Agreement to take into account statutory aspirations where they affect landscape outcomes for Mandeville and future Residential 4A and 4B growth.

(j) Identification of actual and potential landscape influences on Residential 4A and 4B growth centred on Mandeville.

(k) Agreement to describe landscape design principles that would apply to urban growth centred on Mandeville.

Analysis

[23] We now record the matters of opinion agreed by the landscape architects, the matters on which they differed, our analysis of the latter, and findings.

[24] The landscape architects agreed that a Rural Residential 4A or 4B type development of this site would more than likely result in high amenity and that there would be relatively minor change to the existing rural character of the area. We considered this to be quite an important finding in relation to an called-for characteristic in PC32 for the Residential 4B Zone recorded (in Chapter 17) of the District Plan, "*opportunity for rural outlook from within the zone*"; and potentially therefore also to assist with answering the question of whether the appellant's proposal would meet the requirements of the proposed new Objective and new Policy (subject to whatever those mean, a topic we will come to).

[25] The landscape architects also agreed that the extent of any potential Residential 4A or 4B type development of the site is relatively small; therefore there would be little appreciable change to the extent of rural character of the rural land surrounding Mandeville following development of the site. We make the same observations about this agreement, as for the last.

[26] The landscape architects agreed that the site currently adjoins and is accessible via a private right of way through an area of rural residential development connected to Ohoka Meadows Drive, and therefore the site can be internally integrated with same. This agreement would appear to assist with the resolution of whether the proposal would align with sub-paragraphs (a), (b) and (c) of new Objective 18.1.2 (whatever is meant by "*the existing Mandeville settlement*"), and the new Chapter 17 provisions that address roading, access and infrastructure matters.

[27] The landscape architects went further and recorded their substantial agreement that the site has a logical integration with and would "complete" this part of Mandeville's rural residential zone (although Mr Craig recorded that he wasn't quite sure what "complete" meant). A further agreement reached appears to us to make that slight qualification unimportant: that there is no landscape constraint, such as might be dictated by major natural or physical boundaries, to growth centred on

Mandeville, and therefore there is no landscape reason why the appellant's land cannot be included within the Mandeville Growth Area. Once again, we believe this to be an important matter in the context of the overall dispute.

[28] The "flip side" of the last point produced a disagreement, with Mr Head advising that the site is distinguishable from other land surrounding Mandeville's "UGB" (which we infer to mean MGB) in that it can be readily integrated with an area of established rural residential development; while on the other hand Mr Craig felt that apart from the right of way connection to Ohoka Meadows Drive, the site is indistinguishable from other rural land surrounding land Mandeville, being generically the same as the other rural landholdings in the area and having no unusual qualities. Our finding about this aspect is that the proposed objective and policy, so far as one can discern their meaning, are essentially concerned with the form and operation of the Mandeville settlement rather than with avoidance of precedent-setting. Further, this is not of course being a case involving an application for consent to a non-complying activity. Indeed, the very next point, also the subject of disagreement, expressly addressed a concern of Mr Craig's that contiguous landowners might seek their own plan changes and that "*regarding landscape effects, there is no reason why growth cannot continue unabated in Mandeville.*" We reiterate the point about precedent.

[29] The landscape witnesses agreed that the form of this site proposes a small area of rural residential development extending into a rural zone; and that physical connection with and outlook to, a rural zone would be comfortably achieved. There was some play made in questioning of the witnesses about the potential for the subject site to intrude into rural outlook from existing rural residential properties in Ohoka Meadows. However, Mr Craig conceded under cross examination by Mr Bell, that visibility from Ohoka Meadows Drive is not going to alter because of the presence of [existing] shelter belts[6].

[30] As to an element of the new Objective calling for consolidation of the existing Mandeville settlement (and leaving aside the vexed question of what is "existing" and at what date), the two witnesses agreed that the site is located close to the Mandeville Domain, (there being no present central commercial hub), and is located on the same (south) side of Tram Road which would encourage walk-ability.

[6] Transcript p23, lines 21 to 25.

[31] As to the question of whether amendment of the location of the MGB to include the site would provide a logical and consistent boundary to the Mandeville Rural Residential Zone (and again without addressing the question of what is meant by "existing"), there was a measure of agreement that this might provide a defensible boundary. It was also agreed that, considered in isolation, the appellant's land would achieve this outcome, there being no particularly logical landscape reason for the Council's proposed boundary, and no obvious alternative boundary short of the Waimakariri River, other settlements, or State Highway 1.

[32] To Mr Craig's view that the subject site is unexceptional and that there is no logical basis in landscape terms to either include or exclude the appellant's land from rural residential, Mr Head rejoined that the land is exceptional and that it is one of only four properties that remain on the periphery of the MGB that, if developed, would become integrated with an existing area of Mandeville's Rural Residential zoning. To this, we would add by way of observation, that the appellant's property is the only one of those presently offering access into the local Mandeville local roading network, as opposed to having access from arterial roads, thereby satisfying one of the characteristics that PC 32 inserts into chapter 17 of the District Plan. Mr Head, under cross examination by Mr Prebble, acknowledged that this feature was probably the "strongest spoke in [his] argument"[7].

[33] Finally, the two witnesses agreed that as a matter of best landscape practice, the preferred method of managing growth is via a management or structure plan that takes into account the integration of growth areas with the surrounding environment. Also that a planned boundary is a necessary technique to provide people with confidence in their living environment. We observe that this agreement still begs the question of where the line should be, but we do note that the appellant put forward a possible structure plan.

Debate about the meaning of the new Objective and new Policy

[34] At the start of this decision we recorded that the main thrust of the appeal was about a mapping issue. Concerns about the true meaning of key aspects of the Objective and Policy were essentially only raised by a side wind, a prayer for relief reading "*any further amendments to Plan Change 32 required as a consequence of allowing this appeal.*"

[7] Transcript p126 lines 20 to 23.

[35] This latter aspect of the appeal took on considerable life of its own in the hearing. We start by observing that there can be no doubt that there is an unfortunate vagueness in some of the wording of each of the Objective and the Policy. That is, the commencing words in the Objective "*...within the existing Mandeville settlement*", and the use of the same phrase in sub-paragraph (b), and the use of the phrase "the Mandeville settlement" in sub-paragraph (f), seem to beg the question as to precisely what the extent of the Mandeville settlement is and at what date.

[36] At first blush the answer might be thought to be provided in the Policy, which reads "Limit Mandeville settlement to within its boundary existing at 20 September 2011 shown on District Plan Maps 56, 57, 91, 91A, 92, 93, and 167". However things are not as easy as that.

[37] Mr Bell submitted on behalf of the appellant that there are several problems with the wording of the policy. He noted that the Council had accepted that the date 20 September 2011 must be regarded as being incorrect. There seemed to be acknowledgement by both parties that the date 3 December 2011 would be the logical date, because that was the date of promulgation of PC 32. Mr Bell submitted, however, that that did not cure all the problems. The policy cross-refers to several maps, including Map 167 promulgated in PC 32 where, of course, the appellant's property is excluded. Nevertheless, one of the other maps listed, 93, includes the appellant's property.

[38] Next, he submitted that the Policy employs the term "*boundary*" whereas the other references are variously to "*Mandeville settlement*", or "*Mandeville settlement boundary*", or "*Mandeville settlement.*" He suggested that the intention was probably to refer to the MGB in Map 167 of PC 32, whereupon a preferable wording throughout would have been "*Mandeville Growth Boundary*", not "*Mandeville settlement*" or variants.

[39] Mr Bell submitted that whatever the meaning of the Policy, even if it were to be re-worded by correcting the date and making other grammatical changes, the Policy would not yet line up with Objective 18.1.2, despite the fact that it is required that the Policy be the most appropriate means to achieve the Objective.

[40] Mr Bell submitted that on the evidence it is not possible to know what the "existing Mandeville settlement" is, exactly. He perceived that the Council's planning witness Mr Bacon held a view that it would not include any rural areas

except the San Dona subdivision, a view his own planner Ms Aston accepted. Mr Bell pointed out that therefore the use of the word "existing" before Mandeville settlement in the Objective would mean that subdivision development and use that had been confined within an area quite a bit smaller than the MGB established by Policy 18.1.2.1, and that sub-paragraph (b) of the Objective is contradictory where it talks about new subdivision being consolidated within the existing Mandeville settlement and then allows for development within the existing Mandeville Settlement Boundary.

[41] Mr Bell offered the suggestion that it might be necessary to remove the word "existing" from the Objective completely, and that wording suggested by Ms Aston for that provision in her rebuttal evidence, would be entirely appropriate.

[42] Mr Bell submitted that changes should be made for "clarification purposes." He recommended that the Court consider using its powers under s293(1) RMA to make such amendments because he submitted they are clearly warranted.

[43] The above submissions on behalf of the appellant were delivered in Court on the final day of the hearing, and represented a refinement of Mr Bell's opening submissions. Interestingly he did not appear to repeat a submission that arguably the appellant's property was within the MGB at 20 September 2011 because part of the access leg was located within the Residential 4B Zone. We think that such an argument would have been a long bow at best, and clearly runs counter to what is shown on proposed new Map 167.

[44] Interestingly, Mr Prebble in his reply submitted that the concerns of the appellant in the evidence of Ms Aston and the submissions of Mr Bell, were "over-stated." We think Mr Prebble was right to avoid submitting that they were completely wrong. He acknowledged that some grammatical tidying up could be achieved, and the date 3 December 2011 placed in the Policy, conceding that if necessary s293 could be used, and submitted that there would be no need for public notification if that course were to be followed.

[45] Mr Prebble then turned to the amendment for the Objective suggested by Ms Aston. He submitted that it would not be necessary to address the issue raised about uncertainty in the Policy, and that more importantly the proposed amendment would amount to a dramatic watering down of the rationale for the MGB in the Objective. He submitted that if all references to "existing" were removed, the fundamental basis

for the Growth Boundary would be removed, which would undermine the Objective to the point where it would become ineffective.

[46] We are inclined to think that submission misses the point, but that possibly Ms Aston's suggestion does as well. There remains the problem, for instance, of differences between Map 93 and proposed Map 167, and the question of whether the San Dona subdivision is in or out. We have the view that the total plan change package would need to be tightened up by regularising the phraseology throughout to achieve consistency, providing some grammatical improvements, but most importantly by including a definition of the phrase ultimately chosen in order to offer precise geographical definition, preferably by way of a map as at or pre-dating the promulgation of the proposed Plan Change. That would probably require the exercise of powers under s293. We shall see whether this will be required.

Weighting of relevant documents

[47] At the time of the hearing, Mr Bell submitted that Proposed Change 1 to the Regional Policy Statement, and the LURP, were not yet operative, and therefore fell simply to be had regard to, under s74(2) RMA. There has been a significant change regarding the LURP, as earlier noted, it having been gazetted and made operative from 6 December 2013.

[48] We shall address in a separate section of this decision, the issues around the new status of the LURP, and the legal impact of that for the present proceedings.

[49] Concerning the RRDP promulgated under the Local Government Act 2002, Mr Bell submitted that it contained a preference for development "to the south of Tram Road."[8] We note however that the reference to a growth location to the south of Tram Road is cross-referenced to Map sheet A5 at page 31 of the RRDP, from which it appears that most of the appellant's property is in fact excluded.

[50] Mr Bell submitted that the RRDP "*already appears to be substantially out of date as stated by Fiona Aston at 8.17 of her primary evidence.*" He noted that the preferred growth areas do not include a Plan Change 10 area which has been approved by the respondent for rural residential re-zoning and provides for 141 lots described being situated north of Tram Road. He submitted that in an unsuccessful appeal to the

[8] At p28.

Environment Court about PC 4,[9] the Court gave the RRDP very little weight, noting that the Waimakariri District Council had approved two plan changes which would release up to 190 new allotments, including the 141 just mentioned.

[51] In reply, Mr Prebble accepted that the RRDP is substantially out of date and does not include the PC 10 land, this because the PC 10 decision post-dated the RRDP. He submitted that while the RRDP might benefit from updating, this does not take away the fact that PC 32's MGB reflects the preferred growth areas in the RRDP.

[52] Mr Prebble's submission is essentially correct. We observe as well that while the Court would normally place little weight on an instrument like the RRDP, promulgated other than pursuant to Schedule 1 RMA, recovery legislation in Canterbury places a different perspective on it today. We will comment further on this in the following discussion of provisions of the LURP.

[53] We now discuss the situation brought about by the LURP having been gazetted and made operative on 6 December 2013. Counsel filed further submissions in February and March this year after the gazetting was drawn to our attention by Mr Prebble.

[54] Appendix 2 of the LURP provides amendments to the Canterbury Regional Policy Statement, including provision of a policy 6.3.9 – "Rural Residential Development," which provides:

> In Greater Christchurch, rural residential development further to areas already zoned in District Plans as at 1 January 2013 can only be provided for by territorial authorities in accordance with adopted rural residential development strategy prepared in accordance with the Local Government Act 2002 subject to [certain stated qualifications].

[55] The RRDP previously described is, Mr Prebble argued, an "adopted rural residential strategy" for the purposes of policy 6.3.9.

[56] Mr Prebble then submitted that under s75(3)(c) RMA, a District Plan "*must give effect to a Regional Policy Statement*" (which by definition means an operative Regional Policy Statement). Mr Prebble placed emphasis on the word "must".

[57] Counsel drew our attention to s 23 of the Canterbury Earthquake Recovery Act 2011 ("CERA") which provides to the relevant extent:

---

[9] ***Canterbury Fields Management Ltd v Waimakariri District Council, ENV-2010-CHC-196***

> (1) On and from the notification of a Recovery Plan in the *Gazette*, any person exercising functions or powers under the Resource Management Act 1991 must not make a decision or recommendation that is inconsistent with the Recovery Plan on any of the following matters under the Resource Management Act 1991:
>
> ...
>
> (f) the preparation, change, variation, or review of an RMA document under Schedule 1.

[58] Mr Prebble submitted that this makes it clear that the LURP is to be fully applied from the date of the gazetting, and there are no transitional provisions to exclude processes commenced before the gazetting.

[59] Mr Prebble submitted that with effect from 6 December 2013, the appellant's land, not already having been zoned for rural residential development and falling outside of the rural residential development area in the approved RRDP for Mandeville, cannot be the subject of such provision in the District Plan. He submitted that the LURP, introducing as it does new and now operative provisions to the RPS (in particular policy 6.3.9), has a determinative role in these proceedings.

[60] Mr Bell accepted on behalf of the appellant, certain aspects of Mr Prebble's submissions as follows:

- the LURP was gazetted on 6 December 2013;
- the LURP makes Policy 6.3.9 operative [we infer that he meant that the gazetting of the LURP on 6 December 2013 made policy 6.3.9 operative];
- the respondent's RRDP is an "adopted Rural Residential Development Strategy" as referred to in Policy 6.3.9;
- Section 23 of the CERA has retrospective effect on appeals lodged before the LURP was notified where no decision has issued before the LURP was gazetted in December.

[61] Mr Bell then however put forward two prime submissions being reasons why Plan Change 32 should not be seen as inconsistent with the LURP.

[62] His first argument was that Plan Change 32 does not re-zone land nor does it provide for rural residential development; therefore it would not be a breach of Policy 6.3.9.

[63] He submitted that the LURP, in its Appendix 1, defines rural residential activities as "... *residential units outside the identified Greenfield Priority Areas at an average density of between one and two households per hectare.*" He argued that while rural residential activities are defined, there is no definition in the LURP of rural residential development. This seems to us to be an overly fine distinction in the present circumstances.

[64] Mr Bell also submitted that the District Plan refers to rural residential development as being comprised of the residential 4A and 4B zones, with characteristics set out in chapter 17 and generally having average lot sizes of 0.5-1.0 ha respectively.

[65] He noted that the District Plan definition of rural residential development is referred to in the RRDP in its "Background section", and in section 2.1 "Rural Residential Development". In the "Executive Summary" of the RRDP, Rural Residential Development is said to be "*the subdivision and use of land to cater for the needs of those wishing to live within a rural or semi-rural setting.*"

[66] Mr Bell submitted that from the foregoing definitions, if rural residential development is to occur, either the land has to be re-zoned Rural Residential 4A or 4B, or subdivided down to rural-residential sizes. He returned to his argument that PC32 does not seek to re-zone any land to rural residential. He submitted that the new Objective and Policy do not of themselves provide for rural residential development at Mandeville because they don't re-zone or subdivide land; neither therefore does the relief sought by the present appeal.

[67] Mr Bell's second submission was that even if he was wrong with his first, the proposal in the appeal would still be in accordance with the RRDP (similarly the content of PC32). He essentially returned to his theme of PC32 not re-zoning land, referring to the various provisions in the RRDP about broad identification of locations, and locations for potential rural-residential development; also to the effect

that the provisions of the RRDP are indicative only.[10] He pointed to similar themes elsewhere in the RRDP.[11]

[68] He submitted again in light of the quoted provisions from the RRDP, that PC32 and the relief sought by the present appellant would not breach policy 6.3.9 of the LURP. Our concern with this submission was with Mr Bell's continuing emphasis on the fact that the plan change does not seek to re-zone land (which seems reasonably clear in itself) but also that it does not "provide for" rural residential development (being the wording of policy 6.3.9).

[69] Mr Bell went on to draw our attention to another plan change, PC21, decisions on which were notified on 14 December 2013, 8 days after the LURP was gazetted and made operative. Drawing our attention to the relevant mapping there, Mr Bell submitted that part of the area identified in PC21 as a Development Plan Growth Location is located outside of the preferred development location for Ohoka. He referred to remarks of the hearing commissioners that while they were to have regard to the indications of how growth may be managed as set out in the RRDP, they were not required to follow those indications "slavishly."

[70] Mr Bell added that if PC21 was in breach of LURP policy 6.3.9, then so too would be the inclusion of the San Dona area in the Mandeville Growth Boundary Area. He submitted however that, being only indicative as to preferred growth locations, and needing to be "updated and tightened by way of plan change later", such provision in each case would not be in breach of policy 6.3.9.

[71] Employing an old adage "*two wrongs don't make a right*" (actually three in this instance), the PC21 decisions and/or the inclusion of the San Dona area in the MGB cannot influence our decision here. Further, the present proceedings are not in the nature of an application for Declaration or Enforcement Order in relation to the legality or otherwise of the other 2 situations.

---

[10] Provisions of RRDP drawn upon by Mr Bell: Executive Summary at p 3; Context, paragraph 1.1 at p 4; Primary Objectives 1.3; Anticipated Outcomes 1.5

[11] For instance Settlement Size at p 29 concerning further consultation with the community to ascertain boundary limits before any further development is undertaken at Mandeville, Map Sheet 05 at p 31 highlighting an area labelled "Preferred Development Location" and talking of "extended location of additional growth to be determined following further consultation".

[72] In his submissions and reply Mr Prebble slightly regretted having, in his initial submissions on the point, stressed "re-zoning of the Black land." In so doing, he reminded us that the relevant words of policy 6.3.9 of the LURP are:

> In Greater Christchurch, a rural residential development further to areas already zoned... as at 1 January 2013 can only be provided for... in accordance with an adopted [RRDP]...[underlining provided by us]

[73] Mr Prebble submitted in short that the purpose of PC32 is to establish the new objective and policy framework to provide for further rural residential development at Mandeville in accordance with the RRDP.

[74] We have thought about this carefully, and consider that the statutory emphasis is in fact slightly different. What we perceive is that to set a boundary to geographically limit growth of future rural residential development in circumstances where further plan change activity will be necessary to make full provision for such zoning, the present plan change makes some provision for it. We have the view that some, or any, provision is provision of one kind or another.

[75] As to Mr Bell's second submission, Mr Prebble accepted that the RRDP and PC32 are preliminary or provisional in nature, and would require further plan changes to be initiated. He then set about identifying some provisions within the RRDP which he submitted were more definitive in nature than tentative. He referred to s1.1 "Context":

> The development plan is intended to provide a level of certainty to landowners, developers, the Council...

He also referred to s1.5 "Anticipated Outcomes":

> The development plan provides a level of certainty to the Council, landowners, developers and property investors regarding the location and infrastructure requirements for growth and development. It also provides some certainty as to the general spatial extent of development and an understanding of what the surrounding area may look like in future.

Consideration

[76] Mr Bell's first and second submissions and therefore also Mr Prebble's responses, are somewhat bound up. Picking up on our finding that some or any provision is indeed "provision," we do not consider that there is much to be gained by making a semantic comparison of various provisions of the RRDP as to whether they are tentative or more definitive in nature. It is perhaps unfortunate that the importance

of the RRDP has been significantly elevated by a combination of s23 of the CERA and policy 6.3.9 of the LURP, given that the RRDP was never intended as a statutory instrument under the RMA, was never put through the Schedule 1 RMA processes, and is somewhat imprecise and wordy in its structure. However, such is the nature of emergency legislation. We are also left slightly wondering in policy terms how the limitation of rural residential growth around small settlements in Waimakariri District derives from the need for emergency legislation for recovery from the Christchurch earthquakes; but it is not our place to inquire into such a policy matter in these proceedings. The CERA is what it is, and we are bound to uphold its terms as we find them.

[77] By s75(3)(c) the District Plan must give effect to the Regional Policy Statement, which now includes policy 6.3.9. The appellant's property is beyond the provision at Mandeville for rural residential activity in the adopted RRDP. The effect of this is that we cannot allow the relief sought by the appellant.

[78] The outcome probably would have been the same had the LURP not been made operative, because, by s74(2)(a)(i) RMA, we would have had to have regard to those provisions.

[79] That would have been a fine call however, because we consider that the issue of effects on the environment when assessed as required by s32(1)(c) is evenly balanced as to whether inclusion or exclusion of the appellant's property would be the "most appropriate" way for the Objective to achieve the purpose of the Act and for the other provisions to achieve the Objective. For instance we felt that the fact of the accessway to the appellant's land being through rural residential zoned land created a point of difference from other rural land surrounding him. Activities like the transporting of livestock through Residential 4B land could be less than desirable. At the end of the day however the line has to be drawn somewhere, and the professional witnesses variously considered that the "horse has already bolted" at Mandeville[12], and as already recorded, there is no other completely logical available line short of the Waimakariri River or some other neighbouring settlements. We go so far as to acknowledge the legitimacy of the policy of the plan change in general terms, managing the form and size of Mandeville.

[12] Answers in cross examination of Mr Craig by Mr Bell, Transcript p21, lines 8 to 17.

[80] Those factors and the other findings we made in the section of this decision on environmental effects being relatively evenly balanced, we would have resolved matters by having regard to the LURP and the RRDP, for all their foibles.

[81] The appeal must be dismissed.

[82] Before concluding, we remember the submissions of both counsel about s293, and as to whether the provisions of the new Objective and the new Policy should be amended. We are also mindful of Mr Bell's submissions about whether the San Dona area of Mandeville is validly brought inside the MGB. The provisions of subsections (4) and (5) of s293 could prove apposite in that regard. An alternative for the council might however be a further plan change. Counsel should signal a response before the Court closes its file. This decision must be regarded as final so far as the relief sought by Mr Black is concerned, but leave in relation to possible s293 matters will remain open until 18 July 2014.

[83] Costs are reserved, but are unlikely to be an issue in a plan change dispute of the present variety.

SIGNED at AUCKLAND this 29th day of May 2014

For the Court

L J Newhook
Principal Environment Judge

APPENDIX A. Locality Map