

BEFORE THE ENVIRONMENT COURT

Decision No. [2011] NZEnvC 47  
ENV-2011-WLG-000017

IN THE MATTER of an application by the Tasman District Council to make rules operative under s86D of the Resource Management Act 1991

Court: Environment Judge B P Dwyer sitting alone under s279 of the Act  
Heard: In chambers at Wellington

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DECISION

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Issued: **28 FEB 2011**

Application granted.

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[1] Tasman District Council (the Council) has made application to the Court for orders in these terms:

- (1) *Tasman District Council applies pursuant to s86D of the Resource Management Act 1991 for an order that amendments to Rules to be introduced by way of proposed Plan Change 22 to the Tasman Resource Management Plan (TRMP) for Mapua/Ruby Bay and which concern Coastal Hazard Area rules, the subdivision rules for the Residential Closed Zone and Rural 1 Zone and Rural 1 Closed Zone, and the building construction rules in the Residential Zone shall have legal effect from the date the proposed plan change is publicly notified.*
- (2) *The Rules that this order shall apply to are as follows:*
  - (i) *All amendments to the Coastal Hazard Area rules in Section 18.9 of the TRMP and on the Planning Maps*



- (ii) *Amendments to Rule 16.3.3.6 (the prohibited activity rule for subdivision in the Residential Closed Zone) and Rules 16.3.5.1, 16.3.5.3, 16.3.5.4 (rules applying to subdivision in the Rural 1 Coastal Zone and Rural 1 Closed Zone) of the TRMP and associated Planning Map amendments*
- (iii) *Amendments to Rule 17.1.3.2 and 17.1.3.4 (building construction rules in the Residential Zone) of the TRMP.*

[2] The application then goes on to identify the reasons for which the orders are sought in these terms:

(5) *The reasons for this application are that:*

- (i) *The land affected by the rules is the Mapua/Ruby Bay coastal plain which is likely to be affected by future coastal erosion and coastal and freshwater inundation*
- (ii) *It is necessary to restrict further subdivision and construction of dwellings on the Mapua/Ruby Bay coastal plain*
- (iii) *The making of an order under section 86D of the Act whereby the rules restricting subdivision and construction of dwellings on the Mapua/Ruby Bay coastal plain have legal effect from the date of publication of proposed Plan Change 23 (sic-22) promotes sustainable management of the natural and physical resources of this part of Tasman District and meets the purpose of the Act.*

The application was accompanied by a detailed affidavit sworn by Mr G S Markham (Policy Manager at the Council) and a memorandum from Counsel to the Council

[3] It is apparent from consideration of Mr Markham's affidavit and the memorandum of Counsel that the Council has had regard to comments made by myself in *Re New Plymouth District Council*<sup>1</sup> (and an earlier procedural decision) and of Judge Whiting in *Re Manukau City Council*<sup>2</sup>. Mr Markham's affidavit enables a ready understanding of the changes being effected to the District Plan by



<sup>1</sup> [2010] NZEnvC 427.  
<sup>2</sup> [2006] NZEnvC 365.

Plan Change 22 (PC 22) and the areas and numbers of property owners affected by those changes.

[4] I do not propose to revisit in any detail the comments made in my earlier decisions or that of Judge Whiting relating to the background to s86D and as to the process and the appropriate considerations to be taken into account by the Court in determining such applications. There is, however, one matter arising out of Mr Markham's affidavit on which it is appropriate that I comment further.

[5] Although the formal grounds upon which the Council's application is made are set out in para [2] above, it is apparent upon consideration of Mr Markham's affidavit that there is a further underlying basis for the application. Mr Markham deposed as follows:

*21 The Council considers that, if the order is not granted once Plan Change 22 is notified, there is likely to be a rush on applications in these coastal areas to subdivide or develop. This would be generated by public knowledge of the rule amendments before they might otherwise take legal effect, leading to a series of resource consent applications. This potentially undermines the outcome intended by Council.*

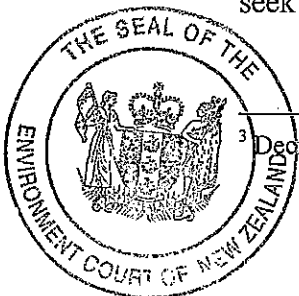
Mr Markham advised that PC 22 was to be publicly notified on 26 February 2011.

[6] Similar concerns to those expressed by Mr Markham were raised by New Plymouth District Council as a basis for the decisions which I have issued regarding s86D applications by that Council.<sup>3</sup> One of the New Plymouth applications was approved (Decision [2010] NZEnvC 427) and one was declined (Decision [2010] NZEnvC 8).

[7] It is reasonable to anticipate that when a local authority proposes changes to a district plan which might be seen as potentially disadvantaging some parties (for example, by way of tightening of subdivision rules), those likely to be affected might seek resource consents under existing, less restrictive, rules. The likelihood of that

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<sup>3</sup> Decisions [2010] NZEnvC 280, 427 and [2011] NZEnvC 8, 23.



happening would surely have been apparent to Parliament when it considered the changes to RMA now contained in ss86A-86G RMA.

[8] Notwithstanding that likelihood, Parliament brought down those amendments providing that, subject to limited exceptions, rules in a proposed plan would not have legal effect until parties who might be affected by those rules had the opportunity to make submissions on them and have their submissions heard and determined by the local authority.

[9] Under those circumstances, I do not consider that the possibility that applications under existing rules might be made, of itself, will necessarily be the determinative factor in deciding an application pursuant to s86D. In my view, such an application requires a wider consideration of the purposes of any changes, their significance, the possible consequences of a *rush* of applications and the provisions of s5 RMA, rather than just consideration of the bare proposition that notification of changes is likely to generate applications for consent.

[10] In this case the relevant rules of PC 22 apply to identified areas of low lying land in the Mapua/Ruby Bay area. The significance of PC 22 in respect of those areas was described in these terms by Mr Markham in his affidavit.

*5 Proposed Plan Change 22 addresses as a significant issue, the need to respond to the combined risks of two coastal hazards, coastal erosion and sea flooding, and also the risk of freshwater flooding from Seaton Valley Stream. The combined area exposed to these hazard risks covers all low lying land adjacent to the coastal marine area and on flood plain areas of Seaton Valley Stream. There is estimated to be a significant future increase in the level of these risks when they are combined under both climate change processes, and extreme weather event conditions. Some of the area exposed is directly protected to an extent from coastal erosion by barrier structures along much of Ruby Bay. However the area of rural and urban land that is exposed to increasing hazard risk, would require significant expansion of any structural protection, together with significant increases in the standard of protection over time.*



[11] Attached to Mr Markham's affidavit were two Council's staff reports.<sup>4</sup> These reports identified the present susceptibility of the low lying areas to erosion, flood water inundation and sea water inundation and the likely progressive increase through time of those risks, particularly as a result of projected climate change influences such as sea level rise. The Appendices identified a number of options for dealing with the existing and projected hazard and PC 22 is an outcome of Council considerations of those documents (inter alia).

[12] The relevant changes to the existing provisions of the District Plan which arise out of PC 22 were described by Mr Markham in these terms:

*(11) The particular amendments to rules for which an order for immediate legal effect is sought, are:*

1. *All amendments to the Coastal Hazard Area rules in Section 18.9, viz. 18.9.2.1 conditions (d) and (e), 18.9.2.2 condition (a) and matters (1), (1A), (1B), 18.9.2.3 and 18.9.2.4. These amendments require any permitted building to be relocatable and not a habitable building, nor a coastal protection structure. They also require that habitable buildings are a non-complying activity and that coastal protection structures are a restricted discretionary activity.*
2. *Amendments to subdivision and land use rules in Rules 16.3.5.1, 16.3.5.3 and 16.3.5.4 to create a variant of the Rural 1 Zone (the Rural 1 Coastal Zone) applying over the very low-lying coastal sand plain bordering Ruby Bay, in which:*
  - (a) Subdivision has a controlled activity minimum allotment area of 3.5 hectares (rather than 12ha)*
  - (b) Subdivision below that minimum is prohibited except as exempted for boundary relocations or adjustments. But when first taking legal effect these amendments would operate as discretionary activity rules and then prohibited rules, following the proposed rules' passage through Schedule 1 process (under section 87B RMA)*

Appendices 1 and 3.



- (c) *The Rural 1 zone land use rules at 17.5.1 continue to apply (but as the Coastal Hazard Area also applies over this location, the amendments as described in 1 above would apply over this zone location)*
3. *Amendments to prohibited subdivision rules:*
- (a) *to apply the Residential Closed Zone to an area of Ruby Bay and to parts of Tahi and Iwa Streets at Mapua; and*
- (b) *to apply the Rural 1 Closed Zone to the low-lying land in the Seaton Valley*
- (c) *The amendments are to Rule 16.3.3.6 and to Rules 16.3.5.1, 16.3.5.3 and 16.3.5.4. The amendments are to prohibit subdivision except as exempted for boundary relocations or adjustments. But when first taking legal effect these amendments would operate as discretionary activity rules and then prohibited rules following the proposed rules' passage through Schedule 1 process (under section 87B RMA.*
4. *Amendments to Residential zone building rules in Rules 17.1.3.2 and 17.1.3.4 to make any second dwelling on a site a non-complying activity in the Residential Closed Zone within the areas of Ruby Bay and parts of Tahi and Iwa Streets at Mapua.*

[13] PC 22 is specific to the low lying areas previously identified. Those areas are identified in the maps which form part of PC 22. Mr Markham's affidavit identifies that some 347 property owners are potentially affected by the amendments proposed.

[14] It will be seen from the above that allowing the identified rules to have legal effect from the date the proposed plan change is publicly notified (or the later date of this decision), will potentially impact on the rights of landowners in the areas concerned, to undertake presently permitted and controlled activities.

[15] It must be acknowledged that the interim controls which are sought to have immediate legal effect in respect of building construction and alteration and (particularly) subdivision represent a substantial change to the status quo. That



factor needs to be given appropriate weight in my considerations, particularly in light of Parliament's clear intention that rules in proposed plans ought not ordinarily have legal effect until local authorities have heard and determined submissions on those proposed rules.

[16] I consider that the following factors are relevant considerations in favour of making the order sought in this case:

- PC 22 is directed at the protection of people and land from the effects of coastal erosion, coastal and freshwater inundation in a specifically identified area which (on the face of the information provided to the Court) is highly vulnerable to those effects. It accordingly requires consideration of people's and communities' social, economic and cultural wellbeing and their health and safety which lie at the heart of sustainable management.
- Allowing the rules contained in PC 22 to have legal effect will enable the Council to immediately manage the use and development of land pending PC 22 becoming operative, in a manner where the effects of coastal erosion, coastal and freshwater inundation are given due weight in its considerations. This represents a precautionary approach to management of the District's land resource which I consider to be appropriate when regard is had to the potential effects of coastal erosion, coastal and freshwater inundation. This approach is consistent with Policy 3(2)(a) of the NZ Coastal Policy Statement (NZCPS) which recommends:
  - (2) *In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:*
    - (a) *avoidable social and economic loss and harm to communities does not occur;*
- Section 7(i) RMA requires the Court to have particular regard to the effects of climate change in exercising its functions. The Council contends that climate change is a factor driving coastal erosion and coastal inundation and this adds weight to my considerations in determining whether or not the Rules in PC 22 ought have immediate legal effect.



- In addition to Policy 3(2)(a) NZCPS referred to above, Policies 7, 24 and 25 also support the Council application in this case. In particular allowing the rules in PC 22 to have immediate legal effect enables avoidance of increased risk from interim subdivision and development, consistent with Policy 25 which provides:

***Policy 25 Subdivision, use, and development in areas of coastal hazard risk***

*In areas potentially affected by coastal hazards over at least the next 100 years:*

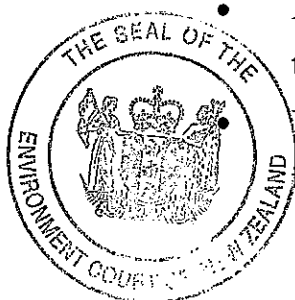
- (a) avoid increasing the risk of social, environmental and economic harm from coastal hazards;*
  - (b) avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards;*
- Finally, I note that PC 22 is the culmination of a comprehensive planning process extending back to publication of the Coastal Tasman Areas Strategic Development Review in December 2000, subsequent development studies and structure plan developments in respect of Mapua/Ruby Bay and public consultation on the Mapua/Ruby Bay Draft Plan Change.

[17] When all of the factors identified in the preceding paragraph are taken into account, I am satisfied that it is consistent with the principle of sustainable management to grant the application made by the Council.

[18] Accordingly, I order as follows:

- Pursuant to s86D(3)(b) RMA the Court orders that the Rules introduced into the Tasman Resource Management Plan by PC 22 and identified in para [12] (supra) are to have immediate legal effect upon the issue of this decision.
- I direct the Council to submit a formal order for sealing which reflects the order hereby made.

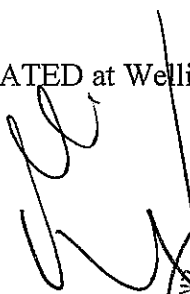
I further direct the Council to prepare a notice for publication in those newspapers circulating in the District in which the Council commonly





places public notices, advising as to the making of this order. Such notice to be given within 15 working days of the making of this order.

DATED at Wellington this 28<sup>th</sup> day of February 2011

  
B P Dwyer  
Environment Judge

