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27 February 2019

Brett Osborne
Upper Hutt City Council
By email

Dear Brett

DEFINITION - HEALTH AND SAFETY SIGN

1 The Upper Hutt City Council (**Council**) is undertaking a rolling review of the Operative Upper Hutt City District Plan 2004 (**Plan**). Proposed Plan Change 45 (**PC45**) is a review of all provisions which relate to signs in the Plan.

2 You have asked us to consider:

2.1 Whether there is scope to include a new definition in the Plan for 'Health and Safety Sign', and

2.2 You have provided two examples and asked what an appropriate definition for 'Health and Safety Sign' may be.

Overview

3 In summary we consider that:

3.1 The Powerco and Oil Companies submissions are 'on' the Plan Change and provide scope to include a new definition in the Plan for 'Health and Safety Sign'. That scope extends beyond the specific words requested by the submitter, and

3.2 An appropriate definition needs to sufficiently certain and clear to support a permitted activity status, and to be the most appropriate way to achieve the objectives and policies of PC45. We consider that Powerco's formulation, with its specific reference to a health and safety purpose is most helpful.

3.3 Some consideration of the consequences of the additional definition is required. For example, is a 'health and safety sign' still a 'sign' and do any of the permitted activity standards apply?

Proposed Plan Change 45

4 The notified version of PC45 included the following amendment to the definition of 'sign/signage':

> ~~a device or facility that displays information and which is visible from outside the site. It includes sandwich boards, shop frontages and every advertising device or advertising matter.~~
>
> means any device or facility, graphics or display that is visible from outside the site, for the purposes of: identification of, or provision of information about any building, activity, site; providing directions; or promoting goods, services or events. Signage may be part of, attached, or projected onto any building, site, or structure or other object. Any sign may be illuminated and may contain moving content, including changing content and digital signage.

5 No definition of 'Health and Safety Sign' was proposed in PC45. Proposed Rule 8A.3.4.1 provides that any health and safety sign is a permitted activity.

6 Submission 3, from the Oil Companies, supports a permitted activity status for all health and safety signs and seeks the following definition of 'Health and Safety Sign':[1]

> If necessary, include a new definition of "health and safety" sign which includes any signs required by legislation. This could be achieved by making changes along the following lines:
>
> *Health and Safety sign means any sign necessary to meet other legislative requirements (e.g. HSNO / Worksafe).*

7 Submission 4, from Powerco Limited also support a permitted activity status for health and safety signs and seeks the following definition of 'Health and Safety Sign':[2]

> The proposed definitions do not include a definition for a "Health and Safety sign". This may lead to confusion over what meets the criteria to be a permitted activity under rule 8A.3.4.1. Therefore, Powerco propose the following addition to the definitions chapter:
>
> *Health and Safety Sign: A sign affixed to a network utility, or any other asset or structure for the purpose of providing a health and safety warning, identification or as a requirement of other legislation.*
>
> Powerco is open to revised wording of this definition, which achieves the same outcome.

Scope

8 When making a decision on a plan change, the Council (or the decision maker with the appropriate delegations) is restricted in terms of the scope to make changes to the proposed Plan. The scope for amendment to a notified plan generally lies between the provisions of the notified version of the proposed Plan, and the relief sought in submissions on the proposed Plan. According to the Courts, any amendment made to the proposed Plan must be a reasonably foreseen logical consequence of a submission.[3]

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[1] Page 8

[2] At paragraph 2.4

[3] *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].

9 Any submission that provides scope must be a valid submission, ie,. it must be 'on; the plan change. The key legal principles for determining whether a submission is 'on' a plan change have been established by the High Court in a number of cases.[4] In *Palmerston North City Council v Motor Machinists Ltd*[5] the High Court referred to its earlier decision of *Clearwater Resort Ltd v Christchurch City Council*[6] and confirmed that a two-limbed test must be satisfied:

9.1 The submission must address the proposed plan change itself, that is it must address the extent of the alteration to the status quo brought about by that change; and

9.2 It must also be considered whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.

10 The rationale behind this approach relates to procedural fairness. Adequate notice and opportunity must be given to those who might seek to take an active part in the hearing if the proposed changes would not have been within the reasonable contemplation of the original reference.[7]

11 We consider that the submissions by the Oil Companies and Powerco are 'on' PC45. PC45 is a complete review of the signage chapter of the district plan and provided a new definition for 'sign' (albeit it did not mention health and safety signs) and provided a new permitted activity for health and safety signs. Accordingly, we consider that the submissions address the change to the status quo and are therefore, 'on' the plan change.

12 That being the case, the submissions by the Oil Companies and Powerco clearly provide scope to insert a new definition for health and safety signs. We consider that the submissions also provide scope for changes to a definition beyond the definitions proposed, both because the Powerco submission states that they are open to alternative wording, and also because we consider that it is a foreseeable consequence of the submissions that the definition would be inserted, and potentially altered.

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[4] *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003, *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC) and *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC). See also the decision of the High Court in *Albany North Landowners v Auckland Council* [2016] NZHC 128 which indicates that in a whole of plan review such as the Proposed Auckland Unitary Plan as opposed to a relatively discrete plan change or variation, the scope for a submission to be on the plan is likely to be very wide.

[5] *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) at [80] to [82] and [91] (d) and (e).

[6] *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02.

[7] *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 at [74].

Permitted activity requirements

13 The caselaw says that rules in a Plan and the provisions of the Plan in general must be clear and precise. If a rule is found to be vague or unclear, it may be void for lack of certainty:[8]

> It is established that rules in a plan, and the provisions of the plan in general, must be clear and precise. If a rule is found to be vague or unclear, it may be void for lack of certainty. In *Sandstad v Cheyne Developments Limited* the Court commented:
>
> > 'It is desirable that those who administer or are affected by or have to advise on the restrictions prescribed by a town planning ordinance should be able to identify without difficulty the properties to which it relates.'

14 In addition, a permitted activity must not reserve discretion to a decision maker to provide final approval to a permitted activity and it must be sufficiently certain to be understandable and functional, ie it should be clear on its face as to whether an activity is permitted by that rule or not.[9] In *AR and MC McLeod Holdings v Countdown Properties Limited*[10] the High Court stated:[11]

> An expression need not always be considered invalid because it is general. Qualitative generalisations are common enough in district schemes, and are accepted planning mechanisms
>
> …
>
> The question must always be: is it sufficiently certain to be understandable and functional.

Appropriate definition

15 Ultimately, the Council must reach a determination on which rules are the most appropriate way to meet the objectives of the proposed Plan, whilst also providing for rules that are sufficiently clear and precise. Under section 32 of the RMA, the Council is required to examine whether the polices and rules are the most appropriate way to achieve the objectives by identifying other reasonably practicable options, assessing the efficiency and effectiveness of the provisions and summarising the reasons for deciding on the provisions.

16 We have reviewed caselaw and have not identified any other definition of health and safety sign. We have briefly reviewed other planning documents[12] and have not located any other definitions of health and safety signs.

17 In terms of the suggestions in the two submission, we prefer a formulation as per Powerco's, submission as it has some 'in-built' limitations, such as the specific reference to a sign for a health and safety purpose and the limits of what it can be attached to. The other definition is potentially wider and relies on reference to other legislation but isn't actually specific that it

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[8] *Lovegrove v Waikato District Council* [2010] NZEnvC 054 at [10].

[9] *Boanas v Oliver* PT Christchurch C072/94, 28 July 1994 at page 5-6

[10] HC Wellington CP949/89, 19 September 1990

[11] Above at page 27 - 28

[12] Auckland Unitary Plan, Lower Hutt City District Plan, and Christchurch City District Plan

is health and safety legislation. The definition also appears to exclude freestanding signs (because of the reference to 'affixed'), which may not be the most appropriate outcome. You may also want to consider whether there is any issue with determining what happens if there is a 'mix' of functions on a sign (eg, a large logo or quasi advertising that is included on a health and safety sign).

18 While not a question you have asked, what is not clear to us is how (if at all) the permitted activity standards and other 'sign' rules apply to health and safety signs if you include a specific definition of 'health and safety sign'. The standards all apply to 'signs' and unless 'health and safety sign' is excluded from that definition there may well be confusion over which rules apply and whether the permitted activity standards apply. We are happy to discuss this further if useful.

Conclusion

19 Our conclusion is set out in the Overview above.

Regards

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