

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER of hearing submissions and further
submissions on the Proposed
Waikato District Plan

AND

IN THE MATTER of Proposed Rezoning Requests:
Hearing 25

MINUTE AND DIRECTIONS FROM HEARING COMMISSIONERS FOLLOWING PRE-HEARING CONFERENCE

15 March 2021

Introduction

1. In accordance with the directions of the Panel dated 5 March 2021 (“Directions”), we convened a pre-hearing conference on 12 March 2021 in response to a Memorandum dated 4 March filed by Mr Peter Fuller, legal counsel for Pokeno West limited, CSL Trust and Top End Properties. Mr Fuller’s Memorandum raised concerns about the Waikato District Council’s (“WDC” or “Council”) section 42A Framework Report dated 19 January 2021 (“Framework Report”).
2. Our Directions invited any party who lodged a submission/further submission relating to Hearing 25 to file a memorandum addressing whether the procedure set out in the Framework Report and, in particular compliance with Lens 1, should be generally adhered to, and, if not, the reasons why. A further 13 memoranda were received by the Panel.
3. The purpose of the pre-hearing conference was to discuss the memoranda received and the way forward.
4. At the outset the Panel wishes to thank the parties for their helpful memoranda and for the constructive ways that they approached the pre-hearing conference.

Issues of Concern

5. The primary concern raised by the parties who filed memoranda related to Lens 1 in the Framework Report. This requires a rezoning proposal to be assessed for consistency against the notified objectives and policies of the proposed plan. The particular concerns raised and discussed were:
 - (a) That Lens 1 functions as a gateway or threshold test that must be passed before a rezoning proposal can proceed to be assessed on its merits under Lenses 2 and 3; and
 - (b) The order that Lens 1 appears in the assessment, being the first step; and
 - (c) Related to b), the notified objectives and policies of the proposed plan are subject to challenge and will change, and as such, may be considered as a final check for the Panel, once the objectives and policies are settled.
6. As a consequence of the above, the parties were concerned there was a risk that the s42A report authors would apply the incorrect legal tests.
7. A number of parties referred to the settled statutory tests for plan provisions set out in Appendix 1 to the Opening Legal submissions by Counsel for WDC, dated 23 September 2019 ("Appendix 1"), and asked that the section 42A authors follow that checklist when assessing rezoning proposals. Mr Fuller did however identify one addition that should be made to that checklist – being a reference to section 31(1)(aa) of the RMA relating to sufficient development capacity in respect of housing and business land to meet the expected demands of the district. This amendment post-dated the decision upon which the checklist in Appendix 1 is based.
8. Legal counsel for WDC, Ms Parham, advised that the Framework Report was intended as a guide only and that it was not the author's intention for Lens 1 to operate as a gateway or threshold test. She said the statement in paragraph 46 was an inadvertent error and that WDC accepted that to apply Lens 1 as a gateway test would be contrary to the statutory direction in section 75(3) of the RMA that rezoning proposals must be assessed against the higher order planning documents.
9. In relation to Lens 1 being the starting point for the assessment, Ms Parham's view was that some aspects of Lens 1 may be relevant to the assessment because it may form part of the relevant statutory test, being the section 32AA evaluation. However, she said that evaluation is undertaken at the end of the assessment and is not the starting point. Ms Parham also concurred with other parties that Appendix 1 reflects the correct statutory tests for plan making, subject to the addition suggested by Mr Fuller.
10. We record there was consensus among all parties that Lens 1 should not be applied as a gateway test and nor should it be applied as the first step in assessing rezoning proposals. There was also consensus that the Appendix 1 checklist is the correct approach for assessing plan provisions, including rezoning proposals, subject to the addition outlined in paragraph 6 above. We did not hear any views to the contrary.
10. The Panel also notes Ms Parham's offer to update Appendix 1 and to liaise with the section 42A authors regarding the application of Appendix 1 to the rezoning proposals.

Directions

11. Accordingly, in light of the above, we make the following directions for the assistance of the section 42A authors:

- (a) The Framework Report is a guide only, not an inflexible rule book;
- (b) Lens 1 is the incorrect legal test;
- (c) Lens 1 should not be applied as a gateway or threshold test;
- (d) Lens 1 is not a standalone test and, as such, should not be seen as the first step in the assessment. Elements of Lens 1 may be of assistance to section 42A report authors in their section 32AA evaluations, if one is required.

Questions from Parties

Any questions regarding these Directions are to be addressed to the Hearings Administrator, Mr Fletcher Bell. His contact details are as follows:

Email Districtplan@waidc.govt.nz

Telephone 027 214 8052

A handwritten signature in blue ink, appearing to read 'P H Mitchell', followed by a period.

P H Mitchell (Chair), P Cooney, L Te Aho

For the Hearings Panel

15 March 2021