

BUNNINGS LTD V AUCKLAND TRANSPORT [2020] NZENVC 92

INTRODUCTION

The Environment Court's recent decision in *Bunnings Ltd v Auckland Transport* [2020] NZEnvC 92 concerned an application to the Environment Court for declarations that a road widening designation contained in the Auckland Unitary Plan (AUP) had lapsed, that Bunnings was not restricted in its use of the land by the designation, and that the inclusion of the designation in the AUP was an error.

Bunnings submitted that the designation had lapsed in November 2015 under s 185 of the Resource Management Act 1991 (RMA), prior to the Proposed Auckland Unitary Plan (PAUP) becoming operative in March 2017. As such the inclusion of the lapsed designation in the PAUP did not revive it and it was therefore included as an error in the AUP. The Environment Court should therefore exercise its powers under s 292 of the RMA to remove the designation from the AUP.

Auckland Transport, supported by Auckland Council, took the position that there was a submission, evidence and hearings process to confirm whether or not the designation should be included in the AUP, resulting in its inclusion.

BACKGROUND

The designation had been included in successive Waitakere City Council district plans to allow for road widening. Under the Local Government (Auckland Transitional Provisions) Act 2010 the designation was included in the district plans of Auckland Council and the lapse date of the designation was deemed to be 1 November 2015. During this time, responsibility for the designation was transferred from the New Zealand Transport Agency to Auckland Transport.

Bunnings purchased land to which the designation applies in January 2015 and in December of that year applied for, and was granted, land use consent to construct and operate a major commercial building on the site. Auckland Council granted the consent, which included an advice note that "the consent holder is responsible for obtaining all of the necessary consents, permits and licences".

In August 2016, the Auckland Council notified the decisions version of the PAUP and the Independent Hearings Panel recommended including the designation



without modification. On 30 September 2016 Auckland Transport issued its decision on the designation, rejecting it in part by making Auckland Transport the requiring authority for the part of the designation in the former Waitakere City Council area and the NZ Transport Agency the requiring authority for the designation in the former Rodney District Council area. No appeals were lodged and on 10 March 2017 Auckland Council notified the decisions version of the AUP and the designation was included in this plan. Auckland Transport advised Bunnings in 2019 that it intended to proceed with the road widening, requiring the full width of the designation. Bunnings disputed the validity of the designation.

DECISION

In relation to the declaration that the designation had lapsed, the Court noted that it was required to weigh competing public policy principles. On the one hand section 184 of the RMA prevents designations unfairly blighting property indefinitely, where the requiring authority does not make substantial progress or effort toward giving effect to the designation. On the other hand section 83 of the RMA, which provide that operative plans shall be deemed to have been prepared and approved in accordance with sch 1, is important in order to achieve finality within the provisions of the operative plan.

The Court considered the decision of *Wylie v Clutha District Council* HC Dunedin CIV-2004-485-1839 and concluded it was bound by that decision. Section 83 operates together

with s 316(3) of the RMA to severely limit the time within which a challenge can be made about the plan processes, and the subject matter of that challenge.

The second declaration sought by Bunnings was that during the period AUP was in its proposed form (1 November 2015 to 10 March 2017) there was no designation which applied to Bunnings land because the challenge to the validity of it was not barred by the operation of s 83. Bunnings argued that the default lapse period of five years runs from the day the designation was first included in a district plan, and the roll-over into subsequent district plans of an unimplemented designation does not restart the lapse period. Auckland Transport, supported by Auckland Council, argued that the lapse date was not reset when the designation was rolled over into the PAUP, rather there was a submission, evidence and hearings process to confirm whether it should be included in the operative AUP.

The Court considered the intention of Parliament in drafting s 178(1) and in particular whether subs (1)(e) provided interim protection to requiring authorities wishing to carry over designations without modification into a proposed district plan (or only to the territorial authorities' own proposed new designations).

The Court agreed with Auckland Transport's view, that subs (1)(e) should be read in its plain language, meaning that when a territorial authority decides to include a requirement

for a designation in its proposed district plan, the requiring authority is provided with broad interim protection from third party activities. In support of this view, the Court pointed to s 181 where alterations to designations are to be processed as if they are a requirement for a new designation. In addition, if Parliament had intended subs (1)(e) only to apply to new designations, it would have explicitly referenced this intention as is clear when looking at the other subsections of the provision.

Having come to this conclusion, the Court concluded that there was no room for the operation of s 292 (remedying defects in plans). While there is a discretion to remedy defects in a plan which are faults, flaws or imperfections and are unintentional, the designation in question was intentionally and overtly included.

COMMENT

This case confirms the position that both modified and unmodified designations that are rolled over into a proposed district plan have interim protection until the date the proposed district plan becomes operative. The decision also serves as a reminder of the limits on revisiting provisions within an operative plan where they have been included using the Schedule 1 process.