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PRACTICAL IMPLICATIONS OF A POST *DAVIDSON* ENVIRONMENT.

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Davidson [2018] NZCA 316.

- Two key questions answered by the Court:
 - When considering a resource consent under s104 is a decision maker able or required to consider Part 2?
 - If the answer to 1 is yes, when may that consideration occur
- Held:
 - “... *We do not consider however that King Salmon prevents recourse to pt 2 in the case of applications for resource consent. Its implications in this context are rather that genuine consideration of the application of relevant plan considerations may leave little room for pt 2 in the outcome. ...*”
 - Must have regard to Part 2 “*when it is appropriate to do so*” – “*untenable to suggest the contrary*”

Davidson – recourse to Part 2.

- When is it not appropriate to have recourse to Part 2?
 - NZCPS:
 - if an activity is clearly in breach of a relevant (directive) policy
 - cannot “*subvert a clearly relevant restriction in the NZCPS*”
 - BUT if “*unclear from the NZCPS itself as to whether consent should be granted or refused*” then appropriate to resort to Part 2

Davidson – recourse to Part 2 continued.

- Other plans:
 - Need to undertake a “*fair appraisal of the objectives and policies read as a whole*”
 - If “*it is clear that a plan has been prepared having regard to pt 2 and a coherent set of policies designed to achieve clear environment outcomes*” then those policies should be implemented in the section 104 consideration
 - If clear relevant guidance referenced to Part 2 such that “*assured*” the plan has been “*competently prepared*” then reference to Part 2 “*would likely not add anything*”
 - Overall: “*Absence such an assurance, or if in doubt, it will be appropriate and necessary*” to resort to Part 2

"If a plan ... has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise."

Davidson [76]

Davidson – recourse to Part 2 continued.

- Is the ability to consider Part 2 limited to the 3 *King Salmon* caveats?
 - NZCPS - yes
 - Other plans - no – “*more flexibility may be required*”
- Two steps to consider:
 - has a plan been 'competently' prepared; and
 - is there a coherent set of policies that reflect clear environmental outcomes.

Panuku Development Auckland Ltd [2018]

NZEnvC 179.

- America's Cup 36 base facilities
- Davidson provides “*definitive clarification*” of the “*extent of regard being required for Part 2 by decision makers*”
- Broad assessment: not necessary to look to Part 2 as “*the AUP has only recently been made operative, so can in a general sense be considered to offer provisions prepared having regard to Part 2, and a coherent set of policies designed to achieve clear environmental outcomes.*”
- An “*assessment against Part 2 would not add anything to the evaluative exercise*”

Ballantyne Baker Holdings [2018] NZEnvC 181.

- 8 lot subdivision out of Wanaka
- Operative and proposed (decisions version) district plan
- “*In most respects*” the plans had been “*sufficiently competently prepared*” such that reference to Part 2 was not required.
- Exceptions:
 - The efficient use of natural resources (s7(b) RMA)
 - Natural hazards (s6(h) RMA)

John Cossens [2018] NZEnvC 205.

- Subdivision – Lake Hawea
- After high level analysis, for the proposed plan held that “*the objectives of the PDP are uncertain if only because of the many appeals on them*”
- Therefore, reference to Part 2

Ohau Protection Society Inc [2018] NZEnvC 243.

- Land use consent, including a dwelling, at Lake Ohau
- *“the obligation to refer to pt 2 remains unless the consent authority is assured that it would not add to its evaluative exercise under s104 to do so.”*
- *“The exercise for the decision-maker, as RJ Davidson reflects, is one of evaluative judgment on the evidence and in the particular context.”*
- Found that both the Regional Policy statement and the district plan *“flesh out and inform or application of the directions given in ss 5, 6(b) and 7(c), RMA”*
- The mere fact that the district plan was the older instrument *“does not render it outdated”*

Bunnings [2019] NZEnvC 59.

- Land use consents for a Bunnings in Frankton, Queenstown
- “... *only when a consent authority is not confident that the plan has been properly prepared under the Act and the statutory documents should [a decision maker] refer to Part 2.*”
- “... *both local authorities and the Environment Court will be reluctant to say that a plan has been ‘not competently’ prepared ...*”
- The phrase “*competently prepared*” suggests the test relates to process rather than outcome
- “*In any event, there is one aspect of Part 2 RMA which almost always requires particular attention on a resource consent application: section 7(b).*”
- Revised *Davidson* (EC) s104 formulaic ‘test’

Davidson Court of Appeal implications.

- Planning preparation and documents:
 - Plan wording is paramount
 - Significance of NPS/NZCPS
 - Planning detail v broader scope
 - How much scope will (or should) be left to regional / district plans?
- Applying section 104:
 - Significance of s104(1)(b)
 - How apply – broader evaluative judgment or systematic/formulaic application?
 - Plan assessment ‘as a whole’ or a specific policy?
 - Importance of context
 - Non-complying activities
 - Veto to provision of a resource consent assessment pathway?

Davidson Court of Appeal implications.

- Competence
 - Process or substantive requirement?
 - Coherent set of policies with clear environmental outcomes?
 - Appropriately provide for relevant Part 2 matters?
 - Appropriately apply NPS/NZCPS
- Designations
- Will this actually change outcomes?

Implications for Consents Practice

- As a reporting officer
- As a decision maker
- When might you need to go “up the line”?
 - What should you look for?
 - Case law criteria
 - Scenarios

Implications for Policy Practice

- Why do we have plans?
- RMA hierarchy
- What is a competent plan?
- What is an incompetent one?
- Focus on better quality plans to provide policy clarity and be clear on how Part 2 is achieved

