

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

UNDER the Resource Management Act 1991

IN THE MATTER OF an appeal against the decision of Western Bay of Plenty District Council on Plan Change 1 (Rural Contractor Depots) to the Proposed and Operative Western Bay of Plenty District Plans under Clause 14(1) of the First Schedule of the Act

BETWEEN **GEORGE D'EMDEN**

Appellant

AND **WESTERN BAY OF PLENTY DISTRICT COUNCIL**

Respondent

**NOTICE OF APPEAL BY GEORGE D'EMDEN
AGAINST THE DECISION OF THE WESTERN BAY OF PLENTY DISTRICT COUNCIL
ON PLAN CHANGE 1 (RURAL CONTRACTOR DEPOTS) TO THE PROPOSED AND
OPERATIVE WESTERN BAY OF PLENTY DISTRICT PLANS**

(21 September 2012)

Notice of appeal by George d'Emden against the decision of the Western Bay of Plenty District Council on Plan Change 1 to the Proposed and Operative Western Bay of Plenty District Plans

Clause 14(1) of First Schedule, Resource Management Act 1991 (RMA)

To: The Registrar
Environment Court
PO Box 7147
Wellesley Street
AUCKLAND

Email: karl.allen@justice.govt.nz

1. George d'Emden ("**Mr d'Emden**") appeals against parts of the decision of the Western Bay of Plenty District Council ("**WBOPDC**") in respect of Plan Change 1 (Rural Contractors Depots) to the Proposed and Operative Western Bay of Plenty District Plans ("**Plan Change 1**").
2. Mr d'Emden made a submission on Plan Change 1.
3. Mr d'Emden received notice of the decision on 13th August 2012. The decision was made by WBOPDC.
4. Mr d'Emden opposes those parts of WBOPDC's decision detailed below for the reasons given.

5 Decisions

- 5.1 The specific provisions, omissions or parts of decisions on submissions being appealed are:
 - a) Rule 16.4.1(k)(ii) of the Proposed Western Bay of Plenty District Plan May 2011;
 - b) Rule 18.4.1(m)(i) of the Operative Western Bay of Plenty District Plan 2012;
 - c) Rule 16.4.1(k)(iii) of the Proposed Western Bay of Plenty District Plan May 2011;
 - d) Rule 18.4.1(m)(iii) of the Operative Western Bay of Plenty District Plan 2012;
 - e) Rule 16.4.1(k)(v) of the Proposed Western Bay of Plenty District Plan May 2011;
and
 - f) Rule 18.4.1(m)(v) of the Operative Western Bay of Plenty District Plan 2012.
- 5.2 Mr d'Emden's general reasons for the appeal are that those sections of the WBOPDC decision under appeal:
 - a) are inappropriate and/or unnecessary;
 - b) will not promote the sustainable management of natural and physical resources;
 - c) will not promote the efficient use and development of natural and physical resources including rural contractor depots;

- d) do not provide adequate security of investment for rural contractor depots;
- e) is contrary to good resource management practice; and
- f) is otherwise inconsistent with the relevant provisions of the RMA including the purpose and principles of the RMA under Part 2.

6 Relief Sought

6.1 Mr d'Emden seeks the following relief:

- a) The relief sought as set out in paragraphs 7.3, 8.3 and 9.3 of this notice.
- b) Such consequential or incidental amendments as are required to achieve consistency with the relief sought in this notice.
- c) Such further or other relief as the Environment Court thinks fit.
- d) Costs.

SPECIFIC DECISIONS APPEALED

7 Number of Operators

7.1 Decision Appealed

WBOPDC's decision to reject Mr d'Emden's submission (which objected to all of the permitted activity conditions on Rural Contractor Depots under Plan Change 1), in relation to:

- a) Rule 16.4.1(k)(ii) of the Proposed Western Bay of Plenty District Plan May 2011; and
- b) Rule 18.4.1(m)(i) of the Operative Western Bay of Plenty District Plan 2012.

7.2 Reasons for Appeal

Rule 16.4.1(k)(ii) of Plan Change 1 proposed a maximum of 3 persons carrying out a Rural Contracting operation, a minimum of one who shall reside on site. Mr d'Emden's submission sought that there be no permitted activity conditions on Rural Contractor Depots. The WBOPDC decisions increased the threshold to 5 persons in Rule 16.4.1(k)(ii) of the Proposed Western Bay of Plenty District Plan May 2011 and Rule 18.4.1(m)(i) of the Operative Western Bay of Plenty District Plan 2012.

Mr d'Emden considers that a restriction of 5 persons carrying out a Rural Contracting operation (with a minimum of one residing on site) is too restrictive. Mr d'Emden owns and operates a home-based Rural Contractor Depot which he considers to be typical of other small-scale Rural Contractor Depots throughout the Western Bay of Plenty District, but considers that a threshold of 7 persons would be more appropriate. This is because in order to run his business efficiently and effectively he requires a mixture of 3 fulltime employees and the addition of 4 part-time independent contractors during the busy summer season.

The WBOPDC Decisions include the following reason for increasing the threshold from 3 to 5 persons:

The increase in the number of permitted workers from three to five is consistent with other business establishments in the Rural Zone such as Education Facilities.

The Section 32 Report also states that the original three person threshold originates from the performance standards for "Home Enterprises". It is considered questionable that the environmental effects of a Rural Contractor Depot can be compared to those associated with an Education Facility or a Home Enterprise as they are significantly different activities.

Mr d'Emden also opposes the requirement that one of the operators must reside on site. This condition does not appear to be effects based and according to the Section 32 Report, it appears that the condition originated from the performance standards for "Home Enterprises" which are significantly different activities from Rural Contractor Depots. By way of example, the condition would result in the undesirable situation of resource consent being triggered if Mr d'Emden retired and sold his Rural Contractors Depot business to someone else who did not reside on site (for example, Mr d'Emden is considering eventually selling/transferring the business to his son (who lives elsewhere) but would continue to live on the property). The change in ownership would not result in any significant change in environmental effects.

7.3 Relief Sought

Amend Rule 16.4.1(k)(ii) of the Proposed Western Bay of Plenty District Plan May 2011 as follows:

The Rural Contractor Depot operation is carried out by a maximum of ~~five~~seven persons, a minimum of one who shall reside on the site.

Amend Rule 18.4.1(m)(i) of the Proposed Western Bay of Plenty District Plan May 2011 as follows:

The Rural Contractor Depot operation is carried out by a maximum of ~~five~~seven persons, a minimum of one who shall reside on the site.

8 Sale of Goods

8.1 Decision Appealed

WBOPDC's decision to reject Mr d'Emden's submission (which objected to all of the permitted activity conditions on Rural Contractor Depots under Plan Change 1), in relation to:

- a) Rule 16.4.1(k)(iii) of the Proposed Western Bay of Plenty District Plan May 2011; and
- b) Rule 18.4.1(m)(iii) of the Operative Western Bay of Plenty District Plan 2012.

8.2 Reasons for Appeal

The WBOPDC decision retains the following permitted activity condition for a Rural Contractors Depot in Rule 16.4.1(k)(iii) of the Proposed Western Bay of Plenty District

Plan May 2011 and Rule 18.4.1(m)(iii) of the Operative Western Bay of Plenty District Plan 2012:

Does not involve the sale of goods from the site, other than those that are produced on the site.

Mr d'Emden's submission sought that there be no permitted activity conditions on Rural Contractor Depots. Mr d'Emden considers that a permitted activity condition on the sale of goods from a Rural Contractors Depot other than those produced on site is unreasonable and inappropriate as it could unwittingly trigger resource consent for many typical small-scale Rural Contractor Depot operations. Many Rural Contractor Depots store "goods" which are not produced on site and are sold to clients as an integral part of their operation. The following examples have been taken from Section 4.2 (page 6) of the Section 32 Report for Plan Change 1:

- a) Fertiliser Distributers and Spreaders – can store imported fertiliser on site which is sold to clients to be spread on their respective rural properties as part of the rural contracting service;
- b) Maize Services – can store imported maize seeds on site which is sold to clients to be planted on their respective properties as part of the rural contracting service;
- c) Orchard Spraying – can store various imported herbicides/pesticides on site which is sold to clients to be sprayed on their respective properties as part of the rural contracting service;
- d) Rural Tyre Repairs – store tyres and associated parts which is sold to clients as part of the rural contracting service; and
- e) Fencing Contractors – can store fencing equipment which is sold to clients as part of the rural contracting service.

The above examples are further reinforced in Section 4.3 (page 7) of the Section 32 Report for Plan Change 1 where the second paragraph includes the following examples of "activities onsite":

- a) Storage of seeds; and
- b) Storage of fertiliser.

Similarly Section 4.4 (page 9) of Plan Change 1 refers to Rural Contractor Depots requiring outdoor areas for various activities including "stockpiles of products".

Other examples of Rural Contractor Depots that store goods not produced on site which are on-sold to clients include the following:

- a) Firewood Suppliers;
- b) Landscapers;
- c) Hay suppliers;
- d) Agricultural Spraying;
- e) Wool buyers; and

- f) Farriers.

Accordingly, many typical Rural Contractor Depots (including those referred to in the Section 32 Report) would be unable to comply with the requirements of Rule 16.4.1(k)(iii) of the Proposed Western Bay of Plenty District Plan May 2011 and Rule 18.4.1(m)(iii) of the Operative Western Bay of Plenty District Plan 2012.

8.3 Relief Sought

Delete:

- a) Condition 16.4.1(k)(iii) of the Proposed Western Bay of Plenty District Plan May 2011; and
- b) Condition 18.4.1(m)(iii) of the Operative Western Bay of Plenty District Plan 2012.

9 Setbacks

9.1 Decision Appealed

WBOPDC's decision to reject Mr d'Emden's submission (which objected to all of the permitted activity conditions on Rural Contractor Depots under Plan Change 1) in relation to:

- a) Rule 16.4.1(k)(v) of the Proposed Western Bay of Plenty District Plan May 2011; and
- b) Rule 18.4.1(m)(v) of the Operative Western Bay of Plenty District Plan 2012.

9.2 Reasons for Appeal

The WBOPDC decision retains the following permitted activity condition for a Rural Contractors Depot in Rule 16.4.1(k)(v) of the Proposed Western Bay of Plenty District Plan May 2011 and Rule 18.4.1(m)(v) of the Operative Western Bay of Plenty District Plan 2012:

The Rural Contractor Depot operation shall not be located within 60 metres of any existing Dwelling, Minor Dwelling, Education Facility or Accommodation Facility that is located on a title separate to that of the subject site and in different ownership to that of the Rural Contractor Depot operator.

Mr d'Emden's submission sought that there be no permitted activity conditions on Rural Contractor Depots. While he is not opposed to a condition requiring a 60 metre separation distance between any Rural Contractor Depot and any existing dwelling, minor dwelling, education facility or accommodation facility, he objects to the fact that there is no reciprocal rule requiring a 60 metre separation distance between any new dwelling, minor dwelling, education facility or accommodation facility and any existing Rural Contractor Depot. Mr d'Emden is concerned that as a result, Rural Contractor Depots are not adequately protected from potential reverse sensitivity effects. The Section 32 Report has determined that a 60 metre separation distance is adequate to "prevent reverse sensitivity issues" and developed a rule restricting the location of Rural Contractor Depots accordingly. However there is no reciprocal rule restricting the location of dwellings, education or accommodation facilities in relation to existing Rural Contractor Depots to avoid those same "reverse sensitivity issues".

Rule 18.4.1(c)(i) of the Operative Western Bay of Plenty District Plan deals with yards in the Rural Zone in relation to “*dwelling, minor dwelling, accommodation facilities, education facilities*”. The yard requirement is 30 metres however there is provision to reduce that yard requirement to no less than 10 metres if certain criteria are met. The criteria include ensuring that there is a 60 metre separation distance from any existing dwelling, minor dwelling, accommodation facility or education facility, or 300 metres from an intensive farming activity. There are no criteria requiring special protection of Rural Contractor Depots. By way of example, if a Rural Contractor Depot is located 30 metres from the boundary (in accordance from the yard requirements), then a dwelling or accommodation/education facility could legitimately establish 40 metres away. A tangible reverse sensitivity effect would be that the Rural Contractor Depot would then no longer be able to comply with the 60 metre setback requirement which could then trigger resource consent if the operator ever wanted to expand (e.g. through the addition of new buildings).

There is also a degree of uncertainty over exactly where the 60 metre setback should be measured. The condition includes reference to the “*Rural Contractor Depot operation*”. The definition for “*Rural Contractor Depot*” in the Proposed and Operative Western Bay of Plenty District Plan is “*...land and/or buildings used for the purpose of storing equipment associated with a business which wholly serves the farming industry.*”. However through the use of the term “operation”, it is not clear whether the setback requirement should be measured from the property boundary, any accessways or simply from any land and/or buildings used for storing equipment (consistent with the definition). It is considered that the condition should be amended so that it clearly links to Rural Contractors Depot definition.

9.3 Relief Sought

Amend 16.4.1(k)(v) of the Proposed Western Bay of Plenty District Plan May 2011 and Condition 18.4.1(m)(v) of the Operative Western Bay of Plenty District Plan 2012 as follows:

The Rural Contractor Depot ~~operation~~ shall not be located within 60 metres of any existing Dwelling, Minor Dwelling, Education Facility or Accommodation Facility that is located on a title separate to that of the subject site and in different ownership to that of the Rural Contractor Depot operator.

Amend Rule 18.4.1(c)(i)(d) as follows:

Where any new dwelling, minor dwelling, accommodation facility or education facility (including any additions or alterations to these) can meet all of the following performance standards:

- *Shall not be located any closer than 60m to any existing dwelling, minor dwelling, accommodation facility, ~~or~~ education facility or Rural Contractors Depot on an adjoining title;*...

10 Mediation

Mr d'Emden is willing to engage in mediation or other alternative dispute resolution.

11 Attachments

The following documents* are attached to this notice:

Appendix A A copy of Mr d'Emden's submission.

Appendix B A copy of the relevant decisions.

Appendix C A list of names and addresses of persons to be served with a copy of this notice.

* These documents must be attached and lodged with the notice to the Environment Court. The appellant does not need to attach a copy of a regional or district plan or policy statement. In addition, the appellant does not need to attach copies of the submission and decision to the copies of the notice served on other persons if the copy served lists these documents and states that copies may be obtained, on request, from the appellant.

Signature:

GEORGE D'EMDEN

by his authorised agents Environmental Management Services Limited:



Graeme J Mathieson

Date:

21 September 2012

Address for Service:

C/- Graeme Mathieson
Environmental Management Services Ltd
10 Banksia Place, Goodwood Heights, Manukau
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Telephone: (09) 2555127
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TO:

The Registrar
Environment Court
PO Box 7147
Wellesley Street
AUCKLAND

AND TO:

The Respondent

AND TO:

The submitters set out in Appendix C

Advice to recipients of copy of notice of appeal*How to become a party to proceedings*

You may be a party to the appeal if you made a submission on the matter of this appeal and you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court within 15 working days after this notice was lodged with the Environment Court.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38).

How to obtain documents relating to the appeal

The copy of this notice served on you does not attach a copy of the appellants submission and the parts of the decision appealed (Appendices A and B). These documents may be obtained, on request, from the appellant.

Advice

If you have any questions about this notice, contact the Environment Court Unit of the Department for Courts in Auckland, Wellington or Christchurch.

APPENDIX A

Mr d'Emden's Submission

APPENDIX B
Relevant Council Decisions

APPENDIX C

Submitters to be Served