

# Practice and Guidance Note

## Considering Operative and Proposed Plan Provisions

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# 1 Introduction

Plan changes to the [Auckland Unitary Plan \(Operative in Part\)](#) (AUP(OP)) have a bearing on how resource consent applications are assessed. The impact of plan changes on assessments will vary. For example, a plan change to rezone a discrete area of rural zoned land under single ownership will affect very few if any resource consent applications. By comparison, Council-led plan changes involving plan-wide matters, or zone-wide matters, can affect many resource consent applications.

The effect of plan changes on the assessment of resource consent applications varies depending on several factors which are prescribed under the Resource Management Act 1991 (RMA). This variation can relate to the activity status of an application, or the weighting of proposed provisions against operative provisions.

Objectives, policies and rules have “legal effect” at different points in time under the RMA. In addition, rules must be treated as operative at different points in time.

This Practice and Guidance Note addresses the following questions:

- When do plan change objectives and policies have legal effect?
- When do rules in plan changes have legal effect?
- Weighting between operative plan and plan change provisions
- When must rules in plan changes be treated as operative?
- When the activity status of applications can be ‘frozen’ - [Section 88A\(1A\)](#) in light of [clause 20](#) of Schedule 1, and [section 86F](#)

## 2 When do plan change objectives and policies have legal effect?

The objectives and policies in a proposed plan change have legal effect immediately upon public notification of a plan change. By contrast, rules in a plan change do not have legal effect at notification, except in certain circumstances (see Section 3 for further explanation).

[Section 104\(1\)\(b\)\(vi\)](#) of the RMA states that when assessing a resource consent application, a consent authority must, subject to Part 2, have regard to any relevant provisions of a proposed plan (which includes plan changes).

## 3 When do rules in plan changes have legal effect?

### 3.1 General Approach

Rules in plan changes have legal effect at different points in time under [section 86B](#). The most common time is when a decision on submissions on the proposed rules is made and publicly notified under [clause 10\(4\)](#) of Schedule 1. However, there are exceptions, as explained below.

Until a rule has legal effect, a planner does not need to consider a proposed rule in the assessment of a resource consent application (see [section 86G](#)). Similarly, when undertaking a planning compliance assessment, the proposed rules are not relevant until they have legal effect.

### 3.2 Exceptions to the General Approach

There are some exceptions to this general approach, which are set out in [section 86B](#) of the RMA.

#### Certain types of rules

[Section 86B\(3\)](#) of the RMA sets out that rules have immediate legal effect upon notification, if the rule:

- protects or relates to water, air, or soil (for soil conservation); or
- protects areas of significant indigenous vegetation; or
- protects areas of significant habitats of indigenous fauna; or
- protects historic heritage; or
- provides for or relates to aquaculture activities.

### **Rules given immediate legal effect by the Environment Court in response to an application by council**

In addition, other rules might have legal effect earlier, in a date specified in an order from the Environment Court, if the Environment Court grants an application made by the council to the court under [section 86D\(2\)](#) of the RMA.

### **Rules given immediate legal effect by the local authority**

Legal effect may occur later in the process where the council resolves that a rule has legal effect only once the plan change becomes operative in accordance with [clause 20](#) of Schedule 1, under [section 86B\(1\)\(c\)](#).

## **3.3 Private Plan Changes**

When a private plan change request is made to council, and it is adopted by council, the parameters set out above in Sections 3.1 and 3.2 apply, in terms of legal effect of rules.

However, if a private plan change request is accepted by council, rather than adopted, then the rules in the plan change do not have legal effect until they become operative.

## **4 Weighting between operative plan and plan change provisions**

### **4.1 Objectives and Policies**

As outlined above in Section 2, the objectives and policies in a proposed plan change have legal effect immediately upon public notification of a plan change.

The RMA does not distinguish between the weight that should be accorded to the objectives and policies of an operative plan as compared to those in a plan change. The requirements of s104 for having regard to various matters relate to the exercise of discretion. Rather than having a general rule about the cases where the objectives and policies of a proposed plan change are to prevail over inconsistent provisions of an operative plan, or vice versa, the reporting officer (in the planning report) and decision maker should consider that matter on a case by case basis according to the circumstances.

Relevant factors to the exercise of discretion include:

- the extent to which the proposed measure has been exposed to independent decision-making
- possible injustice

- the extent to which a new measure may represent a significant policy shift when compared to the provisions of the operative plan, or implement a coherent pattern of objectives and policies in a plan.

Where there has been a significant shift in Council policy, and any new provisions accord with Part II of the RMA (e.g. an identified resource management issue that previous plan provisions failed to address in achieving sustainable management) or the requirements of a national policy statement – then the objectives and policies in the proposed plan change may potentially be given more weight.

## 4.2 Rules

Other than in the exceptions mentioned above in Section 3.2, rules in proposed plan changes do not have legal effect upon notification. Until the rules attain legal effect, they do not need to be considered and no weighting between them and the operative rules is required.

Once the rules attain legal effect, the same considerations outlined above in relation to weighting objectives and policies, apply to the weighting of rules.

Note that the weighting will only occur in terms of assessment considerations under section 104 of the RMA. Legal effect of a proposed rule has no implications on the section 95 notification assessment.

## 5 When must rules in plan changes be treated as operative (section 86F)?

Rules in plan changes must be treated as operative at various points in time under [section 86F\(1\)](#). For example:

- (a) When no submissions have been made in opposition to a rule in a proposed plan change the rule must be treated as operative at the close of the submission period.
- (b) When submissions have been made in opposition to a rule in a proposed plan change and following the issue of decisions there are no appeals to the rule, the rule must be treated as operative when the time for lodging appeals on the rule has expired.
- (c) When submissions have been made in opposition to a rule in a proposed plan and following the issue of decisions there are appeals to the rule, the rule must be treated as operative when the matter is determined through the appeal process.

Under [section 86F\(2\)](#) an exception to the above relates to limited notified plan changes, where rules cannot be treated as operative until the decisions have been given under [clause 10\(4\)](#) of Schedule 1 on all submissions.

A further exception is in relation to a plan change that relates to coastal provisions in the AUP(OP). Even if there are no submissions in opposition to such provisions, and there are no appeals, the provisions are not operative until they have been approved by the Minister of Conservation.

## **6 When can the activity status of applications be 'frozen'?**

In certain scenarios, section 88A in the RMA provides for the 'freezing' of the activity status of an application lodged before a plan change is notified, where the plan change proposes to amend the status of the activity.

The process varies depending on whether the plan change proposes to make the status more onerous, or to 'lighten' the status (i.e. Make the status less onerous).

These scenarios are addressed below. Please refer to the relevant flow diagrams. Please note that these diagrams exclude the situations (s86B(3)) where some rules have immediate legal effect.

### **Proposed Plan Change makes status more onerous (Diagram 1)**

In this scenario, the activity status at the time of lodgement under the operative provisions is 'frozen'. This is because [section 88A](#) functions as a 'shield' to protect an applicant from a more onerous activity status.

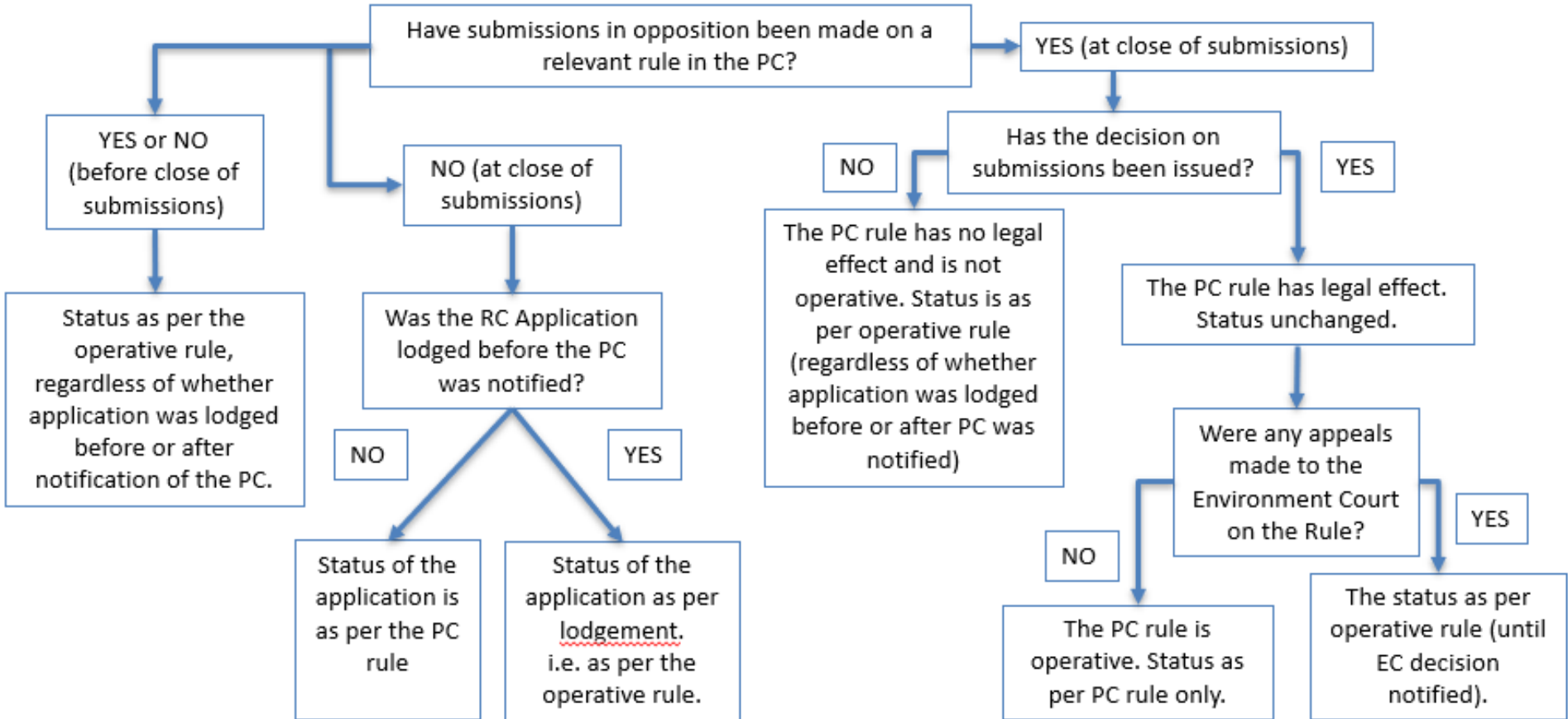
### **Proposed Plan Change lightens the activity status (Diagram 2)**

In this scenario, the activity status is frozen, but if there are no submissions in opposition to a relevant proposed rule at the close of submissions, then the activity status at the time of lodgement is unfrozen and the activity status changes to the lightened activity status under the plan change. This is because s88A functions as a 'shield' to protect an applicant from a more onerous activity status, however, where there is a change in the planning framework with provision for an activity in a somewhat more enabling manner, an applicant should be able to rely on that and not be hamstrung by the activity status found in a superseded plan ([Pierau v Auckland Council \[2017\] NZEnvC 090](#)).

If there were submissions in opposition to the relevant proposed rule, then the activity status at lodgement remains frozen. Once decisions on submissions are notified, the status will be unfrozen and change to whatever the status in the decision is i.e. if the decision confirms the lightened status of the plan change then the status changes to that. This scenario will occur infrequently due to the length of time that passes between when a plan change is notified and when decisions on submissions on the plan change are notified and when a decision is made on a resource consent.

Determining Activity Status where a Plan Change (PC) of relevance to a Resource Consent application has been notified

Diagram 1: Where activity status is more onerous in the Plan Change than the operative provisions for any rule relevant to the application



Determining Activity Status where a Plan Change (PC) of relevance to a Resource Consent application has been notified

Diagram 2: Where activity status is lightened in the Plan Change compared to the operative provisions for any rule relevant to the application

