

Table of Hearing 1/03/2013

Under the Resource Management Act 1991

And

In the Matter of submissions and further submissions by the Christchurch City Council on the proposed Land and Water Regional Plan

Legal Submissions for Christchurch City Council

Dated: 28 February 2013

MAY IT PLEASE THE COMMISSIONERS:

Introduction

1. The Christchurch City Council (Council) has made detailed submissions and further submissions on the proposed Land and Water Regional Plan (LWRP). Its legal submissions and evidence focus on key matters that arise, rather than addressing all submission points.
2. The Council's submissions are generally supportive of the proposed LWRP. There has been consultation between the Regional Council and the City Council on draft provisions. The Council is satisfied that many important matters raised in consultation have generally been incorporated into the proposed LWRP.
3. Submission points made by the Council are generally on matters of drafting detail rather than seeking substantial changes to the proposed LWRP, with several notable exceptions which are highlighted in the evidence.

The Council's Evidence

4. Expert evidence adduced by the Council has been pre-circulated as directed. All of the witnesses other than Dr Dewson are available to summarise key points from their evidence, and Dr Dewson will also be available to attend if any particular queries relevant to her expertise are raised by the Commissioners. The witnesses are:
 - 4.1 Mr Michael Bourke, senior technician in the Asset and Network Planning section of the Council, on wastewater issues;
 - 4.2 Mr Roy Eastman, civil engineer in the Capital Programme Group of the Council, on stormwater management;
 - 4.3 Ms Diane Shelander, senior policy analyst in the Natural Environment section of the Council;
 - 4.4 Ms Elizabeth Garson, a principal advisor in the Natural Environment section of the Council;
 - 4.5 Dr Zoe Dewson, a waterways planner and ecologist at the Council; and

4.6 Ms Jeanine Keller, a consultant environmental planner.

Legal Submission Topics

5. These submissions address some crucial legal issues arising in the Council's submissions, evidence and the s42A report recommendations. These submissions will:

- 5.1 Provide a summary of the statutory requirements for assessment of the proposed plan change;
- 5.2 Address the requirement to give effect to the Regional Policy Statement in relation to parts of the Council's submission;
- 5.3 Consider the appropriateness of objectives in the LWRP which are "aspirational" and unobtainable;
- 5.4 Highlight some of the Council's evidence related to community drinking water supplies;
- 5.5 Consider the appropriateness of including wastewater policies 4.9 and 4.12, which cannot be achieved;
- 5.6 Describe some Council concerns regarding stormwater policy 4.13(b) (treating stormwater before discharge);
- 5.7 Summarise caselaw concerning prohibiting wastewater discharges, in relation to cultural values and prohibited activity status itself; and
- 5.8 Address the appropriateness of some stormwater policies and rules concerning stormwater management plans.

Summary of the required assessment of the proposed plan change

6. I here apply, to regional plans in Canterbury, the summary of the statutory requirements for consideration of a plan change set out in paragraph 34 in

*Long Bay-Okura Great Park Society Inc v North Shore City Council*¹ and paragraph 19 in *High Country Rosehip Orchards Ltd v MacKenzie District Council*².

A. General requirements

1. A regional plan should be designed to *accord with*³, and assist the regional council *to carry out*, its functions⁴ so as to achieve the purpose of the Act⁵.
2. When preparing its regional plan the regional council *must give effect* to any national policy statement or New Zealand Coastal Policy Statement⁶.
3. When preparing its regional plan the regional council shall:
 - (a) *have regard to* any proposed regional policy statement⁷;
 - (b) *give effect to* any operative regional policy statement⁸.
4. The regional plan must not be inconsistent with⁹:
 - (a) a water conservation order, or
 - (b) any other regional plan for the region, or
 - (c) a determination or reservation of the chief executive of the Ministry of Fisheries made under section 186E of the Fisheries Act 1996.
5. When preparing its regional plan the regional council must also:
 - (i) *have regard to* any relevant management plans and strategies under other Acts, any relevant entry in the Historic Places Register and to various fisheries regulations¹⁰; and
 - (ii) *have regard to* consistency with regional policy statements, plans and proposed regional policy statements and plans of adjacent regional councils¹¹; and

¹ *Long Bay-Okura Great Park Society Inc v North Shore City Council* 16 July 2008 A078/08.

² *High Country Rosehip Orchards Ltd v MacKenzie District Council* [2011] NZEnvC 387.

³ Section 66(1) of the Act.

⁴ As described in section 30 of the Act.

⁵ Section 63(1) and 66(1).

⁶ Section 67(3) of the Act.

⁷ Section 66(2)(a) of the Act.

⁸ Sections 65(6) and 67(3)(c) of the Act.

⁹ Section 67(4) of the Act.

¹⁰ Section 66(2)(c) of the Act.

¹¹ Section 66(2)(d) of the Act.

- (iii) *take into account* any relevant planning document recognised by an iwi authority¹²; and
 - (iv) recognise and provide for the management plan for the foreshore and seabed reserve located in its region¹³; and
 - (v) not have regard to trade competition¹⁴.
6. The regional plan must be prepared *in accordance with* any regulation and any direction given by the Minister for the Environment¹⁵.
7. The formal requirement that a regional plan *must* also state¹⁶ its objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies and *may* state¹⁷ other matters, including issues, reasons, and expected environmental results.
- B. Objectives [the section 32 test for objectives]
8. Each proposed objective in a regional plan *is to be evaluated* by the extent to which it is the most appropriate way to achieve the purpose of the Act¹⁸.
- C. Policies and methods (including rules) [the section 32 test for policies and rules]
9. The policies are to *implement* the objectives, and the rules (if any) are to *implement* the policies¹⁹.
10. Each proposed policy or method (including each rule) is to be examined, *having regard to its efficiency and effectiveness*, as to whether it is the most appropriate method for achieving the objectives of the regional plan²⁰:
- (a) *taking into account*²¹:
 - (i) the benefits and costs of the proposed policies and methods (including rules); and

¹² Section 66 (2A)(a) of the Act.

¹³ Section 66(2A)(b) of the Act.

¹⁴ Section 66(3) of the Act.

¹⁵ Section 66(1) of the Act.

¹⁶ Section 67(1) of the Act.

¹⁷ Section 67(2) of the Act.

¹⁸ Section 32(3)(a) of the Act.

¹⁹ Section 67(1) of the Act.

²⁰ Section 32(3)(b) of the Act.

²¹ Section 32(4) of the Act.

- (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods; and
- (b) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances²².

D. Rules

- 11. In making a rule the regional council must *have regard to* the actual or potential effect of activities on the environment²³.
- 12. There are special provisions for rules about protection of property from the effects of surface water, restricted coastal activity, flows or rates of use of water, some activity on the coastal marine area and contaminated land²⁴.
- 13. There are special provisions that apply where a regional council provides in a plan that certain waters are to be managed for any purpose described in Schedule 3 of the Act and includes rules in the plan about the quality of water in those waters²⁵; and that apply before a regional council includes rules in a regional plan that allow as a permitted activity discharges to water²⁶, and regarding climate change²⁷.

E. Other statutes

- 14. Finally the regional council is required to comply with other statutes.
- 15. A regional plan cannot be interpreted or applied in a way that is inconsistent with the Recovery Strategy²⁸.
- 16. The preparation and decision on the proposed regional plan cannot be inconsistent with any recovery plan gazetted under the Canterbury Earthquake Recovery Act 2011²⁹.

²² Section 32(3A) of the Act.

²³ Section 68(3) of the Act.

²⁴ Section 68 of the Act.

²⁵ Section 69 of the Act.

²⁶ Section 69 of the Act.

²⁷ Section 70A and 70B of the Act.

²⁸ Section 15(1) of the Canterbury Earthquake Recovery Act 2011.

17. The decision makers on this proposed regional plan must “*have particular regard to*” the vision and principles of the Canterbury Water Management Strategy (CWMS)³⁰; and regard may also be had to the remainder of the CWMS, at the discretion of the decision maker, as a relevant consideration.
- 6a. Various formulations have been used by the court when considering the meaning of “most appropriate” in the context of section 32 of the Act. In *Landcorp Ltd v Auckland Council*³¹, the Environment Court held that “*There is no presumption that the terms of the proposed Plan Change are appropriate (or not) for achieving the requirements of Part 2. The Court is required simply to seek an optimum planning solution based on the information and options put before it*”. In *Rational Transport Society Inc v New Zealand Transport Agency*³² the High Court held that “most appropriate” means “most suitable”.

Giving effect to the RPS

7. The Council’s witnesses refer in some cases to proposed provisions in the LWRP which, it is submitted, do not give effect to the Regional Policy Statement.
8. A Council submission sought change to Objective 3.9 which confined protection of natural character values to alpine rivers. Ms Keller’s evidence supports the change to that objective (now numbered objective 3.14) recommended in the officers’ report as it gives effect to the RPS³³.
9. Ms Garson’s evidence raises concerns with the consistency between the LWRP and the RPS in relation to human and pest impacts on indigenous habitats and species³⁴.
10. The requirement that the LWRP “give effect to” the Regional Policy Statement³⁵ requires a positive implementation of the superior instrument³⁶.

²⁹ Section 23 of the Canterbury Earthquake Recovery Act 2011.

³⁰ Section 63 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.

³¹ [2013] NZRMA 1, paragraph 59.

³² High Court, Wellington, CIV-2011-485-002259, Gendall J, at paragraph 45.

³³ Paragraphs 3.2 to 3.7.

³⁴ Page 4 of Ms Garson’s evidence.

³⁵ Section 67(3) of the Act.

³⁶ *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211 paragraph 50.

Unobtainable, aspirational objectives

11. It is submitted that an objective is not the most appropriate way to achieve the purpose of the Act if the objective cannot be achieved in the life of the regional plan.
12. This issue arises in particular regarding the objective proposed in the LWRP that "*Those parts of lakes and rivers that are valued by the community for recreation are suitable for contact recreation*" (Objective 3.13, renumbered 3.18 in the s42A report). Aside from any uncertainty as to whether this objective would apply to urban waterways, Dr Dewson's evidence is that this objective cannot be achieved for urban waterways in Christchurch City. Studies of the Avon River have shown that faecal contamination from ducks is a major source of contamination and that as a result, the urban rivers will remain unsuitable for contact recreation even if there was ongoing improvement in urban stormwater and wastewater systems (Dr Dewson paragraph 3.4). It is not necessarily Council wastewater that will stop this objective from being achieved. It may be ducks and dogs.
13. Issues, objectives and policies are not defined in the Resource Management Act 1991. However, sections 32 and 67(1) of the Act articulate the relationship between objectives, policies and methods: the objectives must be the most appropriate way to achieve the purpose of the Act, the policies are to implement the objectives and the rules are to implement the policies.
14. The Act's statement of the purpose of a regional policy statement assists³⁷:

The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.
15. The broad objective is integrated management of the natural and physical resources of the whole region. Issues are problems that need to be addressed to achieve integrated management of the natural and physical

³⁷ Section 59.

resources of the whole region. Objectives are aims to reach in order to address those issues.

16. It is accepted that “aspirational” objectives may in some circumstances be appropriate to achieve the purpose of the Act. But as stated in the planning evidence of Ms Whyte for the other district councils³⁸, “...*aspirational or not it is important that the objective is able to be achieved. Unless an aspirational objective is supported by more practical policies and provisions that identify the path and timing for the objective to be achieved then this will result in difficulties in implementing the provisions*”. Ms Keller’s evidence expresses the opinion that “*The objective, rather than being an “aspirational” one which is unobtainable, ought to acknowledge that urban rivers cannot meet that standard, as seems to be acknowledged in Table 1a Policy 4.1*”³⁹.
17. The evidence of Ms Keller and Dr Dewson notes the inconsistency in the pLWRP between that unobtainable objective, and table 1a in Strategic Policy 4.1, which excludes urban waterways.
18. Accordingly, it is submitted that the objective that “*Those parts of lakes and rivers that are valued by the community for recreation are suitable for contact recreation*” cannot be the most appropriate objective to achieve the purpose of the Act insofar as it relates to urban waterways. This unobtainable objective will have a significant effect on the regional council’s consideration of resource consent applications related to discharges to those waterways. It is submitted that it is not integrated management of natural and physical resources to require resource consent applications to be assessed against an unobtainable objective.

Provisions for community drinking water supplies

19. Ms Keller’s evidence addresses the Council submission on what was objective 3.14 (that there is water available to meet the actual and reasonably foreseeable needs of community drinking water supplies). In the changes to the objectives, there is no express objective of providing for community drinking water supplies.

³⁸ Paragraph 64.

³⁹ Paragraph 3.15.

20. It is submitted that in the absence of an objective which expressly recognises the need to provide for community drinking water supplies, the regional council will not be giving effect to the RPS (Objective 7.2.1 and policy 7.3.4) and the objectives will not be the most appropriate for achieving the purpose of the Act. The regional plan will not be adequately providing for the wellbeings of people and communities.
21. It is accepted that there is still a proposed policy (4.46) for enabling community drinking water supplies. But given that there is such a suite of objectives related to water takes, it is, I submit, crucial that the importance of community drinking water supplies be recognised at that objective level.

Wastewater policies 4.9 and 4.12 cannot be achieved

22. The purpose of policies is to implement the objectives so as to achieve the purpose of the Act. It is submitted that it does not satisfy the tests in section 32 of the Act to include policies that cannot be achieved as they do not reflect the reality of wastewater management systems. Ms Keller's evidence at part 6 and Mr Bourke's evidence address this in relation to wastewater policies 4.9 and 4.12.
23. The proposed rules allow for resource consent applications for discharge of wastewater as a non-complying activity. This must be so, as those discharges are practically unavoidable in Christchurch City (the appropriateness of prohibited activity status is further addressed in these legal submissions). But it is submitted that wastewater policies 4.9 and 4.12 do not adequately acknowledge that reality. Resource consent applications for systems that inevitably include occasional direct discharges of untreated wastewater to surface water bodies will be assessed in a proposed policy framework that states "There are *no* direct discharges...".
24. The officers' report acknowledges that policy 4.9 cannot be achieved in all situations. But it suggests that the policy "*is better left as one that is to be aimed for but which will not necessarily be achieved in all situations*"⁴⁰. It goes on to state that this possibility, that the policy cannot always be achieved, is provided for in the rules.

⁴⁰ Part 5.3 on page 141).

25. It is respectfully submitted that this misses the point of the Council's submission. The objective and policy framework must recognise the reality of the situation. The non-complying resource consent application is to be assessed against the objectives and policies. The application will not pass the gateway test for non-complying activities if the adverse effects are more than minor and the activity is contrary to the objectives and policies. If the applications do pass the gateway test, the consent authority must still have regard to the objectives and policies in the overall exercise of discretion under section 104 of the Act. It is submitted that it is not correct to state that the non-complying activity status means that the LWRP provides for an activity that the policy says is not going to occur. The policies must acknowledge that the activity will occur in some circumstances. The witnesses' concern is that this is not adequately achieved by policy 4.12.
26. As Mr Bourke says, Christchurch is built on a swamp. Wet weather sewer overflows are inevitable and are constructed into the sewer system. Sewer overflows have been worse since the earthquakes and will remain worse than the pre-earthquake state for many years to come.
27. The cost of the rebuild of horizontal infrastructure (water, wastewater, stormwater, roads) is estimated to be close to \$3 billion. The cost of rebuilding the most severely damaged third of the wastewater network is about \$800m⁴¹.
28. The rebuild programme does not plan to replace wastewater services which still provide something close to the pre-earthquake level of service⁴². Due to the costs involved, central and local governments are not proposing to replace pipes that still have a serviceable life remaining⁴³. Even if the less-damaged two-thirds of the wastewater system were to be totally replaced at a cost (today) of approximately \$1.6 billion, overflows are still likely to occur⁴⁴.
29. In that context, it is respectfully submitted that it is not sustainable management of natural and physical resources, and it cannot be efficient and effective having regard to benefits and costs, to be required to design wastewater systems to avoid overflows, as policy 4.9 and 4.12(c) propose

⁴¹ Mr Bourke at 3.10 and in the rebuttal evidence paragraph 6.

⁴² Mr Bourke at 3.10.

⁴³ Mr Bourke at 3.11.

⁴⁴ Mr Bourke 3.19 and rebuttal evidence paragraph 6.

to do. In the life of this LWRP, there are always going to be overflows. Protection of public health is best achieved by directing those overflows to a location that best protects public health⁴⁵.

Stormwater policy 4.13(b)

30. Similar considerations apply in relation to proposed policy 4.13(b). This requires that stormwater be treated in some way before discharge to a lake or river. Mr Eastman⁴⁶ is giving evidence that in some cases this is simply not possible, including in some locations within area-wide consents. Retrofitting treatment systems, particularly in older established areas, may simply not be possible⁴⁷. Addition of the phrase "where feasible" to the policy will acknowledge that reality.
31. It is submitted that in the absence of those changes, there will be another disconnect between the objectives and the reality of sustainable management.

Prohibiting wastewater discharges: cultural values

32. Mr Bourke's supplementary evidence replies to evidence for Ngai Tahu seeking changes to rules so as to prohibit discharges of untreated sewerage to water.
33. The Council understands that such discharges are culturally offensive to tangata whenua. The Council respects concerns about the cultural offensiveness of the continued discharges. However, as in many such cases, there are competing interests between the health, social and economic wellbeing of the community as a whole, as against the cultural values related to keeping wastewater out of waterways.
34. There is no formula for the resolution of these matters. It requires a broad overall judgment to be made under section 5. Such issues typically give rise to various considerations under Part 2 of the Act including section 6(e)

⁴⁵ Mr Bourke paragraph 3.22.

⁴⁶ At paragraph 3.15.

⁴⁷ Mr Eastman paragraph 3.15.

(the relationship of Maori and their culture and traditions with water); section 7(a) (the requirement to have particular regard to kaitiakitanga – guardianship); and section 8 (the requirement to take into account the principles of the Treaty of Waitangi).

35. The Courts have generally recognised that there is an interrelationship between sections 5, 6(e), 7(a) and 8 and they can be considered together when assessing this protection of cultural or spiritual values⁴⁸.
36. In this context, it is submitted that the following points can be taken from case law (particularly under section 6(e)):
 - 36.1 Section 6(e) reflects the duty on the Crown under the Treaty to protect Maori values “to the fullest extent practicable”;⁴⁹
 - 36.2 The presence of a cultural relationship of Maori with land and water is enough to invoke section 6(e);⁵⁰
 - 36.3 The cases show that the duty of active protection does not create a power of veto if a proposed activity otherwise meets the purpose of sustainable management⁵¹.
37. It is submitted that a continuation of limited overflow discharges of wastewater to surface waters in Christchurch City will enable the Council to discharge its wastewater servicing obligations under the Local Government Act and provide for the health, economic, and social well-being of the community.

Prohibiting wastewater discharges: prohibited activity status

38. The section 42A report provides a useful summary of caselaw regarding when prohibited activity status is appropriate. The leading authority is the

⁴⁸ See for example *Te Kupenga o Ngati Hako Inc v Hauraki DC*, A10/01; *Aqua King Ltd v Marlborough DC*, Decision W71/97; and *Winstone Aggregates Ltd v Franklin DC*, Decision A80/02.

⁴⁹ *NZ Maori Council v Attorney-General* [1987] 1 NZLR 641, *Te Runanga o Tuamarere v Northland RC* [1996] NZRMA 77 (PT).

⁵⁰ *Te Runanga o Taumere v Northland RC*, Decision A108/95.

⁵¹ See *Resource Management*, Wellington, Brookers, 1991, A6.10(3)(a), which cites *Mahuta v Waikato RC* EnvC A091/98, *Glendon Trust Partnership v Carterton DC* EnvC W097/00, (upheld by the High Court in *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton DC* HC Wellington AP6/01, 25 June 2001).

Stormwater policies and rules concerning stormwater management plans

41. The Council's concerns with proposed provisions related to stormwater policies and stormwater management plans (SMP) are extensively addressed in the evidence of Mr Eastman and Ms Keller⁵⁸.
42. Provisions in the proposed LWRP that facilitate and encourage use of SMPs, and that discourage individual ad-hoc discharges in the areas covered by SMPs, must be an important tool in the integrated management of the resource. Mr Eastman's evidence stresses the environmental and social benefits of that regime. His evidence is that integrated stormwater systems produce better environmental outcomes than ad hoc individual treatment and discharge systems. He considers that as a result, the LWRP ought to provide incentives for developers to opt for working within the requirements of SMPs⁵⁹. SMPs achieve integrated mitigation, management and discharge and better long term resilience and sustainability for communities. As Ms Keller says, it is important that there are "strong but fair" incentives for councils and developers to use this tool.
43. Those provisions have been in the notified pLWRP, are generally supported in the Council's submission, but have been watered down in the s42A report recommendations.
44. As noted by Ms Keller, objective 3.2 and policies 4.1 and 4.2 acknowledge the importance of integrated management of the water resource. A rule framework of restricted discretionary for discharges from community stormwater systems and non-complying for others that are not into a SMP helps to achieve that integrated management of the resource. But the officers' recommendation for changing the activity status for the individual discharges to discretionary activity undermines that integrated management of the resource. Ms Keller's evidence is that it could lead to a fragmented and less efficient stormwater management system⁶⁰.
45. Mr Eastman's evidence expands on the reasons for that assessment. The provisions proposed in the section 42A report may encourage individual dischargers to opt out of connecting into community stormwater systems.

⁵⁸ Paragraphs 7.1-7.11.

⁵⁹ Paragraph 4.14.

⁶⁰ Paragraph 7.11.

Mr Eastman's evidence is that a potential result will be the loss of a planned and integrated management of the water resource⁶¹.

46. Mr Eastman expresses the concern that if the changes to the rules proposed in the s42A report are approved, it may be difficult for the Christchurch City Council to justify putting resources into SMPs. It is not sustainable management of the City's resources for the Council to continue to put considerable resources into the development of SMPs, if there is little incentive in the LWRP for individual dischargers to seek to connect to those systems. In my submission, spending millions of dollars on developing an infrastructural "white elephant" – a community stormwater system to which many individual dischargers will not be connecting – would not be efficient and effective use of Council resources and is not sustainable management of natural and physical resources.
47. It is respectfully submitted that the section 42A report is correct where it states, in relation to the purpose of the Act, that "*The planning process enables the longer-term, proactive, integrated management of natural and physical resources, rather than an ad-hoc, reactive approach to individual proposals*"⁶². Provisions in the pLWRP that better facilitate the development and use of SMPs achieve that purpose.
48. A related point emphasised in Mr Eastman's evidence concerns the resources that go into the development of SMPs. Use of SMPs is facilitated by the NRRP⁶³. Development of SMPs has cost more than a million dollars. There must be sufficient time provided in the pLWRP for this work to be done properly (assuming that there remains any incentive for the councils to use them).
49. The Council's evidence is that proposed rule 5.72, which sets the standard for permitted discharges, fails in regard to integrating the functions of the district council and the regional council. The proposed rule provides that stormwater discharge into a community system is a permitted activity – regardless of whether the discharge proposed has been approved by the operator of that system. The section 42A report recognises that this rule "*may present some problems for councils in controlling discharges into their*

⁶¹ Mr Eastman rebuttal evidence paragraph 13.

⁶² S42A report page 22.

⁶³ Mr Eastman paragraph 3.7.

system...⁶⁴. Mr Eastman's evidence is that this could create confusion and uncertainty for developers⁶⁵. It is far preferable if people intending to discharge into the CCC system are on notice, in the permitted activity standard in the LWRP, that they need to know whether the CCC is going to accept that discharge into its system.

50. I will now call the Council's witnesses to summarise their evidence and answer any questions.

Dated 28 February 2013

Brent Pizzey
Counsel for Christchurch City Council

⁶⁴ Page 192 first paragraph.

⁶⁵ Mr Eastman paragraph 4.5-4.7.