

BEFORE INDEPENDENT COMMISSIONERS

UNDER the Resource Management Act
1991

IN THE MATTER of The Proposed Canterbury
Land and Water Regional Plan

**SUPPLEMENTARY LEGAL SUBMISSIONS OF COUNSEL FOR THE
CANTERBURY REGIONAL COUNCIL - REPLY**

**WYNN WILLIAMS
LAWYERS
CHRISTCHURCH**

Solicitor: P A C Maw
(philip.maw@wynnwilliams.co.nz)

Canterbury Regional Council's
Solicitor
Homebase, Unit B,
195 Marshland Road,
P O Box 4341, CHRISTCHURCH
Tel 0064 3 3797622
Fax 0064 3 3530247

Introduction

1. During the Council Reply, the Hearing Panel sought further legal submissions on the following issues:
 - a. Permitted Activity Rules – Lawful delegations;
 - b. Whether the provisions in the Waikato Regional Plan that deal with Water User Groups require Council approval, consultation with the Council, or something else;
 - c. Whether a decision maker considering an application for a restricted discretionary activity can take into account objectives and policies of a Plan, or Part 2 matters when none of those matters are included in the list of matters to which the Council has restricted its discretion;
 - d. Provisions of the Long Term Plan relevant to the staged implementation of Policies A2 and B6 of the National Policy Statement for Freshwater Management 2011.
 - e. Whether as a matter of law, a regional plan can assign controlled activity status for the renewal of a water permit.

Permitted Activity Rules - Lawful delegations

2. The Hearing Panel has asked whether a permitted activity rule can lawfully confer a discretion on someone else to approve or disapprove something. This question was asked in relation to proposed Rules 5.149 and 5.163, which each include a condition requiring (in some circumstances) the approval or authority of another person.
3. It is well established that such a discretion as "...subject to the approval of the Council" cannot be reserved in the prescription for a use permitted as of right.¹ This is because conditions must be set out with reasonable certainty such that a user of the plan can determine

¹ *Boanas v Oliver* PT Christchurch C072/94, 28 July 1994; *Ruddlesden v Kapiti Borough Council* 11 NZTPA 301.

whether a proposed use is permitted as of right² and cannot involve the making of a value judgment.³

4. The High Court considered the principle in *T L & N L Bryant Holdings Ltd v Marlborough District Council*.⁴ In that case, a condition for a permitted activity that required notification to be made to the Council before the commencement of any work was held not to be ultra vires, on the basis that no subjective judgement has to be made by the Council. Rather, all that was required was that the condition of notification be met to satisfy the condition of the permitted activity classification.
5. The High Court, in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* has recently considered the issue of lawful delegations in the context of conditions of a resource consent.⁵ The dicta is equally applicable to standards or conditions of rules in the pLWRP because section 77A of the Act provides that rules may specify conditions, but only if the conditions relate to the matters described in section 108 (or 220). Paragraphs 123 and 124 of the decision are insightful, and state:

"[123] The tasks that the Board has left to others in this case are distinguishable from the further assessment struck down as an unlawful delegation of a judicial function in Director-General of Conservation v Marlborough District Council. In that case, the Environment Court had purported to impose, as a condition precedent to the issue of a coastal permit for a marine farm at Clifford Bay, the completion of a two year survey of the site to monitor the population of Hector's dolphins. The Environment Court had required that the survey had to establish that the site

² *Bitumix v Mt Wellington Borough Council* [1979] 2 NZLR 57 at 63.

³ *Ruddlesden v Kapiti Borough Council* (1986) 11 NZTPA 301.

⁴ *T L & N L Bryant Holdings Ltd v Marlborough District Council* [2008] NZRMA 485 (HC).

⁵ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2013] NZHC 1992, 8 August 2013.

was very probably not a site of special significance to Hector's dolphins, before the permit could issue.

[124] The High Court treated that as requiring an exercise of judgement which ought to have been exercised by the Environment Court itself. It was emphasised that the boundaries of appropriate delegation require an examination of the real nature of the decision which the delegate is required to make, rather than the form in which the power to make it has been conferred. That case involved an obligation on the delegate to exercise a judgement that was important to the outcome of the evaluation that the decision-maker was required to undertake. This judgement had a significant bearing on whether consent would have been granted. In contrast, the relevant component of the decision here is the extent to which any deterioration in the water quality would be tolerated, before reduced levels of salmon farming activity would be required. That decision has been made by the Board. Implementing it in quantitative terms is necessarily left until more facts are available."

6. This decision confirms that a delegation is not unlawful if what is delegated is not important to the outcome of the evaluation that a decision-maker is required to undertake and does not have a significant bearing on whether consent is granted. Therefore, if a qualitative decision has been made, the delegation to others to determine the quantitative manner by which to implement the qualitative decision, does not amount to an unlawful delegation.
7. In light of the legal position regarding lawful delegations, the Council Officers have now recommended some further changes to Rules 5.149 and 5.163. In relation to rule 5.149, the Officers recommend that the condition be amended by deleted reference to the phrase "by the CRC or persons acting under written authority of the CRC", and replacing it with "by or on behalf of the CRC".
8. In relation to Rule 5.163, the Officers recommend removing the phrase "or with the approval".

Water User Groups

9. Variation 6 to the Waikato Regional Plan contained provisions relating to water user groups. Provisions approved by the Environment Court included:⁶

Policy 21: Shared Use and Management of Water

(Implements Objective 3.1 .2 a) and g))

The Waikato Regional Council will promote shared use and management of water that, subject to ongoing compliance with individual resource consent conditions:

- a) allows water users the flexibility to work together to make the best use of available water ...*

Method 3.3.4.10 Phasing Out Exceedences of the Table 3-5 Allocable Flows

...

- (h) encouraging the establishment of catchment groups or voluntary agreements between water users to achieve necessary reductions in catchment water use*

3.3.4.27 Standard - How Water Shortage Restrictions Shall Apply

(Implements Section 3.3.3 Policy 8 g), 10 h), 17 and 18

- (a) Restrictions on water takes directly from surface water bodies will occur in the following manner and order, unless existing water take resource consents already contain conditions requiring the restriction or cessation of taking at times of river low flow or in other circumstances in which case the resource consent conditions shall prevail:*

- ia) Priority SW-E users will be required to cease taking if the average flow for the previous seven days falls below the median flow.*

⁶ *Carter Holt Harvey v Waikato Regional Council* [2011] NZEnvC 380.

- i) *Priority SW-D users will be required to cease their taking if the average flow for the previous seven days is less than the minimum flows specified in Table 3-5.*
- ii) *Priority SW-C users will be required to reduce their net daily take rate by 50 percent of the authorised amount (when averaged over any two consecutive days, unless undertaken in accordance with Part c) of this Standard) when river flows fall below the minimum flows specified in Table 3-5, three or more days after part a) ii) of this Standard has been implemented.*
- iii) *If the river flow falls below the minimum flows specified in Table 3-5, seven or more days after part a) ii) of this Standard has been implemented:*
 - *Priority SW-C users will be required to reduce their net daily take rate by 75 percent of the authorised amount (which reduction must be effected on any one day, not averaged over four days unless undertaken in accordance with Part c) of this Policy), and*
 - *Priority SW-B users will be required to reduce their net daily take rate (averaged over any two consecutive days unless undertaken in accordance with Part c) of this Standard) by 15 percent of the authorised amount.*
 - *Priority SW-A users will not be required to reduce their net daily net take rate*
- b) *Where there are no SW-D users the restrictions specified in a) ii) will be implemented if the average flow for the previous seven days is less than the minimum flow in Table 3-5.*
- c) *The Waikato Regional Council may issue Water Shortage Directions under s329 RMA if surface water flows continue to*

fall below the minimum flow after implementing parts a) i), ii), or iii) of this Standard.

- d) *Restrictions under parts a) i), ii), or iii) of this Standard may be implemented by water user groups, voluntary agreements between water users, or transfer of water permits as approved by the Waikato Regional Council...*

10. It does not appear that, in relation to these rules, the Waikato Regional Council is required to approve any agreement in place between members of a water users group. Rather, they demonstrate the use of water user groups in other regions.

Restricted discretionary activities

11. The Hearing Panel has raised the issue of what matters can be taken into account by a decision maker when considering an application for a restricted discretionary activity. This was raised in the context of restricted discretionary activity Rule 5.5 where the following matter for discretion is recommended to be deleted:

The extent to which the proposed activity is consistent with the objectives and policies of this Plan.

12. In particular, the Hearing Panel has asked what the result would be if the above matter for discretion was omitted entirely.
13. Section 87A(3) of the RMA provides that:

If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and –

- (a) *the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and*

- (b) *if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.*

14. Section 87A was inserted as part of the 2009 amendments to the Act. Therefore any case law decided under the RMA prior to these amendments, including *Auckland City Council v John Woolley Trust*⁷ and *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council*⁸ must be read in light of the new section 87A(3).
15. Section 87A has been considered by the Environment Court in *Oman Holdings Limited v Whangarei District Council*.⁹ In that case the Environment Court helpfully summarised how a decision-maker should assess a restricted discretionary activity, particularly in the light of the 2009 amendments:

[5] *When considering an application for restricted discretionary activity resource consent, s 104C of the RMA is relevant, as is s 87A. Under s 104C(1), and relevantly here, a consent authority must consider only those matters over which it has restricted the exercise of its discretion in its plan. [Section 104C(1)(b)] If it grants the application, a consent authority may impose conditions under s 108 of the RMA only in relation to the matters over which its discretion is restricted in the Plan.*

⁷ *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC).

⁸ *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2011] NZEnvC 98; *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735; [2013] NZRMA 126. The High Court in its judgment explained the position set out in *Woolley* and stated that: "what *Woolley* prohibits is the use of a Part 2 matter as an additional ground to decline consent, i.e. additional to the matters for discretion. To put it another way, Part 2 cannot extend the range of grounds for declining a consent beyond those specified in the Plan. It cannot bring additional matters into play except when it comes to granting consent." The High Court went on to state that *Woolley* notes: "Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the Act."

⁹ *Oman Holdings Limited v Whangarei District Council* [2012] NZEnvC 137.

[6] *Section 87A, as introduced by the 2009 Amendment Act, also confirms that, in relation to a restricted discretionary activity, the consent authority has power to decline consent, or to grant consent and to impose conditions on the consent as restricted to the matters over which discretion is restricted – whether in its plan or otherwise. All counsel accepted that the effect intended by the 2009 Amendment Act was to overturn the High Court decision in Auckland City Council v John Woolley Trust, [[2008] NZRMA 260 (HC)] where the High Court held that Part 2 matters could not be used as an additional reason to decline consent if the application was able to meet all other restricted discretionary activity criteria. In other words, it could not be used to trump an application that would otherwise be successful. As a result of the 2009 Amendment Act, Part 2 is relevant to both granting and refusing an application for a restricted discretionary activity.*

[7] *Counsel submitted that the provisions of s104(1) must also be considered. Section 104(1) requires us, when considering an application for resource consent, to have regard to:*

- (a) any actual and potential effects on the environment of allowing the activity (s104(1)(a));*
- (b) any relevant provisions of a number of statutory documents (s104(1)(b)); and*
- (c) any other matter we consider relevant and reasonably necessary to determine the application. (s104(1)(c).*

We agree that the 2009 Amendment Act does not change the position expressed in Woolley that we must take into account s 104(1) and Part 2, but only so far as they relate to matters over which the discretion is restricted.

16. In that case Counsel agreed that the matters in Part 2 relevant to the appeal were predominantly the provisions in sections 7(c) and (f). Counsel and the Environment Court agreed that there were no other matters in Part 2 that needed to be considered, apart from of course, the overall purpose of the RMA contained in section 5.

17. In the context of Rule 5.5, if the extent to which the proposed activity is consistent with the objectives and policies of this Plan was removed as a matter for discretion, then a decision-maker would still be entitled to consider objectives and policies, but only so far as they relate to the other matters over which the discretion is restricted. That is:
1. *The timing, duration and scale of the activity; and*
 2. *The adequacy of the management plan prepared in respect of the activity, and in particular, the identification of the effects and the proposed mitigation.*
18. The same reasoning would apply to other restricted discretionary activities within the pLWRP. That is, a decision-maker must take into account s 104(1), including relevant objectives and policies, and Part 2, but only so far as they relate to matters over which the discretion is restricted.

Provisions of the LTP

19. The relevant provisions of the Council's Long Term Plan relating to the staged implementation of Policies A2 and B6 of the National Policy Statement for Freshwater Management 2011 were referred to at pages 37 – 38 of Volume 1 of the Section 42A report. A copy of the Council's recommendations on the staged implementation of Policies A2 and B6, together with the Public Notice regarding staged implementation, were attached as Appendix 3 and Appendix 4 to the legal submissions of Counsel for the Department of Conservation.

Renewal of Water Permit – Controlled Activity

20. There is no express statutory exclusion in the Act preventing the renewal of a water permit being classified as a controlled activity.
21. Section 30 of the Act sets out the functions of a regional council under the Act. Section 30(4) states:

A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:

- (a) *the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and*
- (b) *nothing in paragraph (a) affects section 68(7); and*
- (c) *the rule may allocate the resource in anticipation of the expiry of existing consents; and*
- (d) *in allocating the resource in anticipation of the expiry of existing consents, the rule may—*
 - (i) *allocate all of the resource used for an activity to the same type of activity; or*
 - (ii) *allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and*
- (e) *the rule may allocate the resource among competing types of activities; and*
- (f) *the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e).]*

22. In particular, section 30(4)(d) allows rules that, in anticipation of the expiry of existing consents, *"allocate all of the resource used for an activity to the same type of activity"*. It is submitted that this might be achieved by using a controlled activity status to enable the renewal of water permits.
23. Further, there is nothing in section 68(7) (relating to regional rules) or in sections 77A or 77B (the power to make rules to apply to classes of activities and the duty to include certain rules in relation to controlled activities) or 87A (classes of activities) which would prevent the imposition of a controlled activity status for a renewal consent.
24. By way of contrast, it is submitted that where Parliament did intend that a particular class of activity status was not available to a council, it expressly said so in the Act. For example, section 68(9) expressly provides that no rule of a regional coastal plan can authorise particular activities as permitted activities.

25. For these reasons, it is submitted that, as a matter of law, a regional council could include a rule in a regional plan which classified the renewal of a water permit as a controlled activity. However, whether such a rule is included in the pLWRP is a question of whether the rule is the most appropriate for achieving the objectives of the plan, having regard to its efficiency and effectiveness. The Council Officers have considered this issue and are of the opinion that restricted discretionary activity status is the most appropriate activity status for the renewal of water permits.

DATED this 13th day of August 2013



.....
P A C Maw

Counsel for the Canterbury Regional Council