

*Tabled @ Hearing
WED - 16.03.20*

**BEFORE CANTERBURY REGIONAL COUNCIL HEARING
COMMISSIONERS**

IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF Proposed Plan Change 4 of the partly operative
Canterbury Land and Water Regional Plan

LEGAL SUBMISSIONS FOR THE CHRISTCHURCH CITY COUNCIL

16 MARCH 2016

CHRISTCHURCH CITY COUNCIL
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MAY IT PLEASE THE COMMISSIONERS:

Introduction

1. The Christchurch City Council (City Council) lodged a submission and further submission on Plan Change 4 to the Canterbury Land and Water Regional Plan.
2. The matters on which the City Council has submitted focus on the following key issues:
 - 2.1 The accuracy of schedule 17 for inanga spawning sites;
 - 2.2 Proposed policy 4.16A and rules 5.93 to 5.97 with regard to Canterbury Regional Council (Regional Council) consenting for site specific stormwater discharges into the City Council's reticulated system.
3. The City Council is adducing evidence from three witnesses on those submissions:
 - 3.1 Mr Brian Norton, a senior stormwater planning engineer at the City Council;
 - 3.2 Dr Belinda Margetts, a waterways ecologist at the City Council;
and
 - 3.3 Ms Jeanine Keller, an environmental planner.
4. These legal submissions address the following matters:
 - 4.1 The scope to amend schedule 17 in the manner sought in Dr Margetts' evidence;
 - 4.2 The authority of the Regional Council to grant or decline site specific permits for discharge into a reticulated stormwater system;
 - 4.3 The appropriateness of the proposed policy and rules seeking transition of consenting of the site specific stormwater discharges from the Regional Council to territorial authorities.

Scope to amend schedule 17 in the manner sought in the evidence of Dr Margetts

5. The Hearing Commissioners have queried whether there is scope to make the changes to Schedule 17 that are sought in Dr Margetts' evidence.
6. Plan Change 4 as notified included Schedule 17, being a list of inanga spawning sites, and rules that constrain activity in the areas identified in Schedule 17.
7. The City Council's original submission is in the following terms:

"The Council has noted that there may be anomalies between Council data and the data in schedule 17 which lists significant inanga spawning sites within Christchurch. It is important that there is consistency between Council and Environment Canterbury with regard to significant sites, and therefore more analysis and discussion between the two councils is required".
8. The relief sought in the submission is:

"If further investigations identify anomalies, amend Schedule 17 to ensure that all significant inanga spawning sites within Christchurch and Banks Peninsula are identified correctly and consistently".
9. The format of the City Council submission framed that submission as being on the policies part of the Proposed Plan, specifically policies 4.86A and 4.86B in section 4. But that could not have caused any confusion for readers of the submission. It was clear from the submission that it was also on the mapping of inanga spawning sites in Schedule 17.
10. The Regional Council gave public notice of a Summary of Decisions Requested. The Summary did not list the City Council's submission as being on the policies. It correctly identified the City Council's submission as being on Schedule 17 (submission point PC4 LWRP-94). Readers of that Summary would have seen that the City Council submission sought to amend the mapping of inanga spawning sites. The Summary of Decisions Requested with regard to that part of the City Council submission states:

"Oppose - amend to ensure that all significant inanga spawning sites within Christchurch and Banks Peninsula are identified correctly and consistently but no specific text provided - see original submission for details".

11. Details of the changes sought by the City Council were contained in an appendix to a further submission by the City Council on a submission by Fonterra Co-Operative Group Ltd and DairyNZ (Submission point PC4 LWRP-240 in the Summary of Decisions Requested). The original submitter opposes in part, and seeks to amend, the definition of Inanga Spawning Habitat to better reflect that the CRC is referring to habitat suitable for inanga spawning (in contrast to known spawning sites); and to enable a case-by-case assessment of water bodies within the area identified on the planning maps to identify whether they contain habitat suitable for inanga spawning.
12. The City Council lodged a further submission supporting that submission in part. The relief sought in the further submission was to *"Amend to re-define inanga spawning habitat through a broader scientific understanding and field observation, as discussed in the accompanying attachment (Attachment 1)";* and in the Attachment, that relief was coupled with *"Amend Schedule 17 to ensure consistency between CCC and Ecan observed sites of Inanga spawning within Christchurch City's boundaries"*.
13. The attachment to that further submission particularised anomalies between the City Council and the Regional Council data for inanga spawning sites (in Schedule 17) and inanga spawning habitats.
14. The City Council does not rely on that further submission as a basis for jurisdiction to grant the relief sought concerning changes to Schedule 17 for inanga spawning sites. It is accepted that a further submission is limited to a matter in support of or opposition to the relevant submission¹. The further submission can only seek allowance or disallowance in whole or in part of the original submission. It cannot extend the scope of the original submission². The original submission did not seek changes to the schedule of known inanga spawning sites.

¹ Clause 8(2) Schedule 1 of the Act.

²: *Offenberger v Masterton DC W053/96 (PT)*.

15. The information attached to that further submission, whilst not a basis for jurisdiction to grant the relief, is a part of the context for considering the Council's original submission. It is further information available to any person who was following submissions relevant to inanga spawning sites and habitats. It enabled any person who was following the issue to see precisely the relief that was being sought by the City Council on its original submission.
16. That information is repeated in Dr Margetts' evidence³.
17. The section 42A report recommends that the changes to Schedule 17 sought by the City Council be made⁴.
18. The Technical Memoranda in the s42A report quoted in Dr Margetts' evidence only expressly refers to accepting the City Council's changes with regard to the Avon and Heathcote Rivers, rather than all of the parts of waterways that are listed in Dr Margetts' evidence⁵. However, it is Dr Margetts' understanding from her communications with Regional Council staff that their intent was to accept the changes to Schedule 17 sought by the City Council for all of the waterways listed by Dr Margetts. Dr Margetts can clarify this.
19. It is submitted that the City Council's original submission provides scope for making the changes sought in Dr Margetts' evidence and accepted as appropriate in the s42A report.
20. Decisions on submissions are confined to being on "matters raised in submissions"⁶. One way of framing the question of whether a matter has been raised by a submission is whether an informed and reasonable member of the public, having studied all the submissions, should have appreciated that the decision was one that the local authority might make had those submissions been accepted⁷.

³ Dated 29 January 2016 Paragraph 19.

⁴ Page 52 Paragraph A.89.

⁵ Paragraphs 15 and 19.

⁶ Clause 10(1) Schedule 1 of the RMA.

⁷ *Noel Leeming Appliances Ltd v North Shore CC* (1993) 1A ELRNZ 276 (PT), at p 28.

21. Amendments to the proposed plan need not be specifically requested in any submissions. There is scope if the submissions have, in substance, effectively raised the issue of seeking improved particularity⁸.
22. In *Countdown Properties (Northlands) Ltd v Dunedin City Council*⁹, many of the submissions did not specify the detailed relief or result sought. Many (such as Countdown's) pointed up deficiencies or omissions in the proposed plan. These alleged deficiencies or omissions were found in the body of the submissions (p170).
23. The High Court there agreed with the Tribunal that

"Councils need scope to deal with the realities of the situation. To take a legalistic view that the Council can only accept or reject the relief sought in any given submission is unreal" (p170).
24. The Court held in *Countdown Properties* (p171):

Adopting the standpoint of the informed and reasonable owner is only one test of deciding whether the amendment lies fairly and reasonably within the submissions filed. In our view, it would neither be correct nor helpful to elevate the "reasonable appreciation" test to an independent or isolated test. The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. In effect, that is what the Tribunal did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.
25. In *Oyster Bay Developments Ltd v Marlborough DC*¹⁰, the Environment Court distilled from the High Court in *General Distributors v Waipa District Council*¹¹ the following elements for deciding whether an amendment is within or beyond jurisdiction:

⁸ *Johnston v Bay of Plenty RC* EnvC A106/03 at [35].

⁹ (1994) 1B ELRNZ 150 (HC).

¹⁰ Decision C081/2009 at [22].

¹¹ (2008) 15 ELRNZ 59 (HC), Wylie J.

- [a] The terms of the proposed change and the content of submissions filed delimit the Environment Court's jurisdiction [64];
 - [b] Whether an amendment goes beyond what is reasonably and fairly raised in submissions on the plan change will usually be a question of degree to be judged by the terms of the plan change and of the content of the submissions [58];
 - [c] That should be approached in a realistic workable fashion rather than from the perspective of legal nicety, and requires that the whole relief package detailed in submissions be considered [59][60].
26. It is submitted that, ultimately, the question is one of procedural fairness. The question is whether there was adequate notice to those who might seek to take an active part in the proceedings that that the changes could result from the hearing of submissions¹².
27. The notified provisions included a schedule of inanga spawning sites and rules that manage activity within and on the banks of waterways that may affect those sites. It was reasonably foreseeable for readers of the Proposed Plan that submitters may seek to extend or restrict that list of sites. The City Council lodged a submission that stated that there were anomalies between the City Council's data and the Regional Council's list, and that the notified list was opposed. Readers were therefore on notice that the City Council sought changes to the Schedule 17 list that were within this district. This was identified in the Summary of Decisions Requested as being unspecified changes sought to the Schedule.
28. The relevant rules affect only people interested in work within and adjacent to waterways. It was clear to those people that a list of inanga spawning sites was proposed, and that a submitter sought changes of detail to that list. Any person with an interest in that list had the opportunity to join as a submitter in support or in opposition to Schedule 17 as notified. If there was any person who did not submit because a location of a waterway that they were interested in was not listed, then a reading of the Summary of Decisions Requested or the City Council's submission put them on notice

¹² Fisher J in *Westfield (New Zealand) Ltd v Hamilton City Council* (2004) 10 ELRNZ 254 (HC) at page 274.

that the City Council sought changes that could possibly affect their location of interest. They had the opportunity to join as a further submitter on the City Council's submission.

29. It is submitted that in those circumstances, there is no unfairness arising from the detail of the changes sought not being in the City Council submission and that the Commissioners have jurisdiction to make the changes to Schedule 17 sought in the City Council's submission and evidence.

Authority for discharges

30. Submissions now address the Hearing Commissioners' questions regarding the authority for the Regional Council to grant or decline permits to discharge stormwater to a reticulated stormwater system.
31. The Regional Council's written answer to those questions has referred to the proposed definitions of stormwater, reticulated stormwater system and discharge.
32. As highlighted in the Commissioners' questions on the first day of the hearing, the definition of "water" in the Resource Management Act is also relevant. The definition of "water" does not include "water in any form while in any pipe, tank or cistern". Water in a reticulated stormwater system is not "water" for the purposes of the Act.
33. It is also relevant that the point of the "discharge" is the point at which the waste leaves the effective control of the discharger¹³.
34. Discharge into a pipe in the land can be reasonably regarded as a discharge into land, given the inclusive definition of "land" in the Act¹⁴.

¹³ The principle stated in *Kerikeri Properties Ltd v Northland Catchment Commission and RWB* (1977) 6 NZTPA 344 (TCPAB) at 348.

¹⁴ **land—**

(a) includes land covered by water and the airspace above land; and
(b) in a national environmental standard dealing with a regional council function under section 30 or a regional rule, does not include the bed of a lake or river; and

There is longstanding authority that discharge into a sump and stormwater system, and from there into a creek, is a discharge to land pursuant to s15(1)(b). Section 15(1)(a) applies only when there has been a discharge of a contaminant directly into water¹⁵.

35. Accordingly, it is submitted that the Regional Council (if provided for in the rules in the Plan):
- (a) does not have authority under s15(1)(a) to grant or decline consents for discharge of stormwater containing contaminants into the water in a reticulated stormwater system, as the water in that system is not water within the definition of water in the Act; and
 - (b) does not have authority under s15(1)(a) to grant or decline site specific consents for discharge of stormwater containing contaminants into the receiving river or stream, via the reticulated stormwater system, as the point of the "discharge" for people who do not manage that reticulated system is the point at which they lose control of the discharge, which is when it enters the network; and
 - (c) does have authority under s15(1)(b) to grant or decline consents for the discharge of stormwater containing contaminants into a reticulated stormwater system which discharges into a waterway, as that is a discharge of contaminants into land in circumstances that may result in the contaminant entering the water.
36. It is therefore submitted that the Regional Council does have authority to use policies and rules to manage the discharge of contaminants into the reticulated stormwater system.

(c) in a national environmental standard dealing with a territorial authority function under section 31 or a district rule, includes the surface of water in a lake or river

¹⁵ *ARC v Bitumix Ltd* (1993) 3 NZPTD 336 (District Court, Otahuhu, Judge Willy).

Appropriateness of the proposed policy and rules seeking transition of consenting of the site specific stormwater discharges from the Regional Council to territorial authorities

37. The City Council's submission opposes policy 4.16A and seeks to delete that policy and rules that implement it. The reasons for the opposition expressed in the submission include:
- (a) the proposed cessation in 2025 of the Regional Council issuing those consents shifts responsibility for contaminant load and other contaminant levels onto the City Council;
 - (b) the rules (5.93-5.97) are inconsistent with the approach of the Council's stormwater management plans and catchment-wide stormwater consents;
 - (c) the provisions are inconsistent with a Memorandum of Understanding between the Regional Council and the City Council;
 - (d) the costs implications for the City Council needing to resource that shift in responsibility;
 - (e) that the City Council mechanism for control of the stormwater entering the reticulation system is a bylaw made under the Local Government Act 2002, and prosecution for breach of the bylaw, and that this is not as efficient as the scope of infringement fines, abatement notices and enforcement orders under the Resource Management Act.
38. Those points are further expanded in the evidence of Mr Norton and Ms Keller.
39. Mr Norton describes the Protocol, Memorandum of Understanding, Surface Water Implementation Management Committee (SWiM) and catchment wide consents by which the Regional Council and the City Council have agreed to work together to manage stormwater issues.
40. Mr Norton's evidence establishes that, contrary to the statement in the s42A report, there have been no *"ongoing discussions between Ecan and the*

territorial authorities as to the best method to manage stormwater"¹⁶ relevant to the Regional Council ceasing to perform this function in 2025.

41. The catchment wide consents which have been issued, and the Comprehensive Stormwater Network Discharge Consent that is currently being processed by the Regional Council, have agreed conditions that are founded on the Regional Council continuing to grant site specific approvals for discharges from "high risk" sites into the City Council's reticulation system¹⁷. Implementation of Policy 4.16A would require the City Council to seek variations of those consents¹⁸.
42. There are significant resourcing issues arising for the City Council from that proposed transfer of responsibility¹⁹.
43. Ms Keller assesses the efficiency and effectiveness, and costs and benefits of these changes. The costs to the City Council have been significantly under-estimated²⁰. There has been inadequate consultation between the Regional Council and the territorial authorities on such significant changes to the stormwater management system for the region.
44. As noted in Ms Keller's evidence, as currently drafted rules 5.94B, 5.94C, 5.95A, 5.95, 5.96 and 5.97 would have the result that after 1 January 2025, an application for discharge into the City Council's reticulated stormwater system would be a non-complying activity²¹.
45. However, non-complying activity status is not the activity status that is required to implement proposed Policy 4.16A. The policy is that the Regional Council "...*shall not issue any permit*..". "*Shall not issue*.." is an absolute prohibition. It has a different meaning from "*avoid*" (as discussed in the Regional Council's answer to the Commissioners' question RvV H.34). The sole way to implement a policy to "*not issue any permit*" is prohibited activity status. It is submitted that there is no evidence of an issue

¹⁶ Page 60 at 8.36.

¹⁷ Brian Norton 29 January 2016 paragraphs 9-10.

¹⁸ Brian Norton 29 January 2016 paragraph 36.

¹⁹ Brian Norton 29 January 2016 paragraphs 28-35.

²⁰ Jeanine Keller 29 January 2016 paragraph 36.

²¹ Jeanine Keller 29 January 2016 paragraph 29.

that comes anywhere near to justifying prohibited activity status for that activity from 1 January 2025.

46. The policy should be deleted until the Regional Council and the territorial authorities have worked together to identify an agreed process for managing these issues.
47. The City Council witnesses do not support all of the changes sought in the City Council's submission. They support deleting Policy 4.16A. Ms Keller's original evidence is that rules 5.93, 5.94 and 5.94A have merit and are not directly related to implementation of policy 4.16A²². Mr Norton is opposed to the inclusion of the words "prior to 1 January 2025" in the rules²³. Ms Keller will be providing a clarification of her evidence on this matter, agreeing with the changes recommended in Mr Norton's evidence. As a result, the City Council's position is that policy 4.16A should be deleted and the words "prior to 1 January 2025" deleted from the relevant rules.

Dated 16 March 2016



BK Pizzey

Counsel for the Christchurch City Council

²² Jeanine Keller 29 January 2016 paragraph 41.

²³ Brian Norton 29 January 2016 paragraph 29.

10 Decisions on provisions and matters raised in submissions

- (1) A local authority must give a decision on the provisions and matters raised in submissions, whether or not a hearing is held on the proposed policy statement or plan concerned.
- (2) The decision—
 - (a) must include the reasons for accepting or rejecting the submissions and, for that purpose, may address the submissions by grouping them according to—
 - (i) the provisions of the proposed statement or plan to which they relate; or
 - (ii) the matters to which they relate; and
 - [[~~(ab)~~ must include a further evaluation of the proposed policy statement or plan undertaken in accordance with section 32AA; and]]
 - (b) may include—
 - (i) matters relating to any consequential alterations necessary to the proposed statement or plan arising from the submissions; and
 - (ii) any other matter relevant to the proposed statement or plan arising from the submissions.
- (3) To avoid doubt, the local authority is not required to give a decision that addresses each submission individually.
- (4) The local authority must—
 - [[~~(aaa)~~ have particular regard to the further evaluation undertaken in accordance with subclause (2)(ab) when making its decision; and]]
 - (a) give its decision no later than 2 years after notifying the proposed policy statement or plan under clause 5; and
 - (b) publicly notify the decision within the same time.
- (5) On and from the date the decision is publicly notified, the proposed policy statement or plan is amended in accordance with the decision.]

15 Discharge of contaminants into environment

- (1) No person may discharge any—
 - (a) contaminant or water into water; or
 - (b) contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or
 - (c) contaminant from any industrial or trade premises into air; or
 - (d) contaminant from any industrial or trade premises onto or into land—

unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.