BEFORE THE ENVIRONMENT COURT

ORIGINAL

Decision No. C 026/2009

IN THE MATTER of appeals under clause 14 of the First Schedule to the Resource Management Act 1991

BETWEEN

J P THACKER
(ENV-2006-CHC-000057)
CANTERBURY REGIONAL COUNCIL
(ENV-2006-CHC-000114
ENV-2006-CHC-000345)
D and M LEE
(ENV-2006-CHC-000350)
CASHMERE RURAL LANDOWNERS INCORPORATED
(ENV-2006-CHC-000351)
ODERINGS NURSERIES LIMITED
(ENV-2006-CHC-000352)
Appellants

AND

CHRISTCHURCH CITY COUNCIL
Respondent

Court: Environment Judge B P Dwyer, Environment Commissioner J R Mills, Environment Commissioner S J Watson

Heard: 28 July – 1 August 2008

Counsel/ Appearances:

J G Hardie appeared on behalf of Christchurch City Council

M Perpick and M A Mehlhopt appeared on behalf of Canterbury Regional Council

P A Steven appeared on behalf of J P Thacker

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

D C Caldwell appeared on behalf of Lower Styx Ponding Group
Cashmere Rural Landowners and Oderings Nurseries Ltd
D Lee appeared on behalf of Sparks Road Garden Ltd, Cashmere Garden and M Lee

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DECISION

Decision Issued:

Introduction

[1] Variation 48 to the Proposed Christchurch City Plan (the Proposed Plan) was introduced to manage the potential effects of flooding in Christchurch City. The Variation provides a package of measures, which were developed following detailed investigations on the major river systems and coastal areas. The investigations analysed the level of flooding risk and potential flood plain mitigation measures for different areas of the City. The essential elements of Variation 48 as amended by the final decision of Christchurch City Council (the City Council) were:

- *To identify areas on the Planning Maps which are at greater risk of flooding than the rest of the City.*
- *To protect the hydraulic function of ponding areas, and life and property within and beyond them, by strictly controlling filling and excavation via non-complying activity status for anything other than building platforms at permitted rural densities; and*
- *To require restricted discretionary activity resource consents with assessment criteria relating to building floor levels, in identified flood management areas (FMA's).*[1]

[1] Para 10, S.M Dixon EiC.

The issues of particular concern in the hearing before us relate to areas called Henderson's Basin, the Cashmere Stream flood plain and the Lower Styx ponding area.

[2] Henderson's Basin and the Cashmere Stream flood plain are located in close proximity to each other in the south-western corner of Christchurch, near the Port Hills in the upper catchment of the Heathcote River. They provide important flood storage capacity in times of significant rainfall. That storage helps reduce downstream water (flood) levels.

[3] Development in the lower and middle reaches of the Heathcote River is located on the river's flood plain and there is a history of flooding from the river. Ponding in Henderson's Basin and the Cashmere Stream flood plain reduces the volume of water in the river during flood events by slowing inflows and, accordingly, reduces the flood risk in the lower reaches of the catchment.

[4] The Lower Styx ponding area is an extensive and low lying flood plain in the lower reaches of the Styx River in the north-east of the city. This area acts as a ponding area for flood waters from the Styx River, particularly during high tides when discharge to the sea through floodgates is restricted.

[5] Although parts of the three identified areas are inundated from time to time, they have been subject to development and a number of activities (primarily rural in character) take place there. Henderson's Basin and the Cashmere Stream flood plain are zoned Rural 2 in the Proposed Plan and the Lower Styx ponding area has both Rural 1 and Rural 3 zonings. All three of these zones contain various controls on subdivision, erection of buildings, filling and excavation. A consequence of Variation 48 is that they will become subject to additional controls over and above those in the current Rural zone rules.

[6] When the Proposed Plan was originally notified in 1995, both Henderson's Basin and the Cashmere Stream flood plain were identified as areas where filling and excavation should be controlled. However further work undertaken by the City Council and the Canterbury Regional Council (the Regional Council) subsequently

led to these controls being revisited and extended to additional areas, including the Lower Styx ponding area.

[7] Variation 48, as notified, proposed a range of controls over subdivision, the erection of residential units, filling and excavation. One of the most significant of those controls was that subdivision, the erection of residential units and filling of areas exceeding 1,000m^2 were proposed to be prohibited activities in what was known as Area B of Henderson's Basin, which is the core or central area of the Basin, as well as in the Cashmere Stream flood plain.

[8] In the Lower Styx ponding area, Variation 48 again imposed a number of controls including non-complying status to residential units, subdivision below certain levels, filling and excavation.

[9] Following submissions and hearings on Variation 48 the City Council made a number of changes to the controls proposed over these areas. For the purposes of our considerations the most significant change was the removal of the various prohibitions which had initially been proposed.

Issues

[10] None of the policies and objectives introduced by Variation 48 are subject to appeal. The dispute before us largely revolves around the methods proposed to give effect to the policies and objectives.

[11] Both the City Council and the Regional Council agree that subdivision, excavation and filling in the areas under consideration should be subject to significant restrictions. The difference between the councils is the degree of restriction. Specifically, the Regional Council seeks reinstatement of the prohibited activity status in respect of various activities which Variation 48 originally proposed and its extension to Lower Styx.

[12] The remaining parties to these appeals all support the City Council's position against prohibition and seek various other remedies in addition. A brief summary of the various parties' positions follows.

[13] Canterbury Regional Council sought to prohibit subdivision, filling and excavation in Henderson's Basin and the Lower Styx ponding areas and within the Rural zoned part of the Cashmere Stream flood plain.

[14] Cashmere Rural Land Owners Society Incorporated (CRL) and Oderings Nurseries Ltd (Oderings) were jointly represented at the appeal. CRL is a group formed by a number of rural land owners within Henderson's Basin and the Cashmere Stream flood plain. Oderings is a specialist horticultural business employing 170 full time staff, some of whose activities are carried out on a property containing 4.78ha at 205 Cashmere Road which is in the Cashmere Stream flood plain. CRL opposes the relief sought by the Regional Council and Oderings seeks the inclusion of what it regards as more liberal provisions for its activities. CRL in particular sought to bring issues relating to the manner in which the City Council managed the Heathcote and related river systems within the ambit of the appeal.

[15] D & M Lee, Cashmere Garden and Sparks Road Garden Ltd were all represented at the hearing by Mr D Lee. He is one of the remaining market gardeners in Christchurch and grows vegetables for the Christchurch market throughout the year. As with CRL, Mr Lee also raised issues relating to the manner in which the City Council managed the Heathcote River and related river systems. Mr Lee supported the City Council's position against prohibition of filling and excavation activities because of what he considered were unreasonable restrictions on him as a market gardener frequently involved in earthmoving activities. He sought provisions which would allow contouring, filling, excavating and building necessary to carry out horticultural activities and subdivision provisions to allow subdivision for more intensive market gardening.

[16] Mrs J R Thacker was opposed to the restrictions which the Regional Council sought as she contended these would impact significantly on normal farming activities. She owns an 18 ha parcel of land situated on the south side of Sparks Road in the Henderson's Basin ponding area. Additionally, she sought that a significant portion of her land be rezoned Living 1 and it was that particular aspect of her appeal which we will consider in more detail.

[17] The Lower Styx Ponding Group is a s274 party to the Regional Council's appeal. This Group represents landowners in the Lower Styx catchment who were concerned about the effects which the restrictions sought by the Regional Council would have on their ability to farm their land and manage it efficiently and economically.

[18] Consideration of the principal issues raised by the various Appellants and s274 parties falls under four separate headings:

- River control issues.
- The Regional Council appeal/prohibition.
- The Thacker appeal/rezoning.
- Rules.

River Control Issues

[19] A significant part of the case advanced by CRL and Messrs Lee related to the manner in which the City Council carries out its maintenance obligations on the Heathcote River system. Detailed evidence was given to us (particularly by CRL) regarding the manner in which the City Council maintained or (allegedly) failed to maintain the river system. It was contended by these parties that ponding in Henderson's Basin and the Cashmere Stream flood plain could be substantially alleviated if the City Council managed the river system differently in terms of removal of weed, control of tree and plant growth along the river edges, contouring of river edges and management of the river's course.

[20] We understood CRL and Messrs Lee to say that if these measures were undertaken there would be no need to impose controls of the sort proposed in Henderson's Basin and the Cashmere Stream flood plain.

[21] A further matter advanced by Mr D Lee was that ponding problems in Henderson's Basin had worsened over recent years as the result of intensification of development in surrounding areas whose stormwater had been directed into Henderson's Basin. There was no empirical evidence advanced to support that view.

[22] Mr R E Eastman (a civil engineer of 32 years' experience employed by the City Council) accepted that if management measures of the sort suggested by CRL and Messrs Lee were adopted, that could have the effect of speeding up the release of water from the ponding areas. However, he was of the view a direct consequence of that would be an increase in water volumes and speed downstream of the ponding areas, which would lead to an increased likelihood of flooding in the downstream areas. He said:

> *The facts are, if you opened up the Cashmere Stream, widened it right out, if you could, yes, you would empty more water out of Henderson's basin more rapidly and you would reduce, your flood level. But, the impact would be felt downstream with existing development, you would increase flloodwater levels within the Heathcote floodplain within all that development area down in the middle and the lower reaches of the Heathcote River.*
>
> *And so, it just does not make economic sense to contemplate that, you will have to carry all of your works all the way down to the estuary.*[2]

[23] Mr Eastman expressed the view that the very earliest written records of Christchurch settlement establish that these particular areas have always been wet, swampy areas, which are prone to flooding and ponding as they still are today.

[24] We did not see it as our function to review the manner in which the City Council carries out its river control responsibilities. We certainly have no jurisdiction to comment on or interfere with those responsibilities by directing them to carry out that work in the manner suggested by CRL and Messrs Lee. In any event we accept the evidence of Mr Eastman that implementing such management measures would merely shift flooding problems elsewhere. We take these matters no further.

The Regional Council Appeal/Prohibition

[25] The Regional Council was a submitter in respect of the flooding provisions of the Proposed Plan both at the time of its original notification in 1995 and when Variation 48 was notified. In 1999 it filed an appeal against the City Council decision

[2] Lines 30-39, NOE page 113

on submissions to the City Plan as originally notified and it has subsequently filed a further appeal in respect of the City Council decisions on Variation 48.

[26] The position now adopted by the Regional Council involves something of an amalgamation of the two sets of submissions and appeals. However none of the parties to these proceedings challenged the view that the Regional Council's position on appeal was in accordance with one or other of its submission and appeal documents.

[27] The matter of principle at stake insofar as the Regional Council is concerned is the status of activity which the Proposed Plan ought to allocate to further development by way of additional residential units, subdivision, excavation and filling within the three flood prone areas. The Regional Council contended that such development should be a prohibited activity as described in s77B(7) RMA, being an activity for which no application may be made and for which a resource consent must not be granted.

[28] There were some subtleties to the Regional Council's position in that it appeared to take a slightly less restrictive approach to the extent of the prohibition in respect of the outer edges of Henderson's Basin (referred to as Area A), the Cashmere Stream flood plain and the Lower Styx ponding area. However we do not think those distinctions are of any great significance for the purposes of our current considerations. It is sufficient to say that as a matter of principle the Regional Council sought the imposition of prohibited activity status on further development by way of additional residential units, subdivision, excavation and filling within the identified areas.

[29] The Regional Council's position was summed up in these terms by Ms Perpick in her opening.

> 6 *It is the CRC position that further development by way of subdivision, excavation and filling does not achieve the purpose and principles of the Act, nor the relevant objectives and policies of the Plan. To some extent, this is because those activities, in themselves, will compromise the ponding areas' water holding functions. But more importantly, the*

characteristics of the ponding area will not be acceptable to people who come to live in them. Such flooding causes property damage and loss, something which the settled objectives and policies of the City Plan seek to avoid.

7 *The Court also has evidence that, once people find themselves in that unacceptable situation, they expect steps to be taken to stop their land from being flooded, even if such steps are quite unrealistic, prohibitively expensive, or would cause significant adverse effects on other people. This is in spite of the fact that these areas have always been ponding areas, and that they must retain that function in order to protect land which has already been developed.*

8 *The assessment by City Council witnesses, particularly Ms Dixon, focuses only on the issue of whether or not further subdivision, filling and excavation, in themselves, will affect the capacity of the ponding/flood plain areas sufficiently to create a significant increase in water levels downstream. Ms Dixon and other Council witnesses have not properly considered the effects, on property owners in the ponding/flood plain areas, of living on land which is periodically covered in water, nor the effects which may follow if such people demand solutions to their problems.*

[30] In the course of her submission Ms Perpick added reference to the development of additional residential units to the mix of further development which ought be prohibited. She explained that the extent of property damage and loss to which she was referring in her submission was not damage or loss which was at a level which would trigger the provisions of s106 RMA.

[31] Section 106 enables a consent authority to refuse subdivision consent (even to a controlled activity subdivision) if the land in respect of which a consent is sought or any structure on that land is or is likely to be subject to material damage by inundation. The Regional Council's concern was directed at lesser levels of flooding than those which trigger the material damage provisions of s106.

[32] We understood from Mr Eastman that Henderson's Basin (which was the area of primary focus) was subject to fairly frequent episodes of inundation. He advised that probably every two years and certainly within every five years there would be episodes of local ponding in the basin, which would be relatively shallow and short lived.[3] Rules would require that dwelling houses were established at levels which put them above 200 year flood levels so that they would avoid damage in the common scenario which Mr Eastman had described, although he acknowledged the *nuisance value* of the more regular flood events.

[33] Mr L R McCallum, an experienced resource management planner, gave evidence on this issue for the Regional Council. He contended that subdivision within the flood prone areas would generally create large lifestyle units upon which substantial homes are likely to be constructed. He testified:

> *The owners of these properties are not likely to welcome their lifestyle units being flooded with the regularity which occurs in these ponding areas and flood plains. Those owners are likely to lobby the Christchurch City Council for the same level of drainage and relative freedom from flooding as other city properties.*[4]

He went on to add:

> *The propensity of groups of people to lobby their local politicians on issues of particular concern to them, resulting in planning and resource management outcomes which are detrimental to the wider community is well known and recognised, most notably in Christchurch, on the airport noise issues.*[5]

[34] Mr McCallum gave examples of the lobbying to which he was referring including examples from the evidence of other parties to these proceedings. He acknowledged that any new houses which might be established as a result of subdivision would be required to have floor levels above 200 year flood levels but was of the view that the houses would effectively become islands amongst otherwise inundated properties at times of flooding. Mr McCallum considered the effect of this inundation as being something more than just a nuisance effect. He pointed to

[3] Lines 26-41, Page 155 NOE.
[4] Paragraph 14, EiC (Methods).
[5] Paragraph 17, EiC (Methods).

potential hazards for people trying to drive vehicles through flood waters or trying to move stock during floods. In response to questions from the Court he referred again to his concern as to the community reaction to such flooding where people seek expensive solutions from the local authority.

[35] The City Council opposed the wide prohibition on various sorts of development sought by the Regional Council. Mr Hardie submitted that:

- The prohibition sought by the Regional Council is not supported by the objectives and policies of the Proposed Plan (those objectives and policies not being subject to challenge).
- Even if the objectives and policies were interpreted in a way which supported a prohibition on development in the flood prone areas as proposed by the Regional Council, such prohibition is not justified on the merits.

[36] The City Council had allocated various activity categories within the separate identified areas to those forms of development in respect of which the Regional Council had sought prohibited activity status. By way of example, in terms of subdivision, the effect of the City Council decision on Variation 48 is that subdivision into allotment sizes greater than 4 ha would be a controlled activity in Henderson's Basin and non-complying if lots smaller than 4 ha were proposed. This control is the same control as is applicable to the Rural 2 Zone generally. We do not propose at this time to go through all of the differences in controls proposed but simply deal with the issue of whether or not the prohibition sought by the Regional Council is appropriate on a broad level.

[37] We think that it was accepted by both Councils that in order for there to be a prohibition on various forms of development within the identified areas, such prohibition must reflect relevant objectives and policies. Mr Hardie contended that nothing in the objectives and policies provided any basis for the prohibition which the Regional Council sought to impose and there is no appeal against the relevant provisions of the objectives and policies.

[38] Ms G M Dixon (Senior Planner for the City Council) identified and analysed all of the relevant objectives and policies in the Proposed Plan and concluded that these did not seek to avoid development in the identified areas but rather to limit that development and to avoid increased risk to wellbeing and safety in the identified areas and downstream. We understood the City Council's position to be that the use of the word *avoid* in the objectives and policies would support prohibited activity status where the use of other expressions would not.

[39] Notwithstanding Ms Dixon's analysis of the Proposed Plan, we do not consider that it can be conclusively said that the provisions of the objectives and policies are so precise as to absolutely rule out the use of prohibited activity status to give effect to them.

[40] A number of the policies to which Ms Dixon referred us sought to *control* development, dwelling densities and the location and extent of filling or excavation. Ms Perpick submitted that *control* could mean drawing the limit of any such developments at the current level of development by way of prohibition on further development, or on development above certain specified levels. We consider that there is some merit to that submission. We certainly cannot say conclusively that in some instances prohibitions of the sort requested by the Regional Council necessarily go beyond the contemplation of the objectives and policies and therefore cannot stand, although neither could it be said that the objectives and policies clearly signal the imposition of prohibited activity status.

[41] We conclude (narrowly) that prohibition on subdivision, development, filling or excavation beyond certain levels may possibly be contemplated by the objectives and policies of the Proposed Plan or alternatively may be a method of giving effect to those objectives and policies. We therefore turn to consider the merits of such prohibitions in this case.

[42] The imposition of prohibited activity status on any activity or activities is the most draconian form of control available under RMA. A prohibited activity is not only one for which a resource consent must not be granted by a consent authority, but a proponent of such an activity may not even make an application for it. Although not

specifically stated by any of the parties to these proceedings there was an implicit acceptance that prohibited activity status was not one which should be imposed lightly and without detailed consideration.

[43] Counsel for both Councils referred to the Court of Appeal decision *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development*[6] in their submissions as did Ms Dixon and Mr McCallum in their evidence.

[44] Counsel and the witnesses referred to the series of situations identified in Paragraph [34] of that decision (being examples advanced by Counsel in that case), where it was contended that prohibited activity status might be the most appropriate status to apply to an activity. In Paragraph [36], the Court accepted the validity of at least some of the examples referred to in Paragraph [34]. Ms Perpick and Mr McCallum contended that imposition of prohibited activity status in respect of subdivision, construction of dwelling units, filling and excavation was in accordance with at least some of the examples identified in *Coromandel Watchdog.*

[45] That may well be the case. For the purposes of our deliberations however, we consider that the most significant portions of the *Coromandel Watchdog* case are those contained in Paragraphs [23] to [31], [37] and [41]. In the two later paragraphs the Court of Appeal identified that the appropriate test for imposition of prohibited activity status is whether or not the allocation of that status is *the most appropriate of the options available.*

[46] In Paragraphs [23] to [31] the Court identified the process to be undertaken in order to determine whether or not the imposition of prohibited activity status was the most appropriate course to adopt. The Court referred to the statutory scheme for plan changes under RMA together with the accepted principles, practices and requirements for application of that statutory scheme.

[47] In particular, the Court of Appeal emphasised the provisions of s32 RMA which impose an obligation on local authorities to undertake an *evaluation* at various

[6] [2008] 1 NZLR 562.

stages of the proposed plan process. Section 32(1) requires the undertaking of an *evaluation* before notification of a proposed plan and s32(2) requires the undertaking of a *further evaluation* prior to making a decision on the proposed plan (or plan change) under Clause 10, Schedule 1.

[48] The nature of the evaluation which the City Council and this Court are obliged to undertake in determining whether or not to impose prohibited activity status is described in ss32(3) and (4) in these terms.

> *(3) An evaluation must examine –*
>
> *(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and*
>
> *(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.*
>
> *(4) For the purposes of the examinations referred to in subsections (3) and 3(A), an evaluation must take into account –*
>
> *(a) the benefits and costs of policies, rules or other methods; and*
>
> *(b) 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.*
>
> Note: We have cited the post 2005 versions of ss32(3) and (4) RMA. There are no differences between the pre and post 2005 versions of these subsections which are material for our considerations.

[49] The matters of evaluation contained in ss32(3) and (4) are mandatory considerations which must be taken into account by a local authority or (on appeal) by this Court in determining whether or not to adopt any particular objectives, policies, rules or other methods as part of the proposed plan process.

[50] Regrettably, in advancing the case for imposition of prohibition on the various activities which it sought the Regional Council failed to give any detailed consideration to the comparative evaluation, which is required.

[51] By way of example, we refer to the proposed prohibition on filling and excavation sought by the Regional Council. It became apparent early in our hearing that such a prohibition might well extend to prohibit land contouring activities routinely undertaken by persons such as Mr Lee in the course of their farming enterprises. Mr McCallum readily conceded that was not the Regional Council's intention.[7]

[52] The costs (disbenefits) which would be imposed by a prohibition on persons carrying out excavation and filling associated with agricultural and horticultural activities in the identified areas was clearly something which must properly be taken into account in any evaluation pursuant to s32. The Regional Council appeared not to have considered those matters until the issue was raised during the course of the hearing. Mr McCallum acknowledged that . . . *The main focus of the prohibition is really on further subdivision*[8]. Ms Perpick appeared to concede that.

[53] Ms Dixon had undertaken an assessment of the subdivision rules proposed by the City Council pursuant to its decisions on Variation 48. The rules propose (in summary) that for Henderson's Basin and the Cashmere Stream flood plain and for the Lower Styx ponding area (east and south of Lower Styx Road) the minimum lot size for controlled activity subdivision is 4 hectares. For Lower Styx ponding area north of Spencerville Road, the minimum lot size for controlled activity subdivision is 20 hectares. Subdivision in these areas below controlled activity standards would be a non-complying activity.[9]

[54] Ms Dixon's evidence established that, on the basis of the controlled activity criteria and the City Council's proposed rules, the following additional lots could be subdivided as controlled activities on private land in the respective areas:

- Henderson's Basin – 20 to 23 allotments.
- Cashmere Stream flood plain – 0 to 3 additional allotments.
- Lower Styx ponding area – 35 additional allotments.

[7] Line 1, Page 197 – Line 32, Page 199 NOE.
[8] Lines 5-6, Page 192 NOE.
[9] EiC Dixon (2) Appendix 2

[55] Ms Dixon referred to development on private land as much of the land in Henderson's Basin has been (and is being) acquired by the City Council as part of what is called the Southwest Area Plan (SWAP) a long term plan for managing urban growth and providing flood management in this area. It is not anticipated that there will be subdivision for residential development on land owned by the City Council. Ms Dixon also considered that the estimates as to the extent of development on private land are likely to be overestimates due to the definition of nett area excluding access strips less than 6 metres in width.

[56] If subdivision into the maximum number of allotments estimated by Ms Dixon in each of the respective areas was permitted, she calculated that might lead to the following possible additional number of houses in the various areas:

- Henderson's Basin – 22 to 28.
- Cashmere Stream flood plain – 1 to 4.
- Lower Styx ponding area - 41.

Again she contended that these were likely to be overestimates as a consequence of the definition of nett site area.

[57] It was the evidence of the City Council's water engineers (Mr J M Walsh and Mr Eastman) that development in Henderson's Basin and the Cashmere flood plain to the extent identified by Ms Dixon would have only a minor effect on flood storage and the downstream flow regime of the Heathcote River. Ms Dixon considered it was unlikely that development at this density would occur in the short term in any event as many owners of land in Henderson's Basin were awaiting the outcome of the SWAP process which might ultimately enable more intensive development on the fringes of the basin.

[58] Insofar as the Lower Styx ponding area is concerned, the evidence as to the possible effect of the full potential development identified by Ms Dixon was from Mr G J Harrington, another water engineer who gave evidence for the City Council. Mr Harrington's *very rough estimate* of such impact was an increase of depth in water over the total ponding area of 7.9 millimetres if all of the land was developed to the

maximum extent allowed, although he identified that in one part of the Lower Styx ponding area there might be a depth change of 23.7 millimetres.

[59] It was apparent that there are shortcomings in the data for the Lower Styx ponding area and that further investigation and modelling work is required before the effect of development in that area can be precisely calculated. However, it was the evidence of both Ms Dixon and Mr Harrington that the maximum extent of development allowable under the proposed rules would not have any significant detrimental effect on the flood retention capacity of the Lower Styx ponding area.

[60] Against that evidence (which largely appeared to be unchallenged) we have the position of the Regional Council, which seeks to impose a total prohibition on further subdivision based almost entirely on the premise that those persons who come to reside on any subdivisions which may have been permitted in the flood prone areas might *demand solutions to their problems,* should they be flooded in the future.

[61] Although it became evident during the hearing that the Regional Council was primarily concerned with the effect of subdivision, the prohibition which it sought in its notice of appeal and submissions extended considerably wider than that, as we have identified. It is apparent that the Regional Council had not given any detailed consideration to the impacts of a total prohibition on land filling and excavation activities which persons such as farmers and market gardeners might have to undertake in the course of their normal activities. No evidence was given by the Regional Council to contradict the evidence of persons such as Mr Lee and the various Lower Styx witnesses who gave evidence as to such impacts.

[62] The Regional Council appeared to belatedly abandon its position on prohibition in all respects other than subdivision, however that simply emphasised to the Court the lack of appropriate analysis which the Regional Council had undertaken in its approach to the matter of prohibition in the first place. We do not consider that the Regional Council provided any substantive evidential basis which would enable us to adequately assess the costs and benefits of imposing prohibitions as sought by it.

[63] Clearly the risk of not acting by declining to impose the requested prohibition is minimal. The City Council's evidence establishes quite conclusively that in the unlikely event of the subdivision of all of the ponding areas to the fullest permissible extent as controlled activities there would be minimal effect on the physical functioning of those areas from consequent development. The only risk identified by the Regional Council is that people who may come to live in such areas might complain about the flooding and seek adequate stormwater management regimes although their houses would not be inundated. Even accepting that it is appropriate to take such a concern into account (and we are uncertain about that) we do not consider that it justifies the imposition of the prohibition sought in response.

[64] We decline to impose the prohibited activity status sought by the Regional Council in this instance. We note that subdivision to more intensive levels than that identified in Ms Dixon's evidence will be subject to non-complying activity status. Flooding issues and the impact of proposed development on storage capacity in the ponding areas will be the subject of scrutiny in any application for resource consent. Nothing in the Regional Council's evidence convinced us that potential applicants for the various forms of development identified by the Regional Council ought be denied the opportunity to make applications for resource consent.

[65] Although we have rejected the Regional Council's request for the imposition of prohibitions on subdivision, land filling and excavation, we accept that there is a need for appropriate management measures to be in place in respect of all three areas concerned. The evidence of Messrs Eastman, Walsh, and E M O'Neill for the City Council satisfied us as to that. The areas in question are subject to flooding, which requires particular resource management controls and we disagree with any suggestion that the controls proposed by Variation 48 be removed. The appeals filed by CRL, Oderings and Messrs Lee are disallowed to the extent that they sought the removal of controls over Henderson's Basin and the Cashmere Stream flood plain. Similarly we agree with the City Council's position on the need for controls in Lower Styx.

[66] We also accept however, that there is a need to ensure that land owners are able to make the best and most efficient use of their land subject to retaining the

ponding capacity of the areas and also protecting the inhabitants against the worst effects of flooding. Variation 48 sets out to do that. The need for some of the controls contained in Variation 48 over Henderson's Basin may in due course be overcome by the SWAP process which we have briefly described, however that appears to be progressing very slowly.

Thacker Appeal

[67] The Thacker appeal has a long history. It commenced as a submission on the proposed City Plan in 1995. The appeal was filed in 1999. We were advised that resolution of the appeal was delayed by the notification of Variation 48 although we note that the appeal was already four years' old when Variation 48 was notified (13 December 2003).

[68] The appeal relates to a parcel of land containing 18.1830 ha described in Certificate of Title 282/283 (Canterbury Registry). The Certificate of Title contains two separate allotments of approximately similar size being Lots 11 and 12 DP3217. The land is currently zoned Rural 2 and is located within the Henderson's Basin ponding area. It is one of the lowest lying parts of that ponding area.

[69] We were told that the land has been owned by the Thacker family for nearly 100 years and over that period of time has been used for market gardening, livestock grazing and farming.

[70] The original relief sought in the Thacker appeal was as follows:

(a) That the southern front of the applicant's property along Sparks Road east of Henderson's Road be re-zoned Living 1 to a depth of 80m and the balance of the applicant's land Zoned Rural 2 be re-zoned Living 1 D and Planning Map 52A be amended accordingly; and

(b) That the Cashmere Stream ponding area be reduced by 100m south of the Sparks Road boundary and Planning Map 52B be amended accordingly.

Or in the alternative if the relief sought (a) and (b) above cannot be had then:

(c) That the applicant's property in the Rural 2 Zone south of Sparks Road and east of Henderson's Road be re-zoned Living 1D and that a

minimum of 5000 square metres net area be required for any building and Planning Map 52A be amended accordingly.

Note: Reference to the Cashmere Stream ponding area is now reference to the Henderson's Basin ponding area.

We understand that this relief precisely reflects the remedy sought in Mrs Thacker's initial submission on the Proposed Plan.

[71] When Mrs Thacker's case was presented to the City Council Hearings Committee, her representatives took a slightly different position to that contained in her submission. The relief which was pursued on her behalf at that hearing was that the southern frontage of the property along Sparks Road be re-zoned Living 1 to a depth of only 60m as opposed to a depth of 80m which the submission had requested.

[72] We had insufficient evidence before us to establish that Mrs Thacker had formally abandoned her initial position as to an 80 metre rezoning or had simply sought to achieve a compromise position of 60m. Accordingly, we consider that Mrs Thacker is entitled to pursue the relief originally sought in her submission and appeal documents ie rezoning to a depth of 80m.

[73] In any event, Mrs Thacker's position changed again for the purposes of the hearing before us. Instead of the 60/80m strip development along the Sparks Road frontage of Lots 11 and 12 DP3217 originally sought, Mrs Thacker now requested the re-zoning to Living 1 of a trapezoid shaped parcel of land containing approximately 5.3ha and contained entirely within the boundaries of Lot 12 DP3217.

[74] We were not given the precise dimensions of the area requested to be re-zoned within Lot 12, however an outline development plan and illustrative concept plan prepared by Cardno TCB, produced to us, indicates that the rezoned area is to extend nearly ¾ of the way into Lot 12 and will exceed the 80m wide rezoning originally requested, possibly by some hundreds of metres. Mrs Thacker's planning witness, Mr K McCracken, estimated the intrusion as being in the order of 200m. We understood that to be a rough estimate, and it appears to us to be something of an underestimate.

[75] The extent to which residential development at Living 1 intensity would extend back from Sparks Road in a southerly direction is of considerable significance in determining whether or not the proposal is *within scope*. Pursuant to Mrs Thacker's original submission and appeal, development at Living 1 density would be restricted to a depth of 80m south of Sparks Road whereas what is now sought is development at Living 1 density to a substantially greater depth south of Sparks Road albeit over a more restricted length than the full frontage of the property along Sparks Road which was originally proposed.

[76] No criticism is directed at Mrs Thacker or her representatives for advancing this changed position on appeal. Her amended position is one which was proposed by the City Council, evidently motivated by recognition of the fact that resolution of the Thacker appeal has been drawn out for a very long period of time. We were told by Ms Dixon that the re-zoning proposal put before us had been approved by the City Council's District Plan Appeals Subcommittee[10] as now representing the Council's position, provided such proposal was supported by Mrs Thacker. Mrs Thacker's representatives indicated support but with substantial caveats.

[77] The re-zoning proposal put before us was apparently developed by City Council staff and advisors in conjunction with Ms J H Reeves, an urban designer instructed by the City Council in these proceedings. Ms Reeves identified a number of shortcomings in the initial Thacker strip development proposal which in her view was not in accordance with good urban design practice. She contends that the cluster development now suggested by the City Council more closely accords with urban design best practice and with the Greater Christchurch Urban Development Strategy and Action Plan 2007, a document which had not begun its gestation at the time of the initial submission and filing of appeal.

[78] The City Council acknowledged through the evidence of Mr Eastman that the land which it proposed to rezone is amongst the lowest lying properties in Henderson's Basin and would likely be totally inundated in a 50-year ARI storm

[10] Para 86 EiC.

event. If the rezoning was to proceed it would be necessary to build up the land to be developed to a datum level of 19.0m.

[79] An additional necessity would be the provision of compensatory storage on the remaining part of the Thacker land which was not subject to development. We understood that compensatory storage meant that the water holding capacity of the balance of Mrs Thacker's land would be increased to compensate for the loss of holding capacity in the built up area. This requirement was an essential component of the City Council's proposal.

[80] When Mrs Thacker's submission was presented to the City Council it was advanced on the basis that the proposed strip development along Sparks Road would produce some 46 sections for development. The form of development now proposed by the City Council has been designed to accommodate 46 allotments at Living 1 density. There is an obvious element of *trade-off* in the proposal now put to the Court.

[81] There are two issues which arise from that proposal:

- Is the proposal before the Court within scope of the submission and appeal?
- If the proposal is not within scope, might it be considered by the Court pursuant to the provisions of s293 RMA.

We address those issues separately.

Scope

[82] In considering the issue of scope we have endeavoured to take a practical and realistic approach to interpretation of the submission and appeal documents. We have particular regard to the fact that Mrs Thacker's case as presented to the City Council would have (if approved) led to the creation of 46 allotments and the proposal now before the Court could similarly generate 46 allotments. It is the configuration of those allotments which has changed.

[83] All Counsel referred to various of the wide range of authorities on the issue of scope. We do not propose to recite all the authorities here, but we simply refer to the

concise summary of the law set out in *Bilimag Holdings Ltd & Others v Waipa District Council*[11] where the Court stated:

> *[31] From the above statutory framework and the case law it will be clear that the starting point in respect of jurisdiction is whether the change sought falls **"fairly and reasonably"** or by **"reasonable implications"** within the general scope of a submission and the proposed plan as notified.*

[84] In this instance we have concluded that the amended proposal advanced does not fall *fairly and reasonably* nor by *reasonable implication* within the scope of relief sought in the submission and appeal documents notwithstanding that the outcome of either proposal in terms of numbers of residential sections generated could be similar. However, we consider that the configuration of the allotments now proposed, or more specifically the extent to which Living 1 size allotments might intrude into the Henderson's Basin ponding area, is particularly significant in determining whether or not the current proposal is within scope.

[85] In terms of the relief requested in the submission and appeal documents the best case scenario which Mrs Thacker sought was one which would permit residential subdivision to Living 1 zone standards extending no further than 80 metres into the Henderson's Basin ponding area. What is now sought is that residential development at Living 1 density might be permitted to extend substantially further into the ponding area albeit on a more narrow front. Although the relief sought by Mrs Thacker did seek further subdivision of land beyond the 80m line that was on the basis that subdivision to enable such development would occur in allotments of no less than 5000m^2 rather than the 400/450m^2 allotments which are now proposed to extend well into the ponding area.

[86] We conclude that a re-zoning proposal which will lead to subdivision development to Living 1 standards extending to the depth now proposed into Henderson's Basin does not fall fairly and reasonably nor by reasonable implication within the general scope of relief sought by Mrs Thacker. That was the position of

[11] Decision A 072/2008.

both the City Council and the Regional Council. Ms Steven, on behalf of Mrs Thacker, contended that the current proposal was within scope. However, we consider that the relief sought by Mrs Thacker was so specific in its request as to the depth of Living 1 development from Sparks Road that even the most liberal interpretation of the submission and appeal documents cannot bring the current proposal within its ambit.

Section 293

[87] Notwithstanding their different positions on the issue of scope, Mr Hardie and Ms Steven agreed that if the Court found that the proposal was not within scope we might nevertheless consider it pursuant to the provisions of s293 RMA. Ms Perpick contended that s293 was not available to remedy the scope shortcomings based on her view that s293 must be applied in its pre-2005 RMA Amendment form and that when considered pre-2005 Amendment it could not accommodate the current proposal.

[88] Section 293(1) and (2) pre-2005 read:

> ***293 Environment Court may order change to policy statements and plans***
>
> *(1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Environment Court may direct that changes be made to the policy statement or plan.*
>
> *(2) If on the hearing of any such appeal or inquiry, the Environment Court considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed change or revocation, it may adjourn the hearing until such time as interested parties can be heard.*

[89] Section 293(1) and (2) post 2005 now read:

> ***293 Environment Court may order change to policy statements and plans***
>
> *(1) After hearing an appeal against, or an inquiry into, the provisions of any policy statement or plan that is before the Environment Court, the Court may direct the local authority to—*
>
> *(a) prepare changes to the policy statement or plan to address any matters identified by the Court:*

(b) consult the parties and other persons that the Court directs about the changes:

(c) submit the changes to the Court for confirmation.

(2) The Court—

(a) must state its reasons for giving a direction under subsection (1); and

(b) may give directions under subsection 1 relating to a matter that it directs to be addressed.

[90] It appears to us that in determining whether or not to exercise our discretion pursuant to s293 in this case, the most significant change pre and post 2005 Amendment was that prior to the Amendment we had to be satisfied that a . . . *reasonable case has been presented* . . . for the change which is sought[12] whereas there is no reference to the presentation of a *reasonable case* in s293 post 2005 Amendment.

[91] The omission of reference to a *reasonable case* in the post-2005 version of s293 seems to confirm that the Court may direct a change of its own volition without any party having presented a reasonable case that it do so. Even accepting that is the case, there must still be some appropriate basis for the Court to determine to exercise its discretion. In this case that basis for the exercise of our discretion is found in the evidence of a number of witnesses, including Messrs Eastman and O'Neill and Ms Reeves for the City Council and Mr McCracken and Ms H R Thacker for Mrs Thacker. We have given careful consideration to all that evidence. However, three matters have been of particular significance to the Court in determining whether or not to exercise our discretion pursuant to s293.

[92] The first is what appears to be an extreme delay in resolving Mrs Thacker's appeal. As we have noted, the appeal was initially filed in 1999. The Court is unaware of the reasons for the delay in finalising the appeal. Delay was one of the factors which the Court took into account in *Apple Fields Ltd v Christchurch City Council*[13] when determining whether to exercise its powers pursuant to s293. In this

[12] Section 293(2) RMA (pre 2005 Amendment).
[13] [2003] NZRMA 1.

instance the delay factor is clearly something which favours the exercise of the Court's discretion in Mrs Thacker's favour.

[93] The second factor which we have considered is that raised in the submissions of the Canterbury Regional Council. Ms Perpick submitted that . . . *If the Court grants the relief sought by Ms Thacker, it will be endorsing an ad hoc and uncoordinated system of channels and isolated islands of urban development throughout the Henderson's Basin ponding area, rather than the comprehensive development which the Council has been working towards since 2002 under the SWAP.* She pointed to the fact that the Thacker land was located in a particularly low lying part of the basin and that granting a Living 1 zoning on that such land would set a precedent for other low lying land in the basin and possibly elsewhere.

[94] Ms Perpick's submission reflected Mr McCallum's evidence. Mr McCallum also expressed concerns regarding the compensatory storage concept and how it would work in practice. He is however a planner, not an engineer.

[95] Mr Hardie referred Mr McCallum to Policy 2.2.6 of the Proposed Plan which states that . . . *There may be limited potential for development in association with compensatory storage in some peripheral areas of the basin, although this would have to be substantiated in each case by assessing effects of flood storage, groundwater levels, and other land in the basin.* It was Mr Hardie's position that the proposal for the Thacker property addressed those issues, although Mr McCallum would not concede that. A matter of particular concern to him was that the bulk of the Thacker land is well below the 19m contour (being the 200-year flood level) and he had reservations about developing in that area even if islands above that level were created by excavation and lowering ground levels elsewhere.

[96] The third factor which we took into account in determining whether or not to exercise our discretion is that there did not appear to be a common position between the City Council and Mrs Thacker regarding compensatory storage. In her evidence for the City Council, Ms Dixon stated that she supported the proposal for the Thacker

land subject to a number of principles including . . . *compensatory storage to be able to be acceptably achieved. Mr Eastman provides evidence on this point.*[14]

[97] Mr Eastman testified that the *necessary compensatory storage* was to be substantially provided by the formation of enhanced stream corridors/flood plains along the length of two drains (Ballentynes and Sheerings' drains) within the properties, together with some additional localised lowering of high points.

[98] The concept plan provided by the City Council provided for 50m wide corridors along each of the drains in question. The margins of the drains would be lowered by up to 1.0m providing a naturalised flood plain and enhancement area. This 50m corridor is intended to provide the necessary water storage to compensate for those areas of the Thacker property which would be built up above the 19m contour line as part of the development proposal. In response to a question from the Court, Mr Eastman made it clear that it was important that development on the Thacker land took place in accordance with the illustrative concept plan, particularly the contouring around the drains.[15]

[99] It was apparent however, that what Ms Dixon and Mr Eastman saw as bottom line requirements for the provision of compensatory storage were not acceptable to Mrs Thacker. In her submissions on Mrs Thacker's behalf, Ms Steven submitted that there was agreement with the City Council about development of the concept plan . . . *subject to the resolution of some minor issues relating to design . . .*[16]. However it was the evidence of Ms H R Thacker for her mother that she was opposed to the City Council requirements for the development of the two compensatory storage areas.[17] We do not think that this disagreement falls into the category of a minor issue as suggested by Ms Steven. Provision of the compensatory storage areas along the drains in question is fundamental to the City Council's position, yet Ms Thacker suggested that one of the areas (along Ballentynes' drain) should be used for houses.

[14] Para 87(b) EiC.
[15] Lines 3-10, Page 329, NOE.
[16] Para 25, Submissions from Mrs Thacker.
[17] Para 45, 46 and 47 EiC.

[100] It was a matter of concern to the Court that an issue (the provision of compensatory storage) which was fundamental to the development proposal on the Thacker land was the subject of disagreement between the two proponents of that proposal when the Court was being asked to exercise its discretion under s293.

[101] We acknowledge the considerable delay on the parties' part in resolving Mrs Thacker's appeal. That is unfortunate. We do not consider however, that the lack of progress justifies approval of ad hoc development as now proposed on Mrs Thacker's behalf, particularly in the very low lying areas of the basin.

[102] All of the evidence which we heard pointed to the fact that there needs to be a co-ordinated approach to the planning of development in and around the Henderson's Basin ponding area, to ensure that whilst land owners can use their land for the most appropriate purposes, development does not interfere with the underlying physical functions which the Basin fulfils.

[103] We were concerned at the fact that even at this late stage there is no agreement between the City Council and Mrs Thacker as to the form of development which the Court is being requested to consider pursuant to s293, particularly in so far as compensatory storage is concerned.

[104] Accordingly, we have determined not to exercise our discretion to consider Mrs Thacker's proposal pursuant to the provisions of s293. Having reached that conclusion we do not need to determine whether or not the processes which would flow from exercising our discretion must be in accordance with the provisions or RMA pre or post 2005 Amendment.

[105] Mrs Thacker's appeal was advanced on the basis that the cluster development proposal was the form of development sought on her behalf. Counsel specifically acknowledged that the 60/80m strip development along Sparks Road was no longer sought, although the relief requested in that regard was not formally abandoned for jurisdictional reasons. The appeal is therefore declined.

Rules

[106] The question of appropriate rules to apply in Henderson's Basin, the Cashmere Stream flood plain and Lower Styx ponding area (assuming that the Regional Council's proposed prohibition was not upheld) was the subject of some, but only limited, debate before us.

[107] Proposed rules 5.3 and 5.4 of Variation 48 dealt with the matters of filling, excavation and building within these three areas. CRL, Oderings, the Lower Styx Ponding Group and Messrs Lee all raised issues suggesting amendments to various of the rules and possible amendments to them during the course of their cases. However, we do not think we are unfair when we say there was no systematic evidential approach to these matters. We also had some difficulty with the disjointed fashion in which the rules were presented to us.

[108] At the conclusion of the hearing, we suggested a process whereby the various parties might consider possible changes to the wording of relevant rules to make better provision for horticultural and farming activities whilst not compromising the ponding and flood retention capacities of the flood-prone areas.

[109] As part of that process the City Council circulated suggested Rule changes to the other parties and its suggestions and responses on behalf of CRL, Oderings, the Lower Styx Ponding Group and Messrs Lee have been collated and forwarded to us. There still remain significant differences between the parties which are summarised in formal responses by the City Council, dated 26 August 2008.

[110] The City Council's summary indicates that there are some areas where agreement has been reached as to the appropriate rules but others where there continues to be disagreement.

[111] We commented to the parties at the conclusion of the hearing that we were hopeful that we might finally resolve the appeals as to Rules without further hearing from the parties, but on the basis of the City Council's summary that may not be possible.

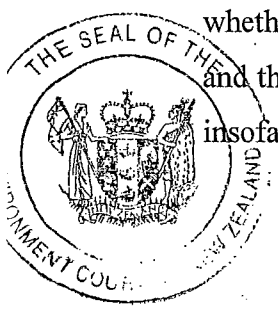
[112] We are reluctant to recommence any hearing on the Rules and in view of the delay in the issue of this decision we imagine that the parties may also be reluctant. We suggest in the first instance that the Court should convene a mediation between the City Council, and those parties with an interest in Rule matters with a view to resolving the remaining outstanding rules by mediation. To assist the parties in their discussions we make the following brief observations.

[113] We repeat the view which we have previously expressed that landowners in the areas under consideration ought enable to make the best and most efficient use of their land in accordance with normal zone rules subject to their activities not interfering with the overall ponding function of the areas and protecting occupiers from flood risk. The rules should set out to achieve that and should allow (for example) the normal working of land to create suitable planting beds for the Lee and Oderings operations and for recontouring to manage local depressions. Reasonable provision should be made in the rules to allow for tunnel houses, additions to buildings and for ancillary structures for the storage of bulk goods and machinery or equipment. Restrictions in such a provision should relate to flood risk rather than area per time period.

[114] We do not propose to comment on all of the matters identified in the Council summary. We note however that in some instances parties seek less restrictive controls on activities in the ponding areas than are applicable in Rural zones generally. That seems inappropriate in the ponding areas which ought (at least) be subject to similar controls as are generally applicable in the Rural zones of which they form part.

[115] We also note that some of the differences between the parties appear to revolve around the interpretation or practical application of the Rules, which ought be matters which the parties can resolve without intervention by the Court.

[116] We request the parties to advise the Court within 15 working days as to whether or not they would be prepared to participate in mediation on these matters and the Court would expedite that process. Obviously this decision is an interim one insofar as Rules are concerned.



Costs

[117] We do not propose to depart from the Court's common practice of not awarding costs on plan appeals. There is accordingly no reservation of costs on any of these matters.

DATED at WELLINGTON this 12 day of May 2009

For the Court:

B P Dwyer
Environment Judge