

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

CIV-

IN THE MATTER of the Environment Canterbury (Temporary
Commissioners and Improved Water
Management) Act 2010 and the Resource
Management Act 1991

AND

IN THE MATTER of an appeal under section 66(2) of the
Environment Canterbury (Temporary
Commissioners and Improved Water
Management) Act 2010

BETWEEN **TRUSTPOWER LIMITED**

Appellant

AND **CANTERBURY REGIONAL COUNCIL**

Respondent

NOTICE OF APPEAL BY TRUSTPOWER LIMITED

19 AUGUST 2016

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TO: The Registrar of the High Court at Christchurch

AND TO: The Respondent

TAKE NOTICE that Trustpower Limited ("**Appellant**") will appeal to the High Court against part of the decision of the Canterbury Regional Council ("**Council**") on Proposed Plan Change 4 to the Canterbury Land and Water Regional Plan ("**Plan Change 4**"), adopted by the Council on 21 July 2016 and publicly notified on 30 July 2016, **UPON THE GROUNDS** that the decision is erroneous in law.

Trustpower was a submitter on Plan Change 4 to the Canterbury Land and Water Regional Plan ("**Regional Plan**").

1. SCOPE OF APPEAL

1.1 The Appellant appeals against the Council's decision to adopt the Hearing Commissioners Report and Recommendations on Plan Change 4 in relation to Policy 4.85A.

2. ERRORS OF LAW

2.1 The Council made the following errors of law:

(a) in relation to the National Policy Statement for Renewable Electricity Generation 2011 ("**NPSREG**") the Council (through the Hearing Commissioners):

- (i) failed to take into account the relevant objectives and policies of the NPSREG; and
- (ii) applied the incorrect statutory test, in that the provisions of Plan Change 4 fail to give effect to the NPSREG;

(the "**NPSREG errors**")

(b) in relation to the Canterbury Regional Policy Statement 2013 ("**RPS**") the Council (through the Hearing Commissioners):

- (i) failed to take into account all relevant provisions of the RPS, particularly the objectives and policies in Chapter 16 Energy and Chapter 10 Beds of Rivers and Lakes and their Riparian Zones; and
- (ii) applied the incorrect statutory test, as the provisions of Plan Change 4 fail to give effect to the RPS, in particular the objectives and policies of Chapter 16 Energy and Chapter 10 Beds of Rivers and Lakes and their Riparian Zones.

(the "**RPS errors**")

2.2 The above errors of law, individually and collectively, materially affected the Council's decision to adopt the Hearing Commissioners' Report and Recommendations on Policy 4.85A of Plan Change 4.

3. GROUNDS OF APPEAL

Statutory framework

3.1 In making its decision on Plan Change 4, the Council was required under the Resource Management Act 1991 ("**RMA**") to, among other things:

- (a) give effect to any national policy statement;¹ and
- (b) give effect to any regional policy statement.²

The NPSREG errors

Failure to consider relevant objectives and policies of the NPSREG

3.2 A specific national policy statement has been issued in relation to renewable electricity generation: the NPSREG. The objective of the NPSREG is:³

To recognise the national significance of renewable electricity generation activities by providing for the development, operation, maintenance and upgrading of new and existing renewable electricity generation activities, such that the proportion of New Zealand's electricity generated from renewable energy sources increases to a level that meets or exceeds the New Zealand Government's national target for renewable electricity generation.

3.3 In addition, Policy C1 of the NPSREG requires decision makers to have regard to the following matters:⁴

- a) the need to locate the renewable electricity generation activity where the renewable energy resource is available;
- b) logistical or technical practicalities associated with developing, upgrading, operating or maintaining the renewable electricity generation activity;

[...]

3.4 Crucially, Policy E2 of the NPSREG requires:⁵

Regional policy statements and regional and district plans shall include objectives, policies, and methods (including rules within plans) to provide for the development, operation, maintenance, and upgrading of new and existing hydro-electricity generation activities to the extent applicable to the region or district.

3.5 Policy 4.85A, as recommended by the Hearing Commissioners and adopted by the Council, provides:

4.85A Indigenous biodiversity, habitats of indigenous fauna and flora, and the natural character of Canterbury's braided river systems is preserved through:

¹ RMA, section 67(3)(a).
² RMA, section 67(3)(c).
³ NPSREG, Objective.
⁴ NPSREG, Policy C1.
⁵ NPSREG, Policy E2.

- (a) preventing further encroachment of activities onto the beds, banks and margins of lakes, braided rivers and associated wetlands and coastal lagoons; and
- (b) limiting vegetation clearance and cultivation within the bed, banks and margins of lakes, braided rivers and associated wetlands and coastal lagoons, unless the vegetation celebration or cultivation is for the purpose of pest management, habitat restoration, flood control purposes, the operation, maintenance, upgrade or repair of structures or infrastructure or maintenance of public access.

3.6 That Policy has the very real potential to prevent the maintenance, upgrading and enhancement of existing, and the development of new, renewable electricity generating infrastructure within the beds and margins of lakes and braided rivers. The Council, in adopting the Hearing Commissioners' Report and Recommendations on Policy 4.85A, has failed to consider, let alone give effect to, the objectives and policies of the NPSREG, including:

- (a) the national significance of renewable electricity generation activities;
- (b) the need to provide for the development, operation, maintenance and upgrading of new and existing renewable electricity generating activities; and
- (c) the need to locate renewable electricity generating infrastructure where the renewable energy resource is available which will, in some instances, be within Canterbury's lakes and braided river systems.

3.7 The Council, therefore, erred in failing to consider the relevant objectives and policies of the NPSREG.

The Plan Change 4 provisions fail to give effect to the NPSREG

3.8 The statutory requirement, as stated in paragraph 3.1 above, to give effect to the provisions of higher order documents requires the Council to "implement" those provisions.⁶ That is a strong directive and places a firm obligation on those that are subject to it.

3.9 The Hearing Commissioners adopted the Section 42A report's recommendations and reasons in relation to the submissions on Policy 4.85A.⁷ The Section 42A report recognised that Plan Change 4 must give effect to the NPSREG but did not give the necessary consideration to the NPSREG, stating:⁸

No submissions or further submissions on Plan Change 4 have sought changes to better give effect to [the NPSREG]. Accordingly, the relevant objectives and policies [of the NPSREG] are not repeated here for the purposes of the section 42A report.

⁶ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [77].

⁷ Report and Recommendations of the Hearing Commissioners, at [339].

⁸ Section 42A report, at 1.109.

- 3.10 In its submission and evidence on Plan Change 4, Trustpower submitted that the NPSREG is a relevant consideration and, in particular, that Plan Change 4 is required to give effect to the NPSREG.⁹
- 3.11 The Hearing Commissioners, in their Report and Recommendations, only made one express reference to the NPSREG¹⁰ but more generally considered that the revised wording of Policy 4.85A as proposed in the Section 42A report "gives better effect to the superior instruments".¹¹
- 3.12 The provisions of Plan Change 4 (specifically Policy 4.85A) fail to give effect to the NPSREG, particularly those provisions outlined above.
- 3.13 The Council, therefore, erred in adopting the provisions of Plan Change 4 (particularly Policy 4.85A) and was in breach of its statutory duty under section 67(3)(a) of the RMA.

The RPS Errors

Failure to consider relevant objectives and policies in the RPS

- 3.14 The Hearing Commissioners, in their Report and Recommendations, referred to a number of objectives and policies in the RPS, which seek to preserve and protect the natural character values of water.¹²
- 3.15 The RPS, however, also includes policies that provide for activities in river and lake beds, including the following:

Policy 10.3.1 - Activities in river and lake beds and their riparian zones

To provide for activities in river and lake beds and their riparian zones, including the planting and removal of vegetation and the removal of bed material, while:

- (1) recognising the implications of the activity on the whole catchment;
- (2) ensuring that significant bed and riparian zone values are maintained or enhanced; or
- (3) avoiding significant adverse effects on the values of those beds and their riparian zones, **unless they are necessary for the maintenance, operation, upgrade, and repair of essential structures**, or for the prevention of losses from floods, in which case significant adverse effects should be mitigated or remedied.

[emphasis added]

- 3.16 In addition, the RPS includes objectives relating to electricity generation, including:

⁹ C15C/148191 at page 2; Statement of Evidence of Claire Hunter on behalf of Trustpower Limited, dated 29 January 2016, at 4.8 to 4.9.

¹⁰ Report and Recommendations of the Hearing Commissioners, at [332].

¹¹ Report and Recommendations of the Hearing Commissioners, at [331].

¹² Report and Recommendations of the Hearing Commissioners, at [310] to [319], referring to RPS objectives 7.2.1, 7.2.3, 10.2.2, and policies 7.3.1, 7.3.9, 7.3.9, 10.3.3 and 10.3.4.

Objective 16.2.2 - Promote a diverse and secure supply of energy

Reliable and resilient generation and supply of energy for the region, and wider contributions beyond Canterbury, with a particular emphasis on renewable energy, which:

(1) provides for the appropriate use of the region's renewable resources to generate energy;

[...]

(6) Recognises the locational constraints in the development of renewable electricity generation activities; and

(a) avoids any adverse effects on significant natural and physical resources and cultural values or where this is not practicable, remedies or mitigates; and

(b) appropriately controls other adverse effects on the environment.

3.17 Of particular relevance to Policy 4.85A, the RPS includes the following policy:

Policy 16.3.5 - efficient, reliable and resilient electricity generation within Canterbury

To recognise and provide for efficient, reliable and resilient generation within Canterbury by:

[...]

(2) enabling the upgrade of existing, or development of new electricity generation infrastructure with a particular emphasis on encouraging the operation, maintenance and upgrade of renewable electricity generation activities and associated infrastructure:

(a) having particular regard to the locational, functional, operational or technical constraints that result in renewable electricity generation in activities being located or designed in the manner proposed;

(b) provided that, as a result of site, design and method selection:

(i) the adverse effects on significant natural and physical resources or cultural values are avoided, or where this is not practicable, remedied or mitigated or offset; and

(ii) other adverse effects on the environment are appropriately controlled.

3.18 Method 1(d) of Policy 16.3.5 of the RPS further provides that the Council will set objectives and policies and may include methods in regional plans to:

(d) enable the upgrading of existing and establishment of new electricity generation infrastructure within the coastal marine area and in the beds of lakes and rivers, while avoiding, remedying or mitigating adverse effects

including through the use of best practice approaches to design, construction and effect management.

- 3.19 The principal reasons and explanation for Policy 16.3.5 recognise that electricity generation can have adverse effects on the environment but that these adverse effects can be minimised by appropriate location and design.
- 3.20 The objectives and policies of the RPS (and corresponding methods and reasons) provide clear direction that there is a need to provide for the operation, maintenance, upgrading and enhancement of existing, or development of new, electricity generating infrastructure. Where such development has adverse effects on the environment, including on the natural values of lakes and rivers, those effects can be remedied or mitigated through appropriate design and management.
- 3.21 The Hearing Commissioners failed to refer to any of the policies within Chapter 16 and did not refer to all of the relevant policies in Chapter 10 (in particular Policy 10.3.1) of the RPS in reaching their conclusion on Policy 4.85A.
- 3.22 As a result, that failure to consider *all* relevant objectives and policies of the RPS also contributed to an erroneous interpretation of the RPS and a failure to give effect to the RPS.

The Plan Change 4 provisions fail to give effect to the RPS

- 3.23 When making its decision on Plan Change 4, the Council is required to give effect the RPS.¹³
- 3.24 As set out above, there are a number of relevant objectives and policies in the RPS that the Council has failed to consider. In particular, no consideration was given to the relevant objectives or policies in the RPS relating to energy or renewable electricity generation, nor the policies that provide for the maintenance, upgrading and operation of those activities within lakes and rivers.
- 3.25 The Council's selective identification of relevant objectives and policies led to it adopting an erroneous interpretation of the RPS as it did not consider the RPS as a whole. The RPS expressly requires that:¹⁴

If there is a perceived conflict between competing policies within the Canterbury Regional Policy Statement, the provisions of all the applicable chapters will be evaluated and applied on a case-by-case basis.

- 3.26 As a result, in adopting Policy 4.85A, the Council failed to give effect to the RPS and in particular, did not consider the RPS as a whole.
- 3.27 The Council consequently adopted a form of Policy 4.85A that does not give effect to the RPS and therefore, was in breach of section 67(3)(c) of the RMA.

¹³ RMA, section 67(3)(c).

¹⁴ RPS, at page 8.

4. THE QUESTIONS OF LAW TO BE RESOLVED

4.1 The questions of law to be resolved are:

- (a) Did the Council (through the Hearing Commissioners) fail to take into account the objectives and policies of the NPSREG?
- (b) Does Policy 4.85A fail to give effect to the NPSREG?
- (c) Did the Council (through the Hearing Commissioners) fail to take into account all of the relevant objectives and policies of the RPS?
- (d) Does Policy 4.85A fail to give effect to the RPS and in particular the objectives and policies in Chapter 16 Energy and Chapter 10 Beds of Rivers and Lakes and their Riparian Zones?

5. RELIEF SOUGHT

5.1 The Appellant seeks:

- (a) that its appeal be allowed;
- (b) that the matter be referred back to the Council for reconsideration in light of the findings of the High Court; and
- (c) costs.

DATED 19 August 2016



A A Arthur-Young
Solicitor for the Appellant

This document is filed by **Allison Anne Arthur-Young**, solicitor for the Appellant, of Russell McVeagh. The address for service on the Appellant is Level 30, Vero Centre, 48 Shortland Street, Auckland 1010.

Documents for service on the Appellant may be left at that address for service, or may be:

- (a) posted to the solicitor at P O Box 8, Auckland 1140; or
- (b) left for the solicitor at a document exchange for direction to DX CX10085.