

23 February 2018

Memorandum to the Commissioners,

cc Matthew Bacon, Team Leader Resource Consents, Waimakariri District Council
Tegan Wadworth, Consents Planner, ECan

CANTERBURY LANDSCAPE SUPPLIES LIMITED – CRC175344 AND CRC175345

PRE-HEARING PROCEDURAL MATTERS: INADEQUATE S.42A ASSESSMENT AND HEARING DEFERRAL

Please be advised that we are not available to speak on the new hearing dates, but our submission stands and we are still opposed to the proposal for the reasons set out in that submission. However, based on recent professional advice, we consider that there are significant pre-hearing procedural matters to address at this point.

INADEQUATE ASSESSMENT IN THE S.42A REPORT

1. We are particularly concerned that the s.42A report does not mention, at all, one of our main submission points, i.e. the relevant RPS provisions (Chapter 6) and our view that the proposal is contrary to these. This omission was advised to the ECan planner in November 2017, but the most recent notice of hearing states *“The Council Planner’s Section 42A report remains as previously circulated.”* Therefore, presumably no new evidence is being presented at the hearing by the planner, as to do so would be outside of the required pre-circulation timeframes of the Resource Management Act (“the Act”) and we would have inadequate opportunity to comment. Therefore, we raise this issue directly with the Commissioners; it impacts significantly upon whether or not the hearing should be deferred and, of course, the final decision.
2. The provisions of relevance from Chapter 6 are as follows (our emphasis in red):

6.2 OBJECTIVES

6.2.1 Recovery framework

Recovery, rebuilding and development are enabled within Greater Christchurch through a land use and infrastructure framework that:

- ...
3. *avoids* urban development outside of existing urban areas or greenfield priority areas for development, unless expressly provided for in the CRPS;
- ...

6.3 POLICIES

6.3.1 Development within the Greater Christchurch area

In relation to recovery and rebuilding for Greater Christchurch:

- ...
4. *ensure* new urban activities *only* occur within existing urban areas or identified greenfield priority areas as shown on Map A, unless they are otherwise expressly provided for in the CRPS;
- ...

Methods

The Regional Council:

Will

1. *Have regard to Policy 6.3.1 in relation to any consents relating to urban activities outside of existing urban areas or greenfield priority areas in Greater Christchurch, and consider deferral under s91 where other consents are required from another local authority, so that the effects of a proposal can be considered together.*

...

3. "Will" under "Methods" above is defined in 3.1.1 Implementation:

*Will indicates an action that **must be taken** to give effect to the policy, although there sometimes may be differences as to how that action is expressed within plans. In addition, some of these methods have qualifiers that make the method less directive, such as the use of will consider.*

4. In considering the provisions above, it is firstly noted that they apply to 'urban' activities. If a proposal is an urban activity, the Regional Council must have regard to the Policy and consider deferral. This retrospective activity is an 'urban' activity and these provisions apply to it. It is considered that the activity is not 'rural', for the reasons set out below.
5. It is firstly noted that the Applicant's planner has addressed Chapter 6 of the RPS in evidence and concludes that the activity is 'rural', as follows:

33 The business that CLS has developed uses diverted material from rural industries – forest products processing, meat processing, to produce products for rural industry – compost, soil conditioner (gypsum), bedding for animal housing etc.

34 The RPS defines 'rural activities' as activities of a size, function, intensity or character typical of those in rural areas and includes:

(a) Rural land use activities such as agriculture, aquaculture, horticulture and forestry.

(b) Businesses that support rural land use activities.

35 The CLS operations support rural land use activities by diverting materials from processing waste streams and recovering or recycling materials that are then used by rural land use activities. The CLS operation at Diversion

Road is a rural activity, and therefore, for the purposes of Chapter 6 RPS, is appropriately located at this site.

6. The planner indicates that the proposal supports rural land use activities by diverting waste from the processing of rural products, i.e. forest products processing and meat processing. However, it must be recognised that these processing activities are not rural activities. Sawmills and wood

processing plants are industrial activities, as are meat processing plants. It is industrial waste product that is 'diverted' in these instances. It is also noted that the planner does not discuss the other raw materials involved, as per the list included in the Applicant's proposed conditions, as follows:

The discharge shall only be from the composting of the following materials:

- a. Sawdust and bark;
- b. Dewatered paunch grass;
- c. Scoured wool fragments;
- d. Egg shell;
- e. Compostable packaging with some residual food waste;
- f. Grease trap waste;
- g. Bio solids that meet Grade A or B of the *Guidelines for the Safe Application of Biosolids to Land in New Zealand 2003* or any replacement;
- h. Paper from gib-board offcuts;
- i. Green waste;
- j. Leaf Litter.

7. All of the waste materials listed above are sourced predominantly, if not solely, from industrial processing/urban activities. In addition, Canterbury Landscape Supplies sells the final processed products to non-rural customers, as per Mr Wylie's Statement:

17 CLS provides products to a wide range of customers including home gardeners, landscapers, nursery growers, pastoral and cropping farmers, farmers with indoor animal housing systems, garden retailers, local authorities and large residential and commercial developers.

8. The definitions and the compatibility of the activity with them must be fully considered as a whole. It is not appropriate to indicate that the rural definition is met because a portion of the activity will support the re-use of waste from the industrial processing of rural-related products and because there may be some rural purchasers.
9. Under the definitions for Greater Christchurch in the RPS, 'rural activities' are defined as follows:

Rural activities	<p>means activities of a size, function, intensity or character typical of those in rural areas and includes:</p> <ul style="list-style-type: none"> • Rural land use activities such as agriculture, aquaculture, horticulture and forestry. • Businesses that support rural land use activities. • Large – footprint parks, reserves, conservation parks and recreation facilities. • Residential activity on lots of 4 ha or more. • Quarrying and associated activities. • Strategic infrastructure outside of the existing urban area and priority areas for development.
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10. The type of activity currently operating is anticipated and permitted in industrial zones. It proposes to take waste from non-rural activities, process it, package it and sell it back to people and businesses. It is understood that the Waimakariri District Council considers the proposal to be a solid waste transfer station. The application to ECan (page 7) states that it is for “an industrial or trade process” and a “waste management process”, and the ECan planner indicates that the Act (s.15) and the Regional Plans (pCARPd and LWRP) consider the activity as an industrial or trade premises.

11. Section 2 of the Act, Interpretation, defines industrial or trade as follows:

industrial or trade premises means—

- (a) any premises used for any industrial or trade purposes; or
- (b) any premises used for the storage, transfer, treatment, or disposal of waste materials or for other waste-management purposes, or used for composting organic materials; or
- (c) any other premises from which a contaminant is discharged in connection with any industrial or trade process;—

but does not include any production land

industrial or trade process includes every part of a process from the receipt of raw material to the dispatch or use in another process or disposal of any product or waste material, and any intervening storage of the raw material, partly processed matter, or product

12. Subclause (b) above essentially lists all waste premises and the composting of organic-only materials as industrial or trade premises. This is not a rural activity.

13. It is noted that the previous location of the activity was at 1250 Main North Road, Kainga. It is useful to also consider that site as a further guide. It was zoned Business 6 – Rural Industrial in the City Plan, i.e. urban industrial land surrounded by rural zoning. It is noted that, under the new Christchurch District Plan, that site is now zoned Industrial Heavy, recognising the types of activities in the Zone. It is also noted in passing that the Christchurch District Plan defines any industrial activity which involves the storage and disposal of refuse, or the discharge of odour or dust beyond the site boundary, as ‘Heavy Industrial’. It would be fanciful to describe the nature of the proposed activity as ‘rural’; it was previously, and is now, a heavy industrial/waste activity.

14. Having concluded that the activity is not rural, it is appropriate to consider the definition of ‘urban activities’ in the RPS, as follows:

Urban activities	<p>means activities of a size, function, intensity or character typical of those in urban areas and includes:</p> <ul style="list-style-type: none"> • Residential units (except rural residential activities) at a density of more than one household unit per 4 ha of site area; • Business activities, except those that fall within the definition of rural activities; • Sports fields and recreation facilities that service the urban population (but excluding activities that require a rural location); • Any other land use that is to be located within the existing urban area or new Greenfield Priority Area.
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15. As such, 'urban' is defined to include business activities that are not 'rural', and 'business activities' is separately defined to include commercial and industrial activities. The subject activity falls within the industrial definition.

Business or business activities	means land or activities that include commercial and industrial and any ancillary activity.
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Industrial	means the manufacturing, assembly, packaging, wholesaling or storage of products or the processing of raw materials and other ancillary activities.
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16. The activity is clearly not 'rural' under the RPS definition, and this is a heavy industrial/waste activity. Therefore, this proposal is 'urban' in terms of the RPS and the subject Chapter 6 provisions apply.
17. In conclusion, under Method 1 (see para. 2 above), the Regional Council must have regard to the Policy "*in relation to any consents relating to urban activities outside of existing urban areas*" and must consider deferral under s.91 of the Act. The s.42A report does not do either.

DEFERRAL OF THE HEARING

18. As noted above, Method 1 under the relevant Policy states that the Regional Council must consider deferral under s.91 where other consents are required from another local authority.
19. It is considered that ECan can decide to defer hearing an application under s.91 until the resource consent application to the District Council has finally been made and is complete, particularly in circumstances where the nature of the activity is not agreed between the Applicant and the District Council and additional information is to be provided, as in this case – s.91 provides for deferral and Method 1 of the RPS specifically requires that this deferral be considered. Joint notification would have been preferable, given that the ECan application was not complete until September 2017, but the District Council application has been maintained on hold by the Applicant since sometime around September/October 2017.
20. In addition, it is understood that ECan decided that a joint hearing could not be required under s.102 because the District Council consent application is currently on hold (at the Applicant's request, for the timeframes allowable by the Act) and because no decision to hear has been made as yet by the District Council (given that the Applicant has chosen to put the application on hold). However, it should be noted that it is not entirely uncommon for Regional and District notification timeframes to be out of sync, but for the authorities to still decide that a joint hearing will be held. The Act requires that a joint hearing be held unless the authorities agree that the applications are sufficiently unrelated that a joint hearing is unnecessary.

21. In this case, it is considered essential that the ECan and District Council consent applications are heard together. Objective 6.2.1 and Policy 6.3.1 are vital considerations and the issues raised are not mutually exclusive – both Councils must consider the land use issue. The land use consent and the RPS Policy relating to land use are intrinsically linked, and any ECan decision on these Chapter 6 provisions will impact significantly on the District Council decision-making process. It is not clear if the ECan planner is liaising with the District in this regard or not. For legal transparency and better understanding of the proposal and the issues it raises, particularly with respect to the RPS, it is considered that the applications must be heard together.

It is requested that the Commissioners consider deferral, in consultation with Waimakariri District Council, and with independent legal advice as necessary.

It is requested that the Commissioners' decision on deferral be issued prior to the hearing.

Further, it is requested that the decision be to defer the hearing, and that the activity be required to cease until the Applicant chooses to take the District Council consent off hold (or exceeds the allowable timeframe) and both consent applications can be jointly heard together.

PROPOSAL CONTRARY TO THE RPS

22. In the event that the Commissioners decide to proceed with the ECan hearing in isolation, which we do not support, we consider that the proposal is contrary to the RPS.
23. As discussed above, the proposal is a heavy industrial/waste activity as anticipated in an industrial zone, and not a rural activity. We consider that Objective 6.2.1 and Policy 6.3.1 apply to this activity, and that ECan are required to consider these provisions.
24. Given the intentionally strong and directive language of the subject Policy and the Objective it stems from, and the relevant and widely accepted caselaw established by King Salmon and Davidson (see details below¹), these provisions are pivotal. It is noted that the use of the word "avoid" in the Objective, in the context of the aforementioned caselaw, means 'not allow' or 'prevent the occurrence of' and provides strong direction, as does the use of the words "ensure" and "only" in the Policy.
25. This strong direction cannot be ignored by ECan and regard must be had to it, in accordance with Method 1.

In the event that the hearing proceeds, given that these issues have not been addressed in the s.42A report and that we are unable to attend the hearing, it is requested that the Commissioners seek independent legal advice on these provisions and their interpretation in light of the relevant caselaw.

We thank you for considering these pre-hearing procedural matters.

Kind regards,
Jakeli Family Trust

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Supreme Court, 2014, Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd
High Court, 2017, RJ Davidson Family Trust v Marlborough District Council