

Before Independent Hearings Commissioners Appointed by Canterbury Regional Council and Selwyn District Council

In the matter of The Resource Management Act 1991

And

In the matter of Applications by **Fulton Hogan Limited** for all resource consents necessary to establish, operate, maintain and close an aggregate quarry (**Roydon Quarry**) between Curraghs, Dawsons, Maddisons and Jones Roads, Templeton

**MEMORANDUM OF COUNSEL ON BEHALF OF FULTON HOGAN LIMITED IN
RESPONSE TO MINUTE 2 OF THE COMMISSIONERS**

DATED: 17 SEPTEMBER 2019

Counsel Acting: David Caldwell
Email: david.caldwell@bridgesidechambers.co.nz
Telephone: 64 21 221 4113
P O Box 3180
Christchurch 8013

MAY IT PLEASE THE COMMISSIONERS

1. The purpose of this memorandum is to respond to the directions in the Commissioners' Minute 2¹. This Memorandum therefore provides legal submissions on behalf of Fulton Hogan Limited (**Fulton Hogan/Applicant**) addressing the issue of scope.
2. In summary, Fulton Hogan agrees with the conclusion in the Joint Memorandum that the changes inherent in the Section 92 response are within the scope of the original application - CRC192408-192414, RC185628 (**Original Application**).
3. To avoid unnecessary repetition, these legal submissions cross-reference to the Joint Memorandum for the Councils, as appropriate.
4. Since Minute 2 was received, Fulton Hogan asked Ms Cooper to provide copies of whatever material was being referred to at paragraph 2 of the Joint Memorandum. The material received is **attached**. Fulton Hogan's submissions are made in light of those items of correspondence.

Proposal in regard to "extraction area"

5. Paragraphs 12 and 19 of the Joint Memorandum discuss a reduction in the *quarrying extraction areas* and the *maximum extraction area* (from 40ha to 26ha) respectively. It appears there may be some confusion around these terms and what they encapsulate.
6. Fulton Hogan is proposing to reduce the *active working quarry area* from 40ha to 26ha. This will include - but not be limited to - the maximum extraction area.
7. The *active working quarry area* comprises not just all working extraction faces and adjacent operational areas, but also stockpiling, load out areas, quarry haul roads (excluding paved areas), and areas where aggregate processing takes place.
8. The Original Application proposed an active working quarry area of 40ha². The Applicant now proposes to reduce this to 26ha, broken down as follows³:
 - (a) 7ha: Central processing area, its fixed plant, stockpiles, portable plant etc.
 - (b) 5ha: Excavation in process
 - (c) 5ha: Fill and rehabilitation in process
 - (d) 5ha: Site roads – unsealed
 - (e) 4ha: Field conveyor, service lanes

¹ Dated 27 August 2019

² See 4.1 of the Assessment of Environmental Effects.

³ See A.1.1.2 Table 1 of the Applicant's post-notification response to additional Requests for Further Information, August 2019.

9. Accordingly, the area where Fulton Hogan proposes excavation to be in process will be limited to 5ha at any one time. For the avoidance of doubt, the Applicant does not propose excavation to be in process at any one time over an area as large as 26ha or 40ha.
10. In all other respects, the Applicant agrees with the summary of changes (**Changes**) as described in paragraphs 10 to 19 of the Joint Memorandum.

Legal submissions on scope

11. Resource consent applicants are generally permitted to amend the details of a proposal at any time prior to the close of a hearing, provided those amendments fall within the scope defined by the Original Application. It is only if amendments fall outside of that scope, a fresh application for consent is needed⁴.
12. Fulton Hogan respectfully agrees with the Joint Memorandum as to the appropriate legal test⁵ - being, whether the activity for which consent is sought is significantly different in scope or ambit from that originally applied for and notified, in terms of:
 - (a) The scale or intensity of the proposed activity; or
 - (b) The altered character of effects/impacts of the proposal⁶.
13. The Applicant agrees the issue of whether there might have been other submitters had the changed activity been that originally applied for and notified, is relevant to the above test. However, it is not the test itself⁷.

Scale and intensity

14. The words "scale" and "intensity" have been interpreted to refer to both the size of a proposal and to the magnitude of generated effects.⁸
15. In the present case, the Changes will not result in any increase to the overall scale or intensity of the activity. In particular:
 - (a) The proposed change in sequencing / staging does not change the scale or intensity of the proposed activity. The Original Application seeks authorisation for the activity to occur across the entire site, and there is no change to that. The changes only alter the timing of the activity, and thus its location at a given point in time.

⁴ *Darroch v Whangarei District Council* (A18/93).

⁵ *Atkins v Napier City Council* (2008) 15 ELRNZ 84 (HC).

⁶ Joint memorandum, at paragraph 20.

⁷ *Atkins v Napier City Council* (2008) 15 ELRNZ 84 (HC).

⁸ *Coull v Christchurch City Council* (C77/66).

- (b) The proposed reduction to the active working quarry area will reduce, not increase, the scale and intensity of the activity.
16. The Joint Memorandum makes similar observations about scale and intensity and the Applicant agrees with them.⁹

Character of effects/impacts

17. The word "character" is a reference to the distinctive *nature* of something.¹⁰
18. In the present case, Fulton Hogan does not propose any change to the character (or nature) of effects emanating from the proposal. In particular:
- (a) The proposed change in sequencing / staging only alters the timing of activity, and thus its location at a given point in time. The character of effects/impacts (e.g. dust and noise) remains the same.
- (b) The proposed reduction to the active working quarry area will reduce the effects / impacts of the proposal. Again, the character of effects/impacts (e.g. dust and noise) remains the same.
19. The Joint Memorandum makes similar observations about the character of effects / impacts and the Applicant concurs.¹¹

Possible submitters

20. As noted above, the inquiry as to possible submitters is not the test for scope itself, but is one means of applying or answering the scope test.
21. Fulton Hogan agrees with the Joint Memorandum¹² that it is *not plausible to conclude there may have been other parties who would have submitted on the amended proposal*. Particularly when the proposal – reviewed holistically - is seeking that quarrying and rehabilitation be authorised over the entire site.
22. The Applicant also agrees that the proposed changes do not give rise to any issues of prejudice or unfairness to other parties.¹³
23. For the above reasons, Fulton Hogan submits the Changes are within the scope of the Original Application.

⁹ Joint memorandum, at paragraphs 22 to 28.

¹⁰ Concise Oxford English Dictionary, Oxford University Press, 11th ed, revised, 2009.

¹¹ Joint memorandum, at paragraphs 22 to 28.

¹² Joint memorandum, at paragraph 29.

¹³ Joint memorandum, at paragraph 30.

24. Despite the fact there is no legal issue as to scope, Fulton Hogan would not oppose the Commissioners *hearing* from submitters who indicated they did not want to be heard, but now do. This offer for additional engagement is a direct response to Ms Eager's email¹⁴ and aligns with the engagement approach Fulton Hogan has adopted for this Proposal, since its inception. For the avoidance of doubt, the offer is in respect of those who have already filed written submissions.

Dated 17 September 2019



D Caldwell
Counsel for the Applicant

¹⁴ Dated 20 August 2019 at 1:08:17pm.

From: [Laurence and Carole Greenfield](#)
To: [Alison Cooper](#)
Subject: Re: Fulton Hogan Limited - Roydon Quarry - Applicants response to 2nd request for further information
Date: Monday, 19 August 2019 4:13:26 PM

Thank you Alison

Please advice procedure required for submitters. After reading this report, do we need to make a further response ?

Carole Greenfield

On Mon, Aug 19, 2019 at 11:36 AM Alison Cooper <alison.cooper@ecan.govt.nz> wrote:

Kia ora

CRC192408, CRC192409, CRC192410, CRC192411, CRC192412, CRC192413, CRC192414, and RC185627 – Fulton Hogan Limited (Roydon Quarry Application)

Applicants Response to Further Information Request

This is to advise that the Applicants response to the requests for further information from Selwyn District Council and Environment Canterbury has been received.

The further information response is available to read on the Environment Canterbury website: <https://ecan.govt.nz/do-it-online/resource-consents/notifications-and-submissions/current-consent-projects/fulton-hogan-ltd-proposed-roydon-quarry/>; and under the heading “s92 Response – Post Notification”.

Nga mihi

Alison Cooper

Consents Hearings

Alison Cooper

Consents Hearings Officer
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From: [Jolene Eagar](#)
To: [Quarry Mail](#)
Cc: [Catherine deGraaff](#); [Alison Cooper](#); [Jesse Burgess](#); [Templeton Residents Association](#)
Subject: Fulton Hogan Limited - Roydon Quarry - Applicants response to 2nd request for further information
Date: Tuesday, 20 August 2019 1:08:17 PM

Good Afternoon,

We are responding to the response we received yesterday from Fulton Hogan regarding the request for further information.

This has been a long, drawn out process but thinking back to the original application from Fulton Hogan received the end of November 2018. It was huge. Scary big. With the proposed activities, how they proposed to manage and mitigate it all with a large amount of reports and assessments done by experts based on the proposal. As time passed the application changed a bit and because it was publicly notified we all had an opportunity to submit on the application. Being a complex application made it difficult for laymen to understand but we did our best. It looks like about 1/3 of the submissions against has indicated that they would like to be heard at the hearing.

Reading the response we received yesterday we are left feeling that there has been some pretty significant changes made to the application. It certainly is very different from the original application dating back to November 2018.

Some might even argue that the differences are so significant that it should be treated as a new application.

Our concern is that only 1/3 of the people that submitted against the application will have the opportunity to respond to the 'new' application. We believe this is unfair and have had a few community members contact us expressing the same concern. Everybody should be afforded the opportunity to read what is now proposed and have their say on the changes.

Fulton Hogan should not be using the RMA to put through changes after submissions have been made that is this different from the original application.

We appreciate your consideration.

Kind Regards,

Jolene Eagar
(for Templeton Residence Association)

From: [Stephen Bain](#)
To: [Alison Cooper](#)
Subject: RE: Fulton Hogan Limited - Roydon Quarry - Applicants response to 2nd request for further information
Date: Tuesday, 20 August 2019 4:13:00 PM

Dear Allison,

Having read this now, I believe this is effectively a new RC application. FH have made a number of contradictions and changes to their initial application, that those who made submissions are not in effect submitting on this new application. What is the process to ensure people have the ability to make a submission on this new application?

Regards

Stephen Bain
Ph 021 557 552

229 Curraghs Road
Weedons
RD 5 Christchurch

From: Alison Cooper <alison.cooper@ecan.govt.nz>
Sent: Monday, 19 August 2019 11:36 AM
To: Hearings <Hearings@ecan.govt.nz>
Subject: Fulton Hogan Limited - Roydon Quarry - Applicants response to 2nd request for further information

Kia ora

CRC192408, CRC192409, CRC192410, CRC192411, CRC192412, CRC192413, CRC192414, and RC185627 – Fulton Hogan Limited (Roydon Quarry Application)

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Nga mihi
Alison Cooper
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