

8 August 2008

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Attention: Nick Boyes

BY EMAIL: nick@rmgroup.co.nz

Dear Nick

LEGAL OPINION RELATING TO SELWYN DISTRICT COUNCIL ASSESSMENT FOR CENTRAL PLAINS WATER SCHEME

- 1 We refer to you recent emails raising a number of queries in relation to the applications for Central Plains Water Limited ("CPWL") and the assessment you are completing for the Selwyn District Council ("SDC").
- 2 The following opinion attempts to address your queries by briefly outlining our understanding of the issues of concern and then providing our advice and response to the questions raised.
- 3 We understand that this advice will be attached to your supplementary planning report addressing matters raised during the course of the hearing.

DESIGNATIONS

- 4 There have been a number of issues that have arisen regarding competing designations between CPWL and Environment Canterbury ("ECan"). Relevant documents which discuss these issues are the evidence of Jane Whyte on behalf of ECan and a legal opinion prepared for ECan by Wynn Williams & Co.
- 5 We have reviewed these documents and have summarised the relevant issues as follows:
 - 5.1 Can CPWL give a notice of requirement for a designation on land held by ECan as endowment land under the Waimakariri River Improvement Act 1922 ("the WRIA")?; and
 - 5.2 If such a designation is imposed:
 - (a) Can CPWL compulsorily acquire such endowment land under the Public Works Act 1981 ("the PWA")?; and
 - (b) How do CPWL rights and powers under the designation interact with ECan's statutory powers under the WRIA and the Soil Conservation and Rivers Control Act 1941 ("the SCRCA")?

Notice of designation

- 6 Under section 168 of the RMA, a requiring authority such as CPWL is able to give notice of its requirement for a designation *"in respect of any land, water, subsoil, or airspace where a restriction is reasonably necessary for the safe or efficient functioning or operation of such a project or work"*.
- 7 There are no restrictions under the RMA that prevent a designation from being imposed where the land is owned by a particular entity, including a local authority.
- 8 In other words, the fact that the Waimakariri River bed is vested in ECan as an endowment under s17 of the WRIA does not prevent a designation being imposed over that land.

Compulsory acquisition

- 9 Once land is designated, under s186(1) of the RMA the requiring authority may apply to the Minister of Lands to have the land compulsorily acquired under Part 2 of the PWA.
- 10 The opinion by Wynn Williams focuses on s186(4) and treats this provision as limiting the ability of a requiring authority to compulsorily acquire land that is held by a local authority. However, following a close analysis of the relevant provisions, we have formed a different view. We consider that s186(4) is not a limit, but an alternative to the compulsory acquisition powers in s186(1).
- 11 S186(4) of the RMA states that where land is held under any enactment by a local authority, with the consent of the local authority, this land may be set apart for a project in the manner described in ss50 and 52 of the PWA.
- 12 SS50 and 52 of the PWA provide an alternative mechanism for dealing with existing public works, public reserves and Crown land, which allows such land to be set apart for a public work without needing to comply with other provisions in the PWA. This is not a compulsory mechanism, but an alternative that may be more appropriate in some circumstances.
- 13 In the same way that s50 and 52 of the PWA do not limit the compulsory acquisition provisions elsewhere in the PWA, we do not consider that s186(4) has any impact on a requiring authorities ability to compulsorily acquire land in accordance with s186(1). S186(4) simply provides an alternative that may be followed if compulsory acquisition is not the preferred option. In summary, we consider that consent of ECan would **not** be required under s186(4) in order for CPWL to compulsorily acquire the land.
- 14 However, this is not the end of the matter. As mentioned above, s17 of the WRIA vests the Waimakariri River bed in ECan as an endowment. Under section 140(3) of the Local Government Act 2002 ("the LGA"), such endowment land must be retained by the local authority for the purpose for which the property was vested.
- 15 Although the LGA imposes restrictions on how ECan may deal with endowment land vested in it, we do not consider that this would limit the ability of CPWL to compulsorily acquire the land under the provisions of the RMA and PWA. It may prevent ECan from providing consent, but as stated above, consent is not required for compulsory acquisition.

- 16 Notwithstanding the above, some protection mechanisms are provided for the landowner in the PWA. If CPWL did attempt to compulsorily acquire endowment land vested in ECan, it is likely that ECan would object to such a notice under s23(3) of the PWA. The objection would then be heard by the Environment Court which must determine whether it would be fair, sound, and reasonably necessary for achieving the objectives of CPWL, for the land of the objector to be taken.
- 17 Assuming that the Environment Court disallowed the objection, the Minister of Lands would also need to provide approval for the acquisition. The test that the Minister must apply under s26 of the PWA is whether he/she is satisfied that no private injury will be done for which due compensation is not provided in the PWA.

Interaction with statutory powers

- 18 Under the SCRCA, ECan has very wide powers to carry out works relating to the control of rivers and the prevention of flooding and erosion.
- 19 In relation to existing flood protection works, and interference with such works without ECan's consent is an offence under the SCRCA. In accordance with s23 of the RMA and the decision of *Gisborne District Council v Faulkner*, even if a designation is imposed, CPWL would still be required to comply with these provisions. This may prevent them from giving full effect to the designation if the works disturb flood protection measures and ECan withholds consent.
- 20 In relation to any new work, the issue is whether ECan would be able to carry out any new work on the designated land that may have a potentially detrimental effect on the CPWL project.
- 21 Under s176 of the RMA, no person may, without the prior written consent of that requiring authority, do anything in relation to the land that is subject to the designation that would prevent or hinder the project or work to which the designation relates.
- 22 In accordance with s10A the SCRCA, nothing in that Act shall derogate from the provisions of the RMA. Therefore, before ECan can exercise its relevant statutory powers under the SCRCA, it still needs to obtain any relevant resource consents and designations under the RMA.
- 23 As the scheme of the RMA clearly applies, we consider that if CPWL holds a designation over the land, ECan would need the consent of CPWL to carry out any work on the land if it may potentially prevent or hinder the CPWL works. To adopt an approach whereby CPWL's consent was not required would severely limit the power of CPWL as a requiring authority and be contrary to the intention of s10A of the SCRCA.

BUNDLING OF RESOURCE CONSENTS

- 24 We understand that some submitters have suggested that the non-complying status of some ECan consents means that all consents, including those to SDC, are to be considered as non-complying. The issue you are interested in is whether the principle of bundling consent applies across consent authorities.
- 25 A recent decision of the Environment Court in *Darby v Queenstown Lakes District Council* (C069/07) usefully summarises relevant case law on the issue of bundling of consents. We have **attached** a full copy for your information.

- 26 The starting point taken by the Court is that stated in *Southpark Corporation Limited and Anor v Auckland City Council* (A111/00), where the Court held at paragraph 8:

At least since Locke v Avon Motor Lodge (1973) 4 NZTPA 17, it has been established and accepted that in general there is no scope for hybrid planning status for a proposal, and the more stringent classification applies to the whole.

- 27 The Court in *Darby* then considered a range of other case law that has discussed the issue of bundling consents, mainly in the context of notification, and summarises the position on this issue at paragraph 33:

It appears to us that the effect of the various authorities above-cited can be summarised as follows. In many cases it will be appropriate for a consent authority to consider a proposal in the round, because failure to do so would mean artificially splitting it up without considering the interrelating issues that relate to the overall judgment requiring to be made in the circumstances, and to determining whether or not the Act's purpose will be suitably served. However, if a particular consent that is sought is plainly limited in its scope and nature, and the effects of exercising the consent would not overlap or have consequential or flow on effects in relation to effects stemming from the exercise of any other consent required for the proposal, then the application for that consent may be adjudged individually on its merits.

- 28 The principle emerging from this decision and prior case law is that where multiple consents for one proposal overlap to such an extent that they can not be realistically or properly separated, the consent authority should adopt a holistic approach and assess the proposal on the basis of the most stringent classification. The intended purpose of bundling consents in this manner is to ensure that an overall judgment can be brought to bear as to whether the proposal is in accordance with the purpose of the Act.

- 29 Although this approach is sensible and applicable to consent applications to one consent authority, there are some real difficulties if applications to different authorities were bundled together and assessed under the most restrictive activity status.

- 30 For example, for a large project such as this, there may be a land use that requires consent as a discretionary activity from one territorial authority, but is classified as a non-complying activity by a neighbouring territorial authority. These differences in classification may be due to different environmental pressures in the district or may simply reflect a different approach to the management of resources by the two authorities.

- 31 District and regional plans are the result of significant public consultation and input from local communities. Bundling these two consent applications together and treating them both as non-complying effectively ignores the differences that may exist between districts and potentially undermine the integrity of the relevant plans. It would potentially require strict assessment of the objectives and policies of a district plan in circumstances where this was not intended.

- 32 We consider that adopting such an approach would require clear legislative or judicial authority, neither of which currently exists. We consider the proposal can still be adequately understood as a whole without considering all consent across multiple consent authorities as the same status.

PUBLIC WORKS ACT

Consideration of effects

- 33 An issue has arisen regarding to what extent effects that will be compensated under the PWA may or may not be considered under the RMA.
- 34 S104(1)(a) of the RMA require a consent authority, when considering an application for resource consent, to have regard to any actual or potential effects of allowing the activity. The only exceptions provided in s104 are as follows:
- 34.1 S104(2) – A consent authority may disregard an adverse effect of the activity on the environment where the plan permits an activity with that effect; and
- 34.2 S104(3)(b) – A consent authority must not have regard to any effect on a person who has given approval to the application.
- 35 Unless the persons who are receiving compensation have also provided written approval to the applications, it does not appear that the fact of compensation in itself enables the consent authority to disregard the effects.
- 36 The case of *Takamore Trustees v Kapiti Coast District Council* AP191/02 considered the issue of compensation in the context of a notice of requirement. This case was an appeal to the High Court on an earlier decision of the Environment Court that upheld the Council's notice of requirement for designation of a link road.
- 37 One of the grounds of appeal was that the Environment Court had incorrectly taken into account the potential for compensation when balancing competing interests and considering the effects of the designation. It was submitted that the issue of compensation was outside the jurisdiction of the Environment Court and should not come into account in the notice of requirement approval process.
- 38 In determining this issue the High Court held at paragraph 110:
- The decision-maker must first consider whether balancing all the relevant material and the predominant s5, the notice of requirement should be confirmed. It will need to consider avoidance, mitigation of affect and other matters set out in paragraph 5. If mitigation, then it will be implicit that some affect remains, and in all probability compensation will be all that will be left to an affected party.*
Compensation will be considered only after it is concluded (if it is) that the balance lies in confirming the notice of requirement and all effort to avoid or mitigate has been undertaken. (emphasis added)
- 39 Although the above comments are made in the context of approving a notice of requirement, we consider that they would also apply to consideration of a consent application. In other words, the potential for compensation should not be taken into account when considering the adverse effects nor should it be considered as a potential mitigating factor that reduces the level of effect.

Section 85 RMA

- 40 In your email dated 25 July 2008, you briefly mention the relevance of s85 of the RMA if land is left uneconomic after compensation under the PWA.
- 41 Under s85 where a person with an interest in land considers that there land has been made incapable of reasonable use by reason of a provision in a plan or proposed plan, they may challenge that provision on those grounds. However, in

accordance with s85(5) this specifically does **not** include an interest in land that is affected by a designation.

- 42 If any land is left incapable of reasonable use by a designation, this is likely to be taken into account when assessing compensation payable under the PWA.

Mineral rights

- 43 We understand that various parties hold mineral rights in the Waianiwaniwa Valley and have stated they will not sell these rights. Your concern is that if these parties maintain this stance and retain their mining rights this may prevent construction of the reservoir.

- 44 Under the PWA, a requiring authority with a designation over land has the ability to compulsorily acquire the land in order to give effect to the designation. The issue is whether this ability extends to acquiring mineral rights and whether the existence of such rights may prevent the designation from being given effect to.

- 45 The relevant section of the PWA is s30 which reads:

Where any land is taken or set apart for a public work, any subsisting licence, permit, right, privilege, or authority in respect of the land may be taken by the same or a subsequent Proclamation; and on and after a day to be named in the Proclamation the licence, permit, right, privilege, or authority shall vest in the Crown, or the local authority, as the case may be, freed and discharged from all mortgages, charges, claims, liens, bills of sale, and interests of any kind whatsoever. The provisions of this Act shall, so far as they are applicable and with the necessary modifications, apply in every such case as if the licence, permit, right, privilege, or authority were an interest in land.

- 46 The effect of the above provision is that any mining rights that exist for a particular property may be compulsory acquired by Proclamation in the same manner as the interest in the land is acquired. This is the appropriate remedy if affected landowners refuse to sell their mining rights.

FUTURE LAND USE CHANGE

- 47 If the scheme takes place, this will enable more dairying to occur on the plains, which in turn will bring about a range adverse effects that are typically associated with dairying. The issue of concern these secondary adverse effects of dairying should be taken into account as part of SDC's assessments, particularly given that dairying is typically a permitted use under the district plan.

- 48 You have referred to a case involving a water take in Doubtful Sound where the judge made some comments as to the extent to which flow-on effects for permitted activities can be taken into account. We understand that the case you are referring to was *Aquamarine Limited v Southland Regional Council (C079/96)*, a copy of which is **attached** for your information.

- 49 In this case the Judge commented that the relevance of an effect is not dependent on the need for resource consents or whether such an activity can be controlled, rather it is dependent on giving a wide interpretation to the Act to ensure that all reasonably foreseeable effects can be considered by the consent authority. However, these comments should be treated cautiously given that the case took place in 1996 before much of the case law and statutory amendments regarding the permitted baseline had been developed.

- 50 In the context of the consent applications, we consider that the statutory permitted baseline under s104(2) would apply. This means that the consider authority would have a discretion whether or not to consider any effects on the environment that are associated with permitted activities. This includes effects associated with potential consequential activities such as dairying.
- 51 The next issue is whether this same principle applies when considering a notice of requirement. In accordance with section 171 of the RMA, when considering a notice of requirement, a territorial authority must consider the effects on the environment of allowing the requirement. Although not expressly stated in this provision, we consider that the same principles for potentially disregarding effects associated with permitted activities would also apply when considering a notice of requirement.

Yours faithfully
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