BEFORE THE INDEPENDENT HEARING COMMISSIONERS

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of applications by Woldwide companies for land use consents, water premits and discharge permits for farming activities

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LEGAL SUBMISSIONS IN SUPPORT OF THE REPORTING OFFICER REGARDING WW1 AND WW2 BASELINE ISSUES

30 OCTOBER 2019

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MAY IT PLEASE THE COMMISSIONERS

1 In minutes dated 7 and 11 October 2019, the Commissioners directed that the Applicants and Council Officers provide legal submissions and evidence regarding the exercise of the 2017 resource consents. In the 7 October 2019 minute, the Commissioners invited the Applicants and Council Officers to address the issue of the scope of the original application, if the 2011 consents are relied on.[1]

2 These submissions address:

(a) the legal test for whether a resource consent has been exercised;

(b) whether a change to conditions under section 127 must be exercised before taking effect; and

(c) the implications of the baseline issues for the application.

3 These submissions are accompanied by a statement of evidence prepared by the Reporting Officers. The statement provides a summary of the resource consents held by by the applicant companies and what those consents do and do not authorise. The Officers' intention is that the statement, when read alongside the Section 42A Report, will provide information to assist the Commissioners in determining whether the correct baseline has been modelled (and if not, what baseline should be modelled).

4 These submissions are intended to assist the Commissioners, rather than provide an adversarial response to the Applicants' submissions and evidence. However, there is an important point that must be corrected. Counsel for the Applicants' submissions suggest that the Council Officers have created the baseline issue that the Panel is now required to grapple with. The Officers reject that. In pre-application meetings, the application, assessment of environmental effects and supporting reports, the Applicants referred to and relied on the 2017 consents as forming part of the environment. It was only in the Applicants' evidence that it identified that as a "mistake" and "miscommunication".[2] The Officers' interest is simply to determine the correct baseline to model in the light of the confusion created by the Applicants.

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1 Minute of Hearing Commissioners Regarding Expert Caucusing for WW2, 7 October 2019, at [6].

2 Evidence of Nessa Legg, at [67].

5 Given the necessary reliance on the Overseer modelling to inform the assessment of effects on ground and surface water quality (and assess the application against the relevant plans), it is essential that the modelled baseline is correct.

Exercising a resource consent

6 It is submitted that there is not a great divide between Counsel and Counsel for the Applicants on the appropriate legal approach to determining whether a resource consent has been "exercised". Counsel for the Applicants acknowledges that no case law appears to exist on this issue, but submits:

(a) a resource consent cannot be exercised inadvertently;

(b) a consent holder can be said to have exercised a resource consent if the holder did something that would be unlawful but for the consent, because he or she new the activity was lawful because of the consent; and

(c) the case law regarding "giving effect" in terms of section 125 of the Act is inapplicable as it relates to a different test and generally has developed in the context of the built environment.

7 It is common ground that a resource consent cannot be exercised inadvertently – the plain meaning of the verb "exercised" denotes active use. It is also agreed that a consent is exercised when an action is taken that would be unlawful but for the consent.

8 However, it is submitted that an assessment of the subjective intention of a consent holder unnecessarily complicates the test. In the context of a complex proposal where the same activities would not occur by coincidence or as an unintended breach, it is enough to demonstrate that the specific activities could only occur if authorised by the resource consent in question. In other words, the actions of the consent holder should speak for themselves, without requiring a Council (either under section 126 or the conditions of a resource consent) to divine whether a consent holder intended to rely on the resource consent or otherwise break the law.

9 In terms of the test of "giving effect", it is acknowledged that it is a different test applying under a different section. However, it is submitted that the test (and the case law developed to understand it) is of

comparative value. The policy underpinning the lapsing provisions under the Town and Country Planning Act 1977 were detailed in *Katz v Auckland City Council* as:[3]

> There are compelling reasons of policy why a planning consent should not subsist for a lengthy period of time without being put into effect. Both physical and social environments change. Knowledge progresses. District schemes are changed, reviewed and varied. People come and go. Planning consents are granted in light of present and foreseeable circumstances as at a particular time. Once granted a consent represents an opportunity of which advantage may be taken. When a consent is put into effect it becomes a physical reality as well as a legal right. But if a consent is not put into effect within a reasonable time it cannot properly remain a fixed opportunity in an ever-changing scene. Likewise, changing circumstances may render conditions, restrictions and prohibitions in a consent inappropriate or unnecessary. Sections 70 and 71 of the Act give legislative recognition and form to these matters of policy which, in the ultimate, do but recognise that planning looks to the future from an ever-changing present.

10 Although there was no equivalent of section 126 of the RMA under the Town and Country Planning Act 1977, it is submitted that a similar rationale applies to the power of consent authorities to cancel a consent that has not been exercised for five years. That power enables consent authorities to cancel consents that are not being put into effect, so they do not remain a "fixed opportunity in an ever-changing scene". This argument is supported by the fact that both sections 125(1A)(b) and 126(2)(b) of the RMA require consideration of whether approval has been obtained by persons who may be adversely affected and the effect on the policies and objectives of any plan or proposed plan.

11 Accordingly, it is submitted that it is appropriate to adopt a similar approach as the case law relating to whether resource consents are "given effect" under section 125. That involves an evaluative, factual assessment, having regard to the steps taken towards implementing the

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3 *Katz v Auckland City Council* (1987) 12 NZTPA 211 (PT), adopted by the Environment Court in relation to section 125 in *Hastings v Auckland Regional Council* ENC Auckland A129/2000, 6 November 2000.

resource consent.[4] Imposing a higher threshold that includes an assessment of the consent holder's intentions is not necessary.

12 In light of the above, the Council Officers urge the Commissioners to undertake an evaluative, factual assessment of the activities undertaken by the Applicants to determine whether the 2017 consents have been exercised or not. As submitted on 4 October 2019, the Officers urge the Commissioners to look beyond the requirement for surrender under the 2017 discharge and water permits and instead ask "have steps been made towards implementing the activities authorised by the land use consent?".

Exercising a section 127 change of conditions

13 There is a greater level of disagreement on the issue of whether a section 127 change to the conditions of a consent must be exercised before taking effect. This issue is important in the context of determining whether discharges to the Horner Block are authorised by a previous version of a discharge permit for the Woldwide Three farm (as opposed to being undertaken under the 2017 consents).

14 It is submitted that the scheme of section 127 does not require a change to conditions to be exercised before taking effect. This is due to the clear language of section 127, which provides that only sections 88 to 121 of the Act apply to a section 127 application.

15 Counsel for the Applicants appears to submit that the omission of reference to sections 125 and 126 can be interpreted as an error on behalf of Parliament. With respect, I disagree.

16 The starting point for interpreting section 127 is its text.[5] The section explicitly provides that sections 88 to 121 of the Act apply to an application to change or cancel conditions. In particular, the change is subject to section 116, which relates to commencement, but (by exclusion)[6] is not subject to section 125.

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4 *Biodiversity Defence Society Inc v Solid Energy NZ Ltd* [2013] NZHC 3283.

5 Interpretation Act 1999, section 5(1).

6 The implied exclusion rule (*expressio unius exclusion est alterius*) provides that the expression of one excludes the other.

17 Numerous authorities have held that adding words into a statute is rarely legitimate.[7] The only scenario where it is legitimate to read words into legislation is where such action is justified by the scheme and purpose of the Act, and the nature of the omission is clear.[8] In other words, it must be possible to state with certainty that the additional words would have been inserted into the section had Parliament's attention had been drawn to their omission.[9] For the following reasons, in my submission the scheme of Part 6 of the RMA is clear that section 127 contains no unintentional omission:

(a) Part 6 of the RMA has been structured to reflect the various stages of a resource consent – from application through to surrender.[10] Section 127 is placed after the sections concerning the giving effect and exercising of consent, but before sections concerning the transferral and surrender of consent. Had Parliament intended for changes of consent to be subject to section 125, it would have done so explicitly.

(b) The process of changing a resource consent is comparable in nature to the review of a resource consent – the key difference being which party drives the change in conditions. Notably, the change and review sections in the RMA both specify the sections in Part 6 which are applicable (with necessary modifications). Under both processes, there is no guarantee that the consent holder will be satisfied with the resulting changes to conditions. It would go against the scheme of the RMA to give the consent holder discretion as to whether to implement changes arising from a review under sections 128-132, as is suggested for changes arising under section 127. If the consent holder does not wish for the conditions to have legal effect, the course of action provided by the RMA is to appeal the decision under section 120 or make a further application under section 127.

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7 See, for example, *R v Steigrad* [2011] NZCA 304, at [61]; *R v Walsh* [2007] 1 NZLR 738 (CA) at [54]-[56]; *R v Stack* [1986] 1 NZLR 257 (CA) at 261 and 262.

8 *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433 (SCNZ) at [146]; *R (Morgan v Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563 (HL) at [45], as approved in *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) at [58].

9 See *Jones v Wrotham Park Settled Estates Ltd* [1980] AC 74 (HL) at 105.

10 The relevance of the organisation and format of an enactment for interpretation purposes is founded in sections 5(2) and (3) of the Interpretation Act 1999, which provide that the matters that may be considered in ascertaining the meaning of an enactment include the organisation and form of the enactment.

(c) The interpretation put forward by counsel for the Applicant would lead to difficulties with enforcement – consent authorities would not have certainty as to what conditions of the consent are enforceable. This highlights the fact that there is a lack of machinery in the Act to deal with the situation where a change to conditions has commenced but have not been exercised.

18 In my submission, section 127 is clear – once a change to the conditions commences under section 116, the resource consent is amended and must be complied with. The scheme of Part 6 of the RMA confirms that there is no sufficient basis upon which it would be appropriate to add a gloss to clear language of the section.

19 Accordingly, it is submitted that the change to the discharge permit for the Woldwide Three farm is not "unexercised". It has commenced and is part of the existing environment.

Implications of baseline issues

20 As noted above, the existing environment that informs the modelled baseline is critical to understanding the potential adverse effects of the proposal. If the baseline model overrepresents nutrient losses, the comparison with the modelled proposal will potentially show a greater improvement than will manifest in reality.

21 In addition to this substantive issue, the baseline issues raise potential issues regarding the scope of the application and the information that supports it.

22 The leading case on whether changes to an application are beyond scope is *Atkins v Napier City Council*, which provides:[11]

> I consider the test, as developed by the Environment Court and Court of Appeal through a series of cases, is whether the activity for which resource consent is sought, as ultimately proposed to the consent authority, is significantly different in its scope or ambit from that originally applied for and notified (if notification was required) in terms of:
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> • The scale or intensity of the proposed activity, or

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11 *Atkins v Napier City Council* (2008) 15 ELRNZ 84 (HC), at [20].

- The altered character or effects/impacts of the proposal.

Whether there might have been other submitters, had the activity as ultimately proposed to the consent authority been that applied for and notified, is a means of applying or answering the test. But it is not the test itself.

23 While, in this case, the final proposal remains the same, the application, assessment of environmental effects and supporting reports were prepared on the basis that the 2017 consents formed part of the existing environment. As the 2017 consents authorise dairy farming on the SH96/Marcel Block (and other activities not authorised by the 2011 consents), the removal of the 2017 consents from the existing environment changes the scale, intensity or character of the proposal when compared with the status quo.

24 In other words, if the 2017 consents form part of the environment, the application is for an intensification of the existing diary platform (which includes SH96/Marcel). If the 2017 consents are not part of the environment, the application is for intensification and expansion of the dairy platform. It is submitted that an application for intensification and expansion might have attracted other submitters.

25 Accordingly, if the 2017 consents are found not to have been exercised, careful consideration will be required as to whether the resulting change to the overall application package is beyond the scope of the original application as notified.

26 In terms of the information supporting the application, the application and assessment of environmental effects were prepared on the basis of the 2017 consents. If the 2017 consents are found not to have been exercised, an information gap will be created. It may be that the Commissioners will be unable to place much weight on the documents in their assessment of the proposal.

Conclusion

27 For the reasons given above, it is submitted that there are issues with the baseline modelling, as detailed in the Section 42A Report. These must be resolved before the application is determined.

28 Ms Phillips is available to review revised baseline modelling, should the Commissioners find errors in the modelled baseline and direct that new modelling is undertaken.

M J Doesburg

Counsel supporting the Reporting Officer