JGH BARRISTER

BEFORE HEARINGS COMMISSIONERS APPOINTED BY PORIRUA CITY COUNCIL AND GREATER WELLINGTON REGIONAL COUNCIL

IN THE MATTER	of the Resource Management Act 1991
AND	applications for resource consent under Part 6
BETWEEN	**WELLINGTON REGIONAL COUNCIL**
	Local Authority
AND	**PORIRUA CITY COUNCIL**
	Local Authority
AND	**JAGGER NZ LIMITED**
	Applicant

CLOSING LEGAL SUBMISSIONS

Introduction

1. These closing submissions address matters arising during the course of the hearing. They are not intended to repeat matters addressed in opening, although in instances they clarify or further address topics recorded as outstanding issues in opening. They also focus on the key matters, rather than looking to address every matter discussed during the hearing point by point.

2. I address:

    a. Minor legal matters: the approach to evidence – expert and lay witnesses; assumed compliance with conditions; impacts on property value generally put to one side, but in any event are nor proved.

    b. The proposal: not “high” density - site coverage, single/two story requirements.

c. Ecology: Stream protection, ianga spawning habitat enhancement, environmental compensation, King Salmon and no net loss.

d. Consent notices: pump station, condition 102, liquefaction.

e. Development contributions (including esplanade reserve requirements).

f. Cultural effects.

g. Conditions – process.

Minor legal questions

3. Expert *opinion* evidence should be given greater weight than non-expert *opinion*. In other jurisdictions, non-expert opinion in inadmissible, but under the RMA it goes to weight:[1]

> *[49] As is well known, the Environment Court is not bound by the rules of law about evidence that apply to judicial proceedings, and may receive anything in evidence that it considers appropriate to receive. This means that there could be no formal objection to opinion evidence being given by someone such as Mr Haworth, or indeed by any lay witness, but the distinction drawn by the cases is still important* ***in terms of the weight*** *to be attached to evidence by the Court.*

4. When weighing *expert* opinion evidence, relevant considerations include how comprehensive conflicting statements are, the extent to which the opinions are informed by data, observations, modelling and other methodologies.

5. In terms of compliance with conditions – and any track record, notwithstanding the evidence from the Applicant of its excellent track record, a consent holder must in any event be presumed to comply with conditions of consent:[2]

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[1] *Scurr v Queenstown Lakes District Council* (C60/2005, Judge McElrea, 29 April 2005).
[2] *Nelson City Council v King* 13/05/08 CRI-2008-042-144 (para 16).

Consent authorities grant resource consents on the basis of an assumption that consent holders will comply with the conditions of their consents. Indeed consent authorities are legally required to assume that conditions will be complied with. Failure to comply with conditions therefore attacks the very basis on which consents are granted.

6. Potential (and perceived) effects on property values are not a relevant consideration under the RMA. There is also no evidence beyond assertion on the matter. Effects on amenity values are of course relevant and have been well canvassed through this process.

The proposal

7. You must assess the proposal before you, and understand and evaluate its effects on the basis of the evidence before you. It is not a comparison against what might have been previously proposed or anticipated under the CDP or any charette process (although those matters are accepted as being relevant background).

8. It is unfair and inaccurate to simply allege that the developer is looking to maximise its profits. You have heard evidence about the changes in markets and expectations; and affordability. That is the primary driver of the density proposed, which is designed to serve customer demand. If there was demand for (and more people could afford) larger lot sizes and therefore lower densities, then a different proposal may well have been proposed by the Applicant. But that is not the reality.

9. The Applicant does not consider – and its evidence, with its experience in markets across the country, is that the proposal to not "high" density. Nor is it "medium density". It is now, around "normal" at or less than that provided for in a number of plans around the country. But rather than seeking to place an alarmist or pejorative label on the category of development by reference to "density", it is better to proceed on the basis of the effects of the proposal. In that regard, the effects on neighbours and the wider surrounding community arising from what is proposed is minor. In particular:

a. In respect of density and scale, the majority of the dwellings will be single storey, as described in the AEE. That is largely a matter of demand, design, and and cost factors. There does not need to be a specific condition in this regard. To have a blanket prohibition on two story buildings will also preclude diversity of form, which can have positive visual impacts.

b. In respect of site coverage, it is only the seven identified perimeter lots that the Applicant seeks either be two storied with 35% coverage (ie the plan expectation) OR single storied and up to 45% coverage. In contrast, Mr Gray seeks single storied and up to 40% coverage.

c. In my submission, the difference between 40% and 45% site coverage would be difficult to distinguish. In addition, on any one façade there could be a longer "width" even at 40% - it all depends on the design. So the real issue is less about the impacts of any one or two lots, but more about the potential for cumulative effects. The "permitted baseline" (or base expectation in the plan) of two stories at 35% is also relevant.

d. In that regard, the Applicant has confirmed its commitment to ensuring high quality landscaping as ensuring high levels of amenity, both on the development lots (which it intends to develop itself) as well as on the riparian and other planting areas.

e. In respect of traffic, the impacts arising from the density of development proposed is acceptable to the relevant road controlling authority NZTA. The NZTA's expert was comfortable with any impacts on levels of service as well as safety concerns, but the NZTA itself was more cautious seeking a review condition – which the Applicant has accepted. Mr Marshall was also comfortable with the traffic effects, including the SH58-James Cook Drive intersection. All anticipate that the impacts will be reduced once Transmission Gully is operational, sometime in 2020.

Ecology

10. An number of related issues arise.

NZCPS

11. There is some uncertainty as to the extent to which the "coastal environment" extends across the development site. Mr Jones for the PCC took the view that the salt marshes fall within "coastal vegetation" under Policy 1(2)(e) and that the site more generally could be considered as being on the "fringe" of the coastal environment. Certainly, some effects (eg sedimentation) will impact on the coastal environment. There was no "line on a map", however, to identify where the coastal environment finishes.

12. The matter takes on some importance, particularly where parties such as Forest & Bird, rely on the directive nature of the NZCPS. If, for example, the stream diversion is not within the coastal environment, then the NZCPS (eg Policy 11 – Indigenous Biodiversity) does not apply to it. In my submission, the location of those works is sufficiently far from the coast, so as to fall outside the NZCPS.

13. Even if the NZCPS applies, there is still the question of what that means in the context of a resource consent:

    a. The first point is that the statutory directive is (subject to Part 2 – refer opening submissions) "to have regard to" the NZCPS (and other planning instruments).

    b. That is quite different to the requirement to "give effect to" (which the Supreme Court equated with "implement").

    c. That said, the language and strength of direction is important, and should be carefully considered. It cannot be determinative, however - or why, if there is an "avoid" policy,

ask any question other than whether an activity has any more than minor or transitory effects?; if it does, then it must be declined, whatever its other benefits or overall merits.

d. The same point can be made in respect of Policy 41 of the proposed Natural Resources Plan. I address the weight to be given to that Plan next.

Policy 41, Schedule G

14. The Policy, as stated, requires, "in the first instance", activities to avoid ecosystems and habitats with significant indigenous biodiversity values and habitats. It is questionable whether the Policy intended to mean **all parts** of all such ecosystems and habitats.

15. Even if it did, the Policy then sets out a hierarchy of avoiding more than minor effects, remedying them, mitigating them, and, if residual adverse effects remain, to "consider" biodiversity offsets.

16. In my submission, the adverse effects have in fact been remedied, and there is no need to consider an offset (refer Miller EIC para 63):

> *[63] Irrespective of the SEV and ECR assessment, in my view the vegetated riparian corridor through the site will be a major improvement compared to the existing situation and will offer ecological benefits beyond stream function. A key benefit will be the provision of a vegetated corridor through the site and link between existing ecosite areas.*

17. Taking a holistic, rather than a piecemeal, numerical approach, it is hard to see how that outcome does not remedy the adverse effects of the stream diversion.

18. This is even even more so, if the offer to enhance inanga spawning habitat is taken up. While that would reduce he numerical SEV score, and impact on the ECR, it is, in Mr Miller's opinion a "better ecological outcome".

19. If this evidence is accepted, then the outcome is consistent with the Policy 41 and its focus on remedying any adverse effect – the result is an improvement.

20. If the Panel does not consider Policy 41 to have been met, the matter of weight to be given to it arises. Mr Anderson for Forest & Bird suggests that "quite a bit" or "considerable weight" be given to the Policy as representing "common practice" and reflecting the NZCPS and *NZ King Salmon* approach.

21. In contrast, I submit that little weight should be given to it:

    a. It is at a very early stage in the process and has not been tested.

    b. There are 27 or so submissions on the Policy, seeking significant changes (including in opposition to the Policy).

    c. There is no evidence that the Policy simply reflects the "accepted" or "good practice" approach. There matter of offsets and requirements (or not) for no net loss continue to be subject to significant debate.

22. To summarise the present position:

    a. There is now agreement between the flood and erosion engineers Mr Christensen and Mr Joseph as to the extent and type of stream treatment works required.

    b. As Ms Conland states, the values of the section of the stream being diverted are not "highly vulnerable or irreplaceable".

    c. Mr Miller has now identified with more specificity the lengths and widths of riparian planting – the spatial extent is known and can be enforced. There is no need for a separate condition identifying precisely what is mitigation and what is offset, provided the obligations themselves are clear.

d. Mr Miller's conclusion is that the result is an improvement from the present position – that therefore is a positive effect; or, put another way, the adverse effects have been remedied.

e. What is proposed (eg the further details provided by Mr Miller) can and should be identified with greater certainty in the consent. Whether that requires a separate "ecological compensation plan" when the planting, and other mitigation proposed, has multiple functions (erosion/flooding, ecological, access) is a matter of substance rather than form.

23. In terms of the 3/5 year commitment to maintenance of planting, the current conditions generally require a 3 year commitment. Aspects cross-over with the development contribution agreement and the vesting of the reserve land in the Council.

24. The Applicant continues to consider a 3 year period appropriate and reasonable, but is prepared – in order to give the Panel additional comfort that the planting will be successful – to accept a 5 year condition period. It does not consider a bond appropriate – that would be an unnecessary additional cost.

Consent notices

25. The Applicant:

a. Maintains its position that consent notices that are in the nature of a "notice" (eg of possible odour effects from the pump station) rather than advising of a continuing obligation (eg in respect of maintaining, or not removing vegetation) are unlawful and inappropriate.

b. Additionally, in respect of the Pump Station, there is a clear commitment by the Council and Wellington Water to undertake the works. A consent notice might reduce the incentive to carry through with their word. The effects are also likely to be intermittent, rather than continuous. That said, rather than have the stigma of a consent notice, the Applicant would be prepared to accept a condition that limits development of the

potentially affected lots to the second stage of that part of the development.

c. In respect of Condition 102, the Applicant maintains that the advice note should be deleted (not elevated to the condition itself). The likelihood of a significant extension to a dwelling being undertaken in the future without the owner at the time (or the Council), when the primary works will have been undertaken prior o section 224 approval, and when any report containing any concerns about further development or other areas of the lot will be contained in any LIM report, is so remote that it can be disregarded. It is unreasonable to blight properties in those circumstances with an undue consent notice.

d. That said, the Applicant will work with the Council to see if some wording can be agreed that would be acceptable to the Applicant.

Development/financial contributions

26. Progress continues to be made in respect of the development agreement. It is anticipated that it will address the basis on which the Council will take over the relevant land and responsibility for maintenance of the relevant mitigation planting and other measures into the future.

27. No doubt the Council will act responsibly in that respect, with the overlay of obligations under the Reserves Act, and the increase in rating base arising from the subdivision also able, in broad terms, to provide Council with the funding for maintenance into the future.

28. The application sought consent for waiver of esplanade reserve requirements (under section 230(3)), <u>should they apply</u>, given what is proposed to vest in terms of reserves and open space. In my submission, the esplanade reserve requirement is not triggered, as the stream is not a “river” (average bed width of 3m or more) as defined in section 230(4). Notwithstanding that, in terms of substance, Mr Gray confirmed the amount of reserve that will be

associated with the development, both existing (146,000 sqm) and what is proposed to be added (25% of 133,000 sqm) is quite "staggering".

29. So the proposal can be considered to deliver a benefit beyond what could be imposed by a strict application of section 230(3).

30. Finally, in terms of the reserve contribution issue, I turn to the question of "double dipping"; or whether the Applicant is avoiding a requirement or expectation. Yes, the CDP anticipated the provision of land as reserves and esplanade planting – potentially avoiding the debate around whether the legal esplanade reserve requirements applied. But it did not address the value of those requirements, nor did it set in stone a requirement that must be met in all circumstances. An approach of looking to sum up, numerically, what might have been required under the CDP, under the esplanade reserve requirements (if they apply), and any ecological mitigation, remediation, or offset is unhelpful. The matters are all interrelated and what the Panel needs to do is step back and exercise its judgement in evaluating the adequacy or reasonableness of what is proposed. Significantly, there are areas of reserve proposed outside the areas of esplanade reserve/stream corridor that are key for the community – for example, the Samuel Marsden walkway linkages and bush reserves; which would not result on a strict application of esplanade reserve requirements.

31. But also – even if there was a requirement under the CDP or otherwise for an ecological corridor. That doesn't mean that it should be discounted as also being of benefit in terms of remedying, mitigating or offsetting. There is no reason, for example, taking a different example, that planting for screening purposes cannot also have an ecological role, or a noise mitigation role. The fact that it has been required for one purpose does not mean it must be discounted should it also mitigate other effects.

Cultural matters

32. The Applicant maintains its offer to continue engagement with Ngati Toa. Jagger and its associated companies intend to develop the site and so will have a continued presence for some years, and wish to do so irrespective of any specific consent conditions.

33. It is unfortunate, but understandable, that the change in personnel at Ngati Toa has impacted on the Applicant's ability to engage and better understand Ngati Toa's concerns.

34. The Applicant will take the opportunity to consider whether any refinements to the consent conditions relating to cultural matters can be made before the hearing is closed.

Conditions

35. The Applicant supports the development of a "consolidated" version of the proposed conditions showing the changes that are agreed between it and Council officers, and outstanding differences (which might include two versions of any particular conditions).

36. Developing that may take a little time, perhaps until Tuesday 12 April 2016. That version could then be provided to submitters for any comment to be made within a week, ie by Tuesday 17 April 2016. The comments can be incorporated into the document for provision to the Panel on Wednesday 18 April 2016.

37. The intention would not be for submitters to engage in a re-write of the conditions generally; they have had the opportunity to identify any particular conditions of concern to them through the process. But is accepted they should have the opportunity to see and comment on any of the proposed changes.

DATED 7 April 2016

James Gardner-Hopkins
Counsel for the Applicant